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WHEN: Tuesday, May 10, 2011
9 a.m.-12:30 p.m.

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

RESERVATIONS: (202) 741-6008

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Document No. FAA–2011–0009; Airspace Docket No. 10–AWP–20]

Amendment of VOR Federal Airways V–1, V–7, V–11 and V–20; Kona, HI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; delay of effective date.

SUMMARY: This action delays the effective date for the amendment of four VOR Federal airways in the vicinity of Kona, HI; V–1, V–7, V–11 and V–20. The FAA is taking this action due to procedural changes requiring additional flight inspection.

DATES: The effective date of FR Doc. 2011–5078, published on March 10, 2011 (76 FR 13082), is delayed to 0901 UTC August 25, 2011.

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Airspace, Regulations and ATC Procedures Group, Office of Mission Support Services, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Background

Airspace Docket No. 10–AWP–20, published in the **Federal Register** on March 10, 2011, (76 FR 13082), amends VOR Federal Airways V–1, V–7 V–11 and V–20; Kona, HI. These VHF Omnidirectional Range Federal airways are being impacted by flight inspection delays due to the relocation of the VHF Omnidirectional Radio Range and Tactical Air Navigation Aid (VORTAC) thereby delaying the effective date of May 5, 2011, to August 25, 2011.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation (1) is not a significant regulatory action under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Delay of Effective Date

The effective date of the final rule, Airspace Docket 10–AWP–20, as published in the **Federal Register** on March 10, 2011 (76 FR 13082), is hereby delayed until August 25, 2011.

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

Issued in Washington, DC, on March 30, 2011.

Gary A. Norek,

Acting Manager, Airspace, Regulations and ATC Procedures Group.

[FR Doc. 2011–8286 Filed 4–13–11; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

Order of the Commodity Futures Trading Commission Relating to the Continuation, Shutdown, and Resumption of Certain Commission Operations in the Event of a Lapse in Appropriations

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of order; final order.

SUMMARY: This order is being issued to provide for the continuation, shutdown, and resumption of certain operations of the Commodity Futures Trading Commission in the event of a lapse in appropriations, and to alert all persons regulated by or engaged in proceedings at the Commodity Futures Trading Commission of these provisions.

DATES: This notice and order is effective on April 13, 2011.

FOR FURTHER INFORMATION CONTACT: For market oversight matters contact Richard A. Shilts, Acting Director, Division of Market Oversight, 202–418–5275, *rshilts@cftc.gov*. For clearing and intermediary matters, contact John Lawton, Deputy Director, *jlawton@cftc.gov*, 202–418–5480; Thomas Smith, Deputy Director, *tsmith@cftc.gov*, 202–418–5495; or Robert Wasserman, Associate Director, *rwasserman@cftc.gov*, 202–418–5092 in the Division of Clearing and Intermediary Oversight.

SUPPLEMENTARY INFORMATION:

I. Background

As of 12:01 a.m. on April 9, 2011, the continuing resolution that funds many Federal government activities is set to expire. Unless additional appropriations are enacted, Federal departments and agencies whose continued operations are dependent upon such funding—including the Commodity Futures Trading Commission (the "Commission")—will be required to execute contingency plans for this lapse in appropriations (commonly referred to as a "shutdown"). Under 31 U.S.C. 1341 (the "Anti-Deficiency Act"), the Commission is prohibited from expending or obligating any funds in the absence of appropriations, subject to a narrow set of exceptions.[1] One exception that applies to the Commission is "emergencies involving the safety of human life or the

[1] The Anti-Deficiency Act provides that an officer or employee of the United States may not:

(A) Make or authorize an expenditure or obligation exceeding an amount in an appropriation or fund for the expenditure or obligation;

(B) Involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

(C) Make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) Involve [the] government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

protection of property."[2] It has been recognized that certain commodity market functions may continue during a lapse in appropriations.[3] Thus, the Commission has designated certain essential personnel to fulfill its obligation to protect property.

The Commission's regulations place a number of filing obligations on registered entities, intermediaries, market participants and the public within specified time frames and also include provisions relating to requests for Commission approval and issuance of exemption and interpretative relief and guidance with specific time frames for Commission action. The Commission has reviewed its rules in light of its obligation to protect property to determine which obligations will continue to apply during a lapse in appropriation.

A. Tolling and Extension of Certain Procedural Time Limits

In the event of a lapse in appropriations, the Commission will not be officially receiving, processing, or reviewing filings for Commission approval or action that are not directly related to the protection of property. Matters not directly related to the protection of property include rule, rule amendment, and contract certifications, except for emergency rules certified pursuant to regulation 40.6(a)(2); rules, rule amendments and contracts voluntarily submitted for Commission approval; requests for contract market designation and derivatives clearing organization and derivatives trade execution facilities registration; and other requests for Commission approval or relief. The above-mentioned matters do not include any emergency notifications that may be required by Commission regulations of registered entities and intermediaries, or that are required by any rule of a registered entity that has been approved by or self-certified to the Commission.

More specifically, matters not directly related to the protection of property include filings under regulation 1.47 and regulation 1.48 (bona fide hedge requests), part 36 (notification filings and information on trading), part 37 (derivatives trading execution facility applications, certifications of continued compliance in situations of merger or sale, and demonstrations of compliance with the core principles), part 38 (designated contract market applications, certifications of continued compliance in situations of merger or sale, and demonstrations of compliance with the core principles), part 39 (derivatives clearing organization applications, requests for orders regarding competition, and demonstrations of compliance with the core principles), part 40 (rule and contract filings (both certifications and approvals and requests for confidential treatment of submissions)), part 41 (filing of notice-designated contract markets trading security futures products), regulations 145.7 and 145.9 requests (requests for Commission records, petitions for confidential treatment of information submitted to the Commission, and appeals of FOIA decisions), regulation 140.99 filings (requests for exemptive, no-action and interpretive letters), and petitions for grandfather relief under section 734 of the Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") pursuant to the Commission's order that became effective on September 10, 2010.[4] For matters that are currently pending before the Commission pursuant to any of these provisions, all applicable time deadlines for Commission action will be tolled until the Commission is able to resume full operations.

Matters not directly related to the protection of property also include certain procedural rules associated with Commission adjudicatory actions, in particular certain rules under part 3 (procedure to deny, condition, or suspend, revoke, or place restrictions on registration), part 9 (related to review of exchange disciplinary, access denial or other adverse actions), part 10 (the Commission's rules of practice for adjudicatory proceedings before the Commission), part 12 (rules related to reparations proceedings), and part 171 (review of National Futures Association decisions). For these matters that are currently pending before the Commission pursuant to any of these provisions, all applicable time deadlines for Commission action will be tolled until the Commission is able to resume full operations. Moreover, all applicable time deadlines for parties to an adjudicative proceeding that arise during a lapse in appropriations will be extended until one business day after the Commission resumes its full operations.

B. Continued Operation of Certain Agency Regulations

The Commission's regulations also impose filing obligations on registered entities, intermediaries, market participants and the public. The Commission has determined that certain filing requirements will remain in effect in order for the Commission to fulfill its obligation to protect property even during a lapse of appropriations. Accordingly, such filing requirements will continue to be in effect during the lapse in appropriations and such filings will continue to be received and processed. This category includes regulation 1.10 filings (financial reports of futures commission merchants (FCMs) and introducing brokers (IBs)), regulation 1.12 filings (notice provisions required of FCMs and IBs), regulation 1.17 filings (capital requirements (business days would include those days the Commission is shutdown for purposes of requirements relating to margin calls and the computation of margin) and any notice provision requirements)),[5] regulation 1.32 filings (segregation calculation (business days would include those days the Commission is shutdown for purposes of requirements related to segregation)), regulation 1.65 filings (notice of bulk transfers (a business day would include those days the Commission is shutdown)), and regulation 30.7 filings (formal secured amount requirements (a business day would include those days the Commission is shutdown)). For these regulations, the business day requirements will not be affected by a lapse in appropriations. Also in this category are part 15 filings (general reporting requirements), part 16 filings (clearing member reports), part 17 filings (FCM reports), part 18 filings (reports by traders), part 19 filings (bona fide hedge position reports), part 21 filings (special call provisions), and regulation 40.6 filings (emergency rules of a registered entity).

The Commission's regulations require and industry practice provides for notification to the Commission and its staff of certain emergency situations. Thus registered entities and

[2] 31 U.S.C. 1342 provides:

An officer or employee of the United States Government * * * may not accept voluntary services for [the] government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property * * *. As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

[3] Memorandum from Walter Dellinger, Assistant Attorney General, Department of Justice, Office of Legal Counsel, to Alice Rivlin, Director, Office of Management and Budget, Aug. 16, 1995, at 2–3.

[4] *See Orders Regarding the Treatment of Petitions Seeking Grandfather Relief for Exempt Commercial Markets and Exempt Boards of Trade*, 75 FR 56513, Sep. 16, 2010.

[5] Generally, the Commission's regulations define business day to exclude only Saturday, Sunday, and Federal holidays. Thus, the shutdown would not affect the operation of these rules.

intermediaries should continue to provide the Commission notice of emergency situations such as system malfunctions, cyber security incidents or financial emergencies throughout a lapse in appropriations.

C. Extension of Open Comment Periods on Proposed Regulation and Other Matters That May Be Subject to a Request for Comment by the Commission

Finally, the Commission has proposed a number of rules to implement the Dodd-Frank Act for which the comment period may expire while the Commission is shutdown. The Commission will be unable to officially receive and process comment submissions until it resumes full operations. Therefore, the Commission is extending the comment periods for such rules, and for any other matters that may be subject to a request for comment by the Commission, until one business day after the Commission is able to resume full operations. Notice of the lifting of a shutdown will be provided on the Commission's Web site.

II. Administrative Compliance

A. Administrative Procedure Act

To the extent that some of the provisions of this order may be subject to notice and comment under the Administrative Procedure Act ("APA"),[6] and may be subject to the provisions of the APA that require publication or service of a substantive rule be made not less than 30 days before its effective date,[7] the Commission for good cause finds that notice and comment and a delayed effective date are impracticable and contrary to the public interest. The Commission may be obligated to commence orderly shutdown of its operations at the commencement of business on April 11 and has determined that it is in the interest of the public and the markets it regulates to have established and publicized its procedures for limiting its operations to only those that are essential to the protection of property before that time.

Moreover, though the tolling of certain procedural time limits will delay the Commission's review and approval of certain industry filings, the review and approval provisions in the Commission's regulations implement review and approval provisions of the Commodity Exchange Act ("CEA") in order to protect the public interest. It would be contrary to the CEA, and to the public interest, if these review and approval time limits continued to run while the Commission is unable to conduct routine business.

Finally, in order to protect the property interests of the public related to the orderly operation of the futures markets, the Commissioners will be supported by essential personnel in the surveillance of the markets in order to identify any emergency market situations that may require action to protect property during a lapse in appropriations. It therefore is essential that reporting regulations associated with market surveillance and emergency notices continue to operate.

B. Paperwork Reduction Act

The Paperwork Reduction Act provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it has been approved by the Office of Management and Budget ("OMB") and displays a currently valid control number.[8] The collections of information referenced in this notice and order have valid control numbers that are currently in effect. Therefore, the Commission is not obligated to seek a control number in connection with this order.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") requires the Commission to consider whether a rule it proposes will have a significant economic impact on a substantial number of small entities and either provide a regulatory flexibility analysis respecting the significant impact or certify that the rule will not have such an impact.[9] The RFA is applicable only to a rule for which the Commission publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b).[10]

The Commission is not publishing this order as a general notice of proposed rulemaking. Therefore, neither a regulatory flexibility analysis nor a certification is required for this rulemaking action. Nonetheless, this order will impose no new regulatory obligations on any party. Rather, it simply establishes the limited regulatory framework under which the Commission will operate during a shutdown in order to ensure the protection of property. Accordingly, as permitted by 5 U.S.C. 605, the Chairman, on behalf of the Commission, hereby certifies that the provisions contained in this order will not have a significant economic impact on a substantial number of small entities.

D. Cost Benefit Analysis

Section 15(a) of the CEA[11] requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA. Section 15(a) specifies that the costs and benefits shall be considered against five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may give greater weight to one or more of the five enumerated considerations to determine, in its discretion, that a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

This order imposes the cost of delay on parties with petitions for approval, self-certification filings, rights of review, and adjudicative matters before the Commission. As the Commission is limited by law to function most notably with respect to the protection of property, these costs are unavoidable.

In terms of benefits, this order provides for the limited continuation of Commission business. The order also confirms the ongoing regulatory obligations of registered entities and intermediaries notwithstanding a shutdown, in order to ensure that the Commission has available to it all information necessary to identify emergency situations and take action to protect property and, hence, to protect market participants and the public, the efficiency and financial integrity of the futures markets, and price discovery.

The order also notifies market participants and the public of the matters in which the Commission will be engaged, as well as of the tolling and extensions of time put in place with respect to filings under Commission regulations. Tolling ensures that the Commission will have an opportunity to review routine industry filings and take steps if necessary to protect the interests of the market and the public before those filings are finalized. The extensions of time ensure that all persons with filing obligations in certain adjudicative proceedings that arise during a shutdown or who wish to submit comments during a comment period that will close during a shutdown will not be prejudiced by the inability of the Commission to accept those filings or comments.

[6] *See* 5 U.S.C. 553(b).

[7] *See* 5 U.S.C. 553(d).

[8] 44 U.S.C. 3501 *et seq.*

[9] 5 U.S.C. 601 *et seq.*

[10] 5 U.S.C. 601(2).

[11] 7 U.S.C. 19(a).

III. Order

In light of the foregoing, the Commodity Futures Trading Commission (the "Commission") has determined to issue the following Order, pursuant to its authority under the provisions of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, and in compliance with the Anti-Deficiency Act, 31 U.S.C. 1341 and 1342.

It is hereby ordered that, in the event of a lapse in appropriations (also referred to as "shutdown") commencing at 12:01 a.m. on April 9, 2011, the Commission will commence operating according to the procedures set forth in this Order:

1. Tolling and Extension of Certain Procedural Time Limits. The Commission will not officially receive or process any filings, or review any matters for Commission approval or action to the extent that the matters are not directly related to the protection of property or market surveillance. This applies to rule, rule amendment and contract certifications, except for emergency rules certified pursuant to regulation 40.6(a)(2); rules, rule amendments and contracts voluntarily submitted for Commission approval or review; requests for contract market designation and derivatives clearing organization and derivatives trade execution facilities registration; and other requests for Commission approval or other action. Specifically, the time limits for Commission action shall be tolled for §§ 1.47 and 1.48 of the Commission's regulations, and parts 36, 37, 38, 39, 40 and 41. Tolling also applies to requests and appeals submitted under §§ 145.7 and 145.9 of the Commission's regulations, and requests submitted under § 140.99.

The time for officially receiving, processing, or reviewing any new matters under these provisions of the Commission's regulations shall be tolled until the Commission is able to resume full operations. For matters that are pending under these provisions when a lapse in appropriations occurs, all applicable time deadlines for Commission action will be tolled until the Commission is able to resume full operations.

This tolling and extension of time limits also shall apply to certain procedural rules associated with Commission adjudicatory actions, in particular the time-limited procedural rules under parts 3, 9, 10, 12, and 171. For matters that are currently pending before the Commission under any of these parts, all applicable time deadlines for Commission action will be tolled until the shutdown is no longer in effect. Moreover, all time deadlines for filings by a party in an adjudicative proceeding that arise during a shutdown period will be extended until one business day after the Commission resumes its full operations. The filing of replies to any filing delayed by a lapse in appropriations will have its reply period extended for the same number of days.

2. Procedures and Time Limits Not Extended or Tolled. The Commission will continue to receive and process filings required of a registered entity or intermediary under certain Commission regulations, specifically under §§ 1.10, 1.12, 1.17, 1.32, 1.65, 30.7, and 40.6(a)(2), or any emergency notification to the Commission that may be required by any rule of a registered entity that has been approved by or self-certified to the Commission. Paragraph 1 also shall not apply to filings under parts 15, 16, 17, 18, 19, and 21 of the Commission's regulations.

3. Extension of Open Comment Periods on Proposed Regulation and Other Matters that may be Subject to a Request for Comment by the Commission. Any comment period for a proposed rulemaking or other matter that may be subject to a request for comment by the Commission that terminates during the shutdown shall be extended until one business day after the Commission resumes its full operations after a shutdown.

Issued in Washington, DC, on April 8, 2011, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2011–9031 Filed 4–13–11; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 358

[Docket No. RM07–1–003; Order No. 717–D]

Standards of Conduct for Transmission Providers

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order on rehearing and clarification.

SUMMARY: The Federal Energy Regulatory Commission (Commission) issued Order No. 717–A to address requests for rehearing and make clearer the Standards of Conduct as implemented by Order No. 717. The Commission issued Order No. 717–B to address expedited requests for rehearing and clarification concerning paragraph 80 of Order No. 717–A and whether an employee who is not making business decisions about contract non-price terms and conditions is considered a "marketing function employee." Order No. 717–C addressed requests for rehearing and clarification concerning Order No. 717–A. This order addresses an additional request for rehearing and clarification concerning Order No. 717–C.

DATES: *Effective Date:* This rule will become effective May 16, 2011.

FOR FURTHER INFORMATION CONTACT: Susan Miller, Office of the General Counsel—Energy Markets, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–8977.

SUPPLEMENTARY INFORMATION:

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

Issued April 8, 2011.

I. Introduction

1. On October 16, 2008, the Commission issued Order No. 717 amending the Standards of Conduct for Transmission Providers (the Standards of Conduct or the Standards) to make them clearer and to refocus the rules on the areas where there is the greatest potential for abuse.[1] On October 15, 2009, the Commission issued Order No. 717–A to address requests for rehearing and clarification of Order No. 717, largely affirming the reforms adopted in Order No. 717.[2] On November 16, 2009, the Commission issued Order No. 717–B to address expedited requests for rehearing and clarification concerning paragraph 80 of Order No. 717–A and whether an employee who is not making business decisions about contract non-price terms and conditions is considered a "marketing function employee".[3] On April 16, 2010 the

[1] *Standards of Conduct for Transmission Providers,* Order No. 717, 73 FR 63796 (Oct. 27, 2008), FERC Stats. & Regs. ¶ 31,280 (Order No. 717).

[2] *Standards of Conduct for Transmission Providers,* Order No. 717–A, 74 FR 54463 (Oct. 22, 2009), FERC Stats. & Regs. ¶ 31,297 (Order No. 717–A).

[3] *Standards of Conduct for Transmission Providers,* Order No. 717–B, 74 FR 60153 (Nov. 20, 2009), 129 FERC ¶ 61,123 (2009) (Order No. 717–B). On October 30, 2009, Edison Electric Institute (EEI) filed a request for expedited clarification of a single issue addressed in Order No. 717–A. The Commission determined that it should address this issue expeditiously even though the time allowed under the regulations for filing rehearing requests had not yet expired. For this reason, the Commission issued Order No. 717–B on November 16, 2009, in which it addressed a single clarification request of EEI, Western Utilities, Otter Tail and

Commission issued Order No. 717–C to provide additional clarification concerning matters petitioners raised regarding the Commission's determinations in Order No. 717–A.[4] In this order, the Commission addresses an additional request for rehearing and clarification concerning Order No. 717–C.

II. Discussion

2. In paragraph 16 of Order No. 717–C, the Commission clarified that "a system impact study performed pursuant to a request for energy resource interconnection service or network resource interconnection service is similar to long-range planning and therefore not a transmission function, because the focus of such a study is to determine the impact of the proposed interconnection on the safety and reliability of the transmission provider's transmission system, but without conveying a right to transmission service".[5] As a result, the Commission concluded that the performance of a system impact study in the context of evaluating an energy resource interconnection service and network resource interconnection service is not a transmission function.

3. The Transmission Access Policy Study Group (TAPS) requests rehearing and clarification of one aspect of Order No. 717–C. Specifically, TAPS requests that the Commission grant rehearing to hold that employees who perform system impact studies (or other studies) in connection with interconnection service requests are transmission function employees. TAPS argues that the consequence of a finding that "performance of a system impact study in the context of evaluating an energy resource interconnection service and network resource interconnection service is not a transmission function" is that the studies may be performed by the Transmission Provider's "merchant-function" personnel.

4. TAPS further argues that the Commission created an inconsistency with its regulatory text when it clarified in Order No. 717–C that the performance of a system impact study in the context of evaluating an energy resource interconnection service and network resource interconnection service is not a transmission function. Specifically, TAPS cites 18 CFR 358.3(h), which defines "transmission functions" as "the planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests." TAPS then argues that because 18 CFR 358.3(f) defines "transmission" as "the interconnection with jurisdictional transmission facilities," employees who perform studies that identify upgrades needed for interconnection, or who otherwise help to determine the terms on which interconnection may occur, perform a transmission function.

5. Alternatively, TAPS requests that the Commission clarify that system study information be treated like other planning information, which the Commission requires transmission providers to make available on a non-discriminatory basis to all interested transmission customers. TAPS is concerned that if "merchant-function" personnel are permitted to conduct interconnection-related studies and have access to customer information, "merchant-function" personnel would obtain undue competitive advantages over any other transmission customer.

6. TAPS further requests clarification of paragraph 17 of Order No. 717–C to make clear that where an employee performs system impact studies in response to transmission service requests, the employee's designation as a transmission-function employee does not turn on the duration of the requested transmission service.

Commission Determination

7. We deny TAPS' request that we classify employees who perform system impact studies in connection with interconnection service requests as transmission function employees.[6] Whether an employee performing a system impact study is a transmission function employee depends upon the purpose for which that study is being performed. The key factor in determining whether the employee is performing a transmission function in conducting the system impact study is whether the performance of that study implicates the day-to-day operation of the transmission system. Thus, an employee performing system impact studies that do not implicate the day-to-day operations of the transmission system would not be a transmission function[7] employee, even in those instances where the system impact study pertains to interconnection.

8. In Order No. 717–C, we found that a system impact study performed pursuant to a request for energy resource interconnection service or network resource interconnection service is similar to long-range planning and therefore not a transmission function because it does not involve the conveyance of a right to transmission service. Contrary to the argument raised by TAPS, our focus in reaching this determination was not based on a distinction between transmission and interconnection. Our conclusion was based upon our finding that these types of system impact studies are analogous to transmission long range planning studies, and that neither type of study implicates day-to-day transmission operations.[8] The performance of a system impact study is not a transmission function so long as the performance of this system impact study is not carried out as part of day-to-day transmission operations, including the granting or denying of transmission service.[9]

9. TAPS is also incorrect that the Commission's clarification in Order No. 717–C concerning the performance of system impact studies created an inconsistency with its regulatory text. The definition of "transmission functions" includes "the planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests."[10] "Transmission" is defined to include "the interconnection with jurisdictional transmission facilities."[11] Thus, the definition of transmission functions includes the planning, directing, organizing or carrying out of day-to-day interconnection operations with jurisdictional transmission facilities. Because of the limiting phrase "day-to-day transmission operations," TAPS is incorrect in its conclusion that "transmission functions" always include

Central Vermont. All other timely requests for rehearing, i.e. those filed by November 16, 2009, were addressed in Order No. 717–C.

[4] *Standards of Conduct for Transmission Providers*, Order No. 717–C, 75 FR 20909 (Apr. 22, 2010), 131 FERC ¶ 61,045 (2010) (Order No. 717–C).

[5] *Id.* P 16.

[6] In a footnote, TAPS contends that employees who perform facility studies and feasibility studies in response to requests for interconnection service should be transmission function employees. TAPS, Motion for Rehearing at p. 3–4 n.4. TAPS concedes that Order No. 717–C does not address the performance of these types of studies. Given that TAPS failed to proffer this argument during previous stages of the process and that Order No. 717–C does not address this issue, TAPS cannot raise this argument at this juncture in the proceeding. *See, e.g., PJM Interconnection, LLC*, 126 FERC ¶ 61,030, at P 15 & n.10 (2009) (A request for rehearing of a new issue is outside the proper scope of the rehearing). *See also, Wholesale Competition in Regions with Organized Electric Markets*, 129 FERC ¶ 61,252, at P 9 & n.18 (2009).

[7] 18 CFR 358.3(h).

[8] *See* Order No. 717–C, 131 FERC ¶ 61,045 at P 11–17. *See also* Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 146–147.

[9] Order No. 717–C, 131 FERC ¶ 61,045 at P 17.

[10] 18 CFR 358.3(h).

[11] 18 CFR 358.3(f).

interconnection-related system impact studies.

10. Similarly, we deny TAPS's request that the information from system impact studies be made available on a non-discriminatory basis to all interested transmission customers. TAPS erroneously assumes that the Commission determined that system impact studies (or other studies) performed in response to interconnection requests are planning activities that may be conducted by marketing function employees. Marketing function employees may not perform system impact studies (or other studies) in response to interconnection requests since the studies would involve the use and analysis of non-public transmission information. As we stated in Order No. 717, planning personnel who do not qualify as marketing function employees may discuss information with transmission function employees.[12] However, we reiterated that the No Conduit Rule applied in this situation, stating that if transmission employees share transmission function information with planning personnel, the planning personnel may not pass such information on to marketing function employees. The clear implication of these statements is that while planning studies may be conducted by personnel who are not transmission function employees, marketing function employees may not participate in the preparation of studies which involve the use and analysis of non-public transmission information.[13]

11. We grant TAPS's clarification request that when an employee performs a system impact study in response to a transmission service request, that employee is a transmission function employee regardless of the duration of the requested transmission service. This clarification is consistent with our previous conclusion that the designation of an employee as a transmission function employee does not depend upon the duration of the requested transmission service.[14]

III. Document Availability

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

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

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

IV. Effective Date

15. Changes to Order No. 717–C adopted in this order on rehearing and clarification are effective May 16, 2011.

By the Commission.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–9059 Filed 4–13–11; 8:45 am]

BILLING CODE 6717–01–P

[12] Order No. 717, FERC Stats. & Regs ¶ 31,280 at P 151.

[13] Order No. 717 specifically recognized that there are employees who are neither transmission function employees nor marketing function employees. *See, e.g.*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 174 ("Transmission function employees are no longer barred from interacting with all the employees of a marketing or energy affiliate (only marketing function employees)").

[14] *See Standards of Conduct for Transmission Providers*, Order No. 717–A, 74 FR 54463 (Oct. 22, 2009), FERC Stats. & Regs. ¶ 31,297, at P 27 (2009).

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 878

[Docket No. FDA–2011–N–0188]

Medical Devices; General and Plastic Surgery Devices; Classification of the Low Level Laser System for Aesthetic Use

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is classifying the low level laser system for aesthetic use into class II (special controls). The special control(s) that will apply to the device is entitled "Class II Special Controls Guidance Document: Low Level Laser System for Aesthetic Use." The Agency is classifying the device into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a guidance document that will serve as the special control for this device type.

DATES: This rule is effective May 16, 2011. The classification was effective on August 24, 2010.

FOR FURTHER INFORMATION CONTACT: Richard Felten, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1436, Silver Spring, MD 20993–0002, 301–796–6392.

SUPPLEMENTARY INFORMATION:

I. What is the background of this rulemaking?

In accordance with section 513(f)(1) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360c(f)(1)), devices that were not in commercial distribution before May 28, 1976 (the date of enactment of the Medical Device Amendments of 1976), generally referred to as postamendments devices, are classified automatically by statute into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless and until the device is classified or reclassified into class I or II, or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and 21 CFR part 807 of the regulations.

Section 513(f)(2) of the FD&C Act provides that any person who submits a premarket notification under section 510(k) of the FD&C Act for a device that has not previously been classified may, within 30 days after receiving an order classifying the device into class III under section 513(f)(1) of the FD&C Act, request FDA to classify the device under the criteria set forth in section 513(a)(1) of the FD&C Act. FDA will, within 60 days of receiving this request, classify the device by written order. This classification will be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing this classification.

In accordance with section 513(f)(1) of the FD&C Act, FDA issued an order on

December 22, 2008, classifying the Erchonia Low Level Laser System for Aesthetic Use into class III because it was not substantially equivalent to a device that was introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, or a device which was subsequently reclassified into class I or class II. On January 5, 2009, Erchonia, Inc., submitted a petition requesting classification of the Erchonia Low Level Laser System for Aesthetic Use under section 513(f)(2) of the FD&C Act. The manufacturer recommended that the device be classified into class II. (Ref. 1)

In accordance with section 513(f)(2) of the FD&C Act, FDA reviewed the petition in order to classify the device under the criteria for classification set forth in section 513(a)(1) of the FD&C Act. FDA classifies devices into class II if general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls to provide reasonable assurance of the safety and effectiveness of the device for its intended use. After review of the information submitted in the petition, FDA determined that the device can be classified into class II with the establishment of special controls. FDA believes these special controls will provide reasonable assurance of the safety and effectiveness of the device.

The device is assigned the generic name Low Level Laser System for Aesthetic Use, and it is identified as a device using low level laser energy for the disruption of adipocyte cells within the fat layer for the release of fat and lipids from these cells for noninvasive aesthetic use.

FDA has identified the following risks to health associated specifically with this type of device and the recommended measures to mitigate these risks.

- Ocular injury is a recognized hazard from laser optical systems because of the unique physical characteristics of laser light; that is, this optical radiation is easily transmitted into the eye as a very bright, intense light beam that may produce lesions on the retina. This hazard is addressed by device labeling, which includes recommendations for not looking directly at the laser beam and the wearing of appropriate laser safety eyewear by both the user and patient. The labeling also includes information defining the size of the area within which this optical hazard exists.
- Electrical shock is addressed by recommended testing of the device according to recognized U.S. and international standards specifically designed to determine and measure potential electrical safety. Again, the recommended device labeling also includes specific warnings for the user in terms of device placement, appropriate electrical wiring needs, reminders to periodically check device wiring and accessories for damage, and avoidance of use of the device in environments where electrical shock is possible.
- Unintended cell damage is a potential risk from use of low level lasers if improper or incorrect energy is used to initiate the process of causing lipid and fat leakage from the target adipocyte cells. The intended effect on the adipocyte cells is the creation of pores that results in the lipid or fat leaving these specialized cells; however, if the laser parameters are not correct, no effect may occur in terms of adipocyte change or other non-adipocyte cells may be affected, resulting in alteration of other cellular membranes or transport systems that could result in unintended cell death.
- Use error represents those risks to the patient that can occur from improper use of the device. In order to address this potential risk, we recommend the manufacturer provide a detailed operator manual, which contains information on possible risks and hazards and how these should be avoided and clear recommended safe treatment procedures that include information on device settings for treatment, clear information on how the device is to be used during treatment, and recommended posttreatment care.

FDA believes that the class II special controls guidance document will aid in mitigating the potential risks to health as described in table 1 of this document.

TABLE 1—RISKS TO HEALTH AND MITIGATION MEASURES

Identified risk	Recommended mitigation measures
Ocular Injury	Section 6. Bench Testing. Section 7. Software Validation. Section 8. Clinical Testing. Section 12. Labeling.
Electrical Shock	Section 11. Electrical and Mechanical Safety Performance Testing (IEC 60601–1). Section 12. Labeling.
Unintended Cell Damage	Section 6. Bench Testing. Section 7. Software Validation. Section 8. Clinical Testing. Section 9. Biocompatibility. Section 10. Electromagnetic Compatibility (IEC 60601–1–2). Section 12. Labeling.
Use Error	Section 12. Labeling.

FDA believes that the special controls guidance, "Low Level Laser System for Aesthetic Use," in addition to general controls, address the risks to health and provide reasonable assurance of the safety and effectiveness of the device. Therefore, on August 24, 2010, FDA issued an order to the petitioner classifying the device into class II. FDA is codifying the classification of the device by adding § 878.5400.

Following the effective date of this final classification rule, any firm submitting a 510(k) premarket notification for low level laser system for aesthetic use will need to address the issues covered in the special controls guidance. However, the firm need only show that its device meets the recommendations of the guidance or in some other way provides equivalent assurance of safety and effectiveness.

Section 510(m) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k) of the FD&C Act, if FDA determines that premarket notification is not necessary to provide reasonable assurance of the

safety and effectiveness of the device. For this type of device, FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of the device. Therefore, this device type is not exempt from premarket notification requirements. Persons who intend to market this type of device must submit to FDA a premarket notification, prior to marketing the device, which contains information about the low level laser system for aesthetic use they intend to market.

II. What is the environmental impact of this rule?

The Agency has determined under 21 CFR 25.34(b) 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.

III. What is the analysis of impacts of this rule?

FDA has examined the impacts of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Order 12866 directs 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 final rule is not a significant regulatory action as defined by the Executive order and so it is not subject to review under the Executive order.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because reclassification of this device from class III to class II will relieve manufacturers of the device of the cost of complying with the premarket approval requirements of section 515 of the FD&C Act (21 U.S.C. 360e), and may permit small potential competitors to enter the marketplace by lowering their costs, the Agency certifies 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 $135 million, using the most current (2009) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

IV. Does this rule have federalism implications?

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. Section 4(a) of the Executive order requires Agencies to "construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute." Federal law includes an express preemption provision that preempts certain state requirements "different from or in addition to" certain Federal requirements applicable to devices. (See section 521 of the FD&C Act (21 U.S.C. 360k); See *Medtronic, Inc.*, v. *Lohr*, 518 U.S. 470 (1996); and *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999 (2008)). The special controls established by this final rule creates "requirements" for specific medical devices under 21 U.S.C. 360k, even though product sponsors have some flexibility in how they meet those requirements. (See *Papike* v. *Tambrands, Inc.*, 107 F.3d 737, 740–42 (9th Cir. 1997)).

V. How does this rule comply with the Paperwork Reduction Act of 1995?

FDA concludes that this final rule contains no new collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520) is not required. This final rule establishes as special controls a guidance document that refers to previously approved collections of information found in other FDA regulations. These collections of information are subject to review by OMB under the PRA. Elsewhere in this issue of the **Federal Register**, FDA is issuing a notice announcing the availability of the guidance document entitled "Class II Special Controls Guidance Document: Low Level Laser System for Aesthetic Use" that will serve as the special control for this device. This notice contains an analysis of the paperwork burden for the guidance document.

VI. References

The following references have been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Petition from Erchonia, Inc., January 5, 2009.

List of Subjects in 21 CFR Part 878

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 878 is amended as follows:

PART 878—GENERAL AND PLASTIC SURGERY DEVICES

■ 1. The authority citation for 21 CFR part 878 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Section 878.5400 is added to subpart F to read as follows:

§ 878.5400 Low Level Laser System for Aesthetic Use

(a) *Identification.* A Low Level Laser System for Aesthetic Use is a device using low level laser energy for the disruption of adipocyte cells within the fat layer for the release of fat and lipids from these cells for noninvasive aesthetic use.

(b) *Classification.* Class II (special controls). The special control for this device is the FDA guidance document entitled "Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: Low Level Laser System for Aesthetic Use." See § 878.1(e) for the availability of this guidance document.

Dated: April 7, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–8944 Filed 4–13–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0206]

Drawbridge Operation Regulation; Sacramento River, Sacramento, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eleventh Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Tower Drawbridge across the Sacramento River, mile 59.0, at Sacramento, CA. The deviation is necessary to allow the community to participate in the Change of Pace Foundation's Capitol City Classic Foot Race. This deviation allows the bridge to remain in the closed-to-navigation position during the event.

DATES: This deviation is effective from 8 a.m. to 9 a.m. on April 17, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0206 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0206 in the "Keyword" box and then clicking "Search". They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District; telephone 510–437–3516, e-mail *David.H.Sulouff@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The California Department of Transportation has requested a temporary change to the operation of the Tower Drawbridge, mile 59.0, Sacramento River, at Sacramento, CA. The Tower Drawbridge navigation span provides a vertical clearance of 30 feet above Mean High Water in the closed-to-navigation position. The draw opens on signal from May 1 through October 31 from 6 a.m. to 10 p.m. and from November 1 through April 30 from 9 a.m. to 5 p.m. At all other times the draw shall open on signal if at least four hours notice is given, as required by 33 CFR 117.189(a). Navigation on the waterway is commercial and recreational.

The drawspan will be secured in the closed-to-navigation position from 8 a.m. to 9 a.m. on April 17, 2011 to allow the community to participate in the Change of Pace Foundation's Capitol City Classic Foot Race. This temporary deviation has been coordinated with waterway users. There are no scheduled river boat cruises or anticipated levee maintenance during this deviation period. No objections to the proposed temporary deviation were raised.

Vessels that can transit the bridge, while in the closed-to-navigation position, may continue to do so at any time.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: April 4, 2011.

D.H. Sulouff,

District Bridge Chief, Eleventh Coast Guard District.

[FR Doc. 2011–9051 Filed 4–13–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–1004]

RIN 1625–AA87

Security Zone; Increase of Security Zones Under 33 CFR 165.1183 From 100 to 500 Yards; San Francisco Bay, Delta Ports, Monterey Bay, and Humboldt Bay, CA

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard will enforce a permanent increase in security zone size from 100 yards (91 meters) to 500 yards (457 meters) for tankers, cruise ships, and High Value Assets (HVAs) while underway on the navigable waters of San Francisco Bay, Delta Ports, Monterey Bay, and Humboldt Bay, CA. Once a tanker, cruise ship, or HVA is anchored or moored within the navigable waters of San Francisco Bay, Delta Ports, Monterey Bay, and Humboldt Bay, CA, the security zone will decrease from 500 yards (457 meters) to 100 yards (91 meters). Security zones are necessary to effectively protect HVAs and are only enforceable within the limits of that zone. Persons and vessels are prohibited from entering into, transiting through, or anchoring within the temporary security zones unless authorized by the Captain of the Port or their designated representative.

DATES: This rule is effective May 16, 2011.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket are part of docket USCG–2010–1004 and are available by going *http://www.regulations.gov,* inserting USCG–2010–1004, in the "keyword" box, and clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Lieutenant Junior Grade Allison A. Natcher, U.S. Coast Guard Sector San Francisco; telephone 415–399–7442 e-mail *D11-PF-MarineEvents@uscg.mil.*

If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On November 3, 2010, we published a notice of proposed rulemaking (NPRM) entitled Security Zone; Increase of Security Zones under 33 CFR 165.1183 from 100 to 500 yards; San Francisco Bay, Delta Ports, Monterey Bay, and Humboldt Bay, CA in the **Federal Register** (75FR212). We received 5 comments on the proposed rule. No public meeting was requested, and none was held.

Background and Purpose

Experiences during security zone enforcement operations, observations during boat tactics training, and discussions with Commanding Officers/Officers in Charge and tactical coxswains from Sector San Francisco's Level I Ports, Waterways & Coastal Security (PWCS) stations, has led Enforcement staff and field units to determine that 100-yard (91 meters) security zones are not adequate enough to protect transiting vessels from sabotage, subversive acts, accidents, criminal actions, or other causes of a similar nature. A 500 yard (457 meters)

security zone increases reaction time, allows proper assessment of the situation, and improves the ability of the tactical coxswains to properly execute protective measures.

Discussion of Comments and Changes

The Coast Guard received general comments on the NPRM concerned that the increased size of the security zone would increase hazards to navigation since 500 yards limits access to large portions of the San Francisco Bay. This included anchorages, leading to an increase of recreational boaters transiting through the main shipping channels. In addition, recreational boaters questioned how the security zone would be enforced when patrol boats were no longer on scene with the vessel. From this input, the Coast Guard is revising the final rule so that the Coast Guard will enforce a permanent increase in security zone size from 100 yards (91 meters) to 500 yards (457 meters) for tankers, cruise ships, and High Value Assets (HVAs) while underway on the navigable waters of San Francisco Bay, Delta Ports, Monterey Bay, and Humboldt Bay, CA. Once a tanker, cruise ship, or HVA is anchored or moored within the navigable waters of San Francisco Bay, Delta Ports, Monterey Bay, and Humboldt Bay, CA, the security zone will decrease from 500 yards (457 meters) to 100 yards (91 meters). The definition for High Interest Vessel (HIV) is being removed and will be replaced with the term HVA because it covers a broader range of vessels that require security zones.

Security zones will be enforced by Coast Guard patrol craft and other law enforcement agencies as authorized by the Captain of the Port. See 33 CFR 6.04–11, Assistance of other agencies.

Regulatory Analyses

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

Regulatory Planning and Review

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

The effect of this regulation will not be significant because the 500 yard (457 meters) increase will be activated while High Value Assets (HVAs) are underway on the navigable waters of San Francisco Bay, Delta Ports, Monterey Bay, and Humboldt Bay, CA. Once the HVA is anchored or moored within the navigable waters of San Francisco Bay, Delta Ports, Monterey Bay, and Humboldt Bay, CA, the security zone will decrease from 500 yards (457 meters) to 100 yards (91 meters).

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. We expect this rule may affect owners and operators of vessels, some of which may be small entities, intending to fish, sightsee, transit, or anchor in the waters affected by these security zones. These security zones will not have a significant economic impact on a substantial number of small entities for several reasons: Small vessel traffic will be able to pass safely around the area and vessels engaged in event activities, sightseeing and commercial fishing have ample space outside of the area governed by the security zone to engage in these activities. Small entities and the maritime public will be advised of implementation of these security zones via public notice to mariners or notice of implementation published in the **Federal Register**.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), in the NPRM we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

This rule does not have Tribal implications under Executive Order

13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under addresses.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise § 165.1183 to read as follows:

§ 165.1183 Security Zones; tankers, cruise ships, and High Value Assets, San Francisco Bay and Delta Ports, Monterey Bay and Humboldt Bay, California

(a) Definitions. The following definitions apply to these sections—(1) *Cruise ship* means any vessel over 100 gross register tons, carrying more than 500 passengers for hire which makes voyages lasting more than 24 hours, of which any part is on the high seas. Passengers from cruise ships are embarked or disembarked in the U.S. or its territories. Cruise ships do not include ferries that hold Coast Guard Certificates of Inspection endorsed for "Lakes, Bays and Sounds" that transit international waters for only short periods of time on frequent schedules.

(2) *High Value Asset* means any waterside asset of high value including military and commercial vessels, or commercial vessels carrying CDC as defined in 33 CFR 160.204, deemed by the Captain of Port, or higher authority, as requiring protection based upon risk assessment analysis and is therefore escorted by the Coast Guard or other law enforcement vessel with an embarked Coast Guard commissioned, warrant, or petty officer.

(3) *Tanker* means any self-propelled tank vessel constructed or adapted primarily to carry oil or hazardous materials in bulk in the cargo spaces.

(4) *Designated representative* means any commissioned, warrant, and petty officers of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, and local, State and Federal law enforcement vessels who have been authorized to act on the behalf of the Captain of the Port.

(b) *Locations.* (1) San Francisco Bay. All waters, extending from the surface to the sea floor, within 500 yards (457 meters) ahead, astern and extending along either side of a tanker, cruise ship, or HVA underway (100 yards when anchored or moored) within the San Francisco Bay and areas shoreward of the line drawn between San Francisco Main Ship Channel buoys 7 and 8(LLNR 4190 & 4195) in positions 37°46.9′ N, 122°35.4′ W and 37°46.5′ N, 122°35.2′ W, respectively.

(2) Monterey Bay. All waters, extending from the surface to the sea floor, within 500 yards (457 meters) ahead, astern and extending along either side of a tanker, cruise ship, or HVA underway (100 yards when anchored or moored) within the Monterey Bay area shoreward of a line drawn between Santa Cruz Light (LLNR 305) to the north in position 36°57.10′ N, 122°01.60′ W, and Cypress Point, Monterey to the south, in position 36°34.90′ N, 121°58.70′ W.

(3) Humboldt Bay. All waters, extending from the surface to the sea floor, within 500 yards (457 meters) ahead, astern and extending along either side of a tanker, cruise ship, or HVA underway (100 yards when anchored or moored) within the Humboldt Bay area shoreward of a 4 nautical mile radius line drawn to the west of the Humboldt Bay Entrance Lighted Whistle Buoy HB (LLNR 8130) in position 40°46.25′ N, 124°16.13′ W.

(c) Regulations. (1) In accordance with the general regulations in § 165.33 of this part, entry into or remaining in this zone is prohibited unless authorized by the Coast Guard Captain of the Port, San Francisco Bay, or a designated representative.

(2) Mariners requesting permission to transit through the security zone may request authorization to do so from the Patrol Commander (PATCOM). The PATCOM may be contacted on VHF–FM Channel 16.

(3) All persons and vessels shall comply with the instructions of the Captain of the Port or the designated representative.

(4) Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(5) The Coast Guard may be assisted by other Federal, State, or local agencies.

Dated: March 30, 2011.

Cynthia L. Stowe,

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

[FR Doc. 2011–9052 Filed 4–13–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0998; FRL–9295–3]

Approval and Promulgation of Air Quality Implementation Plans; Indiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving a request submitted by the Indiana Department of Environmental Management on November 24, 2010, to revise the Indiana State Implementation Plan (SIP) under the Clean Air Act (CAA). These revisions address sulfur dioxide (SO_2) and particulate matter (PM) limits for Cargill, Incorporated (Cargill) at its facility in Hammond (Lake County), Indiana. Indiana's SO_2 revisions tighten emission limits for some existing units at Cargill's Hammond facility and remove the references to other emission units that are no longer in operation, in accordance with the terms of a September 2005 Federal consent decree. The PM revisions reflect the permanent shutdown of, and changes in unit identification for other Cargill units.

DATES: This direct final rule will be effective June 13, 2011, unless EPA receives adverse comments by May 16, 2011. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2010–0998, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: aburano.douglas@epa.gov.*
3. *Fax:* (312) 408–2279.
4. *Mail:* Douglas Aburano, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Douglas Aburano, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2010–0998. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Matt Rau, Environmental Engineer, at (312) 886–6524 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Matt Rau, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6524, *rau.matthew@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

I. What is the background for this action?

a. Sulfur Dioxide Emissions

Cargill entered into a Federal consent decree with EPA and a number of states, including Indiana, to resolve a complaint filed against the company in the United States District Court for the District of Minnesota. The consent decree was lodged on September 1, 2005. It covers 24 Cargill facilities in 13 states.

Paragraph 15 of the consent decree requires, among other things, that Cargill submit permit applications to applicable permitting authorities that will contain annual SO_2 emission limits for the facilities and boilers listed in Appendix B of the decree. Appendix B lists four boilers at the Hammond facility—Numbers 6, 7, 8, and 10. It requires the retirement of Boiler Number 7, while removing the emission limits, recordkeeping requirements, and reporting requirements for the other three boilers. All four boilers have been permanently shutdown.

Paragraph 27 of the consent decree requires SO_2 emission reductions at the Hammond facility to be achieved through the installation of pollution control technologies and the implementation of emission reduction projects to meet a level of control specified for the sources in Appendix L of the decree.

Indiana has revised SIP rule 326 Indiana Administrative Code (IAC) 7–4.1–5 to address these consent decree provisions.

b. Particulate Matter

Indiana revised Cargill's emission limits in 326 IAC 6.8–2–8 to remove the emission units that are no longer in operation at the Hammond facility. These revisions were not required by the consent decree, but were made to reflect the permanent shutdown of Cargill units—ten process sources and two natural gas-fired boilers. Those units now have no emission limits and, as such, they cannot be operated. In

addition, Indiana has made changes in unit identification to reflect current operations.

II. What is EPA's analysis of the revision?

The revisions to the SO_2 emission limits in 326 IAC 7–4.1–5 should result in improved air quality. There will no longer be emissions from the four boilers that Cargill has permanently shutdown, as referenced in Appendix B of the consent decree. In addition, there should be substantial SO_2 emission reductions resulting from the eight units required to be controlled in Appendix L of the consent decree. The revisions to the PM emission rule, 326 IAC 6.8–2–8, help to clarify the PM requirements for Cargill.

EPA, therefore, finds these revisions to the SO_2 and PM SIP rules acceptable.

III. What are the environmental effects of this action?

As a result of the SO_2 emission reduction requirements in the consent decree, Cargill shutdown eight units and tightened emission limits on four other units. The total allowable SO_2 emissions rate from all Cargill units is now 622 pounds per hour lower. The revisions have the potential to reduce SO_2 emissions by 2730 tons per year.

Sulfur dioxide in the atmosphere can aggravate respiratory and cardiovascular disease. Sulfur dioxide emissions also contribute to acid rain and fine particulate matter formation.

Indiana also removed the PM emission limits for ten units that are permanently shutdown. The emission limit revisions do not cause a reduction in PM emissions as the units have already ceased operation, but they are indicative of the reduction in total allowable PM emissions that has occurred at the Cargill facility. The facility's cumulative allowable PM emissions are now 71 pounds per hour lower. That yields a potential annual reduction of 311 tons of PM emissions.

Particulate matter interferes with lung function when inhaled. Exposure to particulates can cause heart and lung disease. Particulate matter also aggravates asthma. Airborne particulate matter or PM is the main source of haze that causes a reduction in visibility.

IV. What action is EPA taking?

EPA is approving revisions to the Indiana SIP. This consists of revisions of the PM emission rule, 326 IAC 6.8–2–8, and the SO_2 emission rule, 326 IAC 7–4.1–5.

We are publishing this action without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the state plan if relevant adverse written comments are filed. This rule will be effective June 13, 2011 without further notice unless we receive relevant adverse written comments by May 16, 2011. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. The EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. If we do not receive any comments, this action will be effective June 13, 2011.

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

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

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

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 13, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section

of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: April 4, 2011.

Susan Hedman,

Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart P—Indiana

■ 2. In § 52.770 the table in paragraph (c) is amended by revising the entries for "Article 6.8. Particulate Matter Limitations For Lake County" and "Article 7. Sulfur Dioxide Rules" to read as follows:

§ 52.770 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED INDIANA REGULATIONS

Indiana citation	Subject	Indiana effective date	EPA approval date	Notes
*	*	*	*	*
Article 6.8. Particulate Matter Limitations for Lake County				
Rule 1. General Provisions				
6.8–1–1	Applicability	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–1–1.5	Definitions	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–1–2	Particulate emission limitations; fuel combustion steam generators, asphalt concrete plant, grain elevators, foundries, mineral aggregate operations; modification by commissioner.	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–1–3	Compliance determination	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–1–4	Compliance schedules	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–1–5	Control strategies	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–1–6	State implementation plan revisions	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–1–7	Scope	2/22/2008	4/30/2008, 73 FR 23356.	
Rule 2. Lake County: PM_{10} Emission Requirements				
6.8–2–1	General provisions and definitions	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–2	Lake County: PM_{10} and total suspended particulates (TSP) emissions.	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–4	ASF-Keystone, Inc.—Hammond	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–6	BP Products North America, Inc.—Whiting Refinery	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–7	Bucko Construction Company, Inc	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–8	Cargill, Inc	11/19/2010	4/14/2011, [Insert page number where the document begins].	
6.8–2–9	W.R. Grace and Co.—Conn	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–13	Hammond Group, Inc. (HGI) Halox Division, Lead Products Division, and Hammond Expander Division.	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–14	Hammond Group, Inc.—Halstab Division	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–16	Resco Products, Inc	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–17	Mittal Steel—Indiana Harbor East Inc	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–18	Jupiter Aluminum Corporation	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–19	Dover Chemical Corporation—Hammond	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–20	LaSalle Steel Company	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–21	Mittal Steel—Indiana Harbor West Inc	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–22	Carmeuse Lime Inc	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–24	Methodist Hospital Inc	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–25	National Recovery Systems	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–26	NIPSCo—Dean H. Mitchell Station	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–27	Praxair Inc	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–28	Premiere Candy Company	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–29	Reed Minerals—Plant #14	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–30	Rhodia, Inc	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–31	Silgan Containers Manufacturing Corporation	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–32	Smith Ready Mix, Inc	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–33	State Line Energy, LLC	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–34	Huhtamaki Foodservice, Inc	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–35	Conopco, Inc. d/b/a Unilever HPC USA	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–36	Union Tank Car Company, Plant 1	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–2–37	United States Gypsum Company	2/22/2008	4/30/2008, 73 FR 23356.	

EPA-APPROVED INDIANA REGULATIONS—Continued

Indiana citation	Subject	Indiana effective date	EPA approval date	Notes
6.8–2–38	U.S. Steel—Gary Works	2/22/2008	4/30/2008, 73 FR 23356.	
	Rule 4. Lake County: Opacity Limits; Test Methods			
6.8–4–1	Test methods	2/22/2008	4/30/2008, 73 FR 23356.	
	Rule 8. Lake County: Continuous Compliance Plan			
6.8–8–1	Applicability	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–8–2	Documentation; operation and maintenance procedures	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–8–3	Plan requirements	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–8–4	Plan; schedule for complying with 326 IAC 6.8–7	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–8–5	Plan; source categories	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–8–6	Plan; particulate matter control equipment; operation and maintenance.	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–8–7	Plan; particulate matter control equipment; recording; operation; inspection.	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–8–8	Plan; department review	9/9/2005	3/22/2006, 71 FR 14383.	
	Rule 9. Lake County: PM_{10} Coke Battery Emission Requirements			
6.8–9–1	Applicability	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–9–2	Definitions	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–9–3	Emission limitations	2/22/2008	4/30/2008, 73 FR 23356.	
	Rule 10. Lake County: Fugitive Particulate Matter			
6.8–10–1	Applicability	2/22/2008	4/30/2008, 73 FR 23356.	
6.8–10–2	Definitions	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–10–3	Particulate matter emission limitations	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–10–4	Compliance requirements; control plans	9/9/2005	3/22/2006, 71 FR 14383.	
	Rule 11. Lake County: Particulate Matter Contingency Measures			
6.8–11–1	Applicability	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–11–2	"Ambient monitoring data" defined	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–11–3	Exceedances	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–11–4	Violation of 24-hour standard	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–11–5	Violation of annual standard	9/9/2005	3/22/2006, 71 FR 14383.	
6.8–11–6	Reduction measures	9/9/2005	3/22/2006, 71 FR 14383.	
	Article 7. Sulfur Dioxide Rules			
	Rule 1.1. Sulfur Dioxide Emission Limitations			
7–1.1–1	Applicability	6/24/2005	9/26/2005, 70 FR 56129.	
7–1.1–2	Sulfur dioxide emission limitations	6/24/2005	9/26/2005, 70 FR 56129.	
	Rule 2. Compliance			
7–2–1	Reporting requirements; methods to determine compliance.	6/24/2005	9/26/2005, 70 FR 56129.	
	Rule 3. Ambient Monitoring			
7–3–2	Ambient monitoring		5/13/1982, 47 FR 20583.	
	Rule 4. Emission Limitations and Requirements by County			
7–4–2	Marion County sulfur dioxide emission limitations	3/11/1999	8/2/2000, 65 FR 47336.	
7–4–3	Vigo County sulfur dioxide emission limitations	9/30/2004	2/28/2005, 70 FR 9533.	
7–4–4	Wayne County sulfur dioxide emission limitations	4/10/1988	9/1/1988, 53 FR 33808.	
7–4–5	LaPorte County sulfur dioxide emission limitations	4/10/1988	9/1/1988, 53 FR 33808.	
7–4–6	Jefferson County sulfur dioxide emission limitations	4/10/1988	9/1/1988, 53 FR 33808.	
7–4–7	Sullivan County sulfur dioxide emission limitations	4/10/1988	9/1/1988, 53 FR 33808.	
7–4–8	Vermillion County sulfur dioxide emission limitations	4/10/1988	1/19/1989, 54 FR 2112.	
7–4–9	Floyd County sulfur dioxide emission limitations	4/10/1988	9/1/1988, 53 FR 33808.	
7–4–10	Warrick County sulfur dioxide emission limitations	8/30/2008	11/10/2009, 74 FR 57904.	
7–4–11	Morgan County sulfur dioxide emission limitations	5/13/1988	12/16/1988, 53 FR 50521.	
7–4–12.1	Gibson County sulfur dioxide emission limitations	12/5/1990	9/19/1994, 59 FR 47804.	
7–4–13	Dearborn County sulfur dioxide emission limitations	3/16/2005	2/28/2006, 71 FR 9936.	
7–4–14	Porter County sulfur dioxide emission limitations	10/23/1988	1/19/1989, 54 FR 2112.	

EPA-APPROVED INDIANA REGULATIONS—Continued

Indiana citation	Subject	Indiana effective date	EPA approval date	Notes
	Rule 4.1. Lake County Sulfur Dioxide Emission Limitations			
7–4.1–1	Lake County sulfur dioxide emission limitations	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–2	Sampling and analysis protocol	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–3	BP Products North America Inc. sulfur dioxide emission limitations.	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–4	Bucko Construction sulfur dioxide emission limitations	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–5	Cargill, Inc. sulfur dioxide emission limitations	11/19/2010	4/14/2011, [Insert page number where the document begins].	
7–4.1–6	Carmeuse Lime sulfur dioxide emission limitations	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–7	Cokenergy Inc. sulfur dioxide emission limitations	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–8	Indiana Harbor Coke Company sulfur dioxide emission limitations.	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–9	Ironside Energy, LLC sulfur dioxide emission limitations	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–10	ISG Indiana Harbor Inc. sulfur dioxide emission limitations	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–11	Ispat Inland Inc. sulfur dioxide emission limitations	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–12	Methodist Hospital sulfur dioxide emission limitations	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–13	National Recovery Systems sulfur dioxide emission limitations.	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–14	NIPSCO Dean H. Mitchell Generating Station sulfur dioxide emission limitations.	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–15	Rhodia sulfur dioxide emission limitations	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–16	Safety-Kleen Oil Recovery Company sulfur dioxide emission limitations.	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–17	SCA Tissue North America LLC sulfur dioxide emission limitations.	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–18	State Line Energy, LLC sulfur dioxide emission limitations	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–19	Unilever HPC USA sulfur dioxide emission limitations	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–20	U.S. Steel—Gary Works sulfur dioxide emission limitations.	6/24/2005	9/26/2005, 70 FR 56129.	
7–4.1–21	Walsh and Kelly sulfur dioxide emission limitations	6/24/2005	9/26/2005, 70 FR 56129.	

* * * * * * * * * * *

[FR Doc. 2011–8867 Filed 4–13–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0545; FRL–9295–1]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Stage I Vapor Recovery Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving into the Indiana State Implementation Plan (SIP), amendments to the stage I vapor recovery rule and administrative changes to stage II vapor recovery rule submitted by the Indiana Department of Environmental Management on June 11, 2010. These rule revisions made volatile organic compounds (VOC) emission control requirements for filling at gasoline dispensing facilities more stringent by applying them statewide, making the rule applicable to smaller tanks and revising the requirements for newer submerged fill pipes. These new State requirements update the SIP consistent with new Federal requirements from January 10, 2008 area source National Emissions Standards for Hazardous Air Pollutants (NESHAPs) for gasoline dispensing facilities. The revisions also delete references to compliance dates which have passed. The rules are approvable because they are consistent with the Clean Air Act (Act) and EPA regulations, and should result in additional emission reductions of VOCs throughout Indiana.

DATES: This direct final rule will be effective June 13, 2011, unless EPA receives adverse comments by May 16, 2011. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2010–0545, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: aburano.douglas@epa.gov.*
3. *Fax:* (312) 408–2279.
4. *Mail:* Doug Aburano, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Doug Aburano, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2010–0545. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any

personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Carolyn Persoon, Environmental Engineer, at (312) 353–8290, before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Carolyn Persoon, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8290, *persoon.carolyn@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

I. What should I consider as I prepare my comments for EPA?

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

2. Follow directions—The EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

4. Describe any assumptions and provide any technical information and/or data that you used.

5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

6. Provide specific examples to illustrate your concerns, and suggest alternatives.

7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

8. Make sure to submit your comments by the comment period deadline identified.

II. What is the background of the rule revisions?

On January 10, 2008, EPA issued new, more stringent National Regulations for Gasoline Dispensing Facilities at 40 CFR part 63, subpart CCCCCC, (73 FR 1945), promulgated under section 112 of the Act. The gasoline dispensing standards in that rule apply nationwide to subject sources of hazardous air pollutants identified in 40 CFR 63.11111.

Indiana adopted new requirements to reflect the revised Federal regulations. These revisions; (1) Remove past compliance dates (326 IAC 8–1–3); (2) extend applicability of the rules to facilities statewide with a through-put of ten thousand (10,000) gallons per month or greater (326 IAC 8–4–1); and (3) add new requirements for filling gasoline storage tanks (326 IAC 8–4–6).

Indiana placed notices for public comment periods in the Indiana Register first on June 27, 2007 and the second notice on June 3, 2009. Indiana placed notices of public hearing dates in four newspapers on July 31, 2009. Indiana then held a public hearing on the proposed rule on September 2, 2009. There were no comments. The proposed rule was published in the Indiana Register on September 23, 2009, and no comments were received. A second notice of hearing was published in the Indiana Register on September 23, 2009 and a second public hearing was held on November 4, 2009. No comments were received. The final rule was adopted on November 4, 2009.

III. What is EPA's analysis of the rule revisions?

The revisions to Indiana's stage I vapor recovery rule, 326 IAC 8–1–3, 326 IAC 8–4–1 and 326 IAC 8–4–6, are approvable because they are consistent with the Act and applicable EPA regulations, and should result in additional VOC emission reductions. A description of the rule revisions follows:

326 IAC 8–1–3 Compliance schedules—This section deletes subsections 8–1–3 (d) and (e), which had allowed for compliance date extensions, because the applicable dates have long past.

326 IAC 8–4–1 Applicability—This section expands the applicability to all gasoline storage tanks at a gasoline dispensing facility with a through-put of ten thousand (10,000) gallons per month or greater.

326 IAC 8–4–6 Gasoline dispensing facilities—Section 6(a)(8) decreases the tank cut off size required to meet the regulatory standards for fueling from two thousand, one hundred seventy six (2,176) to nine hundred forty-six (946) liters (575 to 250 gallons). Section 6(b)(1) revises the requirements for submerged fill pipes for existing and newer tanks. Fill pipes installed before November 9, 2006 must be no more than twelve (12) inches from the bottom of the tank, and those installed after November 9, 2006 must be no more than six (6) inches from the bottom of the tank.

The expanded applicability and more stringent submerged fill requirements will result in additional VOC reductions.

IV. What action is EPA taking?

EPA is approving into the Indiana SIP revisions the entire stage I and stage II vapor recovery rule. Although the only amendments to the rule affected are sections 326 IAC 8–1–3, 326 IAC 8–4–1, and 326 IAC 8–4–6, concerning stage I vapor recovery, and administrative changes to stage II vapor recovery rule, we are approving the entire rule for clarity and consistency.

We are publishing this action without prior proposal because we view this as

a noncontroversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the State plan if relevant adverse written comments are filed. This rule will be effective June 13, 2011 without further notice unless we receive relevant adverse written comments by May 16, 2011. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. The EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. If we do not receive any comments, this action will be effective June 13, 2011.

V. Statutory and Executive Order Reviews

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 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 Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

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

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 13, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 30, 2011.

Susan Hedman,

Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart P—Indiana

■ 2. In § 52.770 the table in paragraph (c) is amended by revising the entries under Article 8 for "8–1 General Provisions" and "8–4 Petroleum Sources" to read as follows:

§ 52.770 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED INDIANA REGULATIONS

Indiana citation	Subject	Indiana effective date	EPA approval date	Notes
*	* * * *	*	*	*
	Article 8. Volatile Organic Compound Rules			
8–1	General Provisions.			
8–1–0.5	Definitions	10/18/1995	11/3/1999, 64 FR 59642.	
8–1–1	Applicability	6/5/1991	3/6/1992, 57 FR 8082.	
8–1–2	Compliance methods	12/15/2002	5/5/2003, 68 FR 23604.	
8–1–3	Compliance schedules	5/15/2010	4/14/2011, [Insert page number where the document begins].	
8–1–4	Testing procedures	7/15/2001	9/11/2002, 67 FR 57515.	
8–1–5	Petition for site-specific reasonably available control technology (RACT) plan.	11/10/1988	9/6/1990, 55 FR 36635.	
8–1–6	New facilities; general reduction requirements	6/24/2006	6/13/2007, 72 FR 32531.	
8–1–7	Military specifications		10/27/1982, 47 FR 20586.	
8–1–9	General record keeping and reporting requirements	5/22/1997	6/29/1998, 63 FR 35141.	
8–1–10	Compliance certification, record keeping, and reporting requirements for certain coating facilities using compliant coatings.	5/22/1997	6/29/1998, 63 FR 35141.	
8–1–11	Compliance certification, record keeping, and reporting requirements for certain coating facilities using daily–weighted averaging.	5/22/1997	6/29/1998, 63 FR 35141.	
8–1–12	Compliance certification, record keeping, and reporting requirements for certain coating facilities using control devices.	5/22/1997	6/29/1998, 63 FR 35141.	
*	* * * *	*	*	*
8–4	Petroleum Sources.			
8–4–1	Applicability	5/15/2010	4/14/2011, [Insert page number where the document begins].	
8–4–2	Petroleum refineries		1/18/1983, 48 FR 2127.	
8–4–3	Petroleum liquid storage facilities		2/10/1986, 51 FR 4912.	
8–4–4	Bulk gasoline terminals		1/18/1983, 48 FR 2127.	
8–4–5	Bulk gasoline plants		1/18/1983, 48 FR 2127.	
8–4–6	Gasoline dispensing facilities	5/15/2010	4/14/2011, [Insert page number where the document begins].	
8-4-7	Gasoline transports	11/5/1999	5/31/2002, 67 FR 38006.	
8–4–8	Leaks from petroleum refineries; monitoring; reports	6/5/1991	3/6/1992, 57 FR 8082.	
8–4–9	Leaks from transports and vapor collection systems; records.	11/5/1999	5/31/2002, 67 FR 38006.	
*	* * * *	*	*	*

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[FR Doc. 2011–8874 Filed 4–13–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2007–1186–201114; FRL–9295–9]

Approval and Promulgation of Air Quality Implementation Plans; Kentucky; Approval of Section 110(a)(1) Maintenance Plans for the 1997 8-Hour Ozone Standards for the Edmonson County, KY; Greenup County Portion of the Huntington-Ashland, WV–KY; Lexington-Fayette, KY; and Owensboro, KY

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve revisions to the Kentucky State Implementation Plan (SIP) that include maintenance plans addressing the 1997 8-hour ozone national ambient air quality standards (NAAQS or standards) for the following four Kentucky attainment areas: Edmonson County (hereafter referred to as the "Edmonson County Area"); the portion of Greenup County that was previously a part of the Huntington-Ashland, West Virginia-Kentucky 1-hour ozone maintenance area (hereafter referred to as the "Greenup County Area"); Fayette and Scott Counties (hereafter referred to as the "Lexington Area"); and Hancock County and the portion of Daviess County that was previously a part of the Owensboro 1-hour ozone maintenance area (hereafter referred to as the "Owensboro Area")—collectively, these

areas will be referred to as the "Four Kentucky Areas." The Four Kentucky Areas were 1-hour ozone maintenance areas that were designated as attainment areas for the 1997 8-hour ozone NAAQS. As attainment areas that were previously 1-hour maintenance areas, Kentucky was required to submit maintenance plans demonstrating how these areas would maintain the 1997 8-hour ozone NAAQS. These maintenance plans were submitted to EPA on May 27, 2008, as revisions to the Kentucky SIP, by the Commonwealth of Kentucky (Commonwealth), through the Kentucky Energy and Environment Cabinet, Division for Air Quality (DAQ), and ensure the continued attainment of the 1997 8-hour ozone NAAQS through the year 2020 for the Four Kentucky Areas. These maintenance plans meet applicable statutory and regulatory requirements and are consistent with EPA's guidance. EPA is approving the revisions pursuant to the Clean Air Act (CAA or Act). This final rule also responds to adverse comments made on EPA's previously published proposed approvals of the maintenance plans for the Four Kentucky Areas.

DATES: *Effective Date:* This rule will be effective May 16, 2011.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2007–1186. All documents in the electronic docket are listed in the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information 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 *http://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: Jane Spann, 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. Jane Spann may be reached by phone at (404) 562–9029 or by electronic mail address *spann.jane@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

In accordance with the CAA, Edmonson County, Kentucky; Huntington-Ashland, West Virginia-Kentucky; Lexington-Fayette, Kentucky; and Owensboro, Kentucky were designated as nonattainment for the 1-hour ozone NAAQS (effective January 6, 1992, 56 FR 56694).

On November 13, 1992, Kentucky submitted requests to redesignate the Edmonson County, Lexington-Fayette, and Owensboro 1-hour nonattainment Areas to attainment for the 1-hour ozone NAAQS. Subsequently, on November 12, 1993, Kentucky submitted a request to redesignate the Kentucky portion of the Huntington-Ashland Area to attainment for the 1-hour ozone NAAQS. In addition to the redesignation requests, Kentucky submitted the required ozone monitoring data and maintenance plans to ensure that the redesignated Areas would remain in attainment for the 1-hour ozone NAAQS for a period of 10 years after redesignation, consistent with the CAA section 175A(a).

EPA approved Kentucky's maintenance plans and requests to redesignate the Kentucky portion of the Huntington-Ashland Area (60 FR 33748; June 29, 1995); the Lexington-Fayette Area (60 FR 47089; September 11, 1995); the Edmonson County Area (59 FR 55053; November 3, 1994); and the Owensboro Area (60 FR 7124; February 7, 1995) for the 1-hour ozone NAAQS.

On April 30, 2004, EPA designated areas for the 1997 8-hour ozone NAAQS (69 FR 23858), and published the final Phase I Implementation Rule for the 1997 8-hour ozone NAAQS (69 FR 23951) (Phase I Rule). Daviess, Edmonson, Fayette, Greenup,[1] Hancock and Scott Counties (including all portions that were previously designated nonattainment for the 1-hour ozone NAAQS) were designated as attainment for the 1997 8-hour ozone NAAQS, effective June 15, 2004.

II. EPA Guidance and CAA Requirements

As a consequence of their designations as attainment for both the 1-hour and 8-hour ozone standards, the Four Kentucky Areas (all 8-hour ozone attainment areas) were required to submit 10-year maintenance plans pursuant to section 110(a)(1) of the CAA and the Phase I Rule, 40 Code Federal Regulations (CFR) 51.905(a)(4). On May 20, 2005, EPA issued guidance as to how a state might fulfill the section 110(a)(1) maintenance plan obligation established by the CAA and the Phase I Rule (Memorandum from Lydia N. Wegman to Air Division Directors, *Maintenance Plan Guidance Document for Certain 8-Hour Ozone Areas Under Section 110(a)(1) of Clean Air Act,* May 20, 2005, hereafter referred to as "Wegman Memorandum"). Neither section 110(a)(1) nor any other provision of the CAA contains detail regarding the specific content of maintenance plans for these types of areas. EPA's Phase I Rule, in 40 CFR 51.905(a)(4) provides that section 110(a)(1) maintenance plans must include contingency measures.

On December 22, 2006, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) issued an opinion that vacated portions of EPA's Phase I Rule. *See South Coast Air Quality Management District (SCAQMD) v. EPA,* 472 F.3d 882 (D.C. Cir. 2006). On June 8, 2007, in response to several petitions for rehearing, the DC Circuit Court clarified that the Phase I Rule was vacated only with regard to those parts of the Rule that had been successfully challenged. Of particular relevance, the Court vacated those portions of the Phase I Rule that provided for regulation of the 1997 8-hour ozone nonattainment areas designated under Subpart 1 (of part D of the CAA) in lieu of Subpart 2, among other portions of the Phase I Rule. The Court's decisions do not alter any 8-hour ozone attainment area requirements under the Phase I Rule for CAA section 110(a)(1) maintenance plans. EPA is thus finalizing its approvals of Kentucky's May 27, 2008, proposed SIP revisions as satisfying the section 110(a)(1) CAA requirements for plans that provide for implementation, maintenance, and enforcement of the

[1] While the portion of Greenup County that was a part of the 1-hour ozone Huntington-Ashland, WV-KY Area was designated attainment, Boyd County which was also a part of the 1-hour ozone Huntington-Ashland, WV-KY Area was designated nonattainment for the 1997 8-hour ozone NAAQS, effective June 15, 2004. Boyd County was subsequently redesignated to attainment for the 1997 8-hour ozone standard and has a CAA section 175A maintenance plan in effect. (72 FR 43172, August 3, 2007).

1997 8-hour ozone NAAQS in the Four Kentucky Areas.

III. This Action

EPA is taking final action to approve SIP revisions incorporating the 110(a)(1) maintenance plans for the 1997 8-hour ozone NAAQS for the Four Kentucky Areas—Edmonson County, Greenup County, Lexington, and Owensboro. On May 27, 2008, Kentucky submitted these maintenance plans to ensure the continued attainment of the 1997 8-hour ozone NAAQS through the year 2020. In addition to reviewing the maintenance plans, EPA has reviewed the updated available air quality monitoring data for the Four Kentucky Areas and has confirmed, that based on the available data that these Areas continue to meet the 1997 8-hour ozone NAAQS. The table below shows the 2007–2009 design values for these attainment areas, based on complete, quality-assured and certified monitoring data. The table below also shows the preliminary data from 2010 which are consistent with continued attainment. The data are listed in EPA's Air Quality System database as the preliminary design value report. EPA does not anticipate any concerns regarding these data.

TABLE 1—1997 8-HOUR OZONE NAAQS DESIGN VALUE

Area	Design value (2007–2009) parts per million (ppm)	Design value (2008–2010) ppm
Edmonson County Area	0.072	0.070
Greenup County Area	0.072	0.069
Lexington Area	0.077	0.069
Owensboro Area	0.075	0.071

In this final action, EPA is also responding to adverse comments received, from the Sierra Club and Kentucky Environmental Foundation, regarding EPA's proposed rulemakings to approve these revisions, 74 FR 12567, March 25, 2009 (Greenup County Area, Lexington Area and Edmonson County Area); 75 FR 3183, January 20, 2010 (Owensboro Area); and 75 FR 16387, April 1, 2010 (Owensboro limited reopening of comment period). EPA proposed approval of the maintenance plans for the Four Kentucky Areas in two separate actions. This final rulemaking action is based on EPA's full review of relevant information and consideration of the comments received, and reflects EPA's conclusion, that these maintenance plans comply with section 110 of the CAA and EPA's implementing regulations. See 40 CFR 51.905(a)(4). EPA's analyses of Kentucky's SIP revisions for the Edmonson County, Greenup County, and Lexington Areas are described in detail in proposed and direct final rules published March 25, 2009 (74 FR 12774 and 74 FR 12567, respectively). Although EPA's direct final rulemaking was withdrawn on May 5, 2009 (74 FR 20601), due to the adverse comments received, EPA's proposed rulemaking remained in place. EPA's analysis for Kentucky's SIP revision for the Owensboro Area is described in detail in a proposed rule published on January 20, 2010 (75 FR 3183). Today's action responds to adverse comments received on EPA's March 25, 2009, and January 20, 2010, rulemakings, and finalizes those rulemakings. EPA's action approving the maintenance plan for each area is separate and independent of its approval of the plans for the other areas.

IV. Comments and Responses

EPA received one set of adverse comments from the Sierra Club and the Kentucky Environmental Foundation (hereafter referred to as "the Commenters"). These comments address EPA's March 25, 2009, proposed and direct final rules to approve Kentucky's 110(a)(1) maintenance plans for the Edmonson County, Greenup County, and Lexington Areas. This same set of comments was submitted by the Commenters for EPA's January 20, 2010, proposed rule to approve Kentucky's 110(a)(1) maintenance plan for the Owensboro Area. Today's rulemaking takes final action on the maintenance plans for all Four Kentucky Areas. The following section of this notice summarizes the adverse comments received, and sets forth EPA's responses to the comments. (The complete comments are available in the docket for this rulemaking.)

Comment 1. The Commenters claim that EPA's proposed and direct final rules to approve Kentucky's 110(a)(1) maintenance plans for the Four Kentucky Areas "run contrary to Administrator's Jackson's promise that the U.S. Environmental Protection Agency decisions would henceforth be based on three guiding principles: transparency; use of sound science; and respect for rule of law." The Commenters state that "[i]ssuing a direct final rule in which the actual rules are not knowable by reading the **Federal Register** notice, or for that matter, the administrative record, is not a transparent process." They further complain that EPA's proposal ignored the science of climate change and contravened statutory language.

Response 1. EPA disagrees with the Commenters' characterization of the content of the **Federal Register** notice. The Commenters' contention that because the complete text of the SIP revisions is not included in the **Federal Register** notice, EPA has failed to adhere to certain principles espoused by EPA Administrator Jackson is simply unsupported. EPA's rulemaking here has fulfilled the goals of transparency, sound science, and respect for the law. With regard to transparency, neither the CAA nor the Administrative Procedure Act mandates that the **Federal Register** notice of proposed rulemaking, or final rulemaking action, include the complete text of the proposed SIP revisions. EPA's notice of proposed rulemaking satisfied the notice requirements by providing citations to the rules at issue, offering the SIP revisions for public review, and describing the subjects and issues involved in the SIP revisions. Because publication in the **Federal Register** is costly and resource intensive, EPA makes every effort to provide key information in proposal notices while at the same time using Agency resources efficiently. EPA drafts rulemaking notices to enable public understanding of the subjects and issues at hand. All documents related to this rulemaking were available at *http://www.regulations.gov* under the docket number EPA–R04–OAR–2007–1186, during the comment period for the proposed rulemaking actions. For a member of the public wishing to review the complete text of the SIP revisions, the notice of proposed rulemaking included instructions for obtaining access to the complete SIP revision. In

addition, the public could also contact the EPA representative designated in the notice to obtain further information or answers to questions. Thus, the Commenters' contention that, because the complete text of the SIP revision was not included in the **Federal Register** notice, EPA failed to adhere to EPA Administrator Jackson's three principles is simply unsupported.

EPA also rejects the Commenters' assertion that the rulemaking violates any of the three principles that have been espoused by EPA Administrator Jackson. EPA's adherence to Administrator Jackson's three principles (transparency, use of sound science, and respect for rule of law) is clearly reflected in the detailed information and explanations set forth in the proposals, direct final actions, and this final action, including the substantive responses to comments. As was discussed earlier in this notice, and is also discussed later in this response to comments section, EPA's approvals of the maintenance plans are supported by the CAA, its implementing regulations, and applicable guidance.

Comment 2. The Commenters assert that Kentucky DAQ has indicated that Greenup County, in the Huntington-Ashland Area, Jessamine County in the Lexington Area, and Edmonson County are violating the 2008 8-hour ozone NAAQS. Therefore, the Commenters state, that the public interest mandates that EPA quickly act to ensure that at the very least, the 1997 8-hour ozone NAAQS is maintained.

Response 2. The present rulemaking action addresses solely the maintenance of the 1997 8-hour ozone NAAQS for the Edmonson County, Greenup County, Lexington, and Owensboro Areas. EPA is approving, pursuant to CAA section 110(a), Kentucky's plans to assure continued maintenance of the 1997 8-hour ozone NAAQS in the Four Kentucky Areas. Attainment or maintenance of any subsequently adopted ozone NAAQS is not relevant to this rulemaking action, and therefore the issue raised by the Commenters is outside the scope of this rulemaking.

The 2008 8-hour ozone NAAQS, promulgated on March 12, 2008, is irrelevant to this rulemaking. EPA is currently reconsidering the 2008 8-hour ozone NAAQS, and has not yet designated areas for any subsequent NAAQS. Actions that EPA may take with regard to the 2008 (or a reconsidered) ozone NAAQS are separate from and independent of the actions now being taken to approve the 110(a)(1) maintenance plans for the Four Kentucky Areas in this rulemaking.

Comment 3. The Commenters assert that the maintenance plans do not ensure maintenance of the 1997 8-hour ozone NAAQS because there is no requirement that major stationary sources demonstrate that they do not cause or contribute to new violations of the 1997 8-hour ozone NAAQS. The basis for this assertion appears to be the Commenters' view that Kentucky's Prevention of Significant Deterioration (PSD) program does not require new or modified sources that trigger major PSD review due to an increase in emissions of nitrogen oxides (NO_X) to demonstrate that they will not cause or contribute to a violation of the ozone NAAQS. The Commenters point to a specific facility and cite to a portion of the PSD application for that facility where volatile organic compounds (VOCs) are considered for the ozone analysis, but not NO_X.

Response 3. On September 15, 2009, the Kentucky DAQ filed an emergency rule to immediately address the issue of NO_X as a precursor for ozone for PSD purposes (which EPA required as part of a November 29, 2005, rulemaking for ozone implementation—70 FR 71612). Kentucky's emergency rule provides explicit requirements for major new sources and major modifications of existing sources of NO_X to demonstrate that they will not cause or contribute to a violation of the ozone NAAQS. The emergency rule became effective immediately in Kentucky and was subsequently submitted to EPA for approval as a SIP revision. On April 1, 2010, EPA proposed approval of Kentucky's rule to address NO_X as a precursor to ozone for PSD (75 FR 16388, April 1, 2010). EPA received adverse comments from the Sierra Club.[2] On September 15, 2010 (75 FR 55988), EPA issued a final action responding to the adverse comments and approving the Commonwealth's rule to address NO_X as a precursor to ozone for PSD as a revision to the Kentucky SIP. EPA thus believes that the concerns voiced by the Commenters in this rulemaking about alleged deficiencies in Kentucky's PSD program and the regulation of NO_X as a precursor to ozone have been satisfactorily addressed and resolved.

Comment 4. The Commenters contend that the maintenance plans are inadequate because there is no consideration of the impacts that climate change will have on ozone levels. The comment makes reference to several publications, provides a discussion on the impact of weather on climate change and ozone, and concludes that failure to consider this important aspect of the problem would lead to an arbitrary result. The Commenters request that EPA evaluate the maintenance plans in light of the "increasing danger climate change will cause from ozone."

Response 4. With regard to the comment that Kentucky's analysis improperly omits consideration of the affect of climate change on ambient ozone levels, EPA agrees that climate change is a serious environmental issue; however, EPA does not agree that the maintenance plans at issue in today's action cannot be approved without the climate change analysis outlined by the Commenters. One of the reports cited to by the Commenters (April 2009 "Assessment of the Impacts of Global Change on Regional U.S. Air Quality: A synthesis of climate change impacts on ground-level ozone," page xxiv) concludes that, "[t]hese studies suggest that EPA's Office of Air Quality Planning and Standards should begin to consider climate change, for example, in the next update of EPA's ozone modeling guidance, especially for planning horizons in 2020 and beyond." Although the EPA report cited in the comment indicates that climate change increases ozone concentrations in "substantial regions of the country," the report also states that there are "pronounced differences in the broad spatial patterns of change" among the various modeling groups. While ozone concentrations may be affected as early as the 2020s (already after the date—2014—required to be addressed by these section 110(a) maintenance plans), most of the modeling groups did not simulate ozone concentration changes prior to the 2050s. Furthermore, the report itself states that "modeling uncertainties persist, and further research is needed." More specifically, the report further states that "[c]urrent modeling uncertainties lead to disagreements about the spatial patterns of future changes in meteorological variables and, hence, the specific regional distributions of future ozone changes across the United States." Several of the projected models, in fact, provide conflicting projections for the area in

[2] The Commenters allege that East Kentucky Power Cooperative (EKPC) is "taking advantage" of the SIP not including NO_X as a precursor for ozone for a proposed J.K. Smith power plant. Comments at pg. 3. This issue, among others, is part of a lawsuit filed by Sierra Club against EPA which is now pending before the DC Circuit Court of Appeals. Notably, in briefs filed by the United States in that action, it was explained that EKPC announced its intentions to cancel plans for the Smith facility and the permit at issue in the comments was subsequently withdrawn (the withdrawal document is included in the docket for today's rulemaking). Because Kentucky's SIP now includes NO_X as a precursor for ozone, the Commenters' concern has been addressed.

which Kentucky is located (see e.g., Fig. 3–1of the above mentioned EPA report). The report concludes "[t]hese studies suggest that EPA's Office of Air Quality Planning and Standards should *begin to consider* climate change, for example, in the next update of EPA's ozone modeling guidance, especially for planning horizons in 2020 and beyond." (Emphasis added.) Thus, the report acknowledges that modeling guidance is not yet available for the type of area-specific analysis of effects of climate change on ozone concentrations required for SIP planning. EPA therefore believes it is premature to require a precise mathematical accounting in the SIP process for the effect of higher ambient temperatures due to climate change on ozone concentrations. EPA stands ready to reevaluate this position when the state of science and confidence in projection improve. Given the above, however, at this time, EPA cannot say Kentucky was in error when it did not model the potential impact of climate change on ozone in the Greenup County, Edmonson County, Lexington and Owensboro Areas as it developed maintenance plans for those areas.

Comment 5. The Commenters contend that Kentucky's maintenance plans ignore the possibility of changes in weather and emissions outside the covered counties. The Commenters also contend that the 2002 emissions inventory are not based on any actual emissions data gathered with continuous emissions monitors or verified with actual emissions from 2005 and 2008. Thus, the Commenters conclude that EPA's approval is arbitrary because the emissions forecasts are flawed. The Commenters claim that there are several reasons for the flaws, including alleged failures to properly consider the role of ozone and ozone precursor transport and of weather.

Response 5. Under 40 CFR 51.905(a)(4) section 110(a)(1), maintenance plans, like the one at issue here, must demonstrate maintenance of the 1997 8-hour NAAQS through 2014. Kentucky has voluntarily extended the coverage of its maintenance plans for the Four Kentucky Areas for an additional six years beyond the required maintenance period (through 2020). EPA has reviewed these plans and determined that they satisfy applicable requirements. The demonstrations are based upon actual emissions inventories, and projected emissions through 2020. These projections take into consideration population, state, local and federal emission controls, and other relevant factors. Unlike maintenance plans for nonattainment areas that are redesignated to attainment, for which section 175A of the CAA specifies express requirements, section 110(a)(1) maintenance plans for areas designated attainment are not subject to specific statutory maintenance plan requirements. In accordance with EPA guidance, however, Kentucky did undertake an analysis, summarized as follows, for certain emissions groups such as stationary sources, area sources and some mobile sources. Response 5, below, contains additional information responsive to Comment 4.

Utilizing Standard Industrial Codes (SIC), all point source emissions were projected based on growth factors calculated using Bureau of Economic Analysis (BEA) projection data for employment, as suggested by EPA and utilized for previous point source projections in similar contexts. The point source data provided SIC codes used to determine a short title description that matched the corresponding description found in the BEA data. The application of growth factors for each projection was then used for point sources. Appendix E to Kentucky's May 27, 2008, SIP revisions provide information on how point source projections were determined.

Area sources can be defined as those sources that are generally too small and/or too numerous to be handled individually in the point source inventory. Area source emissions were estimated by multiplying an emission factor by a known indicator of collective activity such as number of employees or population. For area source emission projections, population growth factors for each chosen year were calculated using an exponential formula in the EXCEL software. The application of these growth factors for each projection was then used for area sources. Information used to calculate growth factors, including population information used to project area sources, was provided by the University of Louisville Urban Data Center and can be found in Appendix F of Kentucky's May 27, 2008, SIP revisions.

The non-highway mobile category is broken down into three groups that include two- and four-cycle gasoline engines and diesel engines (other non-highway engines), railroad locomotives, and aircraft. Emissions are estimated by multiplying the base year inventory by a known indicator of collective activity such as fuel consumed or landing/takeoff operations. For locomotive and aircraft emission projections, population growth factors for each chosen year were calculated using the before mentioned formula. The application of these growth factors for each projection was then used for each of these non-highway categories. For other non-highway categories (e.g., industrial equipment, tractors, leaf blowers), EPA's nonroad model was used to determine the future year projections. Nonroad model and non-highway projection information can be found in Appendix G of Kentucky's May 27, 2008, SIP revisions. Updated minimum and maximum summer temperatures and ambient temperatures were utilized for input into the nonroad model. EPA Volume IV mobile source guidance was followed in determining the updated temperature data. Please see Appendix C of Kentucky's May 27, 2008, SIP revisions for specific temperature documentation.

The use of emissions inventories and emissions forecasts has long been an accepted method for evaluating maintenance of the NAAQS under section 175A for nonattainment areas and EPA's guidance advises its use for purposes of maintenance plans under CAA section 110(a)(1). The Courts have agreed with EPA's longstanding view that a maintenance demonstration for a nonattainment area, and a fortiori an attainment area, need not be based on modeling. *Wall* v. *EPA*, 265 F.3d 426 (6th Cir. 2001); *Sierra Club* v. *EPA*, 375 F.3d 537 (7th Cir. 2004). *See also* 66 FR 53094, 53099–53100 (October 19, 2001); 68 FR 25430–25431 (May 12, 2003).

In its guidance issued May 20, 2005, EPA explained that, "[t]he typical method that areas have used in the past to demonstrate that an area will maintain the 1-hour standard has been to identify the level of ozone precursor emissions in the area which is sufficient to attain the NAAQS and to show that future emissions of ozone precursors will not exceed the attainment levels." Wegman Memorandum at pg. 4. The inventory and projections Kentucky provided in the maintenance plans at issue here use this method to demonstrate that the Areas will maintain the 8-hour ozone standards. Complete, quality-assured air quality monitoring data through the year 2009 for all of these Areas showed maintenance of the 1997 8-hour ozone NAAQS, and data available for 2010 indicate continued maintenance. Maintenance is demonstrated by showing that during the maintenance period the level of precursor emissions remains at or below the attainment level. Variations in weather are accounted for by the 3-year averaging required for finding of attainment (*see e.g.*, the 2004 attainment designation). The requirement that there be three years of quality-assured monitoring data to demonstrate attainment is the

established mechanism by which EPA takes meteorological variability into account for purposes of determining attainment and maintenance. These issues have been addressed multiple times in a variety of EPA rulemakings and court decisions. Today's actions are consistent with EPA's longstanding interpretation of the maintenance plan requirements of the CAA. *See e.g.*, 69 FR 21719 (April 22, 2004) (redesignation of the San Francisco area); 66 FR 53094, 53099 (October 19, 2001) (redesignation of the Pittsburgh-Beaver area); 68 FR 25418, 25430 (May 12, 2003) (redesignation of the St. Louis area); 40 CFR 50.9 and Appendix H (method for determining attainment of 1-hour standard; Appendix H states that three years of data is required); Appendix I (method for 8-hour standard; Appendix I contain similar statement); *Sierra Club* v. *EPA*, 375 F.3d 537, 539–543 (7th Cir. 2004) (discussing the modeling required for maintenance plans). Similarly, the Commenters' concerns about potential modifications of sources or new sources that may affect ambient levels are addressed by the New Source Review (NSR) and PSD programs, as well as by the NOx SIP call requirements and other programs designed to regulate pollutants both inside and outside the covered counties. As a result, and contrary to the Commenters' contention, EPA's review of the maintenance demonstrations considered the role of emissions from outside the area in maintenance of the standard in the Four Kentucky Areas. EPA took into account the relevant federal and state requirements that will help ensure that emissions from outside the area will not interfere with continued maintenance in the area. These include, among others, the NOx SIP Call, NSR/PSD requirements, and other regulations that control emissions from outside the Four Kentucky Areas. (*See also* Response 8, below.)

The inventory and projections Kentucky provided in the maintenance plans use this method to demonstrate the Four Kentucky Areas will continue to maintain the 1997 8-hour ozone NAAQS. The inventory and emissions analyses performed by Kentucky were conservative, and reviewed by EPA, to ensure that they reasonably establish maintenance of the NAAQS pursuant to section 110(a)(1). EPA's review of Kentucky initial attainment inventories and inventory projections of future maintenance inventories confirms that maintenance will continue through the requisite period. Moreover, as is explained further below, the contingency measures portion of the maintenance plan provides a backstop for maintenance, functioning to correct a violation if, despite the projections, one should occur.

With regard to the analyses performed by Kentucky, the emissions inventory includes four components: Point, area, highway mobile and non-highway mobile sources. The Four Kentucky Areas were designated attainment for the 1997 8-hour ozone NAAQS in 2004 using 2001–2003 data. They had an option to choose one of the three attaining years to use as a base year for emission inventory purposes. For these SIP revisions, Kentucky chose to use 2002, an attainment year (for both the 8-hour and 1-hour ozone NAAQS), as the year for developing a new comprehensive ozone precursor emissions inventory from which projected emissions could be developed for 2005, 2008, 2011, 2014, 2017, and 2020. Maintenance is demonstrated by comparing the attainment year emissions to the emissions in the years listed above. The following is a summary of the emission projection methodology that was used to forecast emissions over the maintenance period; the docket includes a more detailed description of this methodology.

Point sources are defined as stationary sources that emit 10 or more tons per year (tpy) of VOC or 100 tpy or more of NOx or carbon monoxide (CO). Annual point source emissions data were used.[3] Point source information is collected by Kentucky from a number of sources (including permitting information) and point source information was provided for utilizing SIC (Response 4, above, discusses the various sources of emissions information used by Kentucky). See also Appendix E of Kentucky SIP Revisions (specifically discussion regarding point source projections). Point source emission projections were based on growth factors calculated using BEA projection data for employment. The point source data provided SIC codes used to determine a title description that matched the corresponding description found in the BEA data. The application of growth factors for each projection was then used for point sources.

As mentioned above, area sources are those that are generally too small and/or too numerous to be handled individually in the point source inventory. The University of Louisville Urban Data Center provided information used to calculate growth factors, including population information used to project emissions from area sources. Two and four-cycle gasoline engines and diesel engines (non-highway engines), railroad locomotives and aircraft make up the non-highway mobile category. Emissions were estimated by multiplying the base year inventory by a known indictor of collective activity such as fuel consumed or landing/takeoff operations. For locomotive aircraft emission projections, population growth factors for each chosen year were calculated. For other non-highway categories such as industrial equipment and tractors, EPA's nonroad model was used to determine future year projections.

Daily Vehicle Miles Traveled (DVMT) and speeds for 2002 and the projection years were obtained from the Kentucky Transportation Cabinet and used to calculate highway mobile source emissions. EPA's MOBILE6.2 model was used to derive appropriate projection year emission factors that were multiplied by the corresponding DVMT to determine the projected highway mobile source emissions. The 1990 mobile emissions were recalculated using the updated MOBILE6.2 emissions model in order to standardize the comparison of the 1990 numbers with the 2002 and 2020 mobile emissions developed using this model. EPA agrees with the methodology used to develop the 2005 and 2008 on-road emissions as projected from the 2002 actual emissions and submitted in the SIP revisions. The projection methodology used to develop future year on-road mobile emissions found in the SIP revisions, combined with the fact that later determined actual emissions were considerably lower than already projected emissions, provides a strong basis for approval of these maintenance plans.

With respect to the Commenters' contention that attainment inventories were not based on actual emissions, in fact the 2002 emission inventories for the Greenup County, Owensboro, and Lexington Areas were based on actual point source emissions. There are no point sources in the Edmonson Area. (See page 2.1 of Appendix C of each Area's 110(a)(1) maintenance plan submittal.) At the time of the initial submission of these 110(a)(1) maintenance plans in 2008, the actual emissions for some source categories for 2005 and 2008 were not required to be submitted. The Consolidated Emissions

[3] Actual emissions were used for base year analyses. Projections were used for future year inventories which, at the time, were for 2005 and 2008. Since then, Kentucky has used the 2005 and 2008 actual inventories that were submitted to EPA per their Consolidated Emissions Reporting Rule (CERR) requirement for the development of the EPA National Emission Inventory (NEI) in order to compare to the previously submitted projected emissions in the maintenance plan submissions.

Reporting Rule (CERR)[4] (40 CFR part 51, subpart A) requires states to submit to EPA an emissions inventory for all source categories every three years and at the time the SIP revisions were due, only the 2002 emissions were available for states to use. See 40 CFR 51.30. Not every source is subject to continuous emissions monitoring, so the information on actual emissions may vary between source categories.

Kentucky has since reviewed the data and compared the actual emissions for 2005 and 2008 with the projected emissions for 2005 and 2008 which were contained in the maintenance plan submittals. This analysis is available in the docket for this final rulemaking. EPA reviewed Kentucky's analysis and found it reliable and compelling. The comparisons revealed that the emissions projected in Kentucky's maintenance plans for the Four Kentucky Areas were higher than the actual emissions by an average of 19 percent for VOC and 11 percent for NOx for 2005; they were higher by an average of 26 percent for VOC and 47 percent for NOx for 2008. Kentucky's maintenance plans demonstrated that, even using projections of emissions that were greater than those that actually occurred in these years, those projections remained below the attainment base-year inventories. Of course, the fact that the actual emissions that occurred in these Areas were substantially less than those that were projected provides further demonstration of continued maintenance. Thus, actual emissions data during the maintenance period have proven that Kentucky's projected emissions were very conservative, and confirm EPA's view that the plans provide adequate assurance of maintenance during the requisite period. In the future, EPA anticipates even further reductions of these ozone precursors. This information supports the position that Kentucky's emissions projections provided with the 110(a)(1) maintenance plans were conservative.

In addition to the assurance provided by the information above, which demonstrates the conservative nature of the emissions forecasts (which were supported by actual emissions data as explained in the previous paragraph); the contingency measures portion of maintenance plans serves as a backstop in the event that any of these Areas requires supplemental measures to maintain air quality. These contingency measures help to ensure that the Areas continue to maintain the NAAQS of concern and can quickly correct a violation should one occur. Kentucky's maintenance plans contain two types of such contingency measures for each of the Four Kentucky Areas. In the event that exceedances (as contrasted with actual violations) of the 8-hour ozone NAAQS are monitored in any portion of the maintenance area, or if periodic emission inventory updates reveal excessive or unanticipated growth greater than 10 percent in ozone precursor emissions, Kentucky will evaluate existing control measures to see if additional control measures should be implemented at that time. If a monitored violation occurs, Kentucky has committed to a contingency measure schedule where one or more contingency measures will be adopted within nine months and implemented within 18 months to bring the area back into attainment.

For the reasons discussed above, the Commenters have failed to identify a deficiency in the 110(a)(1) maintenance plans that warrants any action other than approval.

Comment 6. The Commenters state that the maintenance plans rely both on assuming that measures will be implemented in the future to decrease emissions and assuming that Kentucky will implement contingency measures if the maintenance plans do not achieve their objectives. Specifically, the Commenters argue that Kentucky used a Reid Vapor Pressure (RVP) in gasoline of 8.6 pounds per square inch (psi) in developing future emission levels even though an RVP of only 9.0 psi is legally required. The Commenters believe that the maintenance demonstration should be based on legal requirements rather than assumptions of over-compliance.

Response 6. The forecasting of emissions in a maintenance plan involves the use of reasonable, scientifically-based premises that form the basis for expectations of future emissions, the maintenance projections, and contingency measure requirements. It is not necessary here for EPA to accept or reject the Commenters' contentions regarding historically-based over-compliance with legal requirements. Even if EPA assumes, as the Commenters insist, that EPA evaluates maintenance using the less stringent RVP level of 9.0 psi, the Four Kentucky Areas all demonstrate continued maintenance. First, the Commenters' concern with the stringency of RVP levels does not pertain to the Greenup County Area, since Kentucky modeled only 9.0 psi for RVP for this Area, and did not assume a lower RVP. Thus, the Commenters' assertion regarding RVP levels more stringent than 9.0 psi applies only to the 110(a)(1) maintenance plans for the Edmonson County, Lexington and Owensboro Areas. For these Areas, EPA has received and evaluated additional information that responds to the Commenters' concern. Kentucky has demonstrated that the Edmonson County, Lexington and Owensboro Areas are projected to demonstrate continued maintenance of the 1997 8-hour ozone NAAQS with fuel modeled at either 9.0 psi (the statutory level) or at 8.6 psi (the level indicated by historical surveys that these Areas typically receive). This provides a modeled analysis showing a comparison of VOC and NOx emissions using both the 8.6 and 9.0 psi RVP gasoline. Table 2 below shows the difference in emissions for the Edmonson County, Lexington and Owensboro Areas at RVP levels model at both 8.6 psi and 9.0 psi.

TABLE 2—EDMONSON COUNTY, LEXINGTON AND OWENSBORO AREAS HIGHWAY MOBILE SOURCE EMISSIONS

[Tons per day (tpd)]

County	8.6 psi		9.0 psi		Difference between 8.6 psi & 9.0 psi	
	VOC	NO_X	VOC	NO_X	VOC	NO_X
2002:						
Edmonson	0.55	0.96	0.56	0.97	0.01	0.01
Greenup	N/A	N/A	1.09	1.56	N/A	N/A
Fayette	14.14	23.43	14.66	23.45	0.52	0.02
Scott	2.95	5.71	3.05	5.71	0.1	0

[4] The CERR is discussed in greater detail in Response 14.

TABLE 2—EDMONSON COUNTY, LEXINGTON AND OWENSBORO AREAS HIGHWAY MOBILE SOURCE EMISSIONS—Continued

[Tons per day (tpd)]

County	8.6 psi		9.0 psi		Difference between 8.6 psi & 9.0 psi	
	VOC	NO_X	VOC	NO_X	VOC	NO_X
Hancock	0.1	0.18	0.11	0.18	0.01	0
Daviess	3.98	5.97	4.12	5.97	0.14	0
2005:						
Edmonson	0.42	0.79	0.43	0.79	0.01	0
Greenup	N/A	N/A	0.87	1.33	N/A	N/A
Fayette	10.24	18.14	10.64	18.16	0.4	0.02
Scott	2.23	4.58	2.32	4.59	0.09	0.01
Hancock	0.07	0.13	0.07	0.13	0	0
Daviess	2.9	4.64	3.01	4.64	0.11	0
2008:						
Edmonson	0.39	0.72	0.4	0.72	0.01	0
Greenup	N/A	N/A	0.75	1.12	N/A	N/A
Fayette	9.34	16.27	9.7	16.29	0.36	0.02
Scott	2.13	4.26	2.21	4.27	0.08	0.01
Hancock	0.07	0.12	0.07	0.12	0	0
Daviess	2.6	4.1	2.7	4.1	0.1	0
2011:						
Edmonson	0.36	0.6	0.36	0.6	0	0
Greenup	N/A	N/A	0.64	0.9	N/A	N/A
Fayette	8.39	13.54	8.7	13.56	0.31	0.02
Scott	2	3.66	2.07	3.67	0.07	0.01
Hancock	0.06	0.1	0.06	0.1	0	0
Daviess	2.29	3.37	2.38	3.38	0.09	0.01
2014:						
Edmonson	0.3	0.46	0.31	0.46	0.01	0
Greenup	N/A	N/A	0.54	0.68	N/A	N/A
Fayette	7.3	10.44	7.55	10.45	0.25	0.01
Scott	1.84	2.93	1.9	2.93	0.06	0
Hancock	0.05	0.07	0.05	0.07	0	0
Daviess	1.95	2.56	2.02	2.56	0.07	0
2017:						
Edmonson	0.27	0.38	0.28	0.36	0.01	−0.02
Greenup	N/A	N/A	0.48	0.53	N/A	N/A
Fayette	6.62	8.36	6.84	8.37	0.22	0.01
Scott	1.74	2.43	1.8	2.43	0.06	0
Hancock	0.04	0.06	0.04	0.06	0	0
Daviess	1.74	2.02	1.8	2.02	0.06	0
2020:						
Edmonson	0.24	0.3	0.25	0.3	0.01	0
Greenup	N/A	N/A	0.42	0.44	N/A	N/A
Fayette	6.04	7.03	6.23	7.05	0.19	0.02
Scott	1.85	2.1	1.7	2.11	−0.15	0.01
Hancock	0.04	0.05	0.04	0.05	0	0
Daviess	1.56	1.68	1.61	1.68	0.05	0

The overall effect on VOC emissions of the difference between 8.6 and 9.0 psi RVP gasoline is 0.52 tpd or less for each of the projection years for the Edmonson County, Lexington, and Owensboro Areas. Further, each of the projected VOC emission inventories using 9.0 psi RVP gasoline is less than the baseline VOC emission inventory for the 2002 attainment year. Based upon these data, EPA concludes that the Edmonson County, Lexington, and Owensboro Areas' 1997 8-hour maintenance plans demonstrate continued maintenance with the use of either 8.6 or 9.0 psi RVP gasoline in these Areas. See also Approval Grant Parish 110(a)(1) Maintenance Plan, 72 FR 62579 (November 6, 2007) and 73 FR 8202 (February 13, 1008).

Comment 7. The Commenters state that Kentucky's maintenance plans included unidentified maximum achievable control technology (MACT) standards as sources of reductions of VOC. The Commenters assert that this analysis failed to consider that the MACT standards could result in the increase of NO_X, VOC, and CO emissions due to the "energy penalty" from new emission control devices.

Response 7. The Commenters do not identify the specific impact of any "energy penalty" on maintenance of the 1997 8-hour ozone NAAQS in the Four Kentucky Areas. Energy inefficiencies, as explained by the Commenters, may apply to any number of pollutants and the Commenters did not provide information specifically addressing how an energy penalty would affect emissions reductions relevant to today's action. For purposes of responding to this comment, EPA considered the term "energy penalty" to refer to a reduction in energy output that might result in the increase of emissions.

In the 110(a)(1) maintenance plans at issue, Kentucky stated, "[t]he continued improvement and maintenance of the air quality in the [areas], as verified by the lack of violations of the 8-hour ozone standard, is due to the implementation of permanent and enforceable emission reductions * * *. The following information outlines

emission reduction measures that have occurred from 1990 through 2002, and those implemented after 2002 and projected to 2020." Kentucky then lists Maximum Achievable Control Technology (MACT)—promulgated national emission standards for hazardous air pollutants (commonly referred to as "MACT standards")—controls in this list of measures. With specific regard to that issue, Kentucky explained, "* * * (m)any of the [Hazardous Air Pollutants] HAPs under these industrial categories of controls are also VOCs and compliance with these new MACT standards as they are being promulgated will decrease VOC emissions from the affected industries * * *". Based on discussions with Kentucky, EPA concludes that Kentucky's maintenance analyses do not rely on quantified reductions from MACT standards. Rather, the analyses simply recognize that implementation of MACT standards may result in collateral reductions of VOCs.[5] For that reason, Kentucky listed "MACT" generally as part of the permanent and enforceable reductions in place in the Areas; however, Kentucky did not quantify those reductions numerically with regard to the maintenance plans at issue today and does not rely on them to demonstrate maintenance. EPA further notes that even if Kentucky had claimed reductions from MACT standards, the Commenters simply claim without any supporting information that an energy penalty will occur and will result in increased VOC emissions. Without additional specific information, EPA cannot conclude that there will be any energy penalty whatsoever.

In terms of the environmental benefit of the MACT standards, Kentucky's expectation that the implementation of the MACT standards will have an environmental benefit for ozone is reasonable. The Commenters do not provide information supporting the comment that installation of control technology will require more fuel to be burned such that emissions will increase. Additionally, the Commenters provide the example of the installation of carbon injection or a baghouse to control mercury; however, no emissions calculation based on a specific facility is provided. As a result, the Commenters have not demonstrated that a source will necessarily become less efficient because of these control technologies (as was stated in the comment); nor that Kentucky's maintenance plans are deficient for this reason. EPA believes that Kentucky's consideration of MACT standards was reasonable.

In the future, any collateral emission increases associated with a specific MACT standard control will be addressed during the actual implementation and permitting of sources. If for some reason the maintenance of the Areas appear compromised by any specific MACT standard in the future, the permitting and implementation process, as well as the triggers and measures in the contingency portion of the maintenance plans, should prevent or resolve any problem as expeditiously as practicable.

Comment 8. In further support of the comment regarding use of projected future emissions reductions, the Commenters assert that Kentucky appears to be relying upon reductions in NO_X emissions from the Clean Air Interstate Rule (CAIR). The Commenters state that because CAIR is a cap and trade program, it is arbitrary to assume that sources will reduce emissions in every year between 2008 and 2020.

Response 8. CAIR was remanded to EPA, (*North Carolina* v. *EPA*, 531 F.3d 896 *modified on reh'g,* 550 F.3d 1176 (D.C. Cir. 2008)), and the process of developing a replacement rule is ongoing. As a point of clarification, neither CAIR nor the remand of CAIR altered the requirements of the NO_X SIP Call,[6] which requires states to make significant, specific emissions reductions. See 63 FR 57356 (October 27, 1998).

All four of the Kentucky Areas attained the 1997 8-hour ozone NAAQS by 2002, without any reliance on reductions from CAIR, and before requirements under CAIR were implemented. Kentucky has demonstrated that the Four Kentucky Areas can maintain the 1997 8-hour ozone NAAQS without these requirements. Therefore, EPA believes that the Commenters' expressed concerns about Kentucky's reliance on NO_X reductions from CAIR are misplaced, and Kentucky's demonstrations of maintenance under section 110(a)(1) do not depend upon them.

Although Kentucky did not rely on the remanded CAIR rule for either attainment or maintenance of the 1997 8-hour ozone NAAQS, the NO_X SIP Call requirements provide additional assurance of maintenance in the Four Kentucky Areas. In addition, the anti-backsliding provisions of 40 CFR 51.905(f) specifically provide that the provisions of the NO_X SIP Call, including the statewide NO_X emission budgets, continue to apply after revocation of the 1-hour ozone NAAQS. For the maintenance plans that are the subject of today's actions, Kentucky appropriately does not rely on the remanded CAIR requirements.

Comment 9. Again, as support for the contention that Kentucky considered over-compliance in its maintenance plans, the Commenters explain that Kentucky included vehicle turnover in its consideration of maintenance, but state that there is no requirement for vehicle turnover in the counties covered by the maintenance plans. Thus, it is the Commenters' contention that there is no justification for including this factor in the projected future emissions.

Response 9. For the reasons described below, EPA disagrees that there is no justification for considering fleet turnover in emissions forecasts. Fleet turnover, the gradual, continuing process of new vehicles certified to tighter emissions standards replacing older vehicles, is a historic fact that has been central to estimating the benefits of federal and state emission control programs in SIPs and maintenance plans since the earliest motor vehicle emission controls were implemented. Fleet turnover will occur in the future as long as people continue to replace older vehicles with newer ones, and there is no reason to expect this historic practice to change.

The emission impacts of fleet turnover have been incorporated in every EPA-approved emission model including MOBILE6.2, the approved model for estimating motor vehicle emissions in SIPs and maintenance plans at the time of this analysis. Generally, the calculation of emissions in MOBILE6.2 is based upon the reasonable expectation that each year, the model year composition of the local motor vehicle fleet changes as new vehicles are purchased and enter the fleet and old vehicles are scrapped. This results in a decrease in fleet average NOx and VOC emissions each year

[5] On September 10, 2010, Jane Spann, Regional Ground-Level Ozone Contact for Region 4, spoke with John Gowins of Kentucky DAQ (Environmental Control Supervisor) regarding this issue. Mr. Gowins confirmed that Kentucky had not numerically quantified any specific MACT reductions, but was simply recognizing that the existence of federal regulations in effect at the time were "permanent and enforceable reductions" with regard to VOCs.

[6] On October 27, 1998 (63 FR 57356), EPA issued a NO_X SIP Call requiring the District of Columbia and 22 states to reduce emissions of NO_X in order to reduce the transport of ozone and ozone precursors. In compliance with EPA's NO_X SIP Call, Kentucky developed rules governing the control of NO_X emissions from Electric Generating Units (EGUs), major non-EGU industrial boilers, major cement kilns, and internal combustion engines. EPA approved Kentucky's rules as fulfilling Phase I and Phase II of the NO_X SIP Call on October 23, 2009 (74 FR 54755). Implementation of the NO_X SIP Call was phased with the Kentucky programs being effective in 2002 and 2006 at the state level. *Id;* see also 67 FR 17624 (April 11, 2002).

because older model year vehicles certified to less stringent emission standards leave the fleet and are replaced by newer vehicles certified to more stringent standards. The phase-in of new vehicle standards and the change in the average emissions of the vehicle fleet due to the replacement of older vehicles with newer ones are included in MOBILE6.2 for both past and future years.

Specific inputs for MOBILE6.2 can affect the rate of fleet turnover that the model calculates in future years. EPA has included language in the guidance document "Technical Guidance on the Use of MOBILE6.2 for Emission Inventory Preparation" (dated August 2004) to ensure that states make reasonable assumptions about the rate of fleet turnover in the future. As described in this guidance, projected rates of fleet turnover in the future should take into account historic fleet turnover in the area. That guidance states that it would not be reasonable for a state to assume that the rate of new vehicle purchases and fleet turnover in the future is higher than historic rates. However, EPA expects that states will make the reasonable assumption that residents will continue to purchase or lease new vehicles to replace old ones, at rates similar to historic rates, and that the average emissions of the fleet will decline as a result.

Comment 10. The Commenters complain that the contingency measures in the Kentucky maintenance plans are not automatically effective upon a triggering event. Specifically, the Commenters contend that in order to comply with the standards set out in the CAA and in the Wegman Memorandum, maintenance plans must require that a violation of the NAAQS, or a 10 percent increase in the emission inventory, or another triggering event that EPA develops, must result in automatically effective contingency measures. The Commenters appear concerned that the contingency measures outlined by Kentucky are "vague" and not automatically effective upon a triggering event. In support of the contention that the CAA requires that the contingency measures be in the SIP and automatically effective upon a trigger event, the Commenters cite two court cases: *Sierra Club* v. *EPA,* 356 F.3d 296 (D.C. Cir. 2004) and *Natural Resources Defense Council (NRDC)* v. *EPA,* 22 F.3d 1125, 1134 (D.C. Cir. 1994).

Response 10. The CAA sets no specific requirements for section 110(a)(1) maintenance plans, not even that they contain contingency measures. EPA, in its implementing regulation, provides simply that a section 110(a)(1) maintenance plan "must include contingency measures." EPA guidance in the Wegman memorandum, p. 7, states that contingency provisions should be aimed at promptly correcting violation of the NAAQS, and explains that the SIP should contain an enforceable commitment to adopt and implement contingency measures in a timely fashion once they are triggered. Consistent with this guidance, Kentucky's 110(a)(1) maintenance plans provide that in the event of a monitored violation of the 8-hour ozone NAAQS, Kentucky commits to adopt, within a specific amount of time (i.e., nine months), one or more of the 8 specific contingency measures listed in the plan. Kentucky's maintenance plan commits to implementing the contingency measures within 18 months. The Wegman Memorandum states "[t]he schedule for adoption and implementation should be as expeditious as practicable, but no longer than 24 months." Kentucky's 18-month timeframe is consistent with the Wegman Memorandum.

The Wegman Memorandum goes on to explain that, in addition to the minimum trigger upon violation of the NAAQS, EPA recommends additional triggers could be used such as exceedance of the precursor emission levels upon which maintenance is based. This type of trigger is beneficial because it occurs prior to a violation. Kentucky has also included this type of additional trigger in its 110(a)(1) maintenance plans. If periodic emissions inventory updates reveal excessive or unanticipated growth greater than 10 percent in ozone precursor emissions, Kentucky has committed to evaluating existing control measures to see if any further emission reduction measures should be implemented at that time. By meeting the minimum requirement of adopting and implementing specific contingency measures upon a violation of the NAAQS and including additional triggers, Kentucky has sufficiently provided for contingency measures in its maintenance planning for the 1997 8-hour ozone NAAQS in the Four Kentucky Areas that are the subject of this notice.

The CAA itself does not expressly address contingency measures in section 110(a)(1) maintenance plans, much less require that any contingency measures be automatically effective, and the flexibility afforded to Kentucky ensures that the correct measure can be adopted in order to respond to the particular air quality issues causing the triggering event. While the triggering event directs the state to launch the process to adopt and implement a contingency measure, the state is also given some flexibility to determine which of the identified measures is best suited to address the particular air quality issue that must be corrected. This is reasonable, desirable, and consistent with how EPA and the states have addressed section 175A contingency measures in nonattainment areas that have been redesignated to attainment.

The Commenters' contention that the CAA requires something more than is being required by EPA in the 110(a)(1) maintenance plans at issue in today's action, finds no support in the statute itself. The maintenance plans at issue in this notice are 110(a)(1) maintenance plans for areas in attainment with the NAAQS at issue. Section 110(a)(1) contains no express requirement for maintenance plans for attainment areas to contain contingency measures, much less detail their content. Even where the CAA does require maintenance plans to have contingency measures—section 175A for nonattainment areas being redesignated to attainment—the CAA and its implementing regulations do not require that these measures be automatically effective upon a triggering event. Thus, neither a section 110 or 175A maintenance plan for an area that is attaining the NAAQS (attainment area or a redesignated maintenance area) is required to have fully adopted contingency measures that will take effect without further action by the state in order for the maintenance plan to be approved.

The Memorandum from John Calcagni to Air Division Directors, Procedures for Processing Requests to Redesignate Areas to Attainment, September 4, 1992—hereafter referred to as "Calcagni Memorandum," and the Wegman Memorandum, are consistent with the applicable statutory and regulatory requirements. The Calcagni Memorandum states "[t]hese contingency measures are distinguished from those generally required for nonattainment areas under section 172(c)(9) and those specifically required for ozone and CO nonattainment areas under sections 182(c)(9) and 187(a)(3), respectively." While contingency measures that are required for nonattainment areas under sections 172(c)(9) and section 182(c)(9) must be already adopted so that they can be effective upon a triggering event for a nonattainment area that fails to meet its reasonable further progress (RFP) or attainment deadlines, this is not required for section 110(a)(1) or 175A maintenance plans. The Commenters do

not provide any statutory or regulatory citations for their positions.

Even for maintenance plans for nonattainment areas that are being redesignated to attainment, section 175A requires only that the state include contingency measures, as EPA deems necessary, to promptly correct any violation of the NAAQS that occurs after redesignation of the area. 42 U.S.C. 7505a(d) (Emphasis added.) EPA's interpretation that maintenance plan contingency measures need not be fully adopted has been followed since 1992. The Sixth Circuit in *Greenbaum* v. *EPA*, endorsed the Calcagni Memorandum's statements regarding contingency measures for 175A maintenance plans. Specifically, the Court stated that under 175A, EPA "has been granted broad discretion by Congress in determining what is 'necessary to assure' prompt correction." 370 F.3d at 540. Given the latitude provided maintenance plan contingency measures for nonattainment areas being redesignated, EPA's treatment of section 110(a)(1) maintenance plans for attainment areas is eminently justified and reasonable.

In support of their contention that contingency measures be automatically effective, the Commenters cite to two cases and not any statutory or regulatory provisions. In the first, *Sierra Club* v. *EPA*, 356 F.3d 296 (D.C. Cir. 2004), the D.C. Circuit evaluated a conditional approval for nonattainment area SIPs—the case did not concern maintenance plans for attainment areas and did not address contingency measures for attainment areas. In the second, *NRDC* v. *EPA*, 22 F. 3d 1125 (D.C. Cir. 1994), the Court was also evaluating a conditional approval as well as various EPA rules regarding, in part, vehicle inspection and maintenance programs promulgated pursuant to the 1990 amendments to the CAA. The pinpoint citation provided by the Commenters leads to a discussion on interim milestones to satisfy the conditional approval (under CAA section 110(k)(4)). *Id.* at 1134.

With regard to the Commenters' contention that the contingency measures are "vague," below is a summary of the contingency measures included in the maintenance plans. In the event of a monitored violation of the 8-hour ozone NAAQS, Kentucky commits to adopt, within nine months, one or more of the following contingency measures to re-attain the NAAQS.

- Stage I Vapor Recovery;
- Stage II Vapor Recovery;
- Basic Vehicle Emissions Testing Program;
- Open burning ban during summer ozone season;
- Restriction of certain roads or lanes to, or construction of such roads or lanes for use by, passenger buses or high-occupancy vehicles;
- Trip-reduction ordinances;
- Employer based transportation management plans, including incentives;
- Programs to limit or restrict vehicle use in downtown areas, or other areas of emission concentration, particularly during periods of peak use;
- Programs for new construction and major reconstructions of paths or tracks for use by pedestrians or by non-motorized vehicles when economically feasible and in the public interest.

Further, all regulatory programs will be implemented within 18 months. While the Commonwealth also reserves the right to implement other contingency measures if new control programs should be developed and deemed more advantageous for the Area, this list provides sufficient information regarding the types of contingency measures that will be considered. As explained above, Kentucky's 110(a)(1) maintenance plans for the Four Kentucky Areas are consistent with applicable requirements.

Comment 11. The Commenters assert that EPA has not demonstrated that the Greenup maintenance plan, without contingency measures, "will not interfere with attainment and reasonable further progress in the other portion of Greenup County" or in Boyd County, Kentucky.

Response 11. The Commenters provide no explanation of the basis for their concern that Greenup County's maintenance plan might somehow interfere with attainment in the other portion of Greenup County or in Boyd County, and thus EPA is uncertain of the basis for the Commenters' statements. Nonetheless, EPA reviews below the relationship between Greenup County and Boyd County with respect to the 1-hour and 8-hour ozone standards. With regard to the 1-hour ozone NAAQS, in 1992, Boyd County and a portion of Greenup County[7] were designated nonattainment as the Kentucky portion of the Huntington-Ashland 1-hour ozone Area. In 1995, the Kentucky portion of the Huntington-Ashland Area was redesignated to attainment for the 1-hour ozone NAAQS, and under CAA section 175A, EPA approved Kentucky's 1-hour ozone maintenance plan for the Area. In 2004, during a national designations process, EPA evaluated the Huntington-Ashland Area for the 1997 8-hour ozone NAAQS. EPA designated Boyd County nonattainment for the 8-hour ozone NAAQS. Further, EPA, and designated attainment the portion of Greenup County that was formerly part of the Huntington-Ashland 1-hour ozone Area.

As part of that designations process, EPA made the determination that the portion of Greenup County that was in the former 1-hour ozone area did not contribute to violations of the 8-hour ozone NAAQS in the Huntington-Ashland 1997 8-hour ozone nonattainment Area (including Boyd County). 69 FR 23858, 23906 (April 30, 2004). The portion of Greenup County that was designated attainment for the 1-hour ozone NAAQS was never subject to the 175A maintenance plan because it was never designated nonattainment. EPA has no information indicating that Greenup County Area's maintenance of both the 1-hour and 8-hour NAAQS will interfere with attainment and RFP of Boyd County.

Moreover, based on monitoring data for 2004–2006, EPA determined that the 1997 8-hour ozone nonattainment area for Huntington-Ashland attained the 1997 8-hour ozone NAAQS, and in 2007, EPA redesignated the Area to attainment. (72 FR 43172, August 3, 2007). EPA is not aware of any subsequent 8-hour ozone violations in Boyd County (as part of the 1997 8-hour ozone maintenance area for Huntington-Ashland) which is subject to an approved section 175A 1997 8-hour ozone maintenance plan. There is no evidence that any portion of Greenup County has interfered with or will interfere with 8-hour ozone attainment in the Huntington-Ashland Area (including Boyd County). Today's final approval of the Greenup County Area's section 110(a)(1) maintenance plan will do nothing to increase emissions or interfere with attainment in other areas. Further, the Greenup County Area's 110(a)(1) maintenance plan projects 2020 out-year emissions for Greenup County are expected to decrease by

[7] As a point of clarification, Greenup County was included in the 1-hour ozone designations as a partial county, as part of the 1-hour ozone nonattainment area for the Huntington-Ashland Area. This Area was initially designated as nonattainment and later as attainment for the 1-hour NAAQS. Thus, the portion of Greenup County affected was ultimately a 175A maintenance area for the 1-hour ozone NAAQS. When the 8-hour ozone designations were completed, all of Greenup County was designated as attainment, as its own attainment area—just the one county. It was not included in what was later known as the 8-hour ozone nonattainment area for the Huntington-Ashland Area. As a result, Greenup County is currently and has always been a 110(a)(1) maintenance area for 1997 8-hour ozone NAAQS purposes.

twenty-six percent for VOCs and by fifty-one percent for NO_X, compared to the base year 2002. The Greenup County Area was attaining the 1997 8-hour ozone NAAQS in 2002 based on measured ambient air quality monitoring data, and the emissions inventory future years is shown to remain below the 2002 baseline. Boyd County, as part of the Huntington-Ashland Area, has now been redesignated to attainment for the 1997 8-hour ozone NAAQS. There is no indication that Greenup County is interfering or will interfere with continued maintenance in Boyd County. EPA believes that the emissions reductions expected to continue in Greenup County establish that Greenup County will not interfere with attainment throughout the County or in the Huntington-Ashland Area (Boyd County). Thus, EPA disagrees with the Commenters' contentions regarding Greenup County.

Comment 12. The Commenters incorporated by reference comments previously submitted to EPA regarding the Edmonson County maintenance plan by the Karst Environmental Education and Protection, Inc. (KEEP). Additionally, the Commenters state that EPA must consider the KEEP comments. The KEEP comments, which are directed specifically to the Edmonson County maintenance plan only, expressed concerns about: whether emissions inventories and projections properly considered Mammoth Cave National Park and the Nolin River Lake area; highway emissions inventories and projections not including unique traffic generators (again identifying specific areas); emissions inventories and projections not including gasoline and other fuel handling activities associated with Nolin Lake and Mammoth Cave National Park; non-highway emissions inventories and projections not considering watercraft at Nolin Lake; points source emission inventories and projections not appearing complete (certain sources identified); and that the contingency measures should be implemented immediately or no later than three months.

Response 12. On August 24, 2004, Kentucky submitted an update to its original maintenance plan for the 1-hour ozone NAAQS for the Edmonson County Area as required by section 175A(b) of the CAA. EPA published a proposed and direct final rule on December 17, 2004 (69 FR 75473), to approve Kentucky's updated maintenance plan for the Edmonson County Area. During the public comment period on these rulemakings, EPA received adverse comments from KEEP. In response to these comments, EPA withdrew its direct final rulemaking and Kentucky subsequently withdrew its submitted update to its 1-hour ozone maintenance plan for Edmonson County.

The KEEP comments related to emissions inventories and projections submitted in 2004 for the 1-hour ozone maintenance plan and are not relevant to the 110(a)(1) maintenance plan that Kentucky submitted for the Edmonson County Area for the 1997 8-hour ozone NAAQS. For the development of the 110(a)(1) maintenance plan, Kentucky was required to use the most up-to-date information. Thus the data used to develop the 110(a)(1) maintenance plan in 2007 are not equivalent to the data used in 2003 to develop the 175A maintenance plan. The KEEP comments, as a result, do not address the data in the current 8-hour maintenance plan, and thus do not apply to today's action. Nor are they "adverse" to the instant action because they are not relevant to this action.

The only issue that might even conceivably be deemed to relate to today's action is KEEP's comment regarding the 18-month period for implementation of the 1-hour contingency measures. KEEP argued that section 175A contingency measures for nonattainment areas being redesignated should be implemented in no less than three months based upon the fragile and unique terrestrial and subterranean resources of Mammoth Cave National Park. Response 10 above discusses implementation timeframes for contingency measures under sections 175A and 110(a)(1). As noted above, the CAA does not prescribe contingency measures for attainment area maintenance plans, and the EPA regulation that requires them does not specify any deadlines, much less a three month deadline. EPA's guidance in the Wegman Memorandum is consistent with longstanding EPA practice with respect to implementation of contingency measures. Moreover, the State and EPA may at any time determine that additional measures are necessary to assure correction of a violation; however, at this time, there is no such violation and the proposed contingency measures timeframe is consistent with the applicable requirements. EPA notes that the Edmonson Area has consistently attained the 1-hour ozone NAAQS since 1994 and has been attaining the 8-hour ozone NAAQS since 2004. Thus, EPA sees no reason to require more stringent contingency measure deadlines than those in the submitted maintenance plan.

Comment 13. The Commenters state that EPA must include contingency measures that are triggered based on ambient monitoring and not just emission inventories. The Commenters reference other maintenance plans in Kansas and Missouri; however, no citations were provided. The Commenters also state that the requirements must be written into the CFR at 52.920(e) in order for this to be a clear requirement.

Response 13. The Commenters' concerns are misplaced. The Wegman Memorandum states that a section 110(a)(1) maintenance plan should, "include contingency provisions, as necessary, to promptly correct any violation of the NAAQS that occurs (51.905(a)(3)(iii) and (4) (ii))." Wegman Memorandum at pg. 7. In the 110(a)(1) maintenance plans, Kentucky in fact commits to taking action based on both ambient monitoring data and emission inventory data. Thus, the Commenters are incorrect in contending that contingency measures are not triggered by the results of ambient monitoring. In the event that exceedances of the 1997 8-hour ozone NAAQS are measured in any portion of the maintenance areas (ambient monitoring data of greater than 0.084 ppm ozone), or if periodic emission inventory updates reveal excessive or unanticipated growth greater than 10 percent in ozone precursor emissions, Kentucky commits to evaluate existing control measures to see if any further emission reduction measures should be implemented at that time. In the event of a monitored violation of the NAAQS, Kentucky commits to adopting, within nine months, one or more of a number of measures listed in the maintenance plan and states that all regulatory programs will be implemented within 18 months. The measures listed in the maintenance plans include but are not limited to such measures as Stage 1 Vapor Recovery, Stage II Vapor Recovery, open burning bans during ozone season, and road restrictions. Kentucky also states that it reserves the right to implement other contingency measures if new control programs should be developed or deemed more advantageous. The maintenance plans thus require contingency measures to be triggered upon either ambient monitoring or changes in the emissions inventory projections. The maintenance plans being approved today will be referenced in the appropriate provisions of 40 CFR 52.920.[8] These provisions do not

[8] The Commenters state that 40 CFR 52.920(e) is the appropriate provision. This provision is for EPA-approved Kentucky non-regulatory provisions

explicitly state all the requirements of the plan, but rather, cite to the existence of that plan and note, among other information, the date of approval by EPA. Copies of Kentucky's plan can be obtained at the EPA Region 4 Office or at *http://www.regulations.gov* under the docket number: "EPA–R04–OAR–2007–1186."

Comment 14. The Commenters argue that Kentucky must be required to update the emission inventories and that the maintenance plans should include mandatory language requiring Kentucky to prepare emission inventories every three years using a defined methodology. The Commenters state that these requirements should appear in 40 CFR 52.920(e).

Response 14. Section 110(a)(2)(F) of the CAA provides that SIPs are to require "as may be prescribed by the Administrator * * * (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources." Emission inventories are important for the efforts of state, local, and federal agencies to attain and maintain the NAAQS for criteria pollutants. Pursuant to its authority under section 110 of the CAA, EPA has long required SIPs to provide for the submission, by states to EPA, of emission inventories containing information regarding the emissions of criteria pollutants and their precursors. EPA codified these requirements in 40 CFR part 51, subpart Q in 1979 and amended them in 1987. The 1990 Amendments to the CAA revised many of the provisions of the CAA related to the attainment of the NAAQS and the protection of visibility in mandatory Class I Federal areas (certain national parks and wilderness areas). These revisions established new periodic emission inventory requirements applicable to certain areas that were designated nonattainment for certain pollutants.

The Commonwealth of Kentucky stated that it would use the actual emissions developed through its submittal to EPA per the CERR. The CERR was published in the **Federal Register** on Monday, June 10, 2002 (67 FR 39602) (found in 40 CFR part 51, subpart A). Emissions inventory guidance for the preparation of these inventories is located in the EPA website (*http://www.epa.gov/ttnchie1/publications.html*). The purpose of the CERR is to simplify reporting, offer options for data collection and exchange, and unify reporting dates for various categories of criteria pollutant emission inventories. The rule applies to state and local agencies and consolidates the emission inventory reporting requirements found in various parts of the CAA. States are required to prepare a comprehensive state-wide inventory every three years. *See* 40 CFR 51.30. The first three-year inventory was for the year 2002. The latest CERR inventories were developed for 2005 and 2008 (which were used by Kentucky as was discussed previously). Due to the CERR and Kentucky's commitments in the maintenance plans, there is no need for additional mandatory language or commitments requiring the preparation of emission inventories every three years using a defined methodology. Kentucky will be updating its emission inventories every three years, pursuant to the methodology outlined in the CERR.

Comment 15. The Commenters assert that the maintenance plans should require a monitor in Scott County, in the Lexington Area. The Commenters contend that a monitor operated in Scott County until 2005, and that in 2005 it monitored violations of the 1997 8-hour ozone NAAQS. The Commenters questioned the rationale for removing the Scott County monitor and stated that 40 CFR 52.920(e) should require that an additional monitor be placed in Scott County.

Response 15. EPA addresses this comment in the context of today's approval of the maintenance plan for the Lexington Area. The Commenters' expressed concerns about the Scott County monitor are without foundation. First, contrary to the Commenters' contention, at the time it ceased operation, the Scott County monitor at issue was not violating the 1997 8-hour ozone NAAQS. Moreover, the monitor was shut down because it no longer met siting criteria requirements. Finally, the monitor was an additional special purpose monitor (SPM), that was supplemental to the State's monitoring network, and therefore its continued operation was not required to maintain an adequate monitoring network. These points are discussed in greater detail below.

First, contrary to the Commenters' contention, the Scott County monitoring site was not violating, but in fact had the lowest design value of the four sites in the metropolitan statistical area (MSA) at the time it ceased operation. The 2002–2004 design value for the 8-hour ozone NAAQS was 0.066 parts per million, far below the 1997 8-hour ozone NAAQS. Thus the Commenters are in error when they assert that the Scott monitor was violating the 8-hour ozone NAAQS prior to the time it ceased monitoring. The last time the Scott Monitor registered a violation of the 8-hour ozone standard was in 1996.

Second, the last siting inspection at the Sadieville site in 2004 revealed that the site no longer met the siting requirements for ozone, as per 40 CFR part 58, Appendices D and E. For example, one applicable siting criteria is that the monitor be set back a certain amount from a tree or tree line to ensure proper air flow. *See, e.g.*, 40 CFR part 58, Appendix E. Monitors that fail to meet applicable siting requirements are not appropriate for use in determining compliance with the NAAQS. Because it was an optional SPM, and not a monitor required for the network to be approved, it was not moved to a new site, but ceased operating at the end of the 2004 ozone season.

Third, for the Lexington-Fayette, Kentucky MSA, the Commonwealth operates two State and Local Air Monitoring Stations (SLAMS) ozone monitors: one in Lexington and one in Nicholasville. From April 1993 until October 2004, Kentucky operated an ozone monitor in Sadieville, Scott County. The Sadieville ozone air monitoring station was located off KY Hwy 32 at the Scott County #2 Fire Station (AQS number 21–209–0001). It was designated as a SPM. A SPM is one that allows the capability of providing monitoring for complaint studies, modeling verification, and compliance status for short-term studies. The monitoring data may be reported to EPA, provided that the monitor(s) and station(s) meet the requirements of the SLAMS network. The Sadieville site represented population exposure on an urban scale; its main objective was to evaluate compliance with and/or progress made towards meeting the ozone NAAQS. Because Kentucky's SLAMS network already met all federal requirements for siting and design, this SPM in Sadieville reflected Kentucky's effort to exceed the EPA's siting requirements for ozone.

EPA has determined that Kentucky currently meets the monitoring requirements for ozone as required in 40 CFR part 58, Appendices A, C, D, E, and G. The Kentucky SLAMS consist of a network of monitoring stations whose size and distribution are largely determined by the monitoring requirements for NAAQS comparison and the needs of monitoring organizations to meet their respective SIP requirements. The SLAMS stations must meet requirements that relate to four major areas: Quality assurance, monitoring methodology, sampling

of the SIP. The Commenter does not explain why reference in 52.920*(e)* is of particular importance. The legal effect of the requirement is the same so long as it is SIP-approved and referenced in 52.920.

interval, and siting of instruments/instrument probes. The Areas affected by today's action include five monitors in locations consistent with federal requirements. Thus, at this time, there does not appear to be any rationale for placing a new monitor in Scott County. Every year, Kentucky is required to evaluate its current monitoring network consistent with 40 CFR 58.10. This process is subject to public notice and comment. For today's action, the monitoring network meets applicable requirements.

V. Final Action

Pursuant to section 110(a)(1) of the CAA, EPA is taking final action to approve as revisions to Kentucky's SIP the maintenance plans for the 1997 8-hour ozone NAAQS for the Edmonson County, Greenup County, Lexington and Owensboro Areas, which were submitted by Kentucky on May 27, 2008. These maintenance plans ensure continued attainment of the 1997 8-hour ozone NAAQS for these Areas through the year 2020. After evaluating the Commonwealth's submittals and the comments received on the proposed rulemaking with respect to these plans, EPA has determined that each of these maintenance plans meets the applicable requirements of the CAA and EPA regulations, and is consistent with EPA policy.

VI. Statutory and Executive Order Reviews

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

- Are not "significant regulatory actions" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are 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.*);
- Do 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);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are 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
- Do 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, these rules do not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 13, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: April 6, 2011.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart S—Kentucky

■ 2. Section 52.920(e), is amended by adding new entries for the Huntington—Ashland 8-Hour Ozone Section 110(a)(1) Maintenance Plan, Lexington 8-Hour Ozone Section 110(a)(1) Maintenance Plan, Edmonson County 8-Hour Ozone Section 110(a)(1) Maintenance Plan, and Owensboro 8-Hour Ozone Section 110(a)(1) Maintenance Plan to read as follows:

§ 52.920 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED KENTUCKY NON-REGULATORY PROVISIONS

Name of non-regulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/ effective date	EPA approval date	Explanations
*	*	*	*	*
Huntington—Ashland 8-Hour Ozone Section 110(a)(1) Maintenance Plan.	A portion of Greenup County.	May 27, 2008	4/14/11 [Insert citation of publication].	For the 1997 8-hour ozone NAAQS.
Lexington 8-Hour Ozone Section 110(a)(1) Maintenance Plan Section 110(a)(1).	Fayette and Scott Counties.	May 27, 2008	4/14/11 [Insert citation of publication].	For the 1997 8-hour ozone NAAQS.
Edmonson County 8-Hour Ozone Section 110(a)(1) Maintenance Plan.	Edmonson County	May 27, 2008	4/14/11 [Insert citation of publication].	For the 1997 8-hour ozone NAAQS.
Owensboro 8-Hour Ozone Section 110(a)(1) Maintenance Plan.	Daviess County and a portion of Hancock County.	May 27, 2008	4/14/11 [Insert citation of publication].	For the 1997 8-hour ozone NAAQS.

[FR Doc. 2011–9092 Filed 4–13–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 5

Negotiated Rulemaking Committee on Designation of Medically Underserved Populations and Health Professional Shortage Areas; Notice of Meeting

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Negotiated Rulemaking Committee meeting.

SUMMARY: In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting of the Negotiated Rulemaking Committee on Designation of Medically Underserved Populations and Health Professional Shortage Areas.

DATES: Meetings will be held on May 18, 2011, 9:30 a.m. to 6 p.m.; May 19, 2011, 9 a.m. to 6 p.m.; and May 20, 2011, 9 a.m. to 3 p.m.

ADDRESSES: Meetings will be held at the Legacy Hotel and Meeting Centre, 1775 Rockville Pike, Rockville, Maryland 20852, (301) 881–2300.

FOR FURTHER INFORMATION CONTACT: For more information, please contact Nicole Patterson, Office of Shortage Designation, Bureau of Health Professions, Health Resources and Services Administration, Room 9A–18, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443–9027, E-mail: *npatterson@hrsa.gov* or visit *http://www.hrsa.gov/advisorycommittees/shortage/.*

SUPPLEMENTARY INFORMATION:

Status: The meeting will be open to the public.

Purpose: The purpose of the Negotiated Rulemaking Committee on Designation of Medically Underserved Populations and Health Professional Shortage Areas (Committee) is to establish criteria and a comprehensive methodology for Designation of Medically Underserved Populations and Primary Care Health Professional Shortage Areas, using a Negotiated Rulemaking (NR) process. It is hoped that use of the NR process will yield a consensus among technical experts and stakeholders on a new rule for designation of medically underserved populations and primary care health professions shortage areas, which would be published as an Interim Final Rule in accordance with Section 5602 of the Affordable Care Act, Public Law 111–148.

Agenda: The meeting will be held on Wednesday, May 18; Thursday, May 19; and Friday, May 20. It will include a discussion of various components of a possible methodology for identifying areas of shortage and underservice, based on the recommendations of the Committee in the previous meeting. The Friday meeting will also include development of the agenda for the next meeting. Members of the public will have the opportunity to provide comments during the meeting on Friday afternoon.

Requests from the public to make oral comments or to provide written comments to the Committee should be sent to Nicole Patterson at the contact address above at least 10 days prior to the first day of the meeting, Wednesday, May 18. The meetings will be open to the public as indicated above, 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 above at least 10 days prior to the meeting.

Dated: April 8, 2011.

Reva Harris,

Acting Director, Division of Policy and Information Coordination.

[FR Doc. 2011–9081 Filed 4–13–11; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 393

[Docket No. FMCSA–2010–0177]

Parts and Accessories Necessary for Safe Operation; Grant of Exemption for Flatbed Carrier Safety Group

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) grants an exemption from certain commodity-specific cargo securement rules applicable to motor carriers transporting metal coils. The Flatbed Carrier Safety Group (FCSG) applied for an exemption to allow motor carriers transporting metal coils to secure them in a manner not provided for in current regulations, specifically to secure coils grouped in rows with eyes crosswise and the coils in contact with each other in the longitudinal direction. FCSG requested the exemption so all commercial motor vehicle (CMV) operators will be able to use FMCSA's pre-January 1, 2004 cargo

securement procedures for the transportation of groups of metal coils with eyes crosswise. The Agency believes that permitting motor carriers to haul metal coils in this manner will maintain a level of safety that is equivalent to, or greater than, the level of safety achieved without the exemption.

DATES: This exemption is effective from April 14, 2011, through April 14, 2013.

FOR FURTHER INFORMATION CONTACT: Mr. Luke W. Loy, Vehicle and Roadside Operations Division, Office of Bus and Truck Standards and Operations, MC–PSV, (202) 366–0676, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Background .

Under 49 U.S.C. 31315(b) and 31136(e), FMCSA may grant exemptions from many of the Federal Motor Carrier Safety Regulations (FMCSRs) for a two-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level of safety that would be achieved absent such exemption" (49 CFR 381.305(a)).

FCSG's Request for Exemption

FCSG applied for an exemption from FMCSA's cargo securement requirements specified in 49 CFR 393.120 to allow motor carriers to comply with the pre-January 1, 2004, cargo securement regulations (then at 49 CFR 393.100(c)) for the transportation of groups of metal coils with eyes crosswise. FMCSA published notice of the exemption application on June 14, 2010, and asked for public comment (75 FR 33667).

On September 27, 2002, FMCSA published a final rule revising the regulations concerning protection against shifting and falling cargo for commercial motor vehicles (CMVs) engaged in interstate commerce (67 FR 61212). The new rules were based on the North American Cargo Securement Standard Model Regulations, the motor carrier industry's best practices, and recommendations presented during a series of public meetings involving U.S. and Canadian industry experts, Federal, State, and Provincial enforcement officials, and other interested parties. Motor carriers were required to ensure compliance with the rule by January 1, 2004.

The September 2002 final rule established detailed requirements for a number of specific commodities (logs; dressed lumber; metal coils; paper rolls; concrete pipe; intermodal containers; automobiles, light trucks and vans; heavy vehicles, equipment and machinery; flattened and crushed vehicles; roll-on/roll-off containers; and large boulders). These commodities were identified in public meetings during the development of the model regulations as causing the most disagreement between industry and enforcement agencies. The commodity-specific requirements for these items supersede the general rules when additional requirements are given for a commodity listed in those sections. This means all cargo securement systems must meet the general requirements, except to the extent that a commodity-specific rule imposes additional requirements for the securement method to be used.

Currently, 49 CFR 393.120 specifies requirements for the securement of one or more metal coils which, individually or grouped together, weigh 5,000 pounds or more. Metal coils can be transported with eyes vertical, lengthwise, or crosswise.

Unlike the requirements for securing coils with eyes vertical (49 CFR 393.120(b)) and lengthwise (49 CFR 393.120(d)), the current securement requirements for coils with eyes crosswise (49 CFR 393.120(c)) only speak of *individual coils;* there are no specific requirements for securing *rows of coils.* As such, a motor carrier transporting a row of coils with eyes crosswise must secure each coil as an individual coil in accordance with 49 CFR 393.120(c).

FCSG noted that the regulations in place prior to January 1, 2004 directly addressed the securement of groups of coils loaded with eyes crosswise. Section 393.100(c) read as follows:

(c)(3)(ii) *Coils with eyes crosswise:* Each coil or transverse row of coils loaded side by side and having approximately the same outside diameters must be secured by—

(a) A tiedown assembly through the eye of each coil, restricting against forward motion and making an angle of less than 45° with the horizontal when viewed from the side of the vehicle;

(b) A tiedown assembly through the eye of each coil, restricting against rearward motion and making an angle of less than 45° with the horizontal when viewed from the side of the vehicle; and

(c) Timbers, having a nominal cross section of 4 x 4 inches or more and a length which is at least 75 percent of the width of the coil or row of coils, tightly placed against both the front and rear sides of the coil or row of coils and restrained to prevent movement of the coil or coils in the forward and rearward directions.

(d) If coils are loaded to contact each other in the longitudinal direction and relative motion between coils, and between coils and the vehicle, is prevented by tiedown assemblies and timbers—

(1) Only the foremost and rearmost coils must be secured with timbers; and

(2) A single tiedown assembly, restricting against forward motion, may be used to secure any coil except the rearmost one, which must be restrained against rearward motion. [Emphasis added]

FCSG stated that, without a temporary exemption, adherence to the existing regulations at 49 CFR 393.120(c)—*i.e.*, treating each coil as an individual coil—places a burden on the motor carrier to carry significantly more coil bunks and timbers to secure each coil in a raised bunk off the deck. FCSG argued that individual securement of each coil produces no added safety benefit (but increases securement complexity in terms of coil bunks and timbers) compared to the "unitized" securement of multiple coils with eyes crosswise in rows in contact each other in the longitudinal direction. FCSG stated that securing groups of coils in this manner would allow the load to be unitized while still meeting the aggregate working load limit requirements of 49 CFR 393.106(d).

FCSG is working cooperatively with the North American Cargo Securement Harmonization Forum to effect these changes in the North American Cargo Securement Model Regulation, which both the U.S. and Canada have committed to use to update both the FMCSRs and Canada's National Safety Code 10. FCSG argued that the "unitized" securement of adjacent coils with eyes crosswise was deemed safe prior to the January 2004 revisions to the cargo securement regulations and should be still be considered safe today.

For the reasons stated above, FCSG requested that motor carriers be allowed to comply with the pre-January 2004 cargo securement provisions (then 49 CFR 393.100(c)) during the period of the exemption, if granted. FCSG believes that utilization of the pre-January 2004 regulations will allow carriers transporting metal coils to maintain a level of safety that is equivalent to the level of safety achieved without the exemption. A copy of FCSG's application for exemption is available for review in the docket of this notice.

Comments

FMCSA received two comments to the published exemption notice.

1. Richard Moskowitz responded on behalf of the American Trucking Associations (ATA), a large trade association representing State CMV associations. ATA supported the FCSG application for exemption and noted that the preamble to the September 2002

final rule did not explain why the previous provision governing the transportation of unitized coils with eyes crosswise was being omitted. ATA agreed with FCSG's assertion that there is no additional safety benefit from securing rows of metal coils with eyes crosswise and in contact each other as individual coils under the current 49 CFR 393.120(c).

2. Gerald A. Donaldson, Ph.D., commented on behalf of the Advocates for Highway and Auto Safety (Advocates) in opposition to the FCSG application, arguing that the exemption would (1) undermine the current cargo securement regulation, and (2) place the traveling public in an increased risk of catastrophic events involving the ejection or dislodgement of heavy metal coils weighing up to 40,000 pounds. Advocates stated that FCSG does not cite any independently gathered, credible evidence to support the claim that a "unitized" carriage of coils as described by the applicant is just as safe as separate, independent securement of these coils through the use of tiedowns in conjunction with bunks, chocks, or cradles. Advocates commented that granting the application for temporary exemption would essentially reject the recommendations produced by the deliberations of leading cargo securement experts from the U.S. and Canada that led to the development of the North American Cargo Securement Model Regulation.

Advocates noted that FMCSA relied on two research studies "in proposing and adopting new cargo securement regulations that specifically addressed, in considerable detail, the need to ensure the independent securement of each transverse coil in the 'suicide arrangement' of multiple rows of such coils." Advocates stated that both the 1995 Illinois Transportation Research Center report entitled "Analysis of Rules and Regulations for Steel Coil Truck Transport: Final Report" and the 1997 Canadian Council of Motor Transport Administrators (CCMTA) report entitled "Tests On Methods of Securement for Metal Coils" "explicitly evaluate the need for intervening blocks, chocks, or cradles for each transverse coil so that excessive forces are not generated during vehicle and cargo acceleration (which is non-linear as acceleration force increases) that place excessive demands on tiedowns." Advocates stated that the cargo securement requirements for metal coils are "based on both static and dynamic tests and are of record."

FMCSA Response:

As a result of rulemaking petitions submitted by various parties, FMCSA published a final rule on June 22, 2006, amending its September 2002 final rule concerning protection against shifting and falling cargo (71 FR 35819). Among other things, this rule amended the definition of metal coil to read "*an article of cargo comprised of elements, mixtures, compounds, or alloys commonly known as metal, stamped metal, metal wire, metal rod, or metal chain that are packaged as a roll, coil, spool, wind, or wrap, including plastic or rubber coated electrical wire and communications cable.*" This revised definition meant that the commodity-specific rules for securing metal coils would apply to a wider variety of coils. Some of these products are substantially lighter than coils of flat sheet metal and can therefore be transported in groups on a single vehicle without causing violations of interstate truck (or axle) weight limits designed to protect pavements and bridges from damage and excessive wear and tear.[1]

While the two reports cited by Advocates examined various aspects of metal coil securement, it is important to note that neither of these studies discussed or evaluated—either analytically or through actual testing—the securement of rows of coils grouped together with eyes crosswise. Instead, each of the reports cited by Advocates evaluated only the securement of single coils with eyes vertical, crosswise, or lengthwise.

- The 1995 Illinois Transportation Research Center report on steel coil transport consists of (1) a 1994 field survey at seven Illinois vehicle scale locations, and (2) engineering analyses of metal coil securement through rigid body dynamics analysis, scaled model testing, and finite element analysis. At the time of that report, there was no specific definition of metal coils in the FMCSRs. Further, the term "suicide arrangement" in the Illinois Transportation Research Center report was used as an anecdotal reference only, and was not supported by crash or fatality data that showed CMV drivers to be at a higher risk in the event of a crash in which rows of metal coils grouped together with eyes crosswise were transported and secured according to the pre-2004 rules. While the report recommended a number of amendments to the cargo securement regulations for metal coils, none of these recommendations questioned the then-existing securement requirements for groups of coils with eyes crosswise, or identified specific changes necessary to improve the securement of groups of coils with eyes crosswise.
- The metal coils tested as part of the 1997 CCMTA report weighed individually 18,220 lbs, 23,200 lbs, and 44,400 lbs. These coils could not be tested in groups, since any substantial grouping would push the trailer over the 34,000-pound tandem axle weight allowed on the Interstate System. Like the Illinois Transportation Research Center report, the CCMTA report provided a number of recommendations for the securement of metal coils. Similarly, none of these recommendations questioned the then-existing securement requirements for groups of coils with eyes crosswise, or addressed specific changes necessary to improve the securement of groups of coils with eyes crosswise.

Advocates stated that "Granting the exemption would * * * essentially reject the recommendations produced by the deliberations of leading cargo securement experts from the U.S. and Canada conducted over several years that supported strengthening securement requirements in numerous respects." Representatives of both FMCSA and CCMTA who served on the North American Cargo Securement Harmonization Committee, including the Chairman for the subcommittee on metal coil securement, have been contacted regarding this issue. Each of these representatives has confirmed that the lack of specific securement methods for rows of coils grouped together with eyes crosswise appears to have been an inadvertent omission when the Model Regulation was developed. Subsequently, given that no such requirements exist in the Model Regulation, no requirements for this loading pattern were included in the 2002 revisions to the FMCSRs. This omission has been brought to the attention of the North American Cargo Securement Harmonization Public Forum for consideration.

FMCSA acknowledges that FCSG did not present specific studies or data concerning the safety impact of granting this exemption. However, for the reasons discussed above, the Agency believes that granting the temporary exemption to allow securement of rows of metal coils loaded to contact each other in the longitudinal direction, with relative motion between coils and between coils and the vehicle prevented by tiedown assemblies and timbers, provides a level of safety that is equivalent to, or greater than the level of safety achieved without the exemption.

[1] Congress enacted the Bridge Formula in 1975 to limit the weight-to-length ratio of a vehicle crossing a bridge. This is accomplished either by spreading weight over additional axles or by increasing the distance between axles.

FMCSA has decided to grant FCSG's exemption application. FMCSA encourages any party having information that motor carriers utilizing this exemption are not achieving the requisite level of safety immediately to notify the Agency. If safety is being compromised, or if the continuation of the exemption is not consistent with 49 U.S.C. 31315(b) and 31136(e), FMCSA will take immediate steps to revoke the exemption.

Terms and Conditions for the Exemption

Based on its evaluation of the application for an exemption, FMCSA has decided to grant FCSG's exemption application. The Agency believes that the level of safety that will be achieved using the pre-2004 cargo securement regulations to secure of rows of metal coils with eyes crosswise during the 2-year exemption period will likely be equivalent to, or greater than, the level of safety achieved without the exemption.

The Agency hereby grants the exemption for a two-year period, beginning April 12, 2011, and ending April 12, 2013.

During the temporary exemption period, motor carriers must meet the following requirements while still meeting the aggregate working load limit requirements of 49 CFR 393.106(d).

Coils with eyes crosswise: If coils are loaded to contact each other in the longitudinal direction, and relative motion between coils, and between coils and the vehicle, is prevented by tiedown assemblies and timbers:

(1) Only the foremost and rearmost coils must be secured with timbers having a nominal cross section of 4 x 4 inches or more and a length which is at least 75 percent of the width of the coil or row of coils, tightly placed against both the front and rear sides of the row of coils and restrained to prevent movement of the coils in the forward and rearward directions; and

(2) The first and last coils in a row of coils must be secured with a tiedown assembly restricting against forward and rearward motion, respectively. Each additional coil in the row of coils must be secured to the trailer using a tiedown assembly.

Interested parties possessing information that would demonstrate that motor carriers using the cargo securement exemption for rows of metal coils with eyes crosswise are not achieving the requisite statutory level of safety should provide that information to the Agency, which will place it in Docket No. FMCSA–2010–0177. We will evaluate any such information, and, if safety is being compromised or if the continuation of the exemption is not consistent with 49 U.S.C. 31315(b)(4) and 31136(e), will take immediate steps to revoke this exemption.

Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with or is inconsistent with this exemption to allow the securement of metal coils loaded with eyes crosswise, grouped in rows, in which the coils are loaded to contact each other in the longitudinal direction with respect to a person operating under the exemption.

Issued on: April 5, 2011.

Anne S. Ferro,

Administrator.

[FR Doc. 2011–8563 Filed 4–13–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 070821475–91169–02]

RIN 0648–AV15

Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act

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

ACTION: Final rule.

SUMMARY: We, the National Marine Fisheries Service (NMFS), establish regulations under the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA) to prohibit vessels from approaching killer whales within 200 yards (182.9 m) and from parking in the path of whales when in inland waters of Washington State. Certain vessels are exempt from the prohibitions. The purpose of this final rule is to protect killer whales from interference and noise associated with vessels. We identified disturbance and sound associated with vessels as a potential contributing factor in the recent decline of this population during the development of the final rule announcing the endangered listing of Southern Resident killer whales and the associated Recovery Plan for Southern Resident killer whales (Recovery Plan). The Recovery Plan calls for evaluating current guidelines and assessing the need for regulations and/or protected areas. To implement the actions in the Recovery Plan, we developed this final rule after considering comments submitted in response to an Advance Notice of Proposed Rulemaking (ANPR) and proposed rule, and preparing an environmental assessment (EA). This final rule does not include a seasonal no-go zone for vessels along the west side of San Juan Island that was in the proposed rule. We will continue to collect information on a no-go zone for consideration in a future rulemaking.

DATES: This final rule is effective May 16, 2011.

ADDRESSES: Copies of this rule and the Environmental Assessment, Regulatory Impact Review and Finding of No Significant Impact related to this rule can be obtained from the Web site *http://www.nwr.noaa.gov*. Written requests for copies of these documents should be addressed to Assistant Regional Administrator, Protected Resources Division, Northwest Regional Office, National Marine Fisheries Service, 7600 Sand Point Way NE., Seattle, WA 98115.

FOR FURTHER INFORMATION CONTACT: Lynne Barre, Northwest Regional Office, 206–526–4745; or Trevor Spradlin, Office of Protected Resources, 301–713–2322.

SUPPLEMENTARY INFORMATION:

Background

Viewing wild marine mammals is a popular recreational activity for both tourists and local residents. In Washington, killer whales (*Orcinus orca*) are the principal target species for the commercial whale watch industry (Hoyt 2001, O'Connor *et al.* 2009). Since monitoring of this population segment has begun, the number of whales peaked at 97 animals in the 1990s, and then declined to 79 in 2001. At the end of 2010 there were 86 whales. NMFS listed the Southern Resident killer whale distinct population segment (DPS) as endangered under the ESA on November 18, 2005 (70 FR 69903). In the final rule announcing the listing, NMFS identified vessel effects, including direct interference and sound, as a potential contributing factor in the recent decline of this population. Based on monitoring data regarding the large number of vessels in close proximity to the whales (*i.e.*, within ½ mile), research results regarding behavioral and acoustic impacts caused by vessels, and the risk of vessel strikes, NMFS is concerned that some whale watching activities may harm individual killer whales, potentially reducing their fitness and increasing the population's risk of extinction.

Killer whales in the eastern North Pacific have been classified into three forms, or ecotypes, termed residents, transients, and offshore whales. Resident killer whales live in family groups, eat salmon, and include the Southern Resident and Northern Resident communities. Transient killer whales have a different social structure, are found in smaller groups and eat marine mammals. Offshore killer whales are found in large groups and their diet is largely unknown. The Southern Resident killer whale population contains three pods—J, K, and L pods—and frequents inland waters of the Pacific Northwest. During the spring, summer, and fall, the Southern Residents' range includes the inland waterways of Puget Sound, Strait of Juan de Fuca, and Southern Strait of Georgia. Little is known about the winter movements and range of Southern Residents. Their occurrence in coastal waters extends from the coast of central California to the Queen Charlotte Islands in British Columbia. The home ranges of transients, offshore whales, and Northern Residents also include inland waters of Washington and overlap with the Southern Residents.

There is a growing body of evidence documenting effects from vessels on small cetaceans and other marine mammals. The variety of whale responses include stopping or reducing feeding, resting, and social interaction (Baker *et al.* 1983; Bauer and Herman 1986; Hall 1982; Krieger and Wing 1984; Lusseau 2003a; Constantine *et al.* 2004; Arcangeli and Crosti 2009; Christiansen *et al.* 2010); abandoning feeding, resting, and nursing areas (Jurasz and Jurasz 1979; Dean *et al.* 1985; Glockner-Ferrari and Ferrari 1985, 1990; Lusseau 2005; Norris *et al.* 1985; Salden 1988; Forest 2001; Morton and Symonds 2002; Courbis 2004; Bejder *et al.* 2006); altering travel patterns to avoid vessels (Constantine 2001; Nowacek *et al.* 2001; Lusseau 2003b, 2006; Timmel *et al.* 2008); relocating to other areas (Allen and Read 2000); changes in acoustic behavior (Van Parijs and Corkeron 2001); and masking communication signals (Jensen *et al.* 2009.) One study found that marine mammals exposed to human-generated noise released increased amounts of stress hormones that have the potential to harm their nervous and immune systems (Romano *et al.* 2004). In some studies, however, researchers have found that marine mammals display no reaction to vessels (Watkins 1986; Nowacek *et al.* 2003) or concluded that there is no correlation between vessel effects and survival or reproduction (Weinrich and Corbelli 2009).

Several scientific studies in the Pacific Northwest have documented disturbance of resident killer whales by vessels engaged in whale watching. Several researchers have reported short-term behavioral changes in Northern and Southern Resident killer whales in the presence of vessels (Kruse 1991; Kriete 2002; Williams *et al.* 2002a, 2002b, 2006, 2009; Foote *et al.* 2004; Bain *et al.* 2006, Holt *et al.* 2009, Lusseau *et al.* 2009, Wieland *et al.* 2010), although many studies do not address whether it is the presence and activity of the vessel, the sounds the vessel makes, or a combination of these factors that disturbs the animals. Individual animals can react in a variety of ways to nearby vessels, including swimming faster, adopting less predictable travel paths, making shorter or longer dives, moving into open water, and altering normal patterns of behavior (Kruse 1991; Williams *et al.* 2002a, 2009, 2010; Bain *et al.* 2006; Noren *et al.* 2007, 2009; Lusseau *et al.* 2009).

Some studies have looked at effects on behavior at specific vessel distances. In those studies, vessels were underway during active approaches or may have been parked in the path or stopped close to the whales as part of a leapfrogging sequence (*i.e.*, a vessel repeatedly speeds ahead of the whales, makes a 90 degree turn to intercept the path of the whales and waits for the whales to approach). Many of these studies included both motorized and non-motorized (*e.g.*, sail boats and kayaks) in assessing the impacts of vessels on the behavior of the whales.

Approaches within 100 yards (91.4 m): Research results indicate that killer whale behavior changes from vessel approaches within 100 yards (91.4 m) include changes in swimming patterns, changes in respiratory patterns, reduced time spent foraging, and increased surface active behaviors, such as tail slaps (Bain *et al.* 2006, Noren *et al.* 2007, 2009; Williams *et al.* 2002a, Lusseau *et al.* 2009). Noren *et al.* (2007, 2009) reported the highest frequency of surface active behaviors when the nearest vessel was within 75 to 99 meters in 2005. Lusseau *et al.* (2009) reported a significant decrease in overall time spent foraging and significant increase in overall time spent traveling when vessels were present within 100 yards (91.4 m). Williams *et al.* (2002a) found that experimental vessel approaches at 100 meters (about 100 yards (91.4 m)) resulted in whales covering 13 percent more distance along a less direct route than before the vessel approached. Foraging female whales swam 25 percent faster and changed direction more often when approached by the experimental boat as compared to the observations before the boat approached.

Approaches within 200 to 400 yards (182.9 to 365.8 m): Research results also indicate that killer whale behavior can be affected by approaches at distances greater than 100 yards (91.4 m) (Lusseau *et al.* 2009; Noren *et al.* 2007, 2009; Williams *et al.* 2009). One study reported similar types of effects (*i.e.*, increased direction changes, increased respiratory intervals and transitions between activity states) from vessels within 400 yards (365.8 m) of whales as compared to vessels within 100 yards (91.4 m), although to a lesser degree. This study did not report if the effects of vessels within 400 yards (365.8 m) were from vessels close to the 100-yard (91.4 m) distance (*i.e.*, at 101 yards), at a 200-yard (182.9 m) distance or further away (*i.e.*, 399 yards) (Bain *et al.* 2006). Lusseau *et al.* (2009) also reported a reduction in time spent foraging when vessels were within 400 yards (365.8 m). Noren *et al.* (2007, 2009) reported the highest frequency of surface active behaviors when the closest vessels were within 100 yards (91.4 m) in 2005 and the highest frequency of surface active behaviors when the closest vessel was within 125 to 149 yards (114.3 to 136.2 m) in 2006, as compared to situations when the closest vessel was further away.

The long term effects of these behavioral responses are less well known (Williams *et al.* 2006), although researchers have estimated the physiological consequences of behavioral responses by calculating the energetic costs of the behaviors observed when vessels are present. Williams *et al.* (2006) estimated that killer whales expended slightly more energy in the presence of all types of vessels. The behavior exhibited in the presence of vessels would require approximately 3 percent more energy than behavior in the absence of vessels. The increased energy expenditure may be less important than the reduced time spent feeding and the resulting likely reduction in prey consumption. From their observations, Williams *et al.* (2006) calculated that lost feeding opportunities could result in an 18 percent decrease in energy intake in the presence of all types of vessels compared to when vessels are absent.

In addition, researchers have also looked at the number of boats and how smaller or larger numbers of boats present affects the behavioral responses of killer whales (Williams and Ashe 2007; Giles and Cendak 2010). Giles and

Cendak (2010) analyzed killer whale behavior in high and low boat density conditions. Based on the distribution of number of vessels within 1,000 yards (914.4 m) of the focal group, low boat density was defined as five or fewer vessels within 1,000 yards (914.4 m) and high density was greater than five vessels within 1,000 yards (914.4 m). Whales spent significantly less time foraging in high boat density conditions (approximately 17 percent of time) compared to low boat density conditions (approximately 25 percent of time). Whales were also significantly more likely to remain foraging in low boat density conditions, indicating that the whales discontinued foraging when boat density was high. The effect of boat density was significant only when the whales were foraging, which may be the behavior state most susceptible to disturbance by high numbers of vessels.

Increased energetic costs from behavioral disturbance and reduced foraging can decrease the fitness of individuals (Lusseau and Bejder 2007). Increased energy expenditure or disruption of foraging could result in poor nutrition. Poor nutrition could lead to reproductive or immune effects or, if severe enough, to mortality (Dierauf and Gulland 2001; Trites and Donnelly 2003). Interference with foraging and nutritional stress can affect growth and development, which in turn can affect the age at which animals reach reproductive maturity, fecundity, and annual or lifetime reproductive success (Trites and Donnelly 2003). Vessels in the path of the whales can interfere with important social behaviors such as prey sharing (Ford and Ellis 2006) or with behaviors that generally occur in a forward path as the whales are moving, such as nursing (Kriete 2007). Interference with behaviors including prey sharing and communication could also change social cohesion and foraging efficiency and therefore the growth, reproduction, and fitness of individuals.

Killer whales generally have a range of hearing from 1 to 100 kHz (Szymanski *et al.* 1999) and this wide frequency range of hearing makes killer whales susceptible to effects from a wide range of sounds, including sound produced by vessels. Sound modeling has been used to estimate distances at which vessel sound would cause behavioral responses for killer whales (Erbe 2002). Erbe (2002) predicted that the sounds of fast boats (greater than 50 km/h [31 miles/hour]) would be audible to killer whales at distances of up to 16 kilometers (10 miles) and cause behavioral responses within 200 meters (0.12 miles or 219 yards). For boats moving at slow speeds (10 km/h [6.2 miles/hour]), sound would be audible within 1 kilometer (0.62 miles or 1,094 yards) and cause behavioral changes within 50 meters (55 yards).

Human-generated sounds may mask or compete with and effectively drown out clicks, calls, and whistles made by killer whales, including echolocation (signals sent by the whales that bounce off objects in the water and provide information to the whales) used to locate prey and other signals the whales rely upon for communication and navigation. High frequency sound generated from recreational and commercial vessels moving at high speed in the vicinity of whales may mask echolocation and other signals the species rely on for foraging (Erbe 2002; Holt 2009), communication (Foote *et al.* 2004, Weiland *et al.* 2010), and navigation. Sounds directly in front of the whale (*i.e.*, in their path) would have the greatest impact on the whales ability to hear important sounds. Masking of echolocation would reduce foraging efficiency (Holt 2009), which may be particularly problematic if prey resources are limited. Holt (2009) reviewed the current knowledge and data gaps regarding sound exposure in Southern Resident killer whales. The review provides an overview of acoustic concepts, killer whale sound production, ambient sound levels in Haro Strait (Veirs and Veirs 2006), sound propagation in killer whale habitats, effects of sound exposure, and assessment of likely acoustic impacts on the Southern Residents. Holt used data on ambient sound and characteristics and sound levels of several different types of vessels (Hildebrand *et al.* 2006) to analyze impacts on the effective range of killer whale echolocation in detecting a salmon. The vessel sounds were recorded at idle, when powering up, and at cruise speeds (17 to 31 knots). The review concluded that vessel noise was predicted to significantly reduce the range at which echolocating killer whales could detect salmon in the water column. Holt (2009) reported that the detection range for a killer whale echolocating on a Chinook salmon could be reduced 88 to 100 percent by the presence of a moving vessel within 100 yards (91.4 m) of the whale. The detection range was reduced 38 to 90 percent when different vessels were operating at different speeds 200 and 400 yards (182.9 and 365.8 m) from the whales. Reduction in detection ranges decreased with greater distance from the whales and this was the case for both fast (cruise) and slower (powering up) vessels.

Additionally, prey sharing has recently been identified as an important feature of Northern Resident killer whale foraging (Ford and Ellis 2005). Masking sound from vessels could affect the ability of whales to coordinate their feeding activities, including searching for prey and prey sharing. A study by Foote *et al.* (2004) on Southern Resident killer whales in the San Juan Islands identified that all three pods increased the duration of their primary communication call when vessels were present. This appears to be a recent development, which Foote *et al.* (2004) attributed to increased vessel traffic and subsequent engine noise reaching a threshold above which whales compensated with longer duration of calls to overcome the vessel noise (Foote *et al.* 2004). Wieland *et al.* (2010) also reported increased call durations, but for a larger number of call types (16 out of 21 calls) in a similar comparison. Holt *et al.* (2009) found that killer whales increase their call amplitude in response to vessel noise.

Killer whales may also be injured or killed by collisions with passing ships and powerboats, primarily from being struck by the turning propeller blades (Visser 1999, Ford *et al.* 2000, Visser and Fertl 2000, Baird 2001, Carretta *et al.* 2001, 2004; Van Waerebeek *et al.* 2007). Some animals with severe injuries eventually make full recoveries, such as a female described by Ford *et al.* (2000) that showed healed wounds extending almost to her backbone. A 2005 collision of a Southern Resident with a commercial whale watch vessel in Haro Strait resulted in a minor injury to the whale, which subsequently healed. From the 1960s to 1990s (Baird 2002) only one resident whale mortality from a vessel collision was reported for Washington and British Columbia. However, additional mortalities have been reported since then. In March of 2006, the lone Southern Resident killer whale, L98, residing in Nootka Sound for several years, was killed by a tug boat. While L98 exhibited unusual behavior and often interacted with vessels, his death demonstrates the risk of vessel accidents. Several mortalities of resident killer whales in British Columbia in recent years have been attributed to vessel collisions (Gaydos and Raverty 2007).

Vessel effects were identified as a factor in the ESA listing of the Southern Residents (70 FR 69903; November 18, 2005) and are addressed in the Recovery Plan (73 FR 4176; January 24, 2008), which is available on our Web page at *http://www.nwr.noaa.gov/*.

Current MMPA and ESA Prohibitions and NMFS Guidelines and Regulations

The Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361 *et seq.*, contains a general prohibition on take of marine mammals. Section 3(13) of the MMPA defines the term take as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." Except with respect to military readiness activities and certain scientific research activities, the MMPA defines the term 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]."

In addition, NMFS regulations implementing the MMPA further define the term take to include: "the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild" (50 CFR 216.3).

The MMPA provides limited exceptions to the prohibition on take for activities such as scientific research, public display, and incidental take in commercial fisheries. Such activities require a permit or authorization, which may be issued only after agency review.

The ESA, 16 U.S.C. 1531–1543, prohibits the take of endangered species. Section 3(18) of the ESA defines take to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Both the ESA and MMPA require wildlife viewing to be conducted in a manner that does not cause take.

NMFS has developed specific regulations under the MMPA and ESA for certain marine mammal species in particular locations. Each rule was based on the biology of the marine mammals and available information on the nature of the threats. NMFS has regulated close vessel approaches to large whales in Hawaii, Alaska, and the North Atlantic and created buffer zones to protect Steller sea lions and has experience enforcing these regulations. There are exceptions to each of these rules.

In 1995, NMFS published a final rule to establish a 100 yard (91.4 m) approach limit for endangered humpback whales in Hawaii (60 FR 3775, January 19, 1995). While available scientific information did not provide precise information on a single distance at which vessels disturbed the whales, NMFS established the 100 yard approach regulation based on its experience enforcing the prohibition of harassment (*i.e.*, activities that were initiated or occurred within 100 yards (91.4 m) of a whale had a high probability of causing harassment). In 2001, NMFS published a final rule (66 FR 29502, May 31, 2001) to establish a 100 yard (91.4 m) approach limit for endangered humpback whales in Alaska that included a speed limit when a vessel is near a whale. The approach regulations included approach, by any means, including interception of the path of the whales. NMFS adopted the 100 yard distance to maintain consistency with the published guidelines and with the regulations that existed for viewing humpback whales in Hawaii. NMFS considered some form of speed restrictions to reduce the likelihood of mortality or injury to a whale in the event of a vessel/whale collision. For practical and enforcement reasons, NMFS included a slow safe speed standard, rather than a strict nautical mile-per-hour standard, in the rule.

In 1997, NMFS published an interim final rule to prohibit approaching endangered North Atlantic right whales closer than 500 yards (457.2 m) (62 FR 6729, February 13, 1997). The purpose of the 500-yard (457.2 m) approach regulation was to reduce the current level of disturbance and the potential for vessel interaction and to reduce the risk of collisions. In addition to collision injuries or mortalities, NMFS listed other vessel impacts, including displacing cow/calf pairs from nearshore waters, expending increased energy when feeding is disrupted or migratory paths rerouted, and turbulence associated with vessel traffic, which may indirectly affect right whales by breaking up the dense surface zooplankton patches in certain whale feeding areas. To further reduce impacts to North Atlantic right whales from collisions with ships, NMFS recently published a final rule to implement speed restrictions of no more than 10 knots applying to all vessels, except those operated by or under contract to Federal agencies, 65 ft (19.8 m) or greater in overall length in certain locations, and at certain times of the year along the east coast of the U.S. Atlantic seaboard (73 FR 60173; October 10, 2008).

On November 26, 1990 (55 FR 49204), NMFS listed Steller sea lions as "threatened" under the ESA and the listing included regulations prohibiting vessels from operating within buffer zones 3 nautical miles around the principal Steller sea lion rookeries in the Gulf of Alaska and the Aleutian Islands. The regulations prohibit vessels from operating within the 3-mile buffer zones, with certain exceptions. Similarly, people are prohibited from approaching on land closer than ½ mile or within sight of a listed Steller sea lion rookery. NMFS created the buffer zones to (1) Restrict the opportunities for individuals to shoot at sea lions; (2) facilitate enforcement of this restriction; (3) reduce the likelihood of interactions with sea lions, such as accidents or incidental takings in these areas where concentrations of the animals are expected to be high; (4) minimize disturbances and interference with sea lion behavior, especially at pupping and breeding sites; and (5) avoid or minimize other related adverse effects.

In addition to these specific regulations, NMFS has provided general guidance for wildlife viewing so that the activities are not likely to cause take. This is consistent with the philosophy of responsible wildlife viewing advocated by many federal and state agencies to allow the public to observe the natural behavior of wild animals in their habitats without causing disturbance (see *http://www.watchablewildlife.org/* and *http://www.watchablewildlife.org/publications/marine_wildlife_viewing_guidelines.htm*).

Each of the six NMFS Regions has developed recommended viewing guidelines to educate the public on how to responsibly view marine mammals in the wild and avoid causing a take. These guidelines are available on line at: *http://www.nmfs.noaa.gov/prot_res/MMWatch/MMViewing.htm*. The "Be Whale Wise" guidelines developed for marine mammals by the NMFS Northwest Regional Office and partners are also available at: *http://www.bewhalewise.org/guidelines/*.

Be Whale Wise is a transboundary effort to develop and update guidelines for viewing marine wildlife. NMFS has partnered with monitoring groups, commercial operators, whale advocacy groups, U.S. and Canadian government agencies and enforcement divisions over the past several years to promote safe and responsible wildlife viewing practices through the development of outreach materials, training workshops, on-water education and public service announcements. The 2009 version of the Be Whale Wise guidelines recommends that boaters parallel whales no closer than 100 yards (91.4 m), approach animals slowly from the side rather than

from the front or rear, and avoid putting the vessel within 400 yards (365.8 m) in front of or behind the whales. The guidelines also recommend vessels reduce their speed to less than 7 knots within 400 yards (365.8 m) of the whales, and to remain on the outer side of the whales near shore. In 2008 a state law with similar language to the current approach and "park in the path" guidelines (RCW 15.77.740) was enacted to protect Southern Resident killer whales in Washington State waters.

San Juan County, Washington, identifies two voluntary no-boat areas off San Juan Island on their Marine Stewardship Area maps, although this is separate from the Be Whale Wise guidelines. The first is a ½ mile (~800 m)-wide zone along a 1.8 mile (3 km) stretch of shore centered on the Lime Kiln lighthouse on the west coast of San Juan Island. The second is a ¼ mile (~400 m)-wide zone along much of the west coast of San Juan Island from Eagle Point to Mitchell Point. These areas, totaling approximately 3.8 square miles, facilitate shore-based viewing and reduce vessel presence in an area used by the whales for feeding, traveling, and resting.

NMFS supports the Soundwatch boater education program, an on-water stewardship and monitoring group, to help develop and promote the Be Whale Wise guidelines and monitor vessel activities in the vicinity of whales. Soundwatch reports incidents when the guidelines are not followed and there is the potential for disturbance of the whales (Koski 2004, 2006, 2007, 2008, 2009, 2010a, 2010b). Soundwatch reported that the mean number of vessels following a given group of whales increased from five boats in 1990 to an average of about 15 to 20 boats within ½ mile of the whales during May through September, for the years 1998 through 2010 (Osborne *et al.* 1999; Baird 2001; Erbe 2002; Marine Mammal Monitoring Project 2002; Koski 2004, 2006, 2007, 2008, 2009, 2010a, 2010b), with a peak of 22 vessels around the whales in 1998 and 2003 and a steady decline from 22 vessels in 2003 to an average of 14 vessels in 2010. Soundwatch identified potential reasons for the decline in average number of boats, including economic conditions and fewer opportunities for fishing, as well as a pattern of groups of whales that are spread out in the action area so that vessels are also spread out. Soundwatch remains with one group of whales and records vessel counts around the group and therefore would not count all boats spread out with multiple groups of whales (Koski 2010b).

At any one time, the observed numbers of commercial and recreational whale watch boats around killer whales can be much higher than the mean number of vessels. For example, sources other than Soundwatch have reported that 107 vessels followed one Southern Resident pod (Lien 2000); 76 boats simultaneously positioned around a group of 18 whales from K pod (Baird 2002); and local media reported up to 500 vessels came out on the weekends to view a group of whales from L pod in Dyes Inlet during the fall of 1997. Although the average number of whale watch vessels within ½ mile is lower than what was observed in these three cases, the extreme nature of these events illustrates the degree to which killer whales can captivate the public's interest in the Pacific Northwest and the level of vessel effects that may occur.

Over the last several years, the whale watch season has extended in length, with vessels accompanying whales for more hours of the day and more days of the year. It is not uncommon for Southern Residents or transient killer whales to be accompanied by many boats throughout much or all of the day with peak numbers of attending vessels in late morning and mid-afternoon during the busiest whale watching months of July and August (Koski 2007). In recent years, U.S. and Canadian commercial whale watch vessels have made up from 24 percent (2010) to over 50 percent (2004) of the vessels observed within a ½-mile radius of the whales (Koski 2006, 2007, 2010b).

Soundwatch observers also report incidents when recreational and commercial whale watching vessels, as well as other types of vessels, are not adhering to the guidelines. From 2006 through 2010, there were between 1,085 (2007) and 2,527 (2009) incidents per year of vessels not following the guidelines reported during the time the observers were present. Soundwatch effort (estimated observation time) has fluctuated in recent years and trends in incident data can be difficult to interpret. There was an increasing trend in the number of incidents from 1998 to 2006, which is not based only on increasing hours of observation time (Industrial Economics, Incorporated 2010). An average of 1.2 incidents was observed per hour in 2003, while an average of 6.02 incidents were observed per hour in 2009.

As in the past several years, the most common Soundwatch observed vessel incident categories in 2010 were:

(1) Vessels parking in the path within 100–400 yards (365.8 m) of whales (Parked in path) at 23 percent of all incidents,

(2) Vessels motoring inshore of whales (Inshore of whales) at 17 percent,

(3) Vessels motoring within 100 yards (91.4 m) of whales (Under power within 100 yards (91.4 m) of whales) at 12 percent, and

(4) Vessels motoring fast (greater than 7 knots) within 400 yards (365.8 m) of whales (fast within ¼ mile of whales) at 13 percent of all incidents.

In 2009 there were 2,527 incidents; the majority of these were committed by private boaters (72 percent) and Canadian commercial operators (8 percent). Of the 1,067 incidents in 2010, the majority were committed by private boaters (64 percent) and Canadian commercial operators (10 percent). The most common incidents also reflect this pattern and are most often committed by private boaters and Canadian commercial whale watch vessels.

In both 2009 and 2010, 4 percent of incidents observed were committed by kayaks. Of the 1,067 incidents in 2010, 41 incidents (22 commercial and 19 private kayakers) specific to kayaks were observed, including parking in the path (20 percent of kayak incidents in 2010). Soundwatch has reported that they likely underestimate kayak incidents because the Soundwatch observation vessel remains outside of the current voluntary no-go zone where considerable kayak activity takes place (Dismukes 2010). In 2010, Soundwatch collected new information regarding kayaks from land-based observation points. They observed over 2,100 kayaks with the whales from June to September along the west side of San Juan Island with up to 41 kayaks with the whales at one time. Of the kayaks observed with whales, 74 percent were part of commercial kayaking groups (Koski 2010b). Observers reported a total of 594 incidents of kayakers not following guidelines including 171 incidents of kayaks within 100 yards (91.4 m) of the whales and 88 incidents of kayaks parked within the path of the whales. In most cases when the kayakers made an effort to follow the guidelines they were able to comply with the 100 yard and park in the path guidelines (Koski 2010b).

In addition to monitoring, the Soundwatch program includes an education component, providing information on the viewing guidelines to boaters that are approaching areas with whales. Despite the regulations, guidelines and outreach efforts, interactions between vessels and killer whales continue to occur in the waters of Puget Sound and the Georgia Basin. Advertisements on the Internet and in local media in the Pacific Northwest

promote activities that appear inconsistent with what is recommended in the Be Whale Wise guidelines. NMFS has received letters from the Marine Mammal Commission, members of the scientific research community, environmental groups, and members of the general public expressing the view that some types of interactions with killer whales have the potential to harass and/or disturb the animals by causing injury or disruption of normal behavior patterns. Soundwatch reports high numbers of incidents when vessels are not following the guidelines to avoid harassment (Koski 2004, 2006, 2007, 2008, 2009, 2010a, 2010b). Violations of current ESA and MMPA take prohibitions are routinely reported to NOAA's Office for Law Enforcement; however, the current prohibitions are difficult to enforce. The current prohibition against harassment may require demonstration of changes in the whales' behavior or an injury caused by a specific action which often includes expert testimony regarding behavioral response. NMFS has also received inquiries from members of the public and commercial tour operators requesting clarification of NMFS' policy on what activities constitute harassment.

In 2002, NMFS published an ANPR requesting comments from the public on what types of regulations and other measures would be appropriate to prevent harassment of marine mammals in the wild caused by human activities directed at the animals (67 FR 4379, January 30, 2002). The 2002 ANPR was national in scope and covered all species of marine mammals under NMFS' jurisdiction (whales, dolphins, porpoises, seals and sea lions), and requested comments on ways to address concerns about the public and commercial operators closely approaching, swimming with, touching or otherwise interacting with marine mammals in the wild. Several potential options were presented for consideration and comment, including: (1) Codifying the current NMFS Regional marine mammal viewing guidelines into regulations; (2) codifying the guidelines into regulations with additional improvements; (3) establishing minimum approach regulations similar to the ones for humpback whales in Hawaii and Alaska and North Atlantic right whales; and (4) restricting activities of concern similar to the MMPA regulation prohibiting the public from feeding or attempting to feed wild marine mammals. The 2002 ANPR specifically mentioned the complaints received from researchers and members of the public concerning close vessel approaches to killer whales in the Northwest. NMFS received over 500 comments on the 2002 ANPR regarding human interactions with wild marine mammals in United States waters and along the nation's coastlines.

NMFS has determined that existing prohibitions, regulations, and guidelines described above do not provide sufficient protection of killer whales from vessel impacts. We considered information developed through internal scoping, public and agency comments on the 2002 nation-wide ANPR, a 2007 killer whale-specific ANPR and the 2009 proposed rule (described below), monitoring reports, and scientific information. Monitoring groups continue to report high numbers of vessels around the whales and high numbers of vessel incidents that may disturb or harm the whales. Vessel effects may limit the ability of the endangered Southern Resident killer whales to recover and may impact other killer whales in inland waters of Washington. We therefore deem it necessary and advisable to adopt regulations to protect killer whales from vessel impacts, which will support recovery of Southern Resident killer whales. NMFS' determination that regulations are needed is described in detail in the Rationale for Regulations section below.

Development of Proposed Regulations

In March 2007, we published an ANPR (72 FR 13464; March 22, 2007) to gather public input on whether and what type of regulation might be necessary to reduce vessel effects on Southern Residents. The ANPR requested comments on a preliminary list of potential regulations including codifying the Be Whale Wise guidelines, establishing a minimum approach rule, prohibiting particular vessel activities of concern, establishing time-area closures, and creating operator permit or certification programs. During the ANPR public comment period, we received a total of 84 comments via letter, e-mail and on the Federal e-rulemaking portal. Comments were submitted by concerned citizens, whale watch operators, research, conservation and education groups, federal, state and local government entities, and various industry associations. The majority of comments explicitly stated that regulations were needed to protect killer whales from vessels. Most other comments generally supported protection of the whales. Six comments explicitly stated that no regulations were needed. There was support for each of the options in the preliminary list of alternatives published in the ANPR, and many comments supported multiple approaches. Some additional alternatives were also suggested. A full summary of the comments and NMFS' responses are contained in the proposed rule.

Proposed Rule

In July 2009, NMFS proposed regulations that would prohibit motorized, non-motorized, and self-propelled vessels in inland waters of Washington from (1) Causing a vessel to approach within 200 yards (182.9 m) of any killer whale; (2) entering a restricted zone along the west coast of San Juan Island during a specified season, and (3) intercepting the path of any killer whale in inland waters of Washington (74 FR 3764, July 29, 2009). The proposed regulations included exemptions for certain vessels and activities. As described in the proposed rule and draft EA, we based the proposed regulations on the best available data on vessels and whales, and public comments on the ANPR.

NMFS published the proposed rule in the **Federal Register** and requested public comment on the proposed regulations, the draft EA and supporting documents, such as the Draft Regulatory Impact Review (IEC 2008). To develop the draft EA, we relied on the public comments on the ANPR, the Recovery Plan, Soundwatch data, and other scientific information to develop a range of alternatives to the regulations, including the alternative of not adopting regulations. We analyzed the environmental effects of these alternative regulations and considered options for mitigating effects. After a preliminary analysis of the alternative regulations, we developed an alternative that combined three separate provisions into a single package—a 200-yard (182.9 m) approach restriction, a no-go zone along the west side of San Juan Island from May–September, and a prohibition on parking in the whales' path. We analyzed the effects of that package in the draft EA.

Comments and Responses to Comments on the Proposed Rule

NMFS published proposed regulations to protect killer whales on July 29, 2009, and announced two public meetings. In response to requests, NMFS added a third public meeting (74 FR 47779, September 17, 2009) and extended the comment period to January 15, 2010 (74 FR 53454, October 19, 2009). The public meetings were well attended and over 160 people provided recorded oral comments on the proposed rule. During the public

comment period, 704 unique written comments were submitted via letter, e-mail and the Federal e-rulemaking portal. Comments were submitted by concerned citizens; whale watch operators and naturalists; research, conservation and education groups; federal, state and local government entities; and various industry and other associations. NMFS posted all written comments received during the comment period on the NMFS Northwest Regional Web page: *http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Killer-Whales/Recovery-Implement/Orca-Vessel-Regs.cfm*. In addition to unique comments, over 2,400 form letters were submitted. There were 15 different form letters with the number of copies for each ranging from four to over 1,500. Additionally, we received five petitions that ranged from 100 to 740 signatures each and totaled over 1,300 names and signatures.

Many of the oral and written comments from individual members of the public were short general statements that: (1) Supported the proposed regulations and killer whale conservation in general, (2) disagreed with the proposed regulations, or (3) disagreed only with the proposed no-go zone. Other individual public comments and comments from organizations and government agencies included substantive information, such as specific suggestions to alter the proposed regulations, new information, or additional alternatives to consider. The Marine Mammal Commission made several recommendations in their comments on the proposed rule that are addressed below in response to Comments 4, 6, 7, 14, 16 and 17. The following is a summary of the comments received on both the proposed rule and the draft EA. The proposed rule included almost all of the information in the draft EA and most commenters directed their comments toward the proposed rule. We have grouped and summarized similar comments and recommendations, and responded to issues that directly relate to this rulemaking. Responses to the comments also include descriptions of changes made to the proposed regulations.

Comment 1: Mandatory regulations versus voluntary guidelines. Several commenters supported adoption of mandatory regulations, while other commenters stated that voluntary guidelines are adequate to protect the whales.

Response: Monitoring of vessel activity around the whales reveals that many vessels violate the current voluntary guidelines, the number of violations appears to be increasing, and one of the most serious violations—parking in the path of the whales—was committed primarily by commercial whale watch operators, with a recent increase in parking in the path by recreational boaters. Approaching within 100 yards (91.4 m) of the whales is primarily committed by recreational boaters. In the EA, we examined the available evidence and concluded that mandatory regulations are likely to reduce the number of incidents of vessels disturbing and potentially harming the whales and that this reduction would improve the whales' chances for recovery. We expect both commercial and recreational whale watchers to increase compliance with mandatory regulations compared to the current voluntary guidelines. Commercial whale watchers, in particular, will be aware of the new regulations and can serve as an example of lawful viewing for other boaters. Accordingly, we are adopting mandatory regulations governing vessel activity around the whales.

Comment 2: Enforce state law and maintain current guidelines. Several commenters suggested the current state law, prohibiting approach within 300 feet, should be enforced to increase compliance and that with the current state law and Be Whale Wise guidelines in place, no additional Federal regulations were necessary. One commenter suggested making it unlawful to fail to disengage the transmission of a vessel when within 300 feet of a Southern Resident killer whale similar to the state law.

Response: A state law requiring vessels to stay 300 feet (100 yards (91.4 m)) from Southern Resident killer whales went into effect in June 2008. The Washington Department of Fish and Wildlife (WDFW) has enforced this law since 2008, issuing several violations and many warnings. While NMFS agrees that enforcement of state law has likely improved conditions for the endangered whales, our analysis revealed that vessels at 100 yards (91.4 m) can have harmful effects on whales (see Comment 3: Approach regulation). This final regulation prohibits approaches closer than 200 yards (182.9 m), providing greater protection than the state's 100-yard (91.4 m) law. WDFW supported the 200-yard (182.9 m) approach rule in its comments on NMFS's proposed regulations. NMFS has not included a requirement to disengage the transmission of the vessel when within a certain distance of the whales. The Be Whale Wise guidelines include a recommendation to place engines in neutral and allow whales to pass if your vessel in not in compliance with the 100-yard (91.4 m) approach guideline. NMFS will continue to work with the Be Whale Wise partners to discuss maintaining this recommendation in the guidelines and evaluate the effectiveness of the final regulations to determine if any modifications are needed.

Comment 3: Approach regulation. Some commenters supported an approach limit of 100 yards (91.4 m) (current guideline and state law), and others suggested that an approach limit of 150, 200, 200–400, 1,000 yards (137.1, 182.9, 182.9–365.8, 914.4 m) or several miles would better protect the whales. Commenters noted that an approach regulation could limit the potential for vessels to disturb or collide with whales and for vessel noise to mask the whale's auditory signals, interfering with their ability to communicate and forage. Several whale watch operators raised concerns about how viewing from a distance of 200 yards (182.9 m) would impact their businesses. In addition, they provided comments that viewing from 200 yards (182.9 m) would reduce their ability to educate customers and affect the example they set for other boaters.

Response: In the final EA we fully analyzed the effects of both a 100- and 200-yard (182.9 m) approach regulation. Based on the best available information we concluded that a 100-yard (91.4 m) approach regulation is not sufficient to protect the whales. Researchers have documented behavioral disturbance and estimated the considerable potential for masking from vessels at 100 yards (91.4 m) and as far away as 400 yards (365.8 m). Researchers have modeled the potential for vessel noise to mask the whales' auditory signals and concluded that at 100 yards (91.4 m) there is likely to be up to 100 percent masking, while at 400 yards (365.8 m) the masking has substantially decreased. Even at 200 yards (182.9 m) the models show auditory masking of 75 to 95 percent. We expect the 200-yard (182.9 m) approach limit in the final regulation to significantly reduce the risk of vessel strikes, the degree of behavioral disruption, and the amount of noise that masks echolocation and communication, compared to a 100-yard (91.4 m) approach regulation. An approach regulation greater than 200 yards (182.9 m) would reduce vessel effects even more, but could diminish both the experience of whale watching and opportunities to participate in whale watching. We recognize that whale watching educates the public about whales and fosters stewardship. While it is difficult to quantify the

conservation benefits of public education, the Recovery Plan for Southern Resident Killer Whales identifies education and outreach actions as an essential part of the overall conservation program for the whales (NMFS 2008). We believe that a 200-yard (182.9 m) limit strikes an appropriate balance between the need to reduce vessel interactions with Southern Residents and the public interest in whale watching and observation.

Many whale watch operators expressed concern that their business will decrease if they are required to stay 200 yards (182.9 m) away from whales. Several operators conducted informal surveys of their customers to support their assertion that a 200-yard (182.9 m) approach regulation would diminish the experience and make customers less likely to go on whale watching tours. The best available information, however, supports our conclusion that a 200-yard (182.9 m) approach regulation is unlikely to affect the numbers of people who go on whale watching tours or the price they are willing to pay for the experience (see Comment 11: Economic Analysis).

First, observational data from third-party observers reveals that many operators already regularly view whales from 200 yards (182.9 m) or greater. In 2007–2008 a new research program collected detailed information on the distance of vessels from the whales using an integrated range finder, GPS and compass. This study measured the distance between all vessels and the nearest whale and reported that for all vessels within 400 yards (365.8 m) of the whale (likely engaged in whale watching), 74 percent were greater than 200 yards (182.9 m) from the whales. For all vessels within 800 yards (likely includes both whale oriented and transiting vessels), 88 percent of vessels were greater than 200 yards (182.9 m) from the whales (Giles and Cendak 2010).

In addition, the EA accompanying the final rule describes peer-reviewed studies of customer attitudes that identify the features of the whale watching experience that are most valuable to customers. Several studies focused on killer whales in the Pacific Northwest have assessed the value that whale watching participants have for wildlife viewing and provide data on the factors that lead to an enjoyable or memorable whale watching trip, and how satisfied participants are with various aspects of their trip (Dufus and Deardon 1993; Andersen 2004; Andersen and Miller 2006; Malcolm 2004). Survey results of whale watch participants indicate that proximity to the whales is not the most important part of the whale watchers' experience and that seeing whales and whale behavior was much more important (Andersen 2004; Malcolm 2004). In addition, Malcolm (2004) found participants were most satisfied with the respect their vessels gave the whales. The number of whales, whale behavior, and learning also received higher satisfaction than the distance from which whales were observed. The participants also strongly agreed with statements related to protection of the whales. Economic research also indicates that the general public places a high value on the continued existence of species such as the Southern Residents, such that actions necessary for the species' recovery have broad and lasting economic benefits. The Endangered Species Act protects species that are in danger of or threatened with extinction and states that "these species are of esthetic, ecological, educational, historical, recreational and scientific value to the Nation and its people." Independent research also demonstrates the value that the public places on protection and recovery of endangered species including marine mammals (Loomis and Larson 1994).

While many whale watch operators referenced informal surveys of their customers, these surveys were not scientifically designed and there was no control in their administration. In addition to the evidence described above, we received comments from the public that support the conclusion that a 200-yard (182.9 m) approach regulation will not reduce the public education value of whale watching. These comments highlight the value and effectiveness of educational programs that take place at great distances from the whales, even off the water away from whales, such as in classroom programs.

For the reasons described above and in contrast to the public comments submitted by the commercial whale watching industry, we do not anticipate a reduction in the willingness of customers to participate in commercial whale watch trips or the ability of the whale watching industry to provide an educational and meaningful experience for their customers viewing whales at a distance of 200 yards (182.9 m). In adopting a 200-yard (182.9 m) approach regulation, we evaluated all of the available information on the potential costs to whale watch business. In addition, we balanced the competing conservation benefits to killer whales of reduced vessel interference against continued public education through on-water whale watching opportunities. We consider the viability of the whale watch business to be an integral part of public education. We will continue to study the impact of both motorized and non-motorized vehicle distance limits on whale behavior, and the impact of the newly established regulations on the viability of the whale watch business. NMFS will conduct this analysis alongside the additional consideration of a no-go area discussed in more detail below. If subsequent analysis suggests either a disproportionate impact on segments of the business, or that certain kinds of whale watching, such as the non-motorized business, has less of an effect on whale behavior, we will consider modifying or relaxing restrictions. We will conduct such analysis as the new rulemaking requirements are being implemented over the next two whale watching seasons.

Comment 4: No-go zone. There were a large number of oral and written comments from the public, recreational fishing community, whale watch operators and kayakers in opposition to the proposed no-go zone. Some reasons expressed for opposition to the no-go zone included concerns about setting a precedent for closing additional areas to fishing, impacts to commercial and recreational fishing, elimination of kayaking opportunities, and safety concerns. A number of comments suggested creation of a go-slow zone in the place of a proposed no-go zone. We also received comments supporting the proposed seasonal no-go zone (May–September), as well as suggestions to create a larger no-go zone along the west side of San Juan Island, to include other shoreline areas, and to identify the no-go zone based on feeding "hot spots."

Additional comments on the proposed no-go zone included support for more or fewer exceptions. Several commenters opposed the proposed exception for treaty fishing. Suggestions for additional exceptions were for recreational and commercial fishing, and a corridor near shore in the zone to allow for kayakers, and property owners using the zone for recreational purposes.

Both oral and written commenters expressed concern that NMFS underestimated the economic impacts in the assessment of the proposed no-go zone. One specific concern was that the economic analysis did not adequately address impacts to the recreational and commercial fishing communities and impacts would be greater that what was considered in the EA.

Several commenters suggested creating a public process to receive additional feedback on the concept of

the no-go zone and engage the community in developing an appropriate protected area. Others commented that NMFS should select the site based on the best available science and should consider use of areas by the three separate pods of Southern Resident killer whales.

We received several comments specific to the status of the boat launch at the San Juan County Park (within the proposed no-go zone) as a resource supported by grants from the Washington Recreation and Conservation Office and whether it would be "converted" to uses other than those for which it was funded if the no-go zone was implemented.

Response: Public comments on the no-go zone raised several suggested alternatives that we had not fully analyzed in the draft EA. In addition, we recognize that to be effective, regulations must be understood by the public and have a degree of public acceptance. Because of the many alternatives suggested by the public, and because of the degree of public opposition, we have decided to gather additional information and conduct further analysis and public outreach on the concept of a no-go zone. Therefore, the final rule does not adopt a no-go zone. We will pursue this additional work expeditiously because the best available information indicates there would be a significant conservation benefit to the whales if they were free of all vessel disturbance in their core foraging area.

Comment 5: Park in the path. Some commenters supported adoption of a regulation that all vessels must keep clear of the whales' path. Others commented that a prohibition on parking in the path of the whales would be difficult to enforce and raised questions about situations where whales approach vessels. Commenters also suggested that a single approach distance would be easier for boaters to understand compared to a combination of a 200 yard approach distance and a parking in the path prohibition out to 400 yards.

Response: The risks of both vessel strikes and acoustic masking are both most severe when vessels are directly in front of the whales. In addition researchers have reported behavioral responses from vessels out to 400 yards (365.8 m) and beyond and have expressed concern about impacts to important behaviors, such as prey sharing and nursing that occur as the whales move forward. The final regulations include a prohibition on parking in the path because it provides the best management tool for reducing these risks. Increasing the overall approach distance to mitigate for the specific impacts that can occur from vessels in the whales' path (*i.e.*, a 300 or 400 yard (274.3 or 365.8 m) approach rule) would increase the viewing distance for all whale watchers and could impact the experience of whale watchers and potentially the whale watch businesses (see Comment 3: Approach Regulation). NMFS believes that a 200 yard approach distance in combination with a prohibition on parking in the path of the whales within 400 yards (365.8 m) provides for meaningful and economically viable whale watching and provides additional protection from vessels out in front of the whales. We acknowledge that enforcement of the prohibition on parking in the path of the whales will be challenging and recognize that whales can be unpredictable and can approach vessels unexpectedly. A regulation prohibiting parking in the path of killer whales will be clear to whale watch operators and is consistent with the current guidelines. These operators would likely know about such a regulation and would have some experience in judging the travel path of the whales and estimating a 400 yard (365.8 m) distance. Under certain conditions, however, whale movements can be unpredictable (*i.e.*, foraging whale pod spread out over a large area) even for experienced whale watchers. The prohibition on parking in the path is intended to address specific situations observed by monitoring groups where operators repeatedly position themselves to intercept the whales and do not get out of the way, rather than unexpected situations where whales are moving erratically and boaters find themselves in the path unexpectedly.

Comment 6: Speed restriction. There were comments in support of codifying the current guideline, which suggests a speed of less than 7 knots when within 400 yards (365.8 m) of the nearest whale. There was also support for go-slow zones in combination with or instead of the proposed no-go zone.

Response: The draft EA concluded that risks of vessel strikes and acoustic masking would be reduced if vessels traveled at a slow speed within 400 yards (365.8 m) of the whales, consistent with the current guidelines. We have not included such a provision in the final regulation because it would be difficult to enforce. We will continue to work with partners on the Be Whale Wise campaign to promote a speed guideline and encourage voluntary compliance to reduce impacts from fast moving vessels in close proximity to the whales. We will also consider go-slow zones when we further evaluate a no-go zone as described above under Comment 4: No-go zone.

Comment 7: Other suggested alternatives. Similar to comments we received in response to the ANPR, comments on the proposed rule included a variety of alternatives to the proposed regulations and the alternatives analyzed in the EA. The suggested alternatives included: Permit programs, stand-by zones, time limits for whale watching, time off from whale watching (days of the week or hours of the day), and a prohibition on whale watching during unsafe weather conditions. Comments suggesting variations on the alternatives fully analyzed have been addressed in Comments 3 through 6.

Response: Some of the alternatives suggested during the public comment period on the proposed rule were similar to alternatives suggested in response to the ANPR and these were considered, but not fully analyzed in the draft EA. The comments on stand-by zones and prohibiting whale watching under certain weather conditions were two new suggestions which were not included in the draft EA. The two new alternatives have been included in the alternatives considered but not analyzed in detail in the final EA. There were several reasons why we did not fully analyze or further consider a number of the alternatives suggested in public comments, including difficulties in enforcing them, changes to infrastructure needed to implement them, or a lack of sufficient science to support them. Alternatives considered but not analyzed in detail in the final EA include: (1) Permit or certification program. A permit or certification program, including stand-by zones, was not fully analyzed because it would require a large infrastructure to administer, monitor and enforce. There would also be equity issues in determining who is permitted or certified and who is not. (2) Moratorium on vessel-based whale watching. A moratorium on all vessel-based whale watching, or protected areas along all shorelines, would be challenging to enforce and are not supported by available scientific information. Both commercial and recreational vessels engage in a variety of wildlife and scenic viewing and other activities on the water and it would be difficult to determine at what point they were engaged in prohibited whale watching. (3) Shipping lane or vessel noise regulations. Regulatory options, such as rerouting shipping lanes or imposing noise level standards would have large

economic impacts and unnecessarily restrict some types of vessels rarely in close proximity to the whales. (4) Time limits. It would be difficult to determine when vessels were engaged in whale watching to enforce limits on viewing time, such as the 30 minute limit suggested in the Be Whale Wise guidelines or a time of day restriction on whale watching. (5) Aircraft regulations. Aircraft regulations are beyond the scope of minimizing impacts from vessels as identified in the EA. (6) No whale watching during poor weather conditions. It would be difficult to educate recreational boaters regarding specific weather conditions and when they could or could not watch whales and what vessel activities constitute "whale watching." There is currently no infrastructure to monitor weather conditions with respect to whale watching and to broadcast the information to alert boaters that particular weather conditions in a certain area trigger a prohibition on whale watching.

Comment 8: Scope and Applicability. NMFS received a variety of comments on the scope and applicability of the regulations including the geographic area, the species covered by the regulation and the types of vessels subject to the regulations. Several commenters suggested applying the proposed regulations throughout the range of the Southern Resident killer whales, rather than limiting the scope to inland waters of Washington. Other comments supported regulations that would apply to other species of whales and marine mammals in addition to killer whales. We received many comments on the types of vessels to which the regulations should apply. Commenters suggested that the regulations should only apply to whale watching vessels and that the regulations should not apply to kayaks. Commenters also identified additional exceptions for certain vessels and these are addressed below under Comment 9: Exceptions.

Response: Establishing regulations in coastal waters is an alternative that was considered, but not fully analyzed in the final EA. Most whale watching occurs in inland waters of Washington, with whale watching vessels originating from nearby ports in the United States and Canada. The presence of Southern Residents and other killer whales in inland waters is predictable and reliable, which is the basis for the success of the local commercial whale watch industry. The presence of the whales and proximity of the whale watching industry in inland waters of Washington concentrates whale watch activity in particular areas. Monitoring groups report a high number of incidents of vessels not following the current viewing guidelines in these waters, particularly along the west side of San Juan Island. There are no monitoring groups observing whale watching activities with killer whales in coastal waters, nor does there appear to be extensive whale watching activity in coastal waters, as we have limited sightings of the whales along the coast, and their presence is not reliable enough to support an active killer whale watching industry. If new information in the future indicates that whale watching poses a threat to the whales in coastal waters, we will consider the need for additional protections.

The final vessel regulation applies to all killer whales. It would be difficult for boaters, especially recreational boaters without expertise and experience with killer whales, to identify Southern Residents or even to identify killer whales to ecotype (resident, transient, offshore). Requiring boaters to know which killer whales they are observing is not feasible. In addition, providing protection to all killer whales in inland waters of Washington is appropriate under the MMPA. Including other whale or marine mammal species is outside the scope of this regulation, which is focused on protecting killer whales and, in particular, supporting recovery of endangered Southern Resident killer whales. Wildlife viewing in inland waters of Washington targets Southern Resident killer whales and while other marine mammal species are the subject of opportunistic viewing, particularly when killer whales are not present, vessel impacts have not been identified as a major threat for other marine mammals in inland waters of Washington. While the regulations do not apply to other marine species, we anticipate that other species may benefit as boaters aware of the regulations may be more likely to know about their potential impacts and keep their distance from all wildlife.

The regulations are designed to reduce the impact from vessels including the risk of vessel strikes, behavioral disturbance, and acoustic masking. Available data on vessel activities indicates that private and commercial whale watch vessels are most often in close proximity to the whales, and that other vessels such as government vessels, commercial and tribal fishing boats, cargo ships, tankers, tug boats, and ferries represent a small proportion (typically 5–7 percent in most years) of the vessels that are within one-quarter mile of the whales. Although not the primary focus of the regulations, vessels conducting activities other than whale watching (*i.e.*, transport, fishing, etc.) can impact the whales and are also subject to the regulations with some exceptions (*i.e.*, shipping lanes, safety). Because these vessels do not target the whales and are not often in close proximity, NMFS expects the impacts from adjusting course to avoid getting within 200 yards (182.9 m) of the whales or to stay out of their path will be minimal. We have not included exemptions for Washington State Ferries or vessels associated with oil spill preparedness or training based on the expectation that the vessels will rarely have to adjust their course to comply with the regulations and that the adjustments will be relatively easy to achieve, short-term and minimal. For example, Washington State Ferries already adhere to the 100-yard (91.4 m) guideline and should similarly be able to adhere to a 200-yard (182.9 m) regulation.

Several commenters stated that kayaks do not disturb whales and should be exempt from the regulations. While kayaks are small and quiet, they have the potential to disturb whales as obstacles on the surface. In both 2009 and 2010, 4 percent of incidents observed were committed by kayaks. Of the 1,067 incidents in 2010, 41 incidents (22 commercial and 19 private kayakers) specific to kayaks were observed including parking in the path (20 percent of kayak incidents in 2010). Soundwatch has reported that they likely underestimate kayak incidents because the Soundwatch observation vessel remains outside of the current voluntary no-go zone where considerable kayak activity takes place (Dismukes 2010). New information collected and analyzed in 2010 provides a better assessment of the potential for kayak disturbance and the cumulative effects of large numbers of kayaks in the vicinity of the whales.

For the summer of 2010, Soundwatch's Kayak Education and Leadership Program (KELP), San Juan County Parks, and the San Juan Island Kayak Association worked together to update and refine a Kayaker Code of Conduct as part of KELP. In 2010, the San Juan County Park implemented a required launch permit for boaters using the park boat launch. Before boaters could obtain a permit, they had to attend a required Code of Conduct Training conducted by KELP educators. Commercial operators were required to have all their guides trained by KELP educators and have their guests sign statements acknowledging that they had been trained on the Code of Conduct by

their guides. The code of conduct includes information about the Washington State law prohibiting approach within 100 yards (91.4 m) of Southern Resident killer whales, the Be Whale Wise guidelines, and additional guidelines such as staying close together (rafting) when whales approach, avoiding stopping at headlands to remain out of the whales path, stopping paddling if whales are within 100 yards (91.4 m) (91.4 meters), and suggestions for assessing their position and remaining outside of the path of the whales by moving offshore or inshore.

In addition to providing the guidelines and training for kayakers through the KELP education program, Soundwatch also monitored kayak activity and compliance of kayakers with the recommendations in the code of conduct to augment the Soundwatch vessel monitoring program. From June through September 2010, 594 total incidents were observed (66 percent commercial and 28 percent private) when kayakers did not follow all guidelines, with 171 incidents when kayaks were within 100 yards (91.4 m) of the whales. The most common incidents were kayaks not rafted, parked on headland or within kelp bed, parked in the path of whales and stopped within 100 yards (91.4 m) of whales (Koski 2010b).

Williams *et al.* (2010) analyzed impacts of kayaks on Northern Resident killer whales and reported that kayaks can have a significant impact on killer whale behavior. Killer whales exhibited increased probability of traveling behavior, which indicates an avoidance tactic, and decreased feeding activities when kayaks were present (Williams *et al.* 2010). For additional information on the scientific assessment of kayak impacts on killer whales see Comment 10: Scientific basis for regulations. Based on the best available information, the final regulations will apply to all vessels including kayaks to reduce impacts to the whales.

Comment 9: Exceptions. Commenters provided a range of suggestions for additional exceptions (*i.e.,* kayaks and sail boats, Washington State Ferries, all vessels except whale watching) and expressed disagreement with some of the exceptions in the proposed rule (vessels actively engaged in fishing). Almost all of these comments were specific to the proposed no-go zone. An exception for kayaks to all regulations is discussed under Comment 8: Scope and Applicability. Several commenters suggested wording changes regarding the exception for ships in the shipping lanes and their support vessels, and the exception for vessels actively engaged in fishing activities, and other suggested exempting ferries and vessel engaged in oil spill preparedness and training.

Response: Almost all of the suggestions for additional exceptions or fewer exceptions to the rule were specific to the no-go zone. While the no-go zone is not part of this final rule, NMFS will consider the information on exceptions and other aspects of a no-go zone (see Comment 4: No-go zone) and respond at a later date. NMFS has made changes to the description of the exception for vessels in the established shipping lanes, known as the Traffic Separation Scheme, to clarify when and how it applies to certain vessels. NMFS has also amended the language regarding exceptions for vessels actively engaged in fishing to include transfer of catch, however, vessels transiting to or from or scouting fishing areas are not exempt from the regulations. We expect impacts to these activities associated with fishing to occur in close proximity to whales only rarely and expect any impacts from changing course to maintain 200 yards (182.9 m) or to stay out of the whales' path to be minimal (IEC 2010).

Ferries and vessels associated with oil spill preparedness and training do not target the whales and are not often in close proximity, therefore, NMFS expects the impacts from adjusting course to avoid getting within 200 yards (182.9 m) of the whales and to stay out of their path on rare occasions will be minimal. We have not included exemptions for Washington State Ferries or vessels associated with oil spill preparedness or training based on the expectation that these vessels will rarely have to adjust their course to comply with the regulations and that the adjustments will be relatively easy to achieve, minimal and short-term. For example, Washington State Ferries already adhere to the 100-yard (91.4 m) guideline and should similarly be able to adhere to a 200-yard (182.9 m) regulation. Support vessels associated with booming activities required for fuel transfer or emergency pollution response would be exempt from the regulations based on the exemption for safe operation; we amended the safety exception to include these vessels.

Comment 10: Scientific basis for regulations. Commenters raised questions about the scientific information used to support the vessel regulations. Scientific information on the vessel impacts to whales was called biased, inconclusive, questionable, or wrong. Commenters placed a higher value on their personal observations than on the results from published studies and asserted that they have not seen the whales changing their behavior in response to vessels. Commenters raised concerns that scientists conducting scientific studies on killer whale were biased against the whale watch industry. Some commenters highlighted that results were not conclusive and challenged the interpretation of specific research results, questioning that increased energy expenditure form avoiding vessels or engaging in high energy surface active behaviors, like breaching and tail slapping, would result in a negative impact on the whales. Other commenters questioned the use of models to estimate the potential impact of vessel sound on the whales' ability to use echolocation to find prey in their habitat. Several commenters questioned the science used to demonstrate the potential for kayaks to impact killer whales primarily because it referred to studies on species other than killer whales in other geographic locations.

Response: NMFS relied on the best available data to develop the proposed and final regulations. The majority of the information came from peer reviewed scientific publications. To a lesser extent, unpublished data, personal accounts and other anecdotal information also informed development of the regulations. We gave greater weight to sound peer reviewed studies published in scientific journals than to personal observation and interpretation. These scientific studies use established scientific methods, test hypotheses, employ statistical analysis, and have been peer reviewed and published in scientific journals. These steps in the scientific process reduce the potential for bias in results. We reviewed all of the best available information from multiple independent scientists which also limits the concerns about potential bias related to one individual researcher.

Several independent scientists have reported behavioral changes in whale swimming patterns, changes in respiratory patterns, reduced time spent foraging/feeding, and increased surface active behaviors in the presence of vessels. These studies provide multiple lines of evidence regarding the nature and degree of vessel impacts on the behavior of killer whales. The data from these studies have been rigorously analyzed and the results are statistically significant. Some of the reported behavioral changes may not be obvious to casual observers.

We acknowledge that there is some uncertainty involved in interpretation of the results in the peer reviewed published papers. While we evaluated the quality, applicability and

uncertainty in the scientific information, we also relied on a conservative approach in weighing the severity and likelihood of impacts from vessels in light of the whales' status as an endangered species. The Noren *et al.* (2009) study reported increased energetically expensive surface active behaviors in the presence of vessels, and we considered the uncertainty regarding the conclusions. For example, the function of surface active behaviors is not known for certain. Noren *et al.* (2009) suggest these behaviors may serve a role in communication to promote group coordination, while several commenters speculated that it was play or that the whales enjoyed showing off for whale watch boats. Noren *et al.* (2009) also acknowledged uncertainty based on the limits of the study to provide details on all of the variables that determine whether vessel presence elicits a response in the whales. Even with the uncertainty about the function of the behaviors and some of the conclusions, we did consider the increased energy expenditure as an important result. We were conservative in assuming that increased energy expenditure likely has a negative impact on the whales, particularly in light of the concerns regarding reduced prey for the whales and other studies that found short-term behavioral responses can have long-term consequences for individuals and populations (Lusseau and Bejder 2007).

With field studies of wild animals there will always be some uncertainties because it is not possible to control for all of the variables. In addition, there are some hypotheses that cannot be tested with wild animals in the field. We routinely use models with inherent assumptions to help fill these data gaps and inform our decisions. For example, there is no direct data to measure a reduction in the efficiency of echolocation in the presence of vessel sound. Instead, we relied on a model created to estimate the vessel sound under varying conditions and calculate a reduction in echolocation efficiency. This model is based on data collected on the whales' hearing capabilities, sound recordings of vessels, sound propagation models, and some assumptions about the whales' ability to detect a salmon in the water column. We believe these assumptions are justified by the available information.

In the case of assessing the impact of kayaks on killer whales, we relied on studies done on similar species in other locations and research results that indicated trends, but were not conclusive. Several commenters questioned our reliance on studies of the effects of kayaks on dolphins to support a conclusion that kayaks have the potential to disturb killer whales. Although we believe the dolphin studies give insight into effects on killer whales (the largest member of the dolphin family), in response to these comments, we secured additional analysis of available data on Northern Resident killer whales. Williams *et al.* (2010) assessed the effects of kayak presence on Northern Resident killer whales and reported that kayaks can have a significant impact on killer whale behavior. In previous studies, Williams *et al.* (2006) reported changes to killer whale behavior from boat presence, pooling kayaks and motorized vessels together. In their recent study, the presence of both types of vessels was analyzed separately for data from 1995–2004. In the presence of only kayaks, the probability that the whales will shift to travel behavior from other behavior states (including feeding) significantly increased compared to situations with no vessels present, which indicates an avoidance tactic. As a result, the whales spent significantly more time traveling when in the presence of kayaks than they did under no-boat conditions (11 percent increase in time spent traveling). Consistent with previous studies, killer whales significantly reduced overall time spent feeding in the presence of kayaks and powerboats compared to no-boat conditions (30 percent decrease in time spent feeding). With respect to both kayaks and motorized vessels, the duration of feeding decreased and the overall proportion of time spent feeding decreased when vessels were present, regardless of the type of vessel. One model suggested that the effect of kayaks on feeding activity was perhaps less pronounced than the effect of powerboats on feeding activity. The types of effects vessels have on foraging activities seem to be similar whether the boats involved are kayaks or other types of vessels, but the whales may use different avoidance tactics to deal with the two types of vessels (Williams *et al.* 2010).

Comment 11: Economic analysis. Comments from individuals, commercial whale watch and other industry associations focused on the economic analysis and disagreed with some conclusions in the EA. Commenters believed that NMFS did not adequately evaluate potential economic impacts from new vessel regulations to whale watching businesses, kayak companies, recreational and commercial fishing communities, and the local economy in the San Juan Islands. In addition, several people providing oral comments were concerned that the economic analysis was conducted by a contractor outside of the Puget Sound area. Other commenters suggested that the proposed regulations would have a positive economic impact by protecting the whales, which draw large numbers of people to the area.

Response: In comments on the ANPR and on the proposed rule, whale watch operators expressed concerns regarding the economic impacts to their business from reduced participation in commercial whale watch trips conducted at 200 yards (182.9 m) from the whales. In the Pacific Whale Watch Association comments on the proposed rule, they suggested that at least one company would go out of business and estimated a 30 percent reduction in the number of companies participating in the industry over three years and a drop in revenue for the remaining 70 percent. No commenters provided data to support this assertion. The comments summarized information from informal surveys of customers indicating that they would not book a trip if they would be watching from 200 yards (182.9 m). The whale watch association also asserted that one of their most frequently asked questions is "How close can we get?" and 5 percent of bookings are lost when they answer "100 yards (91.4 m)." In the comments, the whale watch association acknowledged that their informal communications with customers were admittedly not "scientifically accurate surveys". The information from the informal customer surveys also contradicts information from published, peer reviewed, scientifically conducted surveys about the important features of trips for customers. Our analysis of the likely impacts to the whale watch industry relied on the published, peer reviewed, and scientifically conducted surveys using accepted statistical methods rather than the anecdotal information provided by the industry. As part of implementation of new regulations, NMFS will monitor to evaluate effectiveness of the regulations, as well as identify any unanticipated impacts in order to inform adaptive changes to the regulation.

To analyze economic impacts of alternative regulations, NMFS contracted with Industrial Economics, Incorporated (IEC), which has its headquarters in Massachusetts. IEC also has employees located in the Pacific Northwest. IEC has extensive expertise conducting economic analyses regarding actions taking place in Washington State waters, including Puget Sound. IEC has

gathered data and worked on multiple projects in the area, including salmon and killer whale critical habitat designations. In response to concerns raised in public comments about IEC's lack of local knowledge, IEC identified local economics experts from the University of Washington to review the draft economics analysis, help identify additional data, and contribute to the final economic analysis. The local economics experts reviewed the data sources, analysis methods, and assumptions about the study area. They supported the data and methods used. The local experts provided suggestions for clarifications of some assumptions, more detailed descriptions of data sources and methods, and inclusion of additional information on the positive impacts of protecting the whales (*i.e.*, existence values.) They did not identify any additional data sources to inform the analysis. IEC incorporated the results of this additional local review into the final economic analysis.

The economic analysis considers the potential that the Southern Resident killer whales could go extinct without regulatory protection and, therefore, reduce the value of the whale watching industry and contributions to the local economy. The economic analysis also indicates that the continued existence of rare species, including marine mammals, has a broad-based economic benefit separate from the viability of the whale-watching industry. The Endangered Species Act protects species that are in danger of or threatened with extinction and states that "these species are of esthetic, ecological, educational, historical, recreational and scientific value to the Nation and its people." Independent research also demonstrates the value that the public places on protection and recovery of endangered species including marine mammals (Loomis and Larson 1994).

Comment 12: Legal issues. Several comments included concerns regarding the legality of NMFS regulating vessel traffic in the transboundary area of Haro Strait with respect to the Treaty of 1846 between the United States and the United Kingdom [Canada] regarding maritime boundaries and rights of navigation. There were also comments suggesting that all whale watching activity is illegal because it involves "pursuit," which is prohibited under the Endangered Species Act. Some comments also questioned our compliance with Executive Order 12866 and the Regulatory Flexibility Act.

Response: Neither the proposed nor the final regulations violate the 1846 Treaty. NMFS has the authority to establish vessel regulations (including the proposed no-go zone) to protect killer whales from vessels in United States waters and related activities under various domestic laws including the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). Both the proposed and the final vessel regulations are reasonable and consistent with a coastal nation's ability to regulate the navigation of vessels in its territorial seas and internal waters under international law.

The ESA prohibits the "take" of endangered species, which it defines to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." The statute does not define the term "pursue" nor have we adopted regulations defining pursuit. Under both the ESA and MMPA, there are no exceptions to the take prohibition for whale watching; therefore wildlife viewing must be conducted in a manner that does not cause take. To promote responsible and sustainable marine animal viewing that avoids take, NMFS has worked with a variety of whale watch industries in multiple regions to develop numerous education programs, viewing guidelines and regulations. The agency believes that whale watching enhances marine mammal conservation by increasing education and fostering stewardship. The Recovery Plan for Southern Resident killer whales describes the educational benefits of whale watching and identifies actions such as supporting naturalist trainings (NMFS 2008). This is also the case for other species. The Recovery Plan for North Atlantic Right Whales includes a section on whale watching and includes actions regarding educating vessel operators about regulations and guidelines as well as training whale watch naturalists and including conservation messages to whale watchers (NMFS 2005). For this reason, we have not sought to curtail responsible viewing by applying an expansive interpretation to the prohibition on "pursuit." For additional information on NMFS' nationwide efforts to promote responsible wildlife viewing, please visit *http://www.nmfs.noaa.gov/pr/education/viewing.htm.*

We conducted a Regulatory Impact Review/Regulatory Impact Assessment (RIR/RIA) in accordance with Executive Order 12866 and the Regulatory Flexibility Act. We incorporate this assessment and the Final Regulatory Flexibility Analysis into the final EA as Chapter 6. The RIR/RIA summarizes the costs and benefits of alternative regulations, including the No-action Alternative of not promulgating regulations. The final EA, including RIR/RIA analysis, and separate economic analysis (IEC 2010) contain all the elements required of a RIR/RIA. The RIR/RIA also serves as a basis for our determination on whether the proposed action is a "significant regulatory action" under the criteria provided in Executive Order 12866.

Comment 13: NMFS should address other threats. Many oral and public comments cited the threats of pollution and contamination and insufficient salmon prey for the whales. A small number of comments raised concerns about use of Navy sonar. Some commenters suggested we should focus on these threats rather than vessel regulations, while other commenters supported the regulations and encouraged NMFS to also address the other threats.

Response: Promulgation of vessel regulations to protect Southern Resident killer whales is just one part of a comprehensive recovery program to address all of the major threats to the whales. The Recovery Plan for Southern Resident Killer Whales includes actions to address each of the threats and there are many ongoing efforts in the region to restore depleted salmon populations, clean up the Puget Sound ecosystem, develop a response plan for oil spills, use existing MMPA and ESA mechanisms to address sounds like Navy sonar, conduct education and outreach activities, and implement other actions in the plan (NMFS 2008). For more information on implementation of the recovery plan, please visit *http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Killer-Whales/Recovery-Implement/index.cfm.* For specific information on salmon recovery, please visit *http://www.salmonrecovery.gov* and for more information on efforts to address pollution and contaminants, please visit *http://www.psp.wa.gov/.* To the extent that actions authorized, funded, or carried out by a Federal agency may affect species listed under the ESA, the agency is required to consult with NMFS pursuant to ESA section 7, 16 U.S.C. 1536, and its implementing regulations.

Comment 14: Education about regulations. A number of commenters suggested that for new regulations to be effective it was essential to have a strong educational component.

Response: We agree that educating the public and industry is essential to promote compliance with any new regulations and achieve a reduction in vessel impacts to the whales. We recognize that adopting regulations that are different from the current voluntary

guidelines and State law may present some challenges. The new regulations, however, are largely extensions or expansions of the existing guidelines and Washington law. Additionally, the current infrastructure includes enforcement, monitoring, and stewardship groups, who will be available to assist with an education campaign to inform boaters about the new regulations and the scientific information on which they are based. We have developed an implementation plan for the new regulations that includes an active education program with our many partners including WDFW, the U.S. Coast Guard, Soundwatch, Straitwatch, and the Department of Fisheries and Oceans Canada. As part of an education program we will continue to work with partners on guidelines for safe operating procedures in the vicinity of whales.

Comment 15: Enforcement. Many commenters stressed the importance of enforcement for any new regulations to be effective. While some comments suggested that enforcing current guidelines and the state law would be sufficient to protect the whales, others supported the proposed regulations if there were sufficient resources to enforce new regulations.

Response: We agree that enforcement is essential to promote compliance with any new regulations and achieve a reduction in vessel impacts to the whales. Vessel operators are more likely to adhere to mandatory specific regulations than to the current voluntary guidelines. This likelihood for any particular rule would be affected by the clarity of the rules, motivations to comply, and the level of monitoring and enforcement. It is reasonable to assume that commercial operators would know about mandatory regulations, for the same reasons that they are familiar with the current specific voluntary guidelines, and would have strong incentives to comply to protect their business reputation. Recreational boaters are also more likely to comply with mandatory regulations, although they may be less likely to know the details of mandatory regulations than are commercial operators. Regulations with specific distances to the whales provide new tools for enforcement, so that cases are more straightforward and based on an objective criteria, like distance, rather than demonstrating changes in the behavior of the whales with respect to a specific action. Distance regulations are in place for other marine mammals and the NOAA Office for Law Enforcement has experience enforcing this type of regulations. In general, promulgation of specific mandatory regulations is likely to increase enforcement capability and compliance, which will result in fewer incidents between vessels and whales than occurs under the current regime. We have developed an implementation plan for the new regulations that includes an active education program with our many partners including WDFW, the U.S. Coast Guard, Soundwatch, Straitwatch, and the Department of Fisheries and Oceans Canada. See above Comment 1: Mandatory regulations versus voluntary guidelines and Comment 2: Enforce state law and maintain current guidelines, for additional information describing the current guidelines and regulations and our determination regarding the need for these new Federal regulations to protect the whales.

Comment 16: Monitoring effectiveness of regulations. Several commenters who supported the vessel regulations suggested that monitoring the effectiveness of regulations would be an important step to assess compliance and the benefit to the whales and identify and needed changes in the future. Several commenters expressed concern about the regulations, but were more supportive if there was a periodic review in place to evaluate the regulations.

Response: We agree that monitoring effectiveness of the regulations is an important part of an adaptive management process to ensure the regulations are effective in protecting the whales and to identify any unforeseen impacts to local communities. The success of a regulatory program to address vessel impacts is vital to recovery of the Southern Resident killer whales. Therefore, we will monitor the effectiveness of the final regulations and consider altering the measures or implementing additional measures if appropriate. We will continue to collect data on vessel activities in the vicinity of the whales to assess the anticipated increase in compliance with mandatory regulations and reduction in impacts to the whales. As described above (see Comment 3: Approach regulation, Comment 4: No-go zone, and Comment 11: Economic analysis) we will also continue to gather information and further consider the proposed no-go zone as an additional measure to protect the whales.

Comment 17: Consistent regulations in the United States and Canada. Several commenters supported consistent regulations in both United States and Canadian waters to assist with educating boaters and provide adequate protection for the whales.

Response: Southern and Northern Resident killer whales are listed as endangered and threatened, respectively, under the Species at Risk Act in Canada. We have coordinated for several years with the Canadian Department of Fisheries and Oceans to develop consistent guidelines for boaters operating in the waters of both countries. We will continue coordinating on guidelines and provide support for any efforts in Canada to also consider 200-yard (182.9 m) approach guidelines or regulations to maintain consistency and provide a benefit to the whales. Even without similar regulations in Canada, this rulemaking will provide substantial benefits to the Southern Residents because the whales spend considerable time in United States waters.

Comment 18: Technical changes. Several commenters including the U.S. Coast Guard suggested technical wording changes to ensure accuracy with other regulations or improve clarity of the rule.

Response: NMFS agreed with a number of the suggestions for small technical changes and made appropriate changes to the final rule and EA to ensure accuracy and improve clarity. In some cases we eliminated wording to simplify the regulations, such as removing the second sentence describing the 200-yard (182.9 m) approach prohibition.

Final Rule

Current efforts to reduce vessel impacts have not been sufficient to address vessel interactions that have the potential to harass and/or disturb killer whales by causing injury or disruption of normal behavior patterns (See Need for New Regulations). These regulatory measures are designed to protect killer whales from vessel impacts and will support recovery of Southern Resident killer whales. We are issuing these regulations pursuant to our rulemaking authority under MMPA section 112(a) (16 U.S.C. 1382(a)), and ESA 11(f) (16 U.S.C. 1540(f)). These final regulations also are consistent with the purpose of the ESA "to provide a program for the conservation of [* * *] endangered species" and "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species [* * *] and shall utilize their authorities in furtherance of the purposes of [the ESA]." 16 U.S.C. 1531(b), (c).

As part of the rulemaking process, we first published an ANPR and then a proposed rule that included proposed

regulations with three elements that would prohibit motorized, non-motorized, and self-propelled vessels in inland waters of Washington from: (1) Causing a vessel to approach within 200 yards (182.9 m) of any killer whale; (2) entering a restricted zone along the west coast of San Juan Island during a specified season, and (3) intercepting the path of any killer whale in inland waters of Washington. Based on public comments we are issuing final regulations with only two of the elements that were in the proposed rule.

Public comments on the no-go zone raised several suggested alternatives that we had not fully analyzed in the draft EA. In addition, we recognize that to be effective, regulations must be understood by the public and have a degree of public acceptance. Because of the many alternatives suggested by the public, and because of the degree of public opposition, we have decided to gather additional information and conduct further analysis and public outreach on the concept of a no-go zone. Therefore, the final rule does not adopt a no-go zone. We will pursue this additional work expeditiously because the best available information indicates there would be a significant conservation benefit to the whales if they were free of all vessel disturbance in their core foraging area.

The following sections pertain to the final regulations prohibiting motorized, non-motorized, and self-propelled vessels in inland waters of Washington from: (1) Causing a vessel to approach, in any manner, within 200 yards (182.9 m) of any killer whale, and (2) intercepting the path of any killer whale in inland waters of Washington. Below we describe the scope and applicability, requirements and rationale for the final regulations.

Scope and Applicability

Application to All Killer Whales: Under the MMPA and ESA the final regulations will apply to all killer whales. Although killer whales are individually identifiable through photo-identification, individual identification requires scientific expertise and resources (*i.e.*, use of a catalog) and cannot always be done immediately at the time of the sighting. It would be difficult for boaters, especially recreational boaters without expertise and experience with killer whales, to identify the individuals in the ESA-listed Southern Resident DPS or even to identify killer whales to ecotype (resident, transient, offshore). Requiring boaters to know which killer whales they are observing is not feasible. Section 11(f) of the ESA provides NMFS with broad rulemaking authority to enforce the provisions of the ESA. In addition, section 112(a) of the MMPA provides NMFS with broad authority to prescribe regulations that are necessary to carry out the purposes of the statute. Providing protection for all killer whales is a practical consideration because boaters cannot tell different types of killer whales apart and will also reduce the risk of disturbance or injury for all types of killer whales which is consistent with the purpose of the MMPA.

Geographic Area: Regulations will apply to vessels in inland waters of Washington under U. S. jurisdiction. Inland waters include a core summer area for the whales around the San Juan Islands, as well as a fall foraging area in Puget Sound and transit corridor along the Strait of Juan de Fuca. These three areas make up over 2,500 square miles and were designated as critical habitat for Southern Resident killer whales (71 FR 69054; November 29, 2006). These regulations will apply to an area similar to designated critical habitat, including inland waters of the United States east of a line connecting Cape Flattery, Washington (48°23′10″ N./124°43′32″ W.), Tatoosh Island, Washington (48°23′30″ N./124°44′12″ W.), and Bonilla Point, British Columbia (48°35′30″ N./124°43′00″ W.) and south of the U.S./Canada international boundary. The shoreline boundary is the charted mean high water line cutting across the mouths of all rivers and streams.

Vessels Subject to Final Rule: The regulations apply to all motorized and non-motorized vessels in the inland waters of the United States described above. All vessels in U.S. waters, including foreign flag vessels, and persons not citizens of the United States are subject to the jurisdiction of the United States to the extent consistent with recognized principles of international law, including treaties and international agreements to which the United States is signatory. Commercial and recreational whale watch vessels include both motorized and non-motorized vessels (*i.e.*, kayaks and sail boats), both of which can cause disturbances to whales. While kayaks are small and quiet, they have the potential to disturb whales as obstacles on the surface. Kayaks may startle marine mammals by approaching them without being heard (Mathews 2000). Data indicate that substantial numbers of kayakers failed to follow existing voluntary guidelines, and in a study of sea lions, Mathews (2000) found that kayakers were significantly more likely to approach wildlife closely. Kayakers may approach wildlife more closely because they may be more apt to overestimate distance because of their low aspect on the water, and to assume they are less likely to disturb wildlife than other vessels (Mathews 2000). In studies comparing effects of motorized and non-motorized vessels on dolphins, the type of vessel did not matter as much as the manner in which the boat moved with respect to the dolphins (Lusseau 2003b). Some dolphins' responses to vessels were specific to kayaks or were greater for kayaks than for motorized vessels (Lusseau 2006, Gregory and Rowden 2001, Duran and Valiente 2008). Several studies that have documented changes in behavior of dolphins and killer whales in the presence of vessels include both motorized and non-motorized vessels in their analysis (Lusseau 2003b, Nichols *et al.* 2001, Trites *et al.* 2007, Noren *et al.* 2007, 2009).

In response to public comments regarding our reliance on studies of kayak impacts involving other species, NMFS secured additional analysis of available data on Northern Resident killer whales and behavioral responses to kayaks. Williams *et al.* (2010) analyzed the effects of kayak presence on Northern Resident killer whales and reported that kayaks can have a significant impact on killer whale behavior. In previous studies, Williams *et al.* (2006) reported changes to killer whale behavior from boat presence, pooling kayaks and motorized vessels together. In their recent study, the presence of both types of vessels was analyzed separately for data from 1995–2004. In the presence of only kayaks, the probability that the whales will shift to travel behavior from other behavior states (including feeding) significantly increased compared to no-boat conditions, which indicates an avoidance tactic. As a result, the whales spent significantly more time traveling when in the presence of kayaks than they did under no-boat conditions (11 percent increase in time spent traveling). Consistent with previous studies, killer whales significantly reduced overall time spent feeding in the presence of kayaks and powerboats compared to no-boat conditions (30 percent decrease in time spent feeding). With respect to both kayaks and motorized vessels, the duration of feeding decreased and the overall proportion of time spent feeding decreased when vessels were present, regardless of the type of vessel. One model suggested that the effect of kayaks on feeding activity was perhaps less pronounced than the effect of

powerboats on feeding activity. The types of effects vessels have on foraging activities seem to be similar whether the boats involved are kayaks or other types of vessels, but the whales may use different avoidance tactics to deal with the two types of vessels (Williams *et al.* 2010).

While the specific information on impacts to killer whales from kayaks is preliminary at this time, we have taken a conservative approach in assessing this information in light of the endangered status of the Southern Residents. We have considered the information with respect to cumulative impacts as well as the other threats to killer whale survival and recovery. Even if the effects are small for individual kayakers, there are large numbers of kayakers targeting the whales and the cumulative impacts of both kayaks and other types of vessels are significant. In June to September 2010, Soundwatch monitored zones out to ½ mile from shore and observed over 2,100 kayaks in the monitoring zones with the whales and up to 41 kayaks with the whales at one time. Soundwatch observed 594 incidents of kayakers not following recommended guidelines. The cumulative impact of kayaks and all vessels and their effect on feeding behavior is particularly important because we are concerned about the whales' ability to get sufficient prey to maintain their health. Based on all of the information available and a conservative approach to protect endangered Southern Residents, NMFS' final regulations protect killer whales from both motorized and non-motorized vessels.

Exceptions: Five specific categories of vessels will be exempt from the vessel regulations: (1) Government vessels, (2) cargo vessels transiting in the shipping lanes, (3) research vessels, (4) fishing vessels actively engaged in fishing, and (5) vessels limited in their ability to maneuver safely. These exceptions are based on the likelihood of certain categories of vessels having impacts on the whales and the potential adverse effects involved in regulating certain vessels or activities.

Available data on vessel effects on whales from Soundwatch (Koski 2007, 2008, 2009, 2010a), Bain (2007) and Giles and Cendak (2010) indicate that commercial and recreational whale watch vessels are more likely to affect killer whales. This is because operators of whale watching vessels are focused on the whales, track the whales' movements, spend extended time with the whales, and are therefore most often in close proximity to the whales. Other vessels such as government vessels, commercial and tribal fishing boats, cargo ships, tankers, tug boats, and ferries do not target whales in their normal course of business. Soundwatch (Koski 2007, 2008, 2009, 2010a) and Bain (2007) report that these types of vessels combined comprise only 6 percent or less of vessels within ½ mile of the whales from 2006–2009. In 2010 there was a higher percent of commercial fishing vessels observed within ½ mile of the whales which was likely due to increased fishery openings coinciding with presence of whales (Koski 2010b). In 2007–2008, Giles and Cendak (2010) recorded the distance of vessels from the whales using an integrated GPS, range finder and compass and reported only 21 ferries and 22 shipping vessels out of 11,710 vessels observed within 1,000 yards of the whales (0.4 percent). In addition, these vessels generally move slowly and usually in a predictable straight path, which reduces the risk of strikes to whales. While NMFS recognizes that sound from large vessels has the potential to affect whales even at great distances, the primary concern based on available information is the sound from small, fast moving vessels moving in close proximity to the whales and targeting the whales.

Ferries and vessels associated with oil spill preparedness and training do not target the whales and are not often in close proximity; therefore, NMFS expects the impacts from adjusting course to avoid getting within 200 yards (182.9 m) of the whales and to stay out of their path on rare occasions will be minimal. We have not included exemptions for Washington State Ferries, other publicly operated ferries, or vessels associated with oil spill preparedness or training based on the expectation that these vessels will rarely have to adjust their course to comply with the regulations and that the adjustments will be relatively easy to achieve, minimal and short-term. For example, Washington State Ferries already adhere to the 100-yard (91.4 m) guideline and should similarly be able to adhere to a 200-yard (182.9 m) regulation.

Vessels engaged in scientific research do closely approach killer whales to obtain photographs, collect a variety of samples, and observe behavior. Researchers must obtain permission from NMFS before they may legally closely approach the whales. Before permitting research, NMFS evaluates the potential effects of these activities under both the ESA and MMPA. Expertise of researchers, operating procedures, and permit terms and conditions reduce the potential impacts to whales. In issuing permits, NMFS weighs the benefit of the research to the whales' survival and recovery against the harmful impacts of close approaches.

Regulating some categories of vessels could cause adverse impacts. Government vessels are often critical to safety missions, such as search and rescue operations, enforcement, pollution response and activities critical to national security. The movement of large commercial vessels in U.S. and Canadian waters in the area are managed by the Puget Sound Vessel Traffic Service and the Cooperative Vessel Traffic Service, which are designed to efficiently and safely manage vessel transits in the shared waters of the U.S. and Canada. U.S. regulations require power-driven vessels 40 meters or greater in length, while navigating or towing vessels eight or more meters in length, and vessels certificated to carry 50 or more passengers for hire when engaged in trade to participate in the Vessel Movement Reporting System (VMRS) (Navigation and Navigable Waters, 33 CFR 161). These ships generally follow well-defined navigation lanes established by the International Maritime Organization (IMO), known as Traffic Separation Schemes (TSS) (rules for vessel conduct is established by U.S. Coast Guard Navigation Rule 10). If large ships following traffic lanes or making their way to or from the lanes were required to make sudden or unpredictable movements to avoid close approaches to whales, it may impact the good order and predictability of maritime traffic, as well as adversely affect navigation safety, thus increasing the risk of collision and groundings. For the safety of vessel navigation, large ships are sometimes escorted or assisted by smaller vessels such as tug boats, which sometimes navigate just outside the designated lanes. Sudden or unpredictable movements by these escort vessels, in order to avoid close approaches to whales, could also increase the risk of collisions and pose safety hazards. Support vessels associated with booming activities required for fuel transfer or emergency pollution response would also be exempt from the regulations based on the exemption for safe operation.

Commercial fishing vessels, in which the fish harvested are intended to enter commerce, when actively engaged in fishing are exempt from the new regulatory requirements. If they were required to follow regulations while actively engaged in fishing, it could compromise gear or catch. Also, treaty Indian fishing vessels actively engaged

in fishing are exempt from the new regulatory requirements. Exempting treaty Indian fishing vessels is consistent with treaty fishing rights and use of Usual and Accustomed fishing areas. NMFS is also exempting vessels from any regulations if the exemption is required for the safe operation of a vessel to avoid adverse effects to public safety.

Based on these considerations, NMFS' final regulations include several exceptions. The burden would be on the vessel operator to prove the exception applies, and vessel operators would not be exempt from the take prohibitions under the MMPA or ESA. Federal government vessels would not be exempt from consultation requirements under Section 7 of the ESA. The following exceptions apply to all regulations:

(1) The regulations would not apply to Federal Government vessels operating in the course of official duty or to state and local government vessels engaged in official duties involving law enforcement, search and rescue, or public safety.

(2) The regulations would not apply to vessels participating with a Vessel Traffic Service (VTS) and following a Traffic Separation Scheme or complying with a VTS Measure of Direction. This also includes boats escorting vessels in the traffic lanes, such as tug boats.

(3) The regulations would not apply to activities, such as scientific research, authorized through a permit issued by the National Marine Fisheries Service under part 222, subpart C, of this chapter (General Permit Procedures) or through a similar National Marine Fisheries Service authorization.

(4) The regulations would not apply to treaty Indian and commercial fishing vessels lawfully engaged in actively setting, retrieving, or closely tending fishing gear or transferring catch. (Note: The regulations would apply to all fishing vessels, including treaty Indian and non-treaty vessels, transiting to or from fishing areas.)

(5) The regulations would not apply to vessel operations necessary for safety to avoid an imminent and serious threat to a person or vessel, including when necessary for overall safety of navigation, to comply with the Navigation Rules, or in direct support of environmental protection.

Requirements

Approach Restrictions: The final regulations prohibit vessels from approaching any killer whale in the inland waters of Washington closer than 200 yards (182.9 m). This includes approaching, in any manner, including by interception (*i.e.*, placing a vessel in the path of an oncoming killer whale, so that the whale surfaces within 200 yards (182.9 m) of the vessel, or positioning a vessel so that wind or currents carry the vessel to within 200 yards (182.9 m) of a whale).

Prohibition against parking in the whales' path: The final regulations require vessels to keep clear of the whales' path within 400 yards (365.8 m) of the whales. Parking in the path includes interception (positioning a vessel so that whales surface within 200 yards (182.9 m) of the vessel, or so that wind or water currents carry the vessel into the path of the whales).

Rationale for Regulations

The endangered Southern Resident killer whales are a small population with only 86 whales in the population at the end of 2010. The Southern Residents underwent an almost 20 percent decline from 1996 to 2001, and while there were several years of population increases following 2001, there have also been recent years with declines.

Our listing decision and the Recovery Plan for Southern Resident killer whales identified three major threats to their continued existence, all of which likely act in concert—prey availability, contaminants, and vessel effects and sound. While we and others in the region are working to restore salmon runs and minimize contamination in Puget Sound, these efforts will likely take many years to provide benefits for killer whales. In contrast, the threats posed by vessels can be reduced quickly by regulating vessel activities. The primary objective of promulgating these regulations is to manage the threats to killer whales from vessels, in support of the recovery of Southern Residents.

Monitoring groups such as Soundwatch have reported that the mean number of vessels following a given group of whales within ½ mile increased from five boats in 1990 to an average of about 15–20 boats during May through September, for the years 1998 through 2010 (Osborne *et al.* 1999; Baird 2001; Erbe 2002; Marine Mammal Monitoring Project 2002; Koski 2004, 2006, 2007, 2008, 2009, 2010a, 2010b). At any one time, the observed numbers of commercial and recreational whale watch boats around killer whales can be much higher. Monitoring groups have collected several years of data on incidents when vessels are not adhering to the guidelines and the whales may be disturbed. From 2006–2010, there were between 1,085 (2007) and 2,527 (2009) reported incidents per year where vessels did not follow the guidelines during the time the observers were present (Koski 2007, 2008, 2009, 2010a, 2010b). Since observers were not present during all days and all hours, it is likely that there were more incidents than those reported. In 2009, there were 2,527 incidents, and the majority were committed by private boaters (72 percent) and Canadian commercial operators (8 percent). Of the 1,067 incidents in 2010, the majority were committed by private boaters (64 percent) and Canadian commercial operators (10 percent) (Koski 2010a, 2010b). The most common incidents also reflect this pattern and are most often committed by private boaters and Canadian commercial whale watch vessels. The four most commonly observed incidents in 2010, and for the last several years, were parking in the path, vessels motoring inshore of whales, vessels motoring within 100 yards (91.4 m) of whales, and vessels motoring fast within 400 yards (365.8 m) of the whales (Koski 2008, 2009, 2010a, 2010b).

For the summer of 2010, Soundwatch's Kayak Education and Leadership Program (KELP), San Juan County Parks, and the San Juan Island Kayak Association worked together to update and refine a Kayaker Code of Conduct as part of KELP. In addition to providing the guidelines and training for kayakers through the KELP education program, Soundwatch also monitored kayak activity and compliance of kayakers with the recommendations in the code of conduct to augment the Soundwatch vessel monitoring program. From June through September 2010, 594 incidents were observed (66 percent commercial and 28 percent private) and the most common incidents were kayaks not rafted, parked on headland or within kelp bed, parked in the path of whales and stopped within 100 yards (91.4 m) of whales.

The specific threats from these vessel incidents include (1) risk of strikes, which can result in injury or mortality, (2) behavioral disturbance, which increases energy expenditure and reduces foraging opportunities, and (3) acoustic masking, which interferes with echolocation and foraging, as well as communication. Southern and Northern Resident killer whales have been injured or killed by collisions with vessels. Some whales have sustained injuries from propeller blades and have eventually recovered, one was instantly killed, and several mortalities of stranded animals have been attributed to vessel strikes in recent years (Visser 1999; Ford *et al.* 2000; Visser and Fertl

2000; Baird 2001; Carretta *et al.* 2001, 2004, Gaydos and Raverty 2007).

As described in the background section of this final rule and in the EA, it is well documented that killer whales in the Pacific Northwest respond to vessels engaged in whale watching (including kayaks) with short-term behavioral changes. Examples of short-term behavioral responses include increases in direction changes, respiratory intervals, and surface active behaviors, all of which can increase energy expenditure (Bain *et al.* 2006; Noren *et al.* 2007, 2009; Williams *et al.* 2009). Southern Residents also spend less time foraging in the presence of vessels (Bain *et al.* 2006, Lusseau *et al.* 2009; Giles and Cendak 2010; Williams *et al.* 2010). Williams *et al.* (2006) estimated that increased energy expenditure may be less important than the reduced time spent feeding and the resulting likely reduction in prey consumption in the presence of vessels. Vessels in the path of the whales can interfere with important social behaviors such as prey sharing (Ford and Ellis 2006) or with behaviors that generally occur in a forward path as the whales are moving, such as nursing (Kriete 2007).

Vessel sounds may mask or compete with and effectively drown out calls made by killer whales, including echolocation used to locate prey and other signals the whales rely upon for communication and navigation. Masking of echolocation reduces foraging efficiency (Holt 2009), which may be particularly problematic if prey resources are limited. Vessel noise was predicted to significantly reduce the range at which echolocating killer whales could detect salmon in the water column. Holt (2009) reported that the detection range for a killer whale echolocating on a Chinook salmon could be reduced 88 to 100 percent by the presence of a moving vessel within 100 yards (91.4 m) of the whale. Masking sound from vessels could affect the ability of whales to coordinate their feeding activities, including searching for prey and prey sharing. Foote *et al.* (2004) attributed increased duration of primary communication calls to increased vessel traffic and a recent study also found similar increased durations for a larger number of calls (Wieland *et al.* 2010). Holt *et al.* (2009) found that killer whales increase their call amplitude in response to vessel noise.

Energetic costs from increased behavioral disturbance and reduced foraging can decrease the fitness of individuals (Lusseau and Bejder 2007). Energy expenditure or disruption of foraging could result in poor nutrition. Poor nutrition could lead to reproductive or immune effects, or, if severe enough, to mortality. Interference with foraging can affect growth and development, which in turn can affect the age at which animals reach reproductive maturity, fecundity, and annual or lifetime reproductive success. Interference with essential behaviors, including prey sharing and communication, could also reduce social cohesion and foraging efficiency for Southern Resident killer whales, and, therefore, the growth, reproduction, and fitness of individuals. Injuries from vessel strikes could also affect the health and fitness of individuals. Any injury to or reduction in fitness of a single member of the Southern Resident killer whale population is serious because of the small population size.

To reduce the risk of vessel strikes, behavioral disturbance, and acoustic masking, and to manage effectively the threat from vessels, regulations must reduce the current number of harmful vessel incidents. Monitoring demonstrates that there are numerous incidents in which the current voluntary guidelines are not observed. Researchers in other regions have also reported low compliance with voluntary guidelines designed to protect other endangered whales (Wiley *et al.* 2008). Research suggests that vessel operators are more likely to comply with mandatory regulations than with voluntary guidelines (May 2005). In addition, level of compliance is likely to depend on how easy the regulations are to understand, follow and enforce. We therefore expect that clear mandatory regulations will reduce the number of incidents, compared to the current voluntary guidelines.

After analyzing a range of alternative regulations, we concluded that the most appropriate measures to protect the whales are a combination of an approach regulation and a prohibition on parking in the path. We recognize that adopting regulations that are different from the current voluntary guidelines and State law may present some challenges. The current infrastructure, however, includes enforcement, monitoring, and stewardship groups, who will be available to assist with an education campaign to inform boaters about the new regulations and the scientific information on which they are based. The combination of two measures as part of the regulation package provides multiple tools for enforcement that are measurable, easy for the public to understand, and based on the best available science regarding vessel impacts. The final EA contains a full analysis of a No-action alternative, six individual alternatives, the proposed regulations combining three elements and the final regulation combining two elements, described below.

200-yard (182.9 m) approach regulation. A regulation prohibiting approaches closer than 200 yards (182.9 m) will be clear to whale watch operators. These operators will likely know about such a regulation and be able to accurately judge the distance of their vessels from whales, as indicated by their current high levels of compliance with the current 100-yard (91.4 m) guideline. Recreational boaters would be less likely to know about such a regulation, though over time it is reasonable to expect that familiarity with the regulation would increase, particularly with education and publicity about any prosecutions. Some recreational boaters may also follow the example of commercial operators to determine the proper viewing distance.

The 200-yard (182.9 m) approach regulation is intended to reduce the risk of vessel strikes, the degree of behavioral disruption, and the amount of noise that masks echolocation and communication. Current research results have documented behavioral disturbance and estimated a considerable potential for masking from vessels at 100 yards (91.4 m). These effects are reduced at 200 yards (182.9 m) and greater distances. Some effects are observed up to 400 yards (365.8 m) from the whales. While an approach regulation at a distance greater than 200 yards (182.9 m) would further reduce vessel effects, this could diminish both the experience of whale watching and opportunities to participate in whale watching. We recognize that whale watching educates the public about whales and fosters stewardship. We balanced the benefits to killer whales of a greater approach distance regulation and continued whale watching opportunities, and we arrived at the 200-yard (182.9 m) approach regulation.

Parking in the path prohibition. As described above, parking in the path of a whale is a common violation of the current guidelines by commercial whale watch operators and an increasing number of private boaters. It also carries one of the greatest risks, since it increases the chance of vessel strike. This regulation is consistent with the current guidelines and therefore already understood by commercial whale watch operators. A prohibition on parking in the path complements the approach regulation, which prohibits approaching within 200 yards (182.9 m) of the

whales, including by interception. The path regulation provides the best management tool for improving compliance and reducing the risk of vessel strikes and masking from vessels directly in front of the whales. The risk of vessel strikes and masking are both most severe when vessels are directly in front of the whales. By instituting a mandatory regulation in place of a voluntary guideline, we expect increased compliance, particularly by the commercial operators who are most often in the path of the whales.

The final regulations for killer whales differ from protective regulations promulgated to protect other marine mammal species in other locations. In each case the development of regulations was based on the biology of the marine mammal species and available information on the nature of the threats. For the Southern Resident killer whales, we have detailed information on killer whale biology, vessel activities around the whales, and vessel effects on the whales' behavior and acoustic foraging activities that informed the selection of the final rule.

We did not propose some of the regulatory options suggested in the ANPR and in public comments on the proposed rule for several reasons, including, difficulties in enforcing them, changes to infrastructure needed to implement them, or a lack of sufficient science to support them. For example, a speed limit within a certain distance of the whales (*i.e.*, less than 7 knots within 400 yards (365.8 m) of the whales) would be difficult to implement and enforce without vessel tracking technology. A permit or certification program would require a large infrastructure to implement. There would also be equity issues in determining who is permitted or certified and who is not. A moratorium on all vessel-based whale watching, or protected areas along all shorelines, would be challenging to enforce and is not supported by available scientific information. Some comments suggested regulatory options such as rerouting shipping lanes or imposing noise level standards, which would unnecessarily restrict some types of vessels rarely in close proximity to the whales.

We considered both benefits and costs in selecting the final regulation. The reduction in threats for each element of the regulation package as described above provides a benefit to the whales, as well as to the public who value the whales. Reducing threats to the whales also supports the long-term sustainability of the whale watching industry. The regulations also provide benefits to some land-based viewing and may provide benefits to other marine species. In addition to the benefits, we also considered the potential costs of the proposed regulations. To limit some potential costs to vessels or industries rarely in close proximity to the whales, we have included several exemptions to the regulations (*i.e.*, ships in shipping lanes, fishing vessels). The exemptions also prevent other potential costs by protecting public safety, allowing for critical government and permitted activities to continue, and allowing us to fulfill our treaty trust responsibilities.

The costs of implementing vessel regulations to protect the whales will likely be greatest for the commercial whale watch industry and recreational whale watchers. One cost of the proposed regulations is to increase viewing distance, which may affect the quality of whale watching experiences. An increased viewing distance affects the experience of the whale watch participants and not necessarily the revenue of the industry or companies. While some commercial whale watch operators have suggested that increased viewing distance will affect their revenue, there is information indicating that proximity to the whales is not the most important aspect of whale watching, and that participants value viewing in a manner that respects the whales. We do not anticipate any loss of business or reduction in the number of opportunities for participating in whale watching activities. Other impacts to boaters are expected to be minor and include slight deviations of a vessel's path in order to comply with the regulations. Additionally, due to the need for these regulations to facilitate recovery of the Southern Resident population, we anticipate that the continued recovery of the population will result in broad-based benefit to the general public.

In developing these regulations, we have determined that current regulations and guidelines are not sufficient to protect endangered Southern Resident killer whales and that additional regulations are necessary to reduce the risk of extinction. While we cannot quantify the reduction in risk of extinction, the perilous status of the Southern Residents makes it appropriate to take all reasonable actions to improve their chances of survival and recovery. We are issuing appropriate final regulations to reduce threats posed by vessels, limit costs, and maintain opportunities for the public to participate in whale watching. Of the alternatives considered, we chose a combination of two which provide benefits. All of the options have relatively low socioeconomic and recreation costs. In contrast, the cost of extinction of Southern Residents is incalculable. The final regulations will have a net benefit to the whales and the public who value the whales.

Evaluation of the Effectiveness of the Measures

The success of this program is vital to the recovery of the species. Therefore, NMFS will monitor the effectiveness of the final regulations and consider altering the measures or implementing additional measures if appropriate.

References Cited

A complete list of all references cited in this proposed rule can be found on our Web site at *http://www.nwr.noaa.gov/* and is available upon request from the NMFS office in Seattle, Washington (see **ADDRESSES**).

National Environmental Policy Act and Regulatory Flexibility Act

NMFS has prepared a final EA and Finding of No Significant Impact (FONSI) pursuant to NEPA to support this final rule. NMFS was the lead agency for the analysis and the U.S. Coast Guard, Washington Department of Fish and Wildlife, and the Department of Fisheries and Oceans, Canada were cooperating agencies. The final EA also includes a Regulatory Impact Review. An economic report and Regulatory Impact Review, including an analysis under the Regulatory Flexibility Act, were prepared to support the regulation. The Final Regulatory Flexibility Analysis (FRFA) is included in Chapter 6 of the final EA.

IEC (2010) identified a total of 283 small business entities that may be affected by the vessel regulations to protect killer whales implemented by this final rule. This includes 23 small businesses in the whale watching industry, 248 in fishing related industry, and 12 in freight transportation. NMFS considered 9 alternatives for this rulemaking, which are:

Alternative 1: No-action;

Alternative 2: 100–Yard (91.4 m) Approach Regulation;

Alternative 3: 200–Yard (182.9 m) Approach Regulation;

Alternative 4: Protected Area—Current Voluntary No-go Zone;

Alternative 5: Protected Area—Expanded No-go Zone;

Alternative 6: Speed Limit of 7 Knots Within 400 Yards (365.8 m) of Killer Whales;

Alternative 7: Keep Clear of the Whales' Path;

Alternative 8: Proposed Action (Package of Alternatives 3, 5, and 7); and

Alternative 9: Preferred Alternative (Package of Alternatives 3 and 7).

Chapter 2 of the final EA describes each of the 9 alternatives that were analyzed. A summary of the impacts of each of the 9 alternatives is provided below. For detailed information on the costs of each alternative, see Chapter 4 of the final EA. For a summary of the costs and benefits of each alternative, see Table 6–1 found in Chapter 6 of the final EA. The cost of the No Action Alternative is the potential loss of the whale watch industry based on an increased extinction risk for the whales. While operations of the whale watch industry may be affected to different degrees by Alternatives 2 through 9, it is the customers and not necessarily the whale watching companies (*i.e.*, small entities for the purposes of RFA) who may bear impacts. The economic analysis (IEC 2010) projects no change in revenue for whale watching operations or other industries, but rather the potential diminished value of the customers' experience as a result of greater viewing distances and displacement of vessels.

The economic analysis and final EA quantify the number of trips and participating individuals for different types of vessels (commercial whale watch, private whale watching, kayaking, and fishing) that would be potentially affected by Alternatives 2 through 9. A small number of commercial and private whale watching trips, kayak and fishing trips would have to adjust their operations to comply with Alternative 2 (a 100-yard (91.4 m) Approach Regulation). Under Alternative 3 (a 200-yard (182.9 m) Approach Regulation) there was a range of estimated trips and individuals that would experience greater viewing distance which included up to all participants in commercial and private whale watching trips. There was some uncertainty regarding the potential effects of Alternatives 4 and 5 (Current and Expanded No-go Zones), which included increased viewing distances for a small percent of all commercial and private whale watching trips and displacement of a large number of commercial and recreational kayaks from the San Juan County boat launch and a smaller number of commercial fishing vessels from the no-go zone. A small number of commercial and private whale watching trips, kayak and fishing trips would be affected by having to comply with Alternative 6 (a Speed Limit of 7 Knots Within 400 Yards (365.8 m) of Killer Whales) similar to the numbers for Alternative 2 (the 100–Yard (91.4 m) Approach Regulation). A larger number of commercial whale watching trips and similar small number of private whale watching trips would be affected by Alternative 7 (Keep Clear the Whales' Path) compared to Alternatives 2 and 6. Alternative 8 is a combination of Alternatives 3, 5 and 7 and would have the greatest impacts of all the action alternatives. Alternative 9 is a combination of Alternatives 3 and 7 and would have fewer impacts than Alternative 8, but greater impacts than the individual alternatives (Alternatives 2 through 7).

The benefits of two alternatives, Alternatives 3 and 7, are high and Alternative 9 combines these individual regulations into an action with high benefit. The expected costs are minimal for each alternative. The costs associated with Alternatives 2 through 9, as estimated by the number of commercial and recreational trips and passengers affected vary, and in some cases the overall number of trips and passengers affected are small (Alternatives 2, 4, 6, and 7). For other alternatives (Alternatives 3, 5, 8 and 9) there is some uncertainty as to the number of trips and passengers affected. Even if all participants in recreational and commercial whale watching are affected, the impact itself (based on an increased viewing distance) is small. Alternative 8 with the highest benefit and small costs provides the highest net benefit. Alternative 9 also has a high benefit and small costs, providing a net benefit. Alternative 9 does not include Alternative 5 (the Expanded No-go Zone). However, NMFS recognizes the increased benefit to the whales of reducing vessel impacts in a core foraging area and will collect additional information and seek public input to further evaluate the concept of a no-go zone. While there may be some economic cost to various industry groups under Alternative 9, particularly commercial whale watching, overall this cost is likely to be minimal and outweighed by the conservation benefits of regulations. NMFS does not expect any small entity to cease operation as a result of any of the alternatives, including the Preferred Alternative (Alternative 9). The primary costs under the Preferred Alternative (Alternative 9) are a diminished value to individuals engaged in whale watching at greater distances and would not be borne by these small entities. Additional information on selection of the Preferred Alternative (Alternative 9) is included in the Rationale for Regulations section of this final rule. The final EA including the FONSI and FRFA, Regulatory Impact Review, and supporting documents are available for review and can be found on the NMFS Northwest Region Web site at: *http://www.nwr.noaa.gov/*.

Clarity of This Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you believe that we have not met these requirements, send us comments (see **ADDRESSES** section). To better help us revise rules in the future, your comments should be as specific as possible.

Required Determinations

Paperwork Reduction Act

This final rule will not impose any new requirements for collection of information that requires approval by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) This rule will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations.

Executive Order (E.O.) 12866—Regulatory Planning and Review

This Final Rule was determined to be significant for purposes of E.O. 12866. It was reviewed by the Office of Management and Budget and other interested Federal agencies.

E.O. 12988—Civil Justice Reform

We have determined that this final rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of E.O. 12988. We issue protective regulations pursuant to provisions in the ESA and MMPA using an existing approach that improves the clarity of the regulations and minimizes the regulatory burden of managing ESA listings while retaining necessary and advisable protections to provide for the conservation of threatened and endangered species.

E.O. 13175—Consultation and Coordination With Indian Tribal Governments

The longstanding and distinctive relationship between the Federal and

tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and co-management agreements. These differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. E.O. 13175 outlines the responsibilities of the Federal Government in matters affecting tribal interests. During our scoping process we provided the opportunity for all interested tribes to comment on the need for regulations and discuss any concerns they may have. The Lummi Tribe and the Northwest Indian Fisheries Commission provided comments on the proposed rule regarding the exception for treaty Indian fishing vessels. In response to the comments, NMFS included additional clarification regarding the specific treaty fishing activities to which the exception applies. See Comment 9: Exceptions. We will continue to coordinate with the tribes on management and conservation actions related to this species.

E.O. 13132—Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). The Washington Department of Fish and Wildlife (WDFW) was a cooperating agency on the NEPA analysis to support development of proposed regulations. A Federal regulation under the MMPA and ESA prohibiting approach within 200 yards (182.9 m) of killer whales is more protective than the state law (RCW 15.77.740), which prohibits approach within 100 yards (91.4 m) of Southern Resident killer whales in state waters, and therefore may preempt the state law. In their comments on the proposed rule, WDFW supported federal regulations prohibiting approach within 200 yards (182.9 m) of killer whales. Inclusion of the WDFW as a cooperating agency satisfies the consultation requirements of E.O. 13132.

E.O. 13211—Energy Supply, Distribution, or Use

E.O. 13211 requires agencies to prepare a statement of energy effects when undertaking certain actions. According to E.O. 13211, "significant energy action" means any action by an agency that is expected to lead to the promulgation of a final rule or regulation that is a significant regulatory action under E.O. 12866 and is likely to have a significant adverse effect on the supply, distribution, or use of energy. We have determined that the energy effects of this final rule are unlikely to exceed the energy impact thresholds identified in E.O. 13211 and that this rulemaking is, therefore, not a significant energy action. No statement of energy effects is required.

List of Subjects in 50 CFR Part 224

Endangered marine and anadromous species.

Dated: April 8, 2011.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 224 is amended as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for 50 CFR part 224 continues to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

■ 2. In § 224.103, a new paragraph (e) is added to read as follows:

§ 224.103 Special prohibitions for endangered marine mammals.

* * * * *

(e) *Protective regulations for killer whales in Washington*—(1) *Applicability.* The following restrictions apply to all motorized and non-motorized vessels in inland waters of the United States east of a line connecting Cape Flattery, Washington (48°23′10″ N./124°43′32″ W.), Tatoosh Island, Washington (48°23′30″ N./124°44′12″ W.), and Bonilla Point, British Columbia (48°35′30″ N./124°43′00″ W.) and south of the U.S./Canada international boundary. The shoreline boundary is the charted mean high water line cutting across the mouths of all rivers and streams.

(2) *Prohibitions.* Except as provided in paragraph (e)(3) of this section, it is unlawful for any person subject to the jurisdiction of the United States to:

(i) Cause a vessel to approach, in any manner, within 200 yards (182.9 m) of any killer whale.

(ii) Position a vessel to be in the path of any killer whale at any point located within 400 yards (365.8 m) of the whale. This includes intercepting a killer whale by positioning a vessel so that the prevailing wind or water current carries the vessel into the path of the whale.

(3) *Exceptions.* The following exceptions apply to this section:

(i) The prohibitions of paragraph (e)(2) of this section do not apply to

(A) Federal Government vessels operating in the course of their official duty or state and local government vessels when engaged in official duties involving law enforcement, search and rescue, or public safety.

(B) Vessels participating with a Vessel Traffic Service (VTS) and following a Traffic Separation Scheme or complying with a VTS Measure of Direction. This also includes support vessels escorting ships in the traffic lanes, such as tug boats.

(C) Vessels engaged in an activity, such as scientific research, authorized through a permit issued by the National Marine Fisheries Service under part 222, subpart C, of this chapter (General Permit Procedures) or through a similar National Marine Fisheries Service authorization.

(D) Vessels lawfully engaged in commercial or treaty Indian fishing that are actively setting, retrieving, or closely tending fishing gear.

(E) Vessel operations necessary to avoid an imminent and serious threat to a person, vessel or the environment, including when necessary for overall safety of navigation and to comply with the Navigation Rules.

(ii) [Reserved]

(4) *Affirmative defense.* In connection with any action alleging a violation of the prohibitions of paragraph (e)(2) of this section, any person claiming the benefit of any exception listed in paragraph (e)(3) of this section has the burden of raising, pleading, and proving such affirmative defense.

(b) [Reserved]

[FR Doc. 2011–9034 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126521–0640–02]

RIN 0648–XA364

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher Vessels Using Trawl Gear 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; modification of a closure.

SUMMARY: NMFS is opening directed fishing for Pacific cod by catcher vessels using trawl gear in the Bering Sea and Aleutian Islands Management Area (BSAI). This action is necessary to fully use the B season allowance of the 2011 total allowable catch (TAC) of Pacific cod allocated to catcher vessels using trawl gear in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), April 9, 2011, through 1200 hrs, A.l.t., April 12, 2011. Comments must be received at the following address no later than 4:30 p.m., A.l.t., April 25, 2011.

ADDRESSES: Send comments to James W. Balsiger, Regional Administrator, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by RIN 0648–XA364, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov.*
- *Mail:* P.O. Box 21668, Juneau, AK 99802.
- *Fax:* (907) 586–7557.
- *Hand delivery to the Federal Building:* 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record. Comment will generally be posted without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (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.

NMFS closed directed fishing for Pacific cod by catcher vessels using trawl gear in the BSAI under § 679.20(d)(1)(iii) on April 4, 2011 (76 FR 18663, April 5, 2011).

As of April 6, 2011, NMFS has determined that approximately 2,000 metric tons remain in the directed fishing allowance of Pacific cod allocated to catcher vessels using trawl gear in the BSAI. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C), and (a)(2)(iii)(D), and to fully utilize the B season allowance of the 2011 TAC of Pacific cod allocated to catcher vessels using trawl gear in the BSAI, NMFS is terminating the previous closure and is reopening directed fishing Pacific cod by catcher vessels using trawl gear in the BSAI. The Administrator, Alaska Region, NMFS, (Regional Administrator) considered the following factors in reaching this decision: (1) The current catch of Pacific cod by catcher vessels using trawl gear in the BSAI and, (2) the harvest capacity and stated intent on future harvesting patterns of vessels in participating in this fishery. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance will be reached after 72 hours. Consequently, NMFS is prohibiting directed fishing for Pacific cod by catcher vessels using trawl gear in the BSAI effective 1200 hrs, A.l.t., April 12, 2011.

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 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 opening of directed fishing for Pacific cod by catcher vessels using trawl gear in the BSAI. 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 and processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of April 6, 2011.

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.

Without this inseason adjustment, NMFS could not allow the B season allowance of the 2011 TAC of Pacific cod allocated to catcher vessels using trawl gear in the BSAI to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until April 25, 2011.

This action is required by § 679.25 and is exempt from review under Executive Order 12866.

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

Dated: April 8, 2011.

James P. Burgess,

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

[FR Doc. 2011–8925 Filed 4–8–11; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 76, No. 72
Thursday, April 14, 2011

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.

FEDERAL RESERVE SYSTEM

12 CFR Parts 204, 217, and 230

[Regulations D, Q, and DD; Docket No. R–1413]

RIN No. 7100–AD72

Prohibition Against Payment of Interest on Demand Deposits

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of proposed rulemaking; request for public comment.

SUMMARY: The Board is requesting public comment on proposed amendments that would repeal Regulation Q, Prohibition Against Payment of Interest on Demand Deposits, effective July 21, 2011. Regulation Q implements the statutory prohibition against payment of interest on demand deposits by institutions that are member banks of the Federal Reserve System set forth in Section 19(i) of the Federal Reserve Act ("Act"). Section 627 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") repeals Section 19(i) of the Federal Reserve Act effective July 21, 2011. The proposed amendments implement the Dodd-Frank Act's repeal of Section 19(i). The proposed amendments would also repeal the Board's published interpretation of Regulation Q. The proposed amendments also remove references to Regulation Q found in the Board's other regulations, interpretations, and commentary.

DATES: Comments must be submitted by May 16, 2011.

ADDRESSES: You may submit comments, identified by Docket No. R–1413 and RIN No. 7100–AD60, 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.

E-mail: regs.comments@federalreserve.gov. Include the docket number in the subject line of the message.

Fax: (202) 452–3819 or (202) 452–3102.

Mail: Jennifer J. Johnson, 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 *http://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 in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Sophia H. Allison, Senior Counsel (202/452–3565), Legal Division, or Joshua S. Louria, Financial Analyst (202/263–4885), Division of Monetary Affairs; for users of Telecommunications Device for the Deaf (TDD) only, contact (202/263–4869); Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

I. Prohibition Against Payment of Interest on Demand Deposits

Section 19(i) of the Federal Reserve Act ("Act") (12 U.S.C. 371a) generally provides that no member bank "shall, directly or indirectly, by any device whatsoever, pay any interest on any deposit which is payable on demand * * *." Section 19(i) was added to the Act by Section 11 of the Banking Act of 1933 (48 Stat. 162, 181). Section 324 of the Banking Act of 1935 (49 Stat. 684, 714) amended Section 19(a) of the Act to authorize the Board, "for the purposes of this section, to define the terms "demand deposits", "gross demand deposits," "deposits payable on demand" [and] to determine what shall be deemed to be a payment of interest, and to prescribe such rules and regulations as it may deem necessary to effectuate the purposes of this section and prevent evasions thereof * * *."

The Board promulgated Regulation Q on August 29, 1933 to implement Section 19(i) of the Act. In the past, Regulation Q also contained provisions implementing then-current statutory provisions regulating the rates of interest payable on various types of interest-bearing deposits. The Depository Institutions Deregulation Act of 1982 phased out these statutory interest rate limitations effective in March 1986. After that time, Regulation Q consisted primarily or exclusively of provisions related to implementing Section 19(i)'s prohibition of the payment of interest on demand deposits by member banks.

Section 627 of the Dodd-Frank Act repeals Section 19(i) of the Act in its entirety, effective one year from the date of enactment. Accordingly, the Board will no longer have statutory authority to promulgate Regulation Q effective July 21, 2011. The Board therefore proposes to repeal Regulation Q, effective July 21, 2011. For the same reason, the Board proposes to repeal its published interpretation of Regulation Q currently set forth at 12 CFR 217.101 (Premiums on deposits). The Board is proposing a conforming technical amendment to section 204.10 of Regulation D, 12 CFR part 204, to eliminate references to Regulation Q. The Board is also proposing conforming technical amendments to the official staff commentary to Regulation DD, 12 CFR part 230. Specifically, comments 230.2(n)–1 and 230.7(a)(1)–5 would be revised to eliminate references to the definition of "interest" in Regulation Q.

The Dodd-Frank Act did not repeal the Board's authority under Section 19(a) of the Act to "determine what shall be deemed to be a payment of interest." The Board believes, however, that the primary reason for this authority was to enforce Section 19(i)'s prohibition of the payment of interest on demand deposits. Accordingly, the Board believes that there will be no reason to retain the definition of "interest" in Regulation Q following the repeal of Section 19(i). The Board recognizes that there may be other laws or regulations that currently refer to Regulation Q or that incorporate the definition of "interest" currently set forth in Section 217.2(d) of Regulation Q. The Board believes, however, that such other laws and regulations can substantively incorporate the Regulation Q definition

of "interest" at any time if necessary, or can delete references to Regulation Q that will be obsolete after July 21, 2011. Accordingly, the Board does not propose retaining the definition of "interest" currently set forth in Regulation Q.

The Board seeks comments on all aspects of the proposal. In addition, the Board specifically seeks comments on the following:

1. Does the repeal of Regulation Q have significant implications for the balance sheets and income of depository institutions? What are the anticipated effects on bank profits, on the allocation of deposit liabilities among product offerings, and on the rates offered and fees assessed on demand deposits, sweep accounts, and compensating balance arrangements?

2. Does the repeal of Regulation Q have any implications for short-term funding markets such as the overnight federal funds market and Eurodollar markets, or for institutions such as institution-only money market mutual funds that are active investors in short-term funding markets?

3. Is the repeal of Regulation Q likely to result in strong demand for interest-bearing demand deposits?

4. Does the repeal of Regulation Q have any implications for competitive burden on smaller depository institutions?

II. Form of Comment Letters

Comment letters should refer to Docket No. R–1413 and RIN No. 7100–AD70 and, when possible, should use a standard typeface with a font size of 10 or 12; this will enable the Board to convert text submitted in paper form to machine-readable form through electronic scanning, and will facilitate automated retrieval of comments for review. Comments may be mailed electronically to *regs.comments@federalreserve.gov*.

III. Initial Regulatory Flexibility Analysis

In accordance with Section 3(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), the Board has reviewed the proposed amendments to Regulation Q. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

1. *Statement of the objectives of the proposal.* The Board is proposing to repeal Regulation Q, which implements the statutory prohibition set forth in Section 19(i) of the Act, effective July 21, 2011. The proposed repeal implements Section 627 of the Dodd-Frank Act, which repeals Section 19(i) of the Act effective July 21, 2011.

2. *Small entities affected by the proposal.* The proposal would affect all member banks of the Federal Reserve System, regardless of size, that hold demand deposits. The proposal would permit, but not require, member banks to pay interest on demand deposits maintained at those institutions. As such, the Board expects that the proposal would have a positive impact on such entities because it would eliminate an obsolete regulatory provision and because member banks are not obligated to offer interest-bearing demand deposits following the repeal of Regulation Q. The Board is requesting comment on whether the repeal of Regulation Q has any implications for competitive burden on smaller member banks.

3. *Other federal rules.* The Board believes that no federal rules duplicate, overlap, or conflict with the proposed amendments to Regulation Q.

4. *Significant alternatives to the proposed revisions.* The Board welcomes comment on any significant alternatives that would minimize the impact of the proposal on small entities.

IV. Paperwork Reduction Act Analysis

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR Part 1320 Appendix A.1), the Board reviewed the proposed rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The proposed rule contains no requirements subject to the PRA.

List of Subjects

12 CFR Part 204

Banks, banking, Reporting and recordkeeping requirements.

12 CFR Part 217

Banks, banking, Reporting and recordkeeping requirements.

12 CFR Part 230

Advertising, Banks, Banking, Consumer protection, Reporting and recordkeeping requirements, Truth in savings.

For the reasons set forth in the preamble, under the authority of section 627 of Public Law 111–203, 124 Stat. 1376 (July 21, 2010), the Board is proposing to amend 12 CFR parts 204, 217, and 230 to read as follows:

PART 204—RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS

1. The authority citation for part 204 is amended to read as follows:

Authority: 12 U.S.C. 248(a), 248(c), 461, 601, 611, and 3105.

2. In *§ 204.10—Payment of interest on balances*, paragraph (c) is revised to read as follows:

§ 204.10 Payment of interest on balances.

* * * * *

(c) Pass-through balances. A pass-through correspondent that is an eligible institution may pass back to its respondent interest paid on balances held on behalf of that respondent. In the case of balances held by a pass-through correspondent that is not an eligible institution, a Reserve Bank shall pay interest only on the required reserve balances held on behalf of one or more respondents, and the correspondent shall pass back to its respondents interest paid on balances in the correspondent's account.

* * * * *

PART 217—PROHIBITION AGAINST PAYMENT OF INTEREST ON DEMAND DEPOSITS (REGULATION Q)

3. Part 217 is removed and reserved.

PART 230—TRUTH IN SAVINGS (REGULATION DD)

Supplement I to Part 230—Official Staff Interpretations

4. The authority citation for part 230 continues to read as follows:

Authority: 12 U.S.C. 4301 *et seq.*

5. In Supplement I to Part 230:

A. Under *Section 230.2—Definitions, paragraph (n) Interest*, is revised.

B. Under *Section 230.7—Payment of interest, subsection (a)(1) Permissible methods*, paragraph(5) is revised.

The revisions read as follows:

Supplement I to Part 230—Official Staff Interpretations

Section 230.2 Definitions

(n) Interest

1. Relation to bonuses. Bonuses are not interest for purposes of this regulation.

* * * * *

Section 230.7 Payment of interest

(a)(1) Permissible methods

* * * * *

5. *Maturity of time accounts.* Institutions are not required to pay interest after time accounts mature. Examples include:

* * * * *

By order of the Board of Governors of the Federal Reserve System, acting through the

Secretary under delegated authority, April 8, 2011.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2011–9002 Filed 4–13–11; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0360; Directorate Identifier 2010–CE–061–AD]

RIN 2120–AA64

Airworthiness Directives; Univair Aircraft Corporation Models (ERCO) 415–C, 415–CD, 415–D, E, G; (Forney) F–1 and F–1A; (Alon) A–2 and A2–A; and (Mooney) M10 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to Univair Aircraft Corporation Models (ERCO) 415–C, 415–CD, 415–D, E, G; (Forney) F–1 and F–1A; (Alon) A–2 and A2–A; and (Mooney) M10 Airplanes. The existing AD currently requires an inspection of the aileron balance assembly and ailerons for cracks and excessive looseness of associated parts with the required repair or replacement of defective parts as necessary. Since we issued that AD, we received a report of a Univair Aircraft Corporation Model ERCO 415–D Ercoupe that crashed after an in-flight breakup due to possible aileron flutter. This proposed AD would add airplanes to the Applicability section and require inspections of the ailerons, inspections of the aileron balance assembly and aileron rigging for looseness or wear with a required repair or replacement of parts as necessary, and a reporting of the inspection results. We are issuing this proposed AD to prevent failure of the aileron assembly and associated parts, which could result in loss of control.

DATES: We must receive comments on this proposed AD by May 31, 2011.

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:* 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 AD, contact Univair Aircraft Corporation, 2500 Himalaya Road, Aurora, Colorado 80011; telephone: 303–375–8882, fax: 303 375–8888; Internet: *http://univairparts.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Roger Caldwell, Aerospace Engineer, FAA, Denver Aircraft Certification Office, 26805 East 68th Ave., Room 214, Denver, Colorado 80249–6361; telephone: (303) 342–1086; fax: (303) 342–1088; e-mail: *roger.caldwell@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–2011–0360; Directorate Identifier 2010–CE–061–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We issued AD 52–02–02 (21 FR 9447, December 4, 1956) for Ercoupe Model 415 Series and Models E and G Airplanes. That AD requires an initial and repetitive inspection of the aileron balance assembly, including the aileron hinges, screws and control system, the ailerons for cracks in support structure and skin, and the repair or replacement of damaged parts. That AD resulted from several Ercoupe accidents. We issued that AD as a precautionary measure.

Actions Since Existing AD Was Issued

Since we issued AD 52–02–02, we received a report of a Univair Aircraft Corporation Model ERCO 415–D Ercoupe that crashed after an in-flight breakup. Witnesses of the accident noted that while the airplane was banking both ailerons were "fluttering" at a high frequency, and as the bank angle of the airplane increased to almost 90 degrees, the left wing of the airplane "folded back" and separated from the fuselage. We have received nine other documented cases of structural failures of the wing and associated components of the airframe.

There are several Univair airplane models that have similar type design to that of above-referenced incidents, are not part of the compliance of AD 52–02–02, and should be subjected to the requirements of AD 52–02–02.

Relevant Service Information

We reviewed Ercoupe Service Memorandum Nos. 35, 56, and 57 (all not dated). The Ercoupe Service Memorandum No. 35 describes procedures for use in rigging or making adjustments to the rigging. The Ercoupe Service Memorandum No. 56 describes procedures for the inspection of control surfaces for cracks and excessive play and checking controls for excessive movement. The Ercoupe Service Memorandum No. 57 describes procedures for aileron balance weight inspection and removal.

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 add airplanes to the Applicability section of AD 52–02–02 and require inspections of the ailerons, add airplanes to the Applicability section, add repetitive inspections of the aileron bell crank and

the ailerons for looseness or wear with a repair or replacement of parts as necessary, and add the requirement to report the inspection results.

Costs of Compliance

We estimate that this proposed AD affects 2,600 airplanes of U.S. registry.

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

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
Estimated Retained Costs			
4 work-hours × $85 per hour = $340	Not applicable	$340	$884,000
Estimated New Costs			
.5 work-hour × $85 per hour = $42.50	Not applicable	42.50	110,500

We estimate the following costs to do any necessary replacements for the flight control system that would be required based on the results of the proposed inspection. We have no way of determining the number of airplanes that may need this replacement:

ON-CONDITION COSTS

Labor cost	Parts cost	Total cost per airplane
2 work-hours × $85 per hour = $170	Aileron Hinge Part Number (P/N) 415–24003 $25	$195
2 work-hours × $85 per hour = $170	Elevator Hinge P/N 415–22007 $40	210
2 work-hours × $85 per hour = $170	Elevator Hinge P/N 415–22008 $83	253
2 work-hours × $85 per hour = $170	Rudder Hinge P/N 415–24003 $25	195
2 work-hours × $85 per hour = $170	Aileron Rod-End Bearing P/N GMM–3M–670 $20	190

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 have 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 that the 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.

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

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

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

§ 39.13 [Amended]

The FAA amends § 39.13 by removing airworthiness directive (AD) 52–02–02, (21 FR 9447, December 4, 1956), and adding the following new AD:

Univair Aircraft Corporation: Docket No. FAA–2011–0360; Directorate Identifier 2010–CE–061–AD.

Comments Due Date

(a) The FAA must receive comments on this proposed AD action by May 31, 2011.

Affected ADs

(b) This AD supersedes AD 52–02–02 (21 FR 9447, December 4, 1956).

Applicability

(c) This AD applies to Univair Aircraft Corporation Models (ERCO) 415–C, 415–CD, 415–D, E, G; (Forney) F–1 and F–1A; (Alon) A–2 and A2–A; and (Mooney) M10 airplanes, all serial numbers, that are certificated in any category.

Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 27, Flight Controls.

Unsafe Condition

(e) This AD was prompted by a Univair Aircraft Corporation Model ERCO 415–D Ercoupe that crashed after an in-flight breakup due to possible aileron flutter. We are issuing this AD to add airplanes to the Applicability section and require inspections of the ailerons, inspections of the aileron balance assembly and aileron rigging for looseness or wear with a required repair or replacement of parts as necessary, and a reporting of the inspection results.

Compliance

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

Actions	Compliance	Procedures
(1) *For all airplanes:* Inspect the ailerons for cracks in the support structure and skin.	(i) Within the next 25 hours time-in-service (TIS) after the effective date of this AD or within 3 months after the effective date of this AD, whichever occurs first. Repetitively thereafter inspect at intervals not to exceed 100 hours TIS or 12 months, whichever occurs first. (ii) We will allow "unless already done" credit for inspections done within the last 25 hours TIS before the effective date of this AD or within the last 3 months before the effective date of this AD, and you may use the results from that inspection for the reporting requirement in paragraph (f)(10) of this AD.	Follow Ercoupe Service Memorandums No. 56 and 57 (both not dated).
(2) *For airplanes with the aileron balance assembly (ERCO Part Number (P/N) 415–16009) installed:* Inspect the assembly for cracks in the support structure and skin.	(i) Within the next 25 hours TIS after the effective date of this AD or within 3 months after the effective date of this AD, whichever occurs first. Repetitively thereafter inspect at intervals not to exceed 100 hours TIS or 12 months, whichever occurs first. (ii) We will allow "unless already done" credit for inspections done within the last 25 hours TIS before the effective date of this AD or within the last 3 months before the effective date of this AD, and you may use the results from that inspection for the reporting requirement in paragraph (f)(10) of this AD.	Follow Ercoupe Service Memorandums No. 56 and 57 (both not dated).
(3) If any cracking is found during the inspections required in paragraphs (f)(1) and/or (f)(2) of this AD, repair or replace cracked parts.	Before further flight after the inspection where the cracking was found.	Follow Ercoupe Service Memorandums No. 56 and 57 (both not dated).
(4) *For airplanes with the aileron balance assembly (ERCO P/N 415–16009) installed:* Inspect the four No. 6–32 screws that attach the balance weight support to the aileron for looseness and damage.	(i) Within the next 25 hours TIS after the effective date of this AD or within 3 months after the effective date of this AD, whichever occurs first. Repetitively thereafter inspect at intervals not to exceed 100 hours TIS or 12 months, whichever occurs first. (ii) We will allow "unless already done" credit for inspections done within the last 25 hours TIS before the effective date of this AD or within the last 3 months before the effective date of this AD, and you may use the results from that inspection for the reporting requirement in paragraph (f)(10) of this AD.	Follow Ercoupe Service Memorandums No. 56 and 57 (both not dated).
(5) If any looseness or damage is found during the inspection of the screws required in paragraph (f)(4) of this AD, replace the screws with AN 526–632 screws, making sure to not overstress during tightening.	Before further flight after the inspection where the looseness or damage was found.	Follow Ercoupe Service Memorandums No. 56 and 57 (both not dated).
(6) *For airplanes with the aileron balance assembly (ERCO P/N 415–16009) installed:* Inspect the aileron hinges and aileron control system for excessive looseness or wear in hinge pins or bearings. If, with one aileron blocked in the neutral position, the total play of the other aileron, measured at the trailing edge, exceeds 7/16 inch, inspect all the joints and bearings and tighten or replace those which are loose.	(i) Within the next 25 hours TIS after the effective date of this AD or within 3 months after the effective date of this AD, whichever occurs first. Repetitively thereafter inspect at intervals not to exceed 100 hours TIS or 12 months, whichever occurs first. (ii) We will allow "unless already done" credit for inspections done within the last 25 hours TIS after the effective date of this AD or within the last 3 months before the effective date of this AD, and you may use the results from that inspection for the reporting requirement in paragraph (f)(10) of this AD.	Follow Ercoupe Service Memorandums No. 56 and 57 (both not dated).

Actions	Compliance	Procedures
(7) *For airplanes that have never had the aileron balance assembly (ERCO P/N 415–16009) installed or from which it has been removed following Ercoupe Service Memorandum No. 57:* Inspect the aileron hinges and aileron control system for excessive looseness or wear in hinge pins or bearings. If, with one aileron blocked in the neutral position the total play of the other aileron, measured at the trailing edge, exceeds 5/16 inch, inspect all the joints and bearings and tighten those which are loose.	Within the next 25 hours TIS after the effective date of this AD or within 3 months after the effective date of this AD, whichever occurs first.	Follow Ercoupe Service Memorandums No. 56 and 57 (both not dated).
(8) *For all airplanes:* Determine that the air speed instrument is correctly calibrated and distinctly marked in accordance with the operating limitations.	Within the next 25 hours TIS after the effective date of this AD or within 3 months after the effective date of this AD, whichever occurs first.	Follow FAA Advisory Circular (AC) 23–8B, Appendix 9, Airspeed Calibrations, dated August 14, 2003, or any other FAA-approved airspeed calibration method. AC 23–8B can be found at *http://rgl.faa.gov/.*
(9) *For all airplanes:* Remove load from nose wheel and adjust rigging.	Within the next 25 hours TIS after the effective date of this AD or within 3 months after the effective date of this AD, whichever occurs first. Repetitively thereafter inspect at intervals not to exceed 100 hours TIS or 12 months, whichever occurs first.	Follow Ercoupe Service Memorandum No. 35 (not dated).
(10) *For all airplanes:* Report the results from the inspections and/or actions required in paragraphs (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (f)(9) of this AD.	Within 3 days after the initial inspections and/or actions required in paragraphs (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (f)(9) of this AD or within 3 days after the next repetitive inspection and/or action required in paragraphs (f)(1), (f)(2), (f)(4), (f)(6), and (f)(9), whichever occurs first.	Use the reporting form found in figure 1 and send the report to the following offices: (i) Roger A. Caldwell, Aerospace Engineer, FAA, ANM–100D, Denver Aircraft Certification Office (ACO), 26805 East 68th Avenue, Room 214, Denver, Colorado 80249–6361; and (ii) Univair Aircraft Corporation, 2500 Himalaya Road, Aurora, Colorado 80011.

DOCKET NO. FAA–2011–0360 INSPECTION REPORT

Airplane model and year of manufacture			
Airplane serial number			
Airplane registration			
Airplane tachometer hours at time of inspection			
Airspeed calibrated and marked per paragraph (f)(8) of this AD?	YES, but no calibration adjustment required.	YES, and calibration was adjusted.	
For Ercoupe Service Memorandum No. 56			
Did aileron system play exceed 7/16 of an inch?	NO	YES, and was adjusted.	
Was rudder looseness greater than 1/4 of an inch at the trailing edge?	NO	YES, and was adjusted.	
Was there elevator motion greater than 3/8 of an inch?	NO	YES, and was adjusted.	
Were any other discrepancies noticed during this inspection, to include cracks or loose hinges?			
For Ercoupe Service Memorandum No. 57			
Does the airplane have aileron balance weights?	NO	YES	
If balance weights are installed, were the attachments secure?	NO	YES	Not applicable.
Did you remove the balance weights if allowed?	NO	YES	Not applicable.
If you did not remove balance weights, did you perform Ercoupe Service Memorandum No. 20 (Ailerons-Reinforcement of)	NO	YES	Not applicable.
If balance weights were removed, was the aileron free play 5/16 of an inch or less?	NO	YES	Not applicable.

Were any other discrepancies noticed during this inspection?		
For Ercoupe Service Memorandum No. 35		
Did you perform steps 1, 2, and 7 of the Ercoupe Service Memorandum No. 35?	NO	YES
Were any other discrepancies noticed during this inspection?		

Send report to: Roger A. Caldwell, Aerospace Engineer, FAA, ANM–100D, Denver ACO, 26805 East 68th Avenue, Room 214, Denver, Colorado 80249–6361; *fax:* (303) 342–1088; *E-mail: roger.caldwell@faa.gov;* and Univair Aircraft Corporation, 2500 Himalaya Road, Aurora, Colorado 80011

Figure 1

Paperwork Reduction Act Burden Statement

(g) 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.

Alternative Methods of Compliance (AMOCs)

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

(2) Before using any approved AMOC, notify your Principal Maintenance Inspector or Principal Avionics Inspector, as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

(3) AMOCs approved for AD 52–02–02 are approved as AMOCs for this AD.

Related Information

(i) For more information about this AD, contact Roger Caldwell, Aerospace Engineer, FAA, Denver ACO, 26805 East 68th Ave., Room 214, Denver, Colorado 80249–6361; telephone: (303) 342–1086; fax: (303) 342–1088; e-mail: *roger.caldwell@faa.gov.*

(j) For service information identified in this AD, contact Univair Aircraft Corporation, 2500 Himalaya Road, Aurora, Colorado 80011; telephone: (303) 375–8882, facsimile: (303) 375–8888; Internet: *http://univairparts.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust St., 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 April 7, 2011.

Earl Lawrence,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–9091 Filed 4–13–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1167]

Proposed Airworthiness Directive Legal Interpretation

AGENCY: Federal Aviation Administration, DOT.

ACTION: Proposed airworthiness directive interpretation.

SUMMARY: The Federal Aviation Administration is considering issuing a legal interpretation on various provisions in the regulations applicable to airworthiness directives. Comments from the public are requested to assist the agency in developing the final legal interpretation.

DATES: Comments must be received on or before May 16, 2011.

ADDRESSES: You may send comments identified by Docket Number FAA–2010–1167 using any of the following methods:

Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.

Mail: Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

Hand Delivery or Courier: Bring comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Fax: Fax comments to Docket Operations at 202–493–2251.

FOR FURTHER INFORMATION CONTACT: John King, Staff Attorney, Regulations Division, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: 202–267–3073.

SUPPLEMENTARY INFORMATION:

The Request

The Federal Aviation Administration's (FAA) Organization/Procedures Working Group (WG) of the Airworthiness Directive Implementation Aviation Rulemaking Committee (AD ARC) requested that the FAA provide a legal interpretation of several provisions in 14 Code of Federal Regulations (CFR) that would help resolve a number of issues that have been debated within the WG. These issues partly result from certain changes made in the plain language revision to CFR part 39 in 2002 (see 67 FR 48003, July 22, 2002).

Question 1—Continuing Obligation

Some members of the WG question the extent of an aircraft operator's continuing obligation to maintain an AD-mandated configuration. They ask about two regulations:

Section 39.7 What is the legal effect of failing to comply with an airworthiness directive?

Anyone who operates a product that does not meet the requirements of an applicable airworthiness directive is in violation of this section.

Section 39.9 What if I operate an aircraft or use a product that does not meet the requirements of an airworthiness directive?

If the requirements of an airworthiness directive have not been met, you violate § 39.7 each time you operate the aircraft or use the product.

The majority WG opinion is that the language of § 39.7, and its predecessor § 39.3, imposes an operational mandate that the requirements of the AD be maintained for each operation occurring after the actions required by the AD are accomplished. They conclude that § 39.9 expresses the well-established legal position that for continuing operations of products that do not comply with an AD, each flight is a separate violation.

The minority WG opinion is that if the unsafe condition identified in the AD was fixed at a moment in time, then § 39.7 no longer applies. The conclusion of the WG minority was that even if the product was determined to be in a condition contrary to the requirements of the AD at a later time, this change in configuration may be a violation of CFR 43.13(b), but not § 39.7.

Proposed Response 1—Continuing Obligation

Section 39.9 notes the need for both initial action by the aircraft operator and continued compliance by that aircraft operator with the AD requirements. Section 39.9 was added to the final rule in 2002 as a result of comments that the proposed version of the rule language combined compliance and non-compliance issues in one heading (proposed § 39.5, final version is § 39.7 of the 2002 rulemaking). The final rule preamble stated that the agency added § 39.9 "to refer to § 39.7, which is the rule that operators will violate if they fail to operate or use a product without complying with an AD that applies to that product."

Section 39.9 explains the continuing obligation for aircraft operators to maintain the AD-mandated configuration. Section 39.7 imposes an operational requirement. Because the AD imposes an enforceable requirement to accomplish the mandated actions, the only way to give § 39.7 any meaning is to recognize that operators are required to maintain the AD-mandated configuration. Once the AD requirements are met an operator may only revert to normal maintenance if that maintenance does not result in changing the AD-mandated configuration.

The objective of part 39 and ADs generally is not just to require accomplishment of particular actions; it is to ensure that, when products are operated, they are free of identified unsafe conditions. Section 39.7 is the regulatory means by which the FAA prevents reintroduction of unsafe conditions. In 1965 the FAA recognized that maintenance may be the cause of some unsafe conditions: "The responsibilities placed on the FAA by the Federal Aviation Act justify broadening the regulation [part 39] to make any unsafe condition, whether resulting from maintenance, design, defect, or otherwise, the proper subject of an AD." (Amendment 39–106; 30 FR 8826, July 14, 1965). Prior to Amendment 39–106 ADs could not be issued unless the unsafe condition was related to a design feature. After Amendment 39–106 ADs could be issued for unsafe conditions however and wherever found. The FAA does not issue ADs as a substitute for enforcing maintenance rules. If a maintenance process is directly related to an unsafe condition, that maintenance action would be proper for an AD. Particularly for unsafe conditions resulting from maintenance, it would be self-defeating to interpret § 39.7 as allowing reversion to the same maintenance practices that caused or contributed to the unsafe condition in the first place.

Question 2—Additional Actions

Some members of the WG questioned the extent of an aircraft operator's obligation to accomplish actions referenced in an AD beyond those actions necessary to resolve the unsafe condition specifically identified in an AD.

The opinion of these WG members is that a reasonable interpretation of the language in § 39.11 directing action to "resolve an unsafe condition" limits the FAA from requiring actions that do "not relate to correcting" the identified unsafe condition. In other words, an AD is limited to those tasks that resolve the unsafe condition, even if other tasks are explicitly listed in the AD or in a referenced service bulletin (SB). Even if § 39.11 doesn't explicitly limit the types of actions that the FAA may mandate in ADs, these members believe that ADs are limited to imposing requirements that are both necessary and "directly related" to addressing an unsafe condition because that is the sole purpose of ADs, as defined in part 39. The belief is that this would allow an operator to comply with those actions that, in the operator's opinion, correct the unsafe condition without having to obtain an alternative means of compliance (AMOC) for other actions, such as access and close-up procedures, that are "not directly related" to addressing that identified unsafe condition.

Other members of the WG have the opinion that § 39.11 is merely descriptive of the types of actions required by an AD; it neither imposes obligations on the operator nor limits the FAA's authority in issuing an AD. These members believe that, given the FAA's broad regulatory authority, ADs may impose requirements that operators may not consider necessary and "directly related" to resolving the unsafe condition.

Proposed Response 2—Additional Actions

The FAA points to the language contained in § 39.11 that answers the WG's second question.

Section 39.11 What actions do airworthiness directives require?

Airworthiness directives specify inspections you must carry out, conditions and limitations you must comply with, and any actions you must take to resolve an unsafe condition.

First Title 49, United States Code, § 44701, establishes the FAA's broad statutory authority to issue regulations in the interest of aviation safety, and the issuance of an AD is an exercise of this authority. While describing the types of actions required by ADs, § 39.11 does not limit the broad authority established by the statute. The requirements of the AD are imposed by the language of the AD itself, and not by § 39.11. Thus an AD may require more actions than correcting the specific unsafe condition. An example would be an AD requirement for certain continuing maintenance actions to prevent or detect the unsafe condition in the future.

In developing an AD, the FAA exercises its discretion in determining what actions are to be required in the interest of aviation safety. This discretion is limited only by the Administrative Procedure Act's prohibition on rulemaking actions that are "arbitrary and capricious." Provided the actions required by an AD are reasonably related to the purpose of resolving the unsafe condition, it is within the FAA's discretion to mandate them. For example, service information frequently includes instructions for accessing the area to be worked on to address the unsafe condition. Because these access instructions are reasonably related to addressing the unsafe condition, it is within the FAA's discretion to mandate them.

We understand that some members of the AD ARC believe that some ADs are overly prescriptive with respect to mandated actions that they believe are unnecessary to address the unsafe condition. As explained previously, § 39.11 does not address this concern. Rather, the rulemaking process by which individual ADs are adopted provides the public with an opportunity to identify and comment upon these concerns with each AD. In addition,

each AD contains a provision allowing for approval of an AMOC, which allows operators to obtain relief from requirements they consider unnecessary or unduly burdensome.

Question 3—Use of the term "Applicable"

A WG member cited the use of the term "applicable" in a specific AD, AD 2007–07–02 (72 FR 14400, March 28, 2007), which contains these requirements:

(f) Within 60 months after the effective date of this AD: Modify the activation mechanism in the chemical oxygen generator of each passenger service unit (PSU) by doing *all the applicable actions specified in the Accomplishment Instructions of the applicable service bulletin specified in Table 1 of this AD.* [Emphasis added.]

The WG member asked for an explanation of the FAA's use of the word "applicable" in the two instances of its use in paragraph (f) of the AD.

Proposed Response 3—Use of the Term "Applicable"

"Applicable" has the same meaning in both places in paragraph (f). The second usage references Table 1 in the AD that identifies the model(s) of airplanes to which each service bulletin applies. So the "applicable service bulletin" is the one that applies to each corresponding airplane model, as indicated in the table in the AD. Similarly, "all the applicable actions" specified in each applicable service bulletin are those actions that are identified as applying to a particular airplane. "Applicable" is a necessary qualifier in this context for two reasons: (1) In many ADs, the referenced service bulletins specify different actions for different airplane configurations, typically identified as "Group 1, Group 2," *etc.* (2) In many ADs, the referenced service bulletins specify different actions depending upon conditions found during accomplishment of previous steps in the instructions, for example, if a crack is smaller than a specified size, repair in accordance with the Structural Repair Manual; if larger, repair in accordance with a method approved by the Aircraft Certification Office. So "applicable" limits the AD's requirements to only those that are specified in the service bulletin for the configuration and conditions of the particular airplane. We intend for the word "applicable" to limit the required actions to those that apply to the particular airplane under the specific conditions found.

The opinion that "applicable" in this context should be interpreted to refer only to those actions in the service bulletin that are necessary to address the unsafe condition, and that operators should not be required to accomplish any other actions that they determine are not necessary, is incorrect. Without the modifier "applicable," the requirement to accomplish "all actions specified in the service bulletin" would literally mandate accomplishing all actions, whether or not applicable to the configuration and condition of a particular airplane. The modifier "applicable" is necessary to avoid this literal, but unintended and likely overly burdensome, meaning.

For example, in AD 2007–07–02 different actions are required depending on the conditions found while accomplishing the modification. The adjective, "applicable," is necessary to limit the required actions to those that are indicated for the conditions found. The purpose of the phrase, "by accomplishing all the applicable actions specified," is to eliminate precisely the ambiguity that would be introduced by the WG members' question. The operator is required to accomplish "all" the actions that are "applicable" to the affected airplane, without allowing discretion to determine which ones are, in the operator's opinion, "necessary" to address the unsafe condition.

Question 4—Impossibility

A member of the AD ARC questions whether an AD needs to specifically address "impossibilities" (for example, an AD requiring an action that is not possible for the specific aircraft to which the AD applies, such as modifying parts that have been removed during an earlier alteration).

Proposed Response 4—Impossibility

The FAA points to the language of §§ 39.15 and 39.17 that answers the fourth question.

Section 39.15 Does an airworthiness directive apply if the product has been changed?

Yes, an airworthiness directive applies to each product identified in the airworthiness directive, even if an individual product has been changed by modifying, altering, or repairing it in the area addressed by the airworthiness directive.

Section 39.17 What must I do if a change in a product affects my ability to accomplish the actions required in an airworthiness directive?

If a change in a product affects your ability to accomplish the actions required by the airworthiness directive in any way, you must request FAA approval of an alternative method of compliance. Unless you can show the change eliminated the unsafe condition, your request should include the specific actions that you propose to address the unsafe condition. Submit your request in the manner described in § 39.19.

If a change to a product makes it impossible to comply with the requirements of an AD, then the operator must request an AMOC approval.

The FAA does not have the resources to determine the modification status of every product to which the AD may apply. If it is impossible to comply with an AD as written, that does not mean the product does not have the unsafe condition. The only way to make sure the product does not, or that there is another acceptable way to address it, is to require an operator to obtain an AMOC approval.

For several years before part 39 was revised in 2002 the FAA included a Note in every AD that contained the same substance as the regulation. This revision to the regulations was a result of some operators claiming that an AD did not apply to a particular airplane because the airplane's configuration had changed, even though that airplane was specifically identified in the "Applicability" paragraph of the AD. But a change in product configuration does not necessarily mean that the unsafe condition has been eliminated, and in some cases the unsafe condition may actually be aggravated. So it is necessary to emphasize that the "Applicability" paragraph of the AD determines AD applicability, not the configuration of an individual airplane. In the case of the affected component having been removed from the airplane, the operator must obtain an AMOC approval. If the removed component is replaced with a different component that may or may not retain the unsafe condition, this is a technical issue that must be addressed through the AMOC process. There are infinite variations on the "impossibility" issue that cannot be anticipated when drafting an AD but for which the AMOC process is well suited.

Issued in Washington, DC, on April 7, 2011.

Rebecca B. MacPherson,

Assistant Chief Counsel for Regulations.

[FR Doc. 2011–8972 Filed 4–13–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 1, 7, and 16

[Docket No. FDA–2011–N–0121]

RIN 0910–AG60

Further Amendments to General Regulations of the Food and Drug Administration To Incorporate Tobacco Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend certain of its general regulations to include tobacco products, where appropriate, in light of FDA's authority to regulate these products under the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act). With these amendments, tobacco products will be subject to the same general requirements that apply to other FDA-regulated products.

DATES: Submit either electronic or written comments on the proposed rule by June 13, 2011. Submit comments on information collection issues under the Paperwork Reduction Act of 1995 (the PRA) by May 16, 2011, (see the "Paperwork Reduction Act of 1995" section of this document).

ADDRESSES: You may submit comments, identified by Docket No. FDA–2011–N–0121 and/or Regulatory Information Number (RIN) number 0910–AG60, by any of the following methods, except that comments on information collection issues under the PRA must be submitted to the Office of Regulatory Affairs, Office of Management and Budget (OMB) (see the "Paperwork Reduction Act of 1995" section of this document).

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, disk, 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 and Docket No. FDA–2011–N–0121 and RIN 0910–AG60 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: Gerie A. Voss, Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 1–877–CTP–1373, *gerie.voss@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Tobacco Control Act was enacted on June 22, 2009, amending the Federal Food, Drug, and Cosmetic Act (the FD&C Act) and providing FDA with the authority to regulate tobacco products (Pub. L. 11–31; 123 Stat. 1776). In enacting the Tobacco Control Act, Congress sought to ensure that FDA had authority to provide effective oversight and to impose appropriate regulatory controls on the tobacco industry. In order to effectuate these purposes, FDA is seeking to amend several provisions of its general regulations to reflect the Agency's new authority and mandate regarding tobacco products.

II. Legal Authority

FDA is issuing this proposed rule under provisions of the FD&C Act, as amended by the Tobacco Control Act (21 U.S.C. 321, 331, 333, 371, 381, 387, 387a, 387c, 387f, 387j and 387k); FDA is also issuing this proposed rule under section 4 of the Federal Cigarette Labeling and Advertising Act (FCLAA) (15 U.S.C. 1333) as amended by the Tobacco Control Act and under section 3 of the Comprehensive Smokeless Tobacco Health Education Act of 1986 (15 U.S.C. 4402) as amended by the Tobacco Control Act.

II. Description of Proposed Regulations

FDA proposes to make the following amendments to title 21 of the Code of Federal Regulations (CFR), reflecting the Agency's authority over tobacco products under the Tobacco Control Act:

1. Add "tobacco products" to the list of products covered by § 1.21(a) and (c)(1) (21 CFR 1.21(a) and (c)(1)) and § 1.101(a) and (b) (21 CFR 1.101(a) and (b));
2. Revise the definition of "product" in § 7.3(f) (21 CFR 7.3(f)) to include tobacco products; and
3. Revise § 16.1(b) (21 CFR 16.1(b)) to add provisions from the Tobacco Control Act that allow for hearings.

A. Section 1.21—Failure To Reveal Material Facts

Section 1.21(a) states that the labeling of FDA-regulated products shall be deemed misleading if it fails to reveal facts that are: "* * * Material in light of other representations made or suggested by statement, word, design, device or any combination thereof; or [m]aterial with respect to consequences which may result from use of the article under: The conditions prescribed in such labeling or such conditions of use as are customary or usual." FDA is proposing to amend § 1.21(a) to provide that tobacco product labeling also would be deemed misleading for similar failures to reveal material facts. See section 903(a) of the Tobacco Control Act (21 U.S.C. 387c(a)) (stating that a tobacco product shall be deemed to be misbranded if its labeling is false or misleading). See also section 201(n) of the FD&C Act (21 U.S.C. 321(n)).

Section 1.21(c) describes statements that are not permissible on labeling for FDA-regulated products. For example, paragraph (c)(1) explains that this regulation does not "[p]ermit a statement of differences of opinion with respect to warnings * * *" on FDA-regulated products. The proposed rule would amend this paragraph to state that tobacco product labeling, like the labeling of other FDA-regulated products, also may not have a statement of differences of opinion regarding the warnings on tobacco packages or advertisements. This change is in accordance with sections 201 and 204 of the Tobacco Control Act, amending the FCLAA, and the CSTHEA, respectively, as well as section 903(a) generally. FDA already has initiated a rulemaking proceeding to implement section 201 of the Tobacco Control Act, amending 15 U.S.C. 1333). See the **Federal Register** of November 12, 2010 (75 FR 69524).

B. Section 1.101—Notification and Recordkeeping

Section 1.101 outlines the notification and recordkeeping requirements for exports of FDA-regulated products.

Section 1.101(a) pertains to all notifications and records required for FDA-regulated products that may be exported under section 801 or 802 of the FD&C Act (21 U.S.C. 381 and 382) and section 351 of the Public Health Service Act (42 U.S.C. 262). Because section 103(l) of the Tobacco Control Act specifically amends section 801 of the FD&C Act to include "tobacco products" on the list of FDA-regulated products that may be exported under this section, the proposed rule would amend § 1.101(a) and (b) to indicate that tobacco products exported under section 801(e)(1) of the FD&C Act also would be subject to the recordkeeping requirements of this regulation. Please note that this revision to § 1.101(b) does not alter the exercise of enforcement discretion described in the advance notice of proposed rulemaking that published in the **Federal Register** of June 1, 2004 (69 FR 30842).

C. Section 7.3—Definitions

Section 7.3 defines the term "product" to include all the specific items that are subject to FDA's jurisdiction. The proposed change to § 7.3 of the regulations would define "product" to also include tobacco products.

D. Section 16.1—Scope

Section 16.1(b) lists the statutory and regulatory provisions that provide for the opportunity for a regulatory hearing. Sections 903(a)(8)(B)(ii), 906(e)(1)(B), 910(d)(1), and 911(j) of the Tobacco Control Act all provide for the opportunity for a hearing. The proposed rule would amend § 16.1 to include certain instances in the Tobacco Control Act where an opportunity for a hearing is provided.

IV. Analysis of Impacts

A. Introduction and Summary

FDA has examined the impacts of the proposed rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Order 12866 directs 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.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the proposed requirements are likely to impose a burden on a substantial number of affected small entities, the Agency proposes to certify that the final rule will have a significant economic impact on a substantial number of small entities and has conducted an Initial Regulatory Flexibility Analysis as required under the Regulatory Flexibility Act.

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 $135 million, using the most current (2009) 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.

FDA has not quantified the benefits of this proposed rule. This proposed rule would impose compliance costs on producers of tobacco products as they would have to comply with recordkeeping requirements according to general regulations that apply to other products that FDA regulates. The estimated annual costs of complying with these requirements range from $71,438 to $376,242.

B. Need for the Proposed Rule

The Tobacco Control Act grants FDA authority to regulate tobacco products, thereby enabling FDA to assess the effects of tobacco products on the public health.

The proposed amendments would ensure tobacco manufacturers adhere to the regulations that apply to other FDA-regulated products sold in the United States, and exports of products that are not allowed for sale in the United States. The proposed rule clarifies FDA's practices and procedures with respect to voluntary recalls of tobacco products. It also guarantees that tobacco product manufacturers have the same rights as other FDA-regulated entities, where appropriate, such as the right to regulatory hearings.

C. Benefits

FDA is unable to quantify the benefits of the proposed amendments. Benefits would derive from FDA's enhanced ability to carry out its obligations, and from clarifying certain FDA practices and procedures for tobacco product manufacturers.

D. Costs

Section 7.3(f) clarifies and explains FDA's practices and procedures with respect to recalls of tobacco products. FDA tentatively concludes that tobacco product manufacturers follow recall procedures consistent with current regulations and that the proposed amendment to § 7.3(f) would not impose additional burdens on tobacco product manufacturers.[1] The proposed revision to § 16.1(b) allows for an informal hearing when FDA is considering regulatory actions or decisions related to misbranding, good manufacturing practice requirements or withdrawal of a tobacco product. No additional costs are expected to accrue from amendments to §§ 1.21(c), 7.3(f), and 16.1(b).

Additional costs would derive from recordkeeping requirements as they relate to some tobacco product exports (§§ 1.101(a) and (b)). The estimated annual costs range is between $0.07 million and $0.37 million, as further explained in table 1 of this document.

TABLE 1—TOTAL ESTIMATED COSTS OF RULE

Cost factor	Annual cost	
	Low	High
Exports of Tobacco Products	$71,438	$376,242

Sections 1.101(a) and (b) pertain to recordkeeping of documentation that demonstrates that tobacco products not allowed for sale in the United States are exported in accordance with appropriate regulations. In addition, recordkeeping documents must demonstrate that: (1) The product meets the foreign purchaser's specifications; (2) the product does not conflict with the laws of the foreign country; (3) correct labeling is placed outside of the shipping package; and (4) the product is not sold or offered in the United States. These documents are required to be retained (§ 1.101(b)).

1. Number of Affected Entities

The U.S. Department of Commerce International Trade Administration (ITA) reports that the total number of

[1] In 1995, a major tobacco product manufacturer voluntarily recalled a few tobacco product lines when it was found that the products might be contaminated. After several investigations a Centers for Disease Control and Prevention (CDC) report concluded that it was the use of the tobacco product and not the contaminated product that caused the health complaints (Ref. 1).

(manufacturing and nonmanufacturing) U.S. companies exporting tobacco products (North American Industry Classification System or NAICS code 3122) to the world in 2007 was 158, which includes 30 manufacturers and 125 nonmanufacturers of tobacco products.[2] Exporting manufacturers represent approximately 38 percent of all manufacturing companies reported by the 2007 Economic Census in this NAICS category (Ref. 3). FDA takes the total number of exporting manufacturing companies as a lower bound and the total number of exporting (manufacturing and nonmanufacturing) companies as an upper bound for the total number of respondents that would be affected by the proposed rule.

2. Estimated Economic Costs on Affected Entities

In estimating the burden, FDA uses the number of responses per respondent (3), and time per response (2 hours for recordkeeping) from previously reported estimates relating to drugs and medical devices (73 FR 46007, August 7, 2008). In valuing the time cost, FDA uses the 2009 median hourly wage of $18.04 for Office and Administrative Support Occupations (Standard Occupational Classification code 430000) in the tobacco manufacturing industry (NAICS code 312200) as reported by the Bureau of Labor Statistics (Ref. 4), plus benefits and overhead. Table 2 of this document shows that annual recordkeeping costs for all respondents are estimated to be between $0.07 million and $0.37 million.

TABLE 2—ESTIMATED INCREMENTAL BURDEN FOR EXPORTERS

Cost factor	Number of recordkeepers	Responses per recordkeeper	Total annual records	Hours per recordkeeper	Annual cost low—high
Recordkeeping	30 to 158	3	90 to 474	2	$71,438 to $376,242.

E. Analysis of Alternatives

The simplest alternative would be to exempt exporters of tobacco products from the proposed recordkeeping requirements according to general regulations that apply to other exports that FDA regulates. Under this option, there would be no immediate compliance costs or benefits. Compliance costs for exporters of tobacco products are estimated to be between $0.07 million and $0.37 million. The proposed recordkeeping requirements for exporters of tobacco products would have the benefit of allowing FDA to carry out its obligations and to clarify practices and procedures for tobacco product manufacturers.

F. Initial Regulatory Flexibility Act Analysis

FDA has examined the economic implications of this proposed rule as required by the Regulatory Flexibility Act. If a rule will have a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires Agencies to analyze regulatory options that would lessen the economic effect of the rule on small entities. This analysis serves as the Initial Regulatory Flexibility Analysis as required under the Regulatory Flexibility Act.

1. Description and Number of Affected Small Entities

The U.S. Small Business Administration (SBA) uses different definitions of what a small entity is for different industries. Using 2009 SBA size standard definitions, a firm categorized in NAICS code 312229 (Other Tobacco Product Manufacturing) is considered small if it hires fewer than 500 employees. On the other hand, firms classified in NAICS code 312221 (Cigarette Manufacturing) are considered small if they hire fewer than 1,000 employees (Ref. 5).

The most current available data on the number of establishments by employee size have not been released for the categories listed previously; thus, FDA uses data from the 2002 Economic Census (Ref. 6) to determine the number of small entities. FDA notes that the data are available at the establishment level rather than at the firm level, and assumes that the typical manufacturing establishment is roughly equivalent to the typical small manufacturing firm. Statistics on the classification of establishments by employment size show that in the year 2002, 67 to 99 percent of tobacco manufacturing entities had fewer than 1,000 employees and would be considered small by SBA. (See table 3 of this document.)

TABLE 3—ESTIMATED NUMBER OF SMALL ENTITIES AFFECTED

	Cigarette manufacturing (NAICS 312221)	Other tobacco product manufacturing (NAICS 312229)
Size Standards in Number of Employees	< 1,000	< 500
Total Number of Establishments	15	83
Percent Considered Small	67%	99%
Estimated Number of Affected Entities	2	12

FDA also estimates the percent of small to medium-sized[3] exporting companies to be 15 percent, using industry trade data for NAICS code 3122 (Tobacco Products) made available by ITA. The estimated number of affected exporting entities is determined by multiplying 0.15 by the total number of establishments. The estimates indicate that the estimated number of affected entities would range between 2 and 12 exporters. (See table 3 of this document.)

[2] As firms sometimes export multiple products, a single firm can be represented in multiple products; thus, exporter counts may not add up to the total (Ref. 2).

[3] ITA defines small firms as those with fewer than 100 employees and medium-sized firms as those that employ from 100 to 499 workers (Ref. 7).

2. Economic Effect on Small Entities

FDA uses the total value of shipments data by employment size from the 2002 Economic Census published by the U.S. Bureau of the Census to determine the unit cost as a percent of the total value of shipment for a typical manufacturer. The analysis of the effect on small versus large entities is limited by the U.S. Bureau of the Census data restrictions imposed to safeguard the confidentially of some establishments in NAICS code 312221. Consequently, the average value of shipments is presented for all establishments in NAICS code 312221 and for establishments employing 1 to 19 and 20 to 99 employees, separately. The average cost per entity is $2,814. It is estimated that this average cost as a percent of average value of shipments for small entities may be between 0.00 and 0.31 percent (see table 4). The Agency tentatively concludes that this proposed rule would have a significant economic impact on a substantial number of small entities, but the impact is uncertain.

TABLE 4—ESTIMATED AVERAGE VALUE OF SHIPMENTS FOR A TYPICAL MANUFACTURER

Description	NAICS		
	31221	31229	
Establishment Employee Size	All	1 to 19	20 to 99.
Value of Shipments ($1,000)	$34,562,900	$35,979	$270,348.
Number of Establishments	15	47	20.
Average Value of Shipments ($1,000)	$2,304,193	$766	$13,517.
Unit Cost as Percent of Average Value of Shipments	0.00%	0.31%	0.02%.

3. Additional Flexibility Considered

In this section, we discuss an alternative that would present possible reductions in costs which would be channeled through small entities. Exempting exporters of tobacco products from recordkeeping requirements would result in an estimated annual savings of 0.02 to 0.31 percent of the cost of the value of shipments for small-sized firms. However, these recordkeeping requirements would provide evidence that tobacco product manufacturers export according to regulations that apply to other FDA-regulated products.

V. Paperwork Reduction Act of 1995

This proposed rule contains information collection provisions that are subject to review by OMB under the PRA (44 U.S.C. 3501–3520). A description of these provisions is given in the following paragraphs with an estimate of the annual recordkeeping burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

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

Title: Further Amendments to General Regulations of the Food and Drug Administration to Incorporate Tobacco Product Issues—21 CFR 1.101.

Description: On June 22, 2009, the President signed the Tobacco Control Act into law. In this proposed rule, FDA is amending certain of its general regulations to include tobacco products, where appropriate, in light of FDA's authority to regulate these products under the Tobacco Control Act. The amendments in this proposed rulemaking will subject tobacco products to the same general requirements that apply to other FDA-regulated products, where appropriate.

This proposed rule would amend § 1.101(b), among other sections, to require persons who export human drugs, biologics, devices, animal drugs, cosmetics, and tobacco products that may not be sold in the United States to maintain records demonstrating their compliance with the requirements in section 801(e)(1) of the FD&C Act. Section 801(e)(1) requires exporters to keep records demonstrating that the exported product: (1) Meets with the foreign purchaser's specifications; (2) does not conflict with the laws of the foreign country; (3) is labeled on the outside of the shipping package that is intended for export; and (4) is not sold or offered for sale in the United States. These criteria also could be met by maintaining other documentation, such as letters from a foreign government Agency or notarized certifications from a responsible company official in the United States stating that the exported product does not conflict with the laws of the foreign country.

Description of Respondents: Manufacturers, distributors, and other persons who export tobacco products not intended for sale in the United States.

TABLE 5—ESTIMATED ANNUAL RECORDKEEPING BURDEN EXPORTERS OF TOBACCO PRODUCTS

21 CFR section	Number of recordkeepers	Annual frequency of recordkeeping	Total annual records	Hours per recordkeeper	Total hours
1.101(b)	158	3	474	22	10,428

The Agency estimated the number of respondents and burden hours associated with the recordkeeping requirements by reviewing Agency records and using Agency expert resources, and conferring with another Federal Agency with experience and information regarding tobacco product exporters. FDA estimates that between

30 and 158 establishments could be involved in the exporting of tobacco products and, based on previous recordkeeping estimates in OMB control number 0910–0482, "Export Notification and Recordkeeping Requirements," each establishment may have to maintain records up to 3 times per year, at a total of 22 hours per recordkeeper. Therefore, the Agency estimates between 1,980 and 10,428 burden hours will be needed for tobacco product exporters to create and maintain records demonstrating compliance with section 801(e)(1) of the FD&C Act. Therefore, FDA estimates that 158 respondents will require approximately 10,428 hours to comply with the requirements of section 801(e)(1) of the FD&C Act.

VI. Executive Order 13132: 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.

VII. Environmental Impact

The Agency has determined under 21 CFR 25.30(h), (i), and (k) 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.

VIII. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed 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.

IX. References

The following references have been placed on public display in the Division of Dockets Management (see **ADDRESSES**), and may be seen by interested parties between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site addresses, but FDA is not responsible for any subsequent changes to Web sites after this document publishes in the **Federal Register**.

1. CDC, 1996, "Recall of Philip Morris Cigarettes, May 1995–March 1996," *Morbidity and Mortality Weekly Report*, 45(12): pp. 251–254, *http://www.cdc.gov/mmwr/preview/mmwrhtml/00041035.htm*, accessed November 2010.
2. ITA, 2010, "Industry Trade Data and Analysis," *http://www.trade.gov/mas/ian/EDB/Reports/2007/table14_allmarkets_allcategories.html*, last accessed November 2010.
3. U.S. Census Bureau American FactFinder, 2007, "Sector 31: EC0731I1: Manufacturing: Industry Series: Detailed Statistics by Industry for the United States: 2007," *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-ds_name=EC0231I4&-_lang=en*, accessed October 2010.
4. U.S. Bureau of Labor Statistics, 2009, "Occupational Employment Statistics," *http://data.bls.gov/oes*, accessed October 15, 2010.
5. SBA, 2010, "Table of Small Business Size Standards Matched to North American Industry Classification System Code," *http://www.sba.gov/content/table-small-business-size-standards*, accessed March 2, 2011.
6. U.S. Census Bureau American FactFinder, 2002, "2002 Economic Census: Sector 31: Manufacturing: Industry Series: Industry Statistics by Employment Size: 2002," *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-ds_name=EC0231I4&-_lang=en*, accessed October 2010.
7. ITA, *http://www.trade.gov/mas/ian/smeoutlook/edbtechnicalnotes/tg_ian_001929.asp*, last accessed November 2010.

List of Subjects

21 CFR Part 1

Cosmetics, Drugs, Exports, Food labeling, Imports, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 7

Administrative practice and procedure, Consumer protection, Reporting and recordkeeping requirements.

21 CFR Part 16

Administrative practice and procedure.

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 parts 1, 7, and 16 be amended as follows:

PART 1—GENERAL ENFORCEMENT REGULATIONS

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

Authority: 15 U.S.C. 1333, 1453, 1454, 1455, 4402; 19 U.S.C. 1490, 1491; 21 U.S.C. 321, 331, 333, 334, 335a, 343, 350c, 350d, 352, 355, 360b, 362, 371, 374, 381, 382, 387, 387a, 387c, 393; 42 U.S.C. 216, 241, 243, 262, 264.

2. Amend § 1.21 by revising paragraph (a) introductory text and paragraph (c)(1) to read as follows:

§ 1.21 Failure to reveal material facts.

(a) Labeling of a food, drug, device, cosmetic, or tobacco product shall be deemed to be misleading if it fails to reveal facts that are:

* * * * *

(c) * * *

(1) Permit a statement of differences of opinion with respect to warnings (including contraindications, precautions, adverse reactions, and other information relating to possible product hazards) required in labeling for food, drugs, devices, cosmetics, or tobacco products under the Federal Food, Drug, and Cosmetic Act.

* * * * *

3. Amend § 1.101 by revising paragraph (a) and the heading of paragraph (b) to read as follows:

§ 1.101 Notification and recordkeeping.

(a) *Scope.* This section pertains to notifications and records required for human drug, biological product, device, animal drug, food, cosmetic, and tobacco product exports under sections 801 or 802 of the Federal Food, Drug, and Cosmetic Act or (21 U.S.C. 381 and 382) or section 351 of the Public Health Service Act (42 U.S.C. 262).

(b) *Recordkeeping requirements for human drugs, biological products, devices, animal drugs, foods, cosmetics, and tobacco products exported under or subject to section 801(e)(1) of the Federal Food, Drug, and Cosmetic Act.* * * *

* * * * *

PART 7—ENFORCEMENT POLICY

4. The authority citation for part 7 continues to read as follows:

Authority: 21 U.S.C. 321–393; 42 U.S.C. 241, 262, 263b–263n, 264.

5. Amend § 7.3(f) by revising the first sentence to read as follows:

§ 7.3 Definitions.

* * * * *

(f) *Product* means an article subject to the jurisdiction of the Food and Drug Administration, including any food,

drug, and device intended for human or animal use, any cosmetic and biologic intended for human use, any tobacco product intended for human use, and any item subject to a quarantine regulation under part 1240 of this chapter. * * *

* * * * *

PART 16—REGULATORY HEARING BEFORE THE FOOD AND DRUG ADMINISTRATION

6. The authority citation for part 16 continues to read as follows:

Authority: 15 U.S.C. 1451–1461; 21 U.S.C. 141–149, 321–394, 467f, 679, 821, 1034; 28 U.S.C. 2112; 42 U.S.C. 201–262, 263b, 364.

7. Amend § 16.1 by adding new statutory provisions to the end of paragraph (b)(1) to read as follows:

§ 16.1 Scope.

* * * * *

(b) * * *

(1) * * *

Section 903(a)(8)(B)(ii) of the Federal Food, Drug, and Cosmetic Act relating to the misbranding of tobacco products.

Section 906(e)(1)(B) of the Federal Food, Drug, and Cosmetic Act relating to the establishment of good manufacturing practice requirements for tobacco products.

Section 910(d)(1) of the Federal Food, Drug, and Cosmetic Act relating to the withdrawal of an order allowing a new tobacco product to be introduced or delivered for introduction into interstate commerce.

Section 911(j) of the Federal Food, Drug, and Cosmetic Act relating to the withdrawal of an order allowing a modified risk tobacco product to be introduced or delivered for introduction into interstate commerce.

* * * * *

Dated: April 8, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–9044 Filed 4–13–11; 8:45 am]

BILLING CODE 4160–01–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3050

[Docket No. RM2011–9; Order No. 713]

Periodic Reporting

AGENCY: Postal Regulatory Commission.

ACTION: Notice of proposed rulemaking; availability of rulemaking petition.

SUMMARY: The Commission is establishing a docket to consider a proposed change in certain analytical methods used in periodic reporting. This action responds to a Postal Service rulemaking petition. Establishing this docket will allow the Commission to consider the Postal Service's proposal and comments from the public.

DATES: *Comments are due:* May 9, 2011.

ADDRESSES: Submit comments electronically by accessing the "Filing Online" link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx*. Commenters who cannot submit their views electronically should contact the person identified in **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION: On April 6, 2011, the Postal Service filed a petition pursuant to 39 CFR 3050.11 asking the Commission to initiate an informal rulemaking proceeding to consider changes in the analytical methods approved for use in periodic reporting.[1]

Proposal One[2] would propose to modify the attribution of costs for Fee Group E Post Office Boxes so that the costs are considered institutional rather than as part of the attributable costs of Post Office Box Service. The Postal Service asserts that its aim is to achieve more equitable financing of Fee Group E Post Office Boxes. It notes that the proposal has no impact on the methodology for the calculation of costs for Fee Group E Post Office Boxes. *Id.* at 1.

The Postal Service states that under this proposal, Group E costs would be paid for by all mailers, not just post office box holders. It maintains that the Group E costs methodology remains consistent with Docket No. ACR2010 and Docket No. MC2010–20. *Id.* Attachment at 1.

The Attachment to the Postal Service's Petition explains its proposal in more detail, including its background, objective, rationale, and estimated impact. The Petition, including the attachments, is available for review on the Commission's Web site, *http://www.prc.gov*.

Pursuant to 39 U.S.C. 505, James F. Callow is designated as Public Representative to represent the interests of the general public in this proceeding. Comments are due no later than May 9, 2011.

It is ordered:

1. The Petition of the United States Postal Service Requesting Initiation of a Proceeding to Consider Proposed Changes in Analytic Principles (Proposal One), filed April 6, 2011, is granted.

2. The Commission establishes Docket No. RM2011–9 to consider the matters raised by the Postal Service's Petition.

3. Interested persons may submit comments on Proposal One no later than May 9, 2011.

4. The Commission will determine the need for reply comments after review of the initial comments.

5. James F. Callow is appointed to serve as the Public Representative to represent the interests of the general public in this proceeding.

6. The Secretary shall arrange for publication of this Notice in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2011–9058 Filed 4–13–11; 8:45 am]

BILLING CODE 7710–FW–P

[1] Petition of the United States Postal Service Requesting Initiation of a Proceeding to Consider Proposed Changes in Analytic Principles (Proposal One), April 6, 2011 (Petition).

[2] This is the first proposal filed after the FY 2010 Annual Compliance Report. It is the Postal Service's current practice to restart its proposal numbering sequence.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0998; FRL–9295–4]

Approval and Promulgation of Air Quality Implementation Plans; Indiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a request submitted by the Indiana Department of Environmental Management on November 24, 2010, to revise the Indiana State Implementation Plan (SIP) under the Clean Air Act. Indiana submitted revisions to the particulate matter (PM) and sulfur dioxide (SO_2) limits for Cargill, Incorporated (Cargill) at its facility in Hammond (Lake County), Indiana. Indiana's SO_2 revisions tighten emission limits for some existing units at Cargill's Hammond facility and remove the references to other emission units that are no longer in operation, in

accordance with the terms of a September 2005 Federal consent decree. The PM revisions reflect the permanent shutdown of and changes in unit identification for other Cargill units.

DATES: Comments must be received on or before May 16, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2010–0998, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: aburano.douglas@epa.gov.*
3. *Fax:* (312) 408–2279.
4. *Mail:* Douglas Aburano, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Douglas Aburano, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Matt Rau, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6524, *rau.matthew@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: April 4, 2011.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2011–8869 Filed 4–13–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2011–0031; FRL–9295–8]

Approval and Promulgation of Air Quality Implementation Plans; New Mexico; Prevention of Significant Deterioration; Greenhouse Gas Tailoring Rule Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a revision to the New Mexico State Implementation Plan (SIP), submitted by the New Mexico Environment Department (NMED) to EPA on December 1, 2010. The proposed SIP revision modifies New Mexico's Prevention of Significant Deterioration (PSD) program to establish appropriate emission thresholds for determining which new stationary sources and modification projects become subject to New Mexico's PSD permitting requirements for their greenhouse gas (GHG) emissions. Due to the SIP Narrowing Rule, 75 FR 82536, starting on January 2, 2011, the approved New Mexico SIP's PSD requirements for GHG apply at the thresholds specified in the Tailoring Rule, not at the 100 or 250 tons per year (tpy) levels otherwise provided under the Clean Air Act (CAA or Act), which would overwhelm New Mexico's permitting resources. This rule clarifies the applicable thresholds in the New Mexico SIP, addresses the flaw discussed in the SIP Narrowing Rule, and incorporates State rule changes adopted at the State level into the Federally-approved SIP. EPA is proposing approval of New Mexico's December 1, 2010, PSD SIP revision because the Agency has made the preliminary determination that this PSD SIP revision is in accordance with section 110 and part C of the Federal Clean Air Act and EPA regulations regarding PSD permitting for GHGs.

DATES: Comments must be received on or before May 16, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R06–OAR–2011–0031, by one of the following methods:

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

(2) *E-mail:* Mr. Jeff Robinson at *robinson.jeffrey@epa.gov.* Please also cc the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below.

(3) *U.S. EPA Region 6 "Contact Us" Web site: http://epa.gov/region6/r6coment.htm.* Please click on "6PD" (Multimedia) and select "Air" before submitting comments.

(4) *Fax:* Mr. Jeff Robinson, Chief, Air Permits Section (6PD–R), at fax number 214–665–6762.

(5) *Mail:* Mr. Jeff Robinson, Chief, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.

(6) *Hand or Courier Delivery:* Mr. Jeff Robinson, Chief, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2011–0031. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through *http://www.regulations.gov* or e-mail, if you believe that it is CBI or otherwise protected from disclosure. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means that EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you

include your name and other contact information in the body of your comment along with any disk or CD–ROM submitted. 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 and any form of encryption and should be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. A 15 cent per page fee will be charged for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area on the seventh floor at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittals related to this SIP revision, and which are part of the EPA docket, are also available for public inspection at the State Air Agency listed below during official business hours by appointment:

New Mexico Environment Department, Air Quality Bureau, 1190 St. Francis Drive, Sante Fe, New Mexico, 87502.

FOR FURTHER INFORMATION CONTACT: Ms. Melanie Magee (6PD–R), Air Permits Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue (6PD–R), Suite 1200, Dallas, TX 75202–2733. The telephone number is (214) 665–7161. Ms. Magee can also be reached via electronic mail at *magee.melanie@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

I. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

2. Follow directions—The EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

4. Describe any assumptions and provide any technical information and/or data that you used.

5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

6. Provide specific examples to illustrate your concerns, and suggest alternatives.

7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

8. Make sure to submit your comments by the comment period deadline identified.

II. Summary of New Mexico's Submittal

On December 1, 2010, NMED submitted a SIP revision request to EPA to establish appropriate emission thresholds for determining which new or modified stationary sources become subject to New Mexico's PSD permitting requirements for GHG emissions. The submitted revisions to the SIP are enacted at 20.2.74.7 New Mexico Air Code (NMAC). Final approval of this SIP revision request will put in place the GHG emission thresholds for PSD applicability set forth in EPA's Tailoring Rule, ensuring that smaller GHG sources emitting less than these thresholds are not subject to permitting requirements. Pursuant to section 110 of the CAA, EPA is proposing to approve this revision into the New Mexico SIP. NMED also submitted revisions to the remainder of the New Mexico PSD program at 20.2.74.9, 20.2.74.200, 20.2.74.300, and 20.2.74.320 NMAC that correctly update internal cross-references to the PSD definitions. EPA is also proposing approval of these revisions pursuant to section 110 of the CAA.

Also on December 1, 2010, NMED submitted revisions to the New Mexico Title V Operating Permits Program at 20.2.70 NMAC. EPA will address these revisions to the New Mexico Title V program at a later date and in a separate action on the Title V Program.

III. What is the background for this proposed action?

This section briefly summarizes EPA's recent GHG-related actions that provide the background for today's proposed action. More detailed discussion of the background is found in the preambles for those actions. In particular, the background is contained in what we call the GHG PSD SIP Narrowing Rule,[1] and in the preambles to the actions cited therein.

A. GHG-Related Actions

EPA has recently undertaken a series of actions pertaining to the regulation of GHGs that, although for the most part distinct from one another, establish the overall framework for today's final action on the New Mexico SIP. Four of these actions include, as they are commonly called, the "Endangerment Finding" and "Cause or Contribute Finding," which EPA issued in a single final action,[2] the "Johnson Memo Reconsideration,"[3] the "Light-Duty Vehicle Rule,"[4] and the "Tailoring Rule."[5] Taken together and in conjunction with the CAA, these actions established regulatory requirements for GHGs emitted from new motor vehicles and new motor vehicle engines; determined that such regulations, when they took effect on January 2, 2011, subjected GHGs emitted from stationary sources to PSD requirements; and limited the applicability of PSD

[1] "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule." 75 FR 82536 (December 30, 2010).

[2] "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66496 (December 15, 2009).

[3] "Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 FR 17004 (April 2, 2010).

[4] "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25324 (May 7, 2010).

[5] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule." 75 FR 31514 (June 3, 2010).

requirements to GHG sources on a phased-in basis. EPA took this last action in the Tailoring Rule, which, more specifically, established appropriate GHG emission thresholds for determining the applicability of PSD requirements to GHG-emitting sources.

PSD is implemented through the SIP system, and so in December 2010, EPA promulgated several rules to implement the new GHG PSD SIP program. Recognizing that some States had approved SIP PSD programs that did not apply PSD to GHGs, EPA issued a SIP call and, for some of these States, a FIP.[6] Recognizing that other States had approved SIP PSD programs that do apply PSD to GHGs, but that do so for sources that emit as little as 100 or 250 tpy of GHG, and that do not limit PSD applicability to GHGs to the higher thresholds in the Tailoring Rule, EPA issued the GHG PSD SIP Narrowing Rule. Under that rule, EPA withdrew its approval of the affected SIPs to the extent those SIPs covered GHG-emitting sources below the Tailoring Rule thresholds. EPA based its action primarily on the "error correction" provisions of CAA section 110(k)(6).

B. New Mexico's Actions

On June 24, 2010, New Mexico provided a letter to EPA, in accordance with a request to all States from EPA in the Tailoring Rule, with confirmation that the State has the authority to regulate GHG in its PSD program. The letter confirmed that current New Mexico rules require regulating GHGs at the existing 100/250 tpy threshold, rather than at the higher thresholds set in the Tailoring Rule because the State does not have the authority to apply the meaning of the term "subject to regulation" established in the Tailoring Rule. New Mexico also submitted a letter on September 14, 2010, in response to the proposed GHG SIP Call again confirming that EPA correctly classified New Mexico as a State with authority to apply PSD requirements to GHGs. The September 14, 2010, letter also identifies that NMED is pursuing rulemaking activity to define the terms "greenhouse gas" and "subject to regulation". See the docket for this proposed rulemaking for copies of New Mexico's June 24, 2010, and September 14, 2010, letters.

In the SIP Narrowing Rule, published on December 30, 2010, EPA withdrew its approval of New Mexico's SIP—among other SIPs—to the extent that SIP applies PSD permitting requirements to GHG emissions from sources emitting at levels below those set in the Tailoring Rule.[7] As a result, New Mexico's current approved SIP provides the State with authority to regulate GHGs, but only at and above the Tailoring Rule thresholds; and Federally requires new and modified sources to receive a PSD permit based on GHG emissions only if they emit at or above the Tailoring Rule thresholds.

New Mexico has amended its State regulations to incorporate the Tailoring Rule thresholds, and has submitted the adopted regulations as revisions to the New Mexico SIP. EPA's proposed approval of the New Mexico revisions will clarify the applicable thresholds in the New Mexico SIP.

The basis for this SIP revision is that limiting PSD applicability to GHG sources to the higher thresholds in the Tailoring Rule is consistent with the SIP provisions that provide required assurances of adequate resources, and thereby addresses the flaw in the SIP that led to the SIP Narrowing Rule. Specifically, CAA section 110(a)(2)(E) includes as a requirement for SIP approval that States provide "necessary assurances that the State * * * will have adequate personnel [and] funding * * * to carry out such [SIP]." In the Tailoring Rule, EPA established higher thresholds for PSD applicability to GHG-emitting sources on grounds that the States generally did not have adequate resources to apply PSD to GHG-emitting sources below the Tailoring Rule thresholds,[8] and no State, including New Mexico, asserted that it did have adequate resources to do so.[9] In the SIP Narrowing Rule, EPA found that the affected States, including New Mexico, had a flaw in their SIP at the time they submitted their PSD programs, which was that the applicability of the PSD programs was potentially broader than the resources available to them under their SIP.[10] Accordingly, for each affected State, including New Mexico, EPA concluded that EPA's action in approving the SIP was in error, under CAA section 110(k)(6), and EPA rescinded its approval to the extent the PSD program applies to GHG-emitting sources below the Tailoring Rule thresholds.[11] EPA recommended that States adopt a SIP revision to incorporate the Tailoring Rule thresholds, thereby (i) assuring that under State law, only sources at or above the Tailoring Rule thresholds would be subject to PSD; and (ii) avoiding confusion under the Federally-approved SIP by clarifying that the SIP applies to only sources at or above the Tailoring Rule thresholds.[12]

IV. What is EPA's analysis of New Mexico's proposed SIP revision?

The regulatory revisions that NMED submitted on December 1, 2010, establish thresholds for determining which stationary sources and modification projects become subject to permitting requirements for GHG emissions under New Mexico's PSD program. Specifically, the submittal includes changes to New Mexico's PSD regulations at 20.2.74.7, 20.2.74.9, 20.2.74.200, 20.2.74.300, and 20.2.74.320 NMAC.[13]

New Mexico is currently a SIP-approved State for the PSD program, and has incorporated EPA's 2002 New Source Review (NSR) reform revisions for PSD into its SIP. In letters provided to EPA on June 24, 2010, and September 14, 2010, New Mexico notified EPA of its interpretation that the State currently has the authority to regulate GHGs under its PSD regulations. The current New Mexico program (adopted prior to the promulgation of EPA's Tailoring Rule) applies to major stationary sources (having the potential to emit at least 100 tpy or 250 tpy or more of a regulated NSR pollutant, depending on the type of source) or modifications constructing in

[6] Specifically, by notice dated December 13, 2010, EPA finalized a "SIP Call" that would require those States with SIPs that have approved PSD programs but do not authorize PSD permitting for GHGs to submit a SIP revision providing such authority. "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," 75 FR 77698 (Dec. 13, 2010). EPA has begun making findings of failure to submit that would apply in any State unable to submit the required SIP revision by its deadline, and finalizing FIPs for such States. See, e.g. "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure To Submit State Implementation Plan Revisions Required for Greenhouse Gases," 75 FR 81874 (December 29, 2010); "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan," 75 FR 82246 (December 30, 2010). Because New Mexico's SIP already authorizes New Mexico to regulate GHGs once GHGs become subject to PSD requirements on January 2, 2011, New Mexico is not subject to the proposed SIP Call or FIP.

[7] "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule." 75 FR 82536 (December 30, 2010).

[8] Tailoring Rule, 75 FR 31,517/1.

[9] SIP Narrowing Rule, 75 FR 82,540/2.

[10] *Id.* at 82,542/3.

[11] *Id.* at 82,544/1.

[12] *Id.* at 82,540/2.

[13] On December 1, 2010, Governor Richardson also submitted revisions to the New Mexico Title V program. These revisions were not submitted as part of the SIP and NMED did not request SIP approval for these regulations. EPA will take separate action on the title V program revisions in a separate rulemaking.

areas designated attainment or unclassifiable with respect to the National Ambient Air Quality Standards.

The changes to New Mexico's PSD program regulations are substantively the same as the amendments to the Federal PSD regulatory provisions in EPA's Tailoring Rule. As part of its review of this submittal, EPA performed a line-by-line review of New Mexico's proposed revision and has determined that they are consistent with the Tailoring Rule. EPA's Technical Support Document detailing our analysis of the proposed revisions to the New Mexico SIP is available in the docket for this action.

V. What action is EPA taking?

EPA is proposing to approve New Mexico's December 1, 2010, SIP submittal, relating to PSD requirements for GHG-emitting sources. Specifically, New Mexico's December 1, 2010, proposed SIP revision establishes appropriate emissions thresholds for determining PSD applicability to new and modified GHG-emitting sources in accordance with EPA's Tailoring Rule. EPA has made the determination that this SIP submittal is approvable because it is in accordance with the CAA and EPA regulations regarding PSD permitting for GHGs.

If EPA finalizes our approval of New Mexico's changes to its air quality regulations to incorporate the appropriate thresholds for GHG permitting applicability into New Mexico's SIP, then paragraph (d) in Section 52.1634 of 40 CFR part 52, as included in EPA's SIP Narrowing Rule—which codifies the limitation of EPA's approval of New Mexico's PSD SIP to not cover the applicability of PSD to GHG-emitting sources below the Tailoring Rule thresholds—is no longer necessary. In today's proposed action, EPA is also proposing to amend Section 52.1634 of 40 CFR part 52 to remove this unnecessary regulatory language.

VI. Statutory and Executive Order Reviews

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

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, and Reporting and recordkeeping requirements.

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

Dated: April 6, 2011.

Al Armendariz,

Regional Administrator, Region 6.

[FR Doc. 2011–9099 Filed 4–13–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0545; FRL–9295–2]

Proposed Approval of Air Quality Implementation Plans; Indiana; Stage I Vapor Recovery Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve into the Indiana State Implementation Plan (SIP), amendments to the stage I vapor recovery rule and administrative changes to stage II vapor recovery rule submitted by the Indiana Department of Environmental Management on June 11, 2010. These rule revisions made volatile organic compounds (VOC) emission control requirements for filling at gasoline dispensing facilities more stringent by applying them statewide, making the rule applicable to smaller tanks and revising the requirements for newer submerged fill pipes. These new state requirements update the SIP consistent with new Federal requirements from January 10, 2008 area source National Emissions Standards for Hazardous Air Pollutants for gasoline dispensing facilities. The revisions also delete references to compliance dates which have passed. The rules are approvable because they are consistent with the Clean Air Act and EPA regulations, and should result in additional emission reductions of VOCs throughout Indiana.

DATES: Comments must be received on or before May 16, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2010–0545, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: aburano.douglas@epa.gov.*
3. *Fax:* (312) 408–2279.
4. *Mail:* Doug Aburano, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Doug Aburano, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The

Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Please see the direct final rule which is located in the Final Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Carolyn Persoon, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8290, *persoon.carolyn@epa.gov*.

SUPPLEMENTARY INFORMATION: In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: March 30, 2011.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2011–8860 Filed 4–13–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2011–0018; MO92210–0–0008–B2]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Prairie Chub as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the prairie chub (*Macrhybopsis australis*) as threatened or endangered under the Endangered Species Act of 1973, as amended (Act), and to designate critical habitat. The prairie chub is a fish endemic to the upper Red River basin in Oklahoma and Texas. Based on our review, we find that the petition presents substantial scientific or commercial information indicating that listing the prairie chub may be warranted. Therefore, with the publication of this notice, we are initiating a review of the status of the species to determine if listing the prairie chub is warranted. To ensure that this status review is comprehensive, we are requesting scientific and commercial data and other information regarding this species. Based on the status review, we will issue a 12-month finding on the petition, which will address whether the petitioned action is warranted, as provided in the Act.

DATES: To allow us adequate time to conduct this review, we request that we receive information on or before June 13, 2011. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** section, below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Time on this date.

ADDRESSES: You may submit information by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. In the box that reads "Enter Keyword or ID," enter the Docket number for this finding, which is [Docket No. FWS–R2–ES–2011–0018]. Check the box that reads "Open for Comment/Submission," and then click the Search button. You should then see an icon that reads "Submit a Comment." Please ensure that you have found the correct rulemaking before submitting your comment.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: [Docket No. FWS–R2–ES–2011–0018]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will post all information we receive on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Request for Information section below for more details).

After June 13, 2011, you must submit information directly to the Field Office (see **FOR FURTHER INFORMATION CONTACT** section below). Please note that we might not be able to address or incorporate information that we receive after the above requested date.

FOR FURTHER INFORMATION CONTACT: Dixie Bounds, Field Supervisor, U.S. Fish and Wildlife Service, Oklahoma Ecological Services Field Office, 9014 East 21st Street, Tulsa, OK 74129, by telephone at 918–581–7458, or by facsimile at 918–581–7467. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Request for Information

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly review the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on the prairie chub from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We seek information on:

(1) The species' biology, range, and population trends, including:

(a) Habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) The factors that are the basis for making a listing determination for a species under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

If, after the status review, we determine that listing the prairie chub is warranted, we will propose critical habitat (see definition in section 3(5)(A) of the Act), under section 4 of the Act, to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, within the geographical range currently occupied by the prairie chub, we request data and information on:

(1) What may constitute "physical or biological features essential to the conservation of the species";

(2) Where these features are currently found; and

(3) Whether any of these features may require special management considerations or protection.

In addition, we request data and information on "specific areas outside the geographical area occupied by the species" that are "essential to the conservation of the species." Please provide specific comments and information as to what, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and why such habitat meets the requirements of section 4 of the Act.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made "solely on the basis of the best scientific and commercial data available."

You may submit your information concerning this status review by one of the methods listed in the **ADDRESSES** section. If you submit information via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*.

Information and supporting documentation that we received and used in preparing this 90-day finding are available for you to review at *http://www.regulations.gov*, or you may make an appointment during normal business hours at the U.S. Fish and Wildlife Service, Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1533(b)(3)(A)) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). If we find that substantial scientific or commercial information was presented, we are required to promptly conduct a species status review, which we subsequently summarize in our 12-month finding.

Petition History

On January 25, 2010, we received a petition dated January 14, 2010, from WildEarth Guardians, requesting that the prairie chub be listed as threatened or endangered and that critical habitat be designated under the Act. The petition clearly identified itself as such and included the requisite identification information for the petitioner, as required by 50 CFR 424.14(a). In a July 19, 2010, letter to the petitioner, we responded that we reviewed the information presented in the petition and determined that issuing an emergency regulation temporarily listing the species under section 4(b)(7) of the Act was not warranted. We also stated that, due to court orders and judicially approved settlement agreements for other listing and critical habitat determinations under the Act that required nearly all of our listing and critical habitat funding for fiscal year 2010, we would not be able to further address the petition at that time, but would complete the action when workload and funding allowed. This finding addresses the petition.

Previous Federal Actions

There have been no Federal actions specific to the prairie chub.

Species Information

Taxonomy and Description

The prairie chub is a small fish that was originally described by Hubbs and Ortenberger (1929, pp. 23–28) from a collection in the Red River 10 to 14 kilometers (km) (6 to 9 miles (mi)) southwest of Hollis, Harmon County, Oklahoma. Until 2004, the prairie chub was treated as a single, wide-ranging, geographically variable species, referred to as *Macrhybopsis aestivalis* (Wallace 1980, p. 180; Eisenhour 2004, pp. 9–10). An analysis of the species' morphology conducted by Eisenhour (2004, p. 13) resulted in the recognition of five species west of the Mississippi River within the *Macrhybopsis* complex: The prairie chub (*M. australis*) in the upper Red River drainage; the peppered chub (formerly Arkansas River speckled chub) (*M. tetranema*) in the upper Arkansas River drainage; the shoal chub (*M. hyostoma*) in the central and eastern United States; the speckled chub (*M. aestivalis*) from the Rio Grande River in Texas; and the burrhead chub (*M. marconis*), which occurs in the San Antonio and Guadalupe Rivers in Texas, with remnant populations possibly in the Edwards Plateau portion of the Colorado River (Miller and Robison 2004, pp. 126–127; Hubbs *et al.* 2008, p. 21).

Even though there are morphological characteristics separating *Macrhybopsis* into five species, there are genetic similarities that dispute this species separation. Underwood *et al.* (2003, pp. 493, 497) examined genes in three of the western members of the *Macrhybopsis* complex and noted that the three forms of speckled chub occurring in the Red and Arkansas Rivers could possibly comprise a single species. Underwood *et al.* (2003, p. 297) suggested that the mixing of the species' genes through hybridization may be why the shoal chub (*M. hyostoma*) in the Red and Arkansas Rivers is genetically similar to the prairie chub (*M. australis*) in the Red River and the peppered chub (*M. tetranema*) in the Arkansas River (Underwood *et al.* 2003, p. 498). Further genetic studies are needed on all five species of *Macrhybopsis* west of the

Mississippi River to help resolve their genetic lineages.

We accept the characterization of the prairie chub as a separate species with the scientific name *Macrhybopsis australis* because of research conducted by Eisenhour (2004, pp. 13, 28–31); this research has been accepted by the scientific community. The prairie chub is listed as a species in the *Common and Scientific Names of Fishes*, which was published by the American Fisheries Society in 2004.

Distribution

The prairie chub is endemic to the upper Red River basin in Oklahoma and Texas. Based on information in the petition and readily available in our files, the species' current distribution appears to include the following rivers and streams: Elm Fork of the Red River, North Fork of the Red River downstream of Altus Lake, Salt Fork of the Red River, Prairie Dog Town Fork of the Red River, Buck Creek, Pease River, North Wichita River, South Wichita River, Mud Creek, Bitter Creek, Gypsum Boggy Creek, Sandy (Lebos) Creek, Beaver Creek, and the Red River proper upstream of Lake Texoma (Wilde *et al.* 1996, pp. 26–55; Underwood 2003, p. 499; Eisenhour 2004, pp. 30, 40–41; Miller and Robison 2004, pp. 126–127). The species is presumed extirpated in the Washita River (Miller and Robison 2004, p. 127) and the North Fork of the Red River upstream of Altus Lake (Winston *et al.* 1991, pp. 102–103).

Habitat

Little is known about the habitat requirements of the prairie chub. The species is known to occupy relatively large, shallow rivers of the Red River basin, and is typically found over clean sand or gravel substrates (Miller and Robinson 2004, p. 126). The peppered and prairie chubs are considered sister species with similar genetics and ecological distributions (Underwood 2003, p. 498). For this reason, we can use scientific information gathered on the peppered chub as a means to explain unknown biological and ecological attributes of the prairie chub. Bonner (2000, p. 16) found that the peppered chub favored relatively shallow depths of 18.1 to 23.5 centimeters (cm) (7.1 to 9.3 inches (in)) and swift currents of 40 centimeters per second (cm/s) to 62 cm/s (16 to 24 inches per second (in/s)). Peppered chubs were typically collected from sand substrates throughout the year; however, the species favored cobble substrate during the spring and gravel substrate during the summer (Bonner 2000, p. 17). The peppered chub was collected from water temperatures ranging from 0 to 34 degrees Celsius (°C) (32 to 93 degrees Fahrenheit (°F)) (Bonner 2000, p. 16).

Age and Growth

Similar to the peppered chub, the prairie chub likely has a relatively short lifespan, with very few individuals surviving to their third year (Bonner 2000, p. 44; Wilde and Durham 2008, p. 1657). Bonner (2000, p. 63) found that the population of peppered chubs was dominated by age-0 and age-1 fish, suggesting high post-spawning mortality and high overwinter mortality. Age-2 peppered chubs reached a maximum length of 77 millimeters (mm) (3 in) in the study (Bonner 2000, p. 64).

Reproduction

Little is known about prairie chub reproduction, but based on known reproductive habits of other *Macrhybopsis* species, the prairie chub is likely a broadcast spawner, meaning it releases semibuoyant nonadhesive eggs into moving water (Platania and Altenbach 1998, p. 561). This reproductive strategy is considered to be an adaptation to highly variable stream environments (Platania and Altenbach 1998, p. 565). Based on drift rates and the length of time needed for egg development, Platania and Altenbach (1998, p. 566) suggested that peppered chub eggs could be transported 72 to 144 km (44 to 90 mi) before hatching. Once hatched, fry (recently hatched fish) could continue to be transported downstream another 216 km (134 mi) until they are able to swim (Platania and Altenbach 1998, p. 566).

Reproductive success of species within the *Macrhybopsis* complex appears to be related to stream discharge during the spring and summer (Wilde and Durham 2008, p. 1658). Many studies have shown that species in the *Macryhobopsis* complex spawn during high-discharge events (Platania and Altenbach 1998, p. 565). However, Durham and Wilde (2006, pp. 1647–1649) found that young were produced throughout the summer, when relatively low discharge was present. In addition, Durham and Wilde (2006, pp. 1647–1649) found that high peak discharges were associated with low catch rates. Durham and Wilde (2006, p. 1651) concluded that there was an association between moderate peak rates and reproductive success of five minnows, including the peppered chub. Further, Bonner (2000, p. 62) found that the peppered chub spawned in pools; however, reproductive success was not documented. Based on these studies, the reproductive success of prairie chubs may be related to stream discharge.

Evaluation of Information for This Finding

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations at 50 CFR 424 set forth the procedures for adding a species to, or removing a species from, the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be a threatened or endangered species due to one or more of the five factors described in section 4(a)(1) of the Act:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In making this 90-day finding, we evaluated whether information regarding threats to the prairie chub, as presented in the petition and in other information available in our files, is substantial scientific or technical information, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The petitioner asserts that impoundments, water quality, Red River chloride control, land use, water use, and invasive plants are threats to the prairie chub's habitat or range.

Impoundments

Information Provided in the Petition

In support of the assertion that impoundments are a threat to the prairie chub, the petitioner suggests that stream flows within the Red River basin have been greatly altered by dams and dikes. These structures include Lake Tanglewood Dam, Altus Dam, Altus Auxiliary Dike, Altus East Dike, Altus Lugert Dike, Altus North Dike, Altus South Dike, Farmers Creek Dam, and Fish Creek Dam. The petitioner referenced Bonner (2000, p. 1) to describe how dams alter physical and chemical conditions of streams. These alterations, including changes in temperature and substrate, presence of backwaters, and timing and volume of discharge, all directly affect fish populations. A reduction in discharge can result in changes to channel

morphology and indirectly affect stream fish populations that require streams or rivers for all or part of their life history. For example, Altus Dam on the North Fork of the Red River caused changes to the fish community above the dam, including extirpation of the prairie chub (Winston *et al.* 1991, p. 98). In addition, Eisenhour (2004, pp. 30–31) states that reproduction and recruitment would be affected by reservoirs because the species is likely a flood-pulse spawner and because downstream habitat in the form of permanent flowing streams would be altered.

Evaluation of Information Provided in the Petition and Available in Service Files

Information readily available in our files supports the petitioner's assertions that impoundments, such as dams and dikes, cause modification of prairie chub habitat. Streams and rivers of the Red River basin have been significantly altered by dams and small impoundments. A total of 660 named reservoirs and an additional 3,877 impoundments, all 2 hectares (ha) (5 acres (ac)) or larger, have been constructed within the prairie chub's current known distribution. Twenty-eight percent of named streams (181 of 647) within the current prairie chub drainage have at least 1 impoundment over 2 ha (5 ac) in size (U.S. Geological Survey 2007, p. 1).

Impoundments, particularly those that are regulated, cause dampened and less-frequent peak flows downstream of dams, and prolonged periods of high or no flow. Because reproduction of the prairie chub is likely dependent upon discharge and varying flows, any alteration of the natural flow regime could affect its reproductive capability. Regulation of flow also causes increased channelization, decreased complexity of stream habitats, and a loss of connectivity between the river and its floodplain (Dudley and Platania 2007, p. 2081). As a result, flow velocity is increased, which increases downstream transport of eggs into unsuitable reaches such as reservoirs (Dudley and Platania 2007, p. 2081), where the eggs drop out of suspension and possibly perish because of unsuitable habitat (Platania and Altenbach 1998, p. 566). Additionally, because the connection between the river and its floodplain is diminished or lost, refugia for newly hatched fish are less available, leaving them vulnerable to potential predation.

Luttrell *et al.* (1999, p. 986) found that extirpation of peppered chubs from the Arkansas River basin coincided with completion of reservoirs and severe drought. Their finding was supported by a life history model for the peppered chub, developed by Wilde and Durham (2008, p. 1663), that predicted that for the peppered chub population to be maintained, an annual discharge below the long-term average would have to be followed the next year by a higher-than-average discharge. For example, if annual discharge was less than the long-term average by 10 percent, discharge the following year would have to exceed 11 percent of the long-term average in order for the peppered chub population to recover. Because peppered and prairie chubs are thought to spawn only once, a quick population rebound is critical to its survival. Thus, impoundments throughout the prairie chub's range may affect the ability of the species to rebound from a population decline.

In reference to the petitioner's claims regarding impoundments as a threat to the prairie chub, the information appears to be reliable. Information readily available in our files indicates that impoundments alter stream flows, which the prairie chub appears to be dependent upon for reproduction and recruitment. Therefore, we find that there is substantial information indicating that impoundments may be a threat to the species such that listing may be warranted.

Water Quality

Information Provided in the Petition

The petitioner asserts that degraded water quality is a threat to the prairie chub. In support of this threat, the petitioner provided information on both Oklahoma and Texas water-quality inventories of the Upper Red River Basin, which demonstrate that several regions of the system are degraded (Oklahoma Department of Environmental Quality 2008, Appendix B, pp. 1–170; Texas Commission on Environmental Quality 2008, pp. 1–117). For example, in Texas, 11 stream segments in the Red River basin are on the Environmental Protection Agency's Clean Water Act 303(d) list of degraded waters. These segments make up close to 1,448 km (900 mi) of stream. Additionally, malathion (a chemical toxic to fishes) is used to eradicate boll weevils (*Anthonomus grandis*) from cotton crops in the region (Grefenstette and El-Lissy 2003, p. 131). Furthermore, the petitioner references Jester *et al.* (1992, p. 14) to state that the speckled chub (incorrectly referenced as prairie chub in the petition) is intolerant of changes to habitat and moderately intolerant to changes in water quality.

Evaluation of Information Provided in the Petition and Available in Service Files

With regard to degraded water quality being a threat to the prairie chub, the information provided by the petitioner appears to be reliable. Information in our files supports the petitioner's assertion that water quality in many streams of the upper Red River basin is degraded to some degree and that prairie chubs may be susceptible to this degradation. Of the 14 streams known to recently support prairie chubs, the Environmental Protection Agency considers 10 of those to be impaired due to one or more of the following parameters: Fecal coliform, total dissolved solids, *Escherichia coli*, *Enterococcus*, turbidity, chlorides, selenium, sulfates, lead, dichlorodiphenyltrichloroethane (DDT), *Toxaphene*, and fish bioassessments (EPA 2008, p. 1). These elements are detrimental to water quality and affect fishes by limiting their potential distribution, lowering dissolved oxygen, and accumulating in fish tissues. Additionally, a study by Adornato and Martin (1995, p. 18) concluded that fish within their project area, including two streams occupied by prairie chubs, were highly contaminated with organochlorine pesticides, including dieldrin, DDT metabolites, and *Toxaphene*, all of which are known to be toxic to all fishes. Selenium, also toxic to fishes, was found to be elevated, which the authors attributed to crop irrigation (Adornato and Martin 1995, p. 18). Because various chemical toxins have been found in the same streams of the prairie chub, and the toxins are known to cause mortalities in all fishes, degraded water quality may be a threat to the species. Therefore, we find that the petition and information in our files provides substantial information indicating that listing the prairie chub may be warranted due to degraded water quality.

Red River Chloride Control

Information Provided in the Petition

The petitioner asserts that the U.S. Army Corps of Engineers' (ACE) Red River Chloride Control Project is a threat to the prairie chub. The ACE is authorized to identify and implement measures to reduce naturally occurring brine emissions into several Red River basins in Texas and Oklahoma. The project's primary purpose is to minimize chloride inputs into the Red River. The petitioner references Matthews *et al.* (2005, p. 304) and states that completion of the program to control chlorides in the Upper Red

River Basin will threaten the natural salinity gradient upon which many flora and fauna depend. Additionally, if chloride levels in the upper Red River basin were lowered to the point that allowed for additional irrigation, water withdrawals would increase and hydrologic estimates suggest that "no-flow" days in the upper basin might be tripled annually. Taylor *et al.* (1993, p. 22) is also referenced in the petition, suggesting that the chloride control program could have a substantial effect on the fish community structure.

Evaluation of Information Provided in the Petition and Available in Service Files

In reference to the petitioner's claims that the Red River Chloride Control Project is a threat to the prairie chub, the information appears to be reliable. Information in our files confirms the petitioner's assertion that the project could alter existing stream flows, thus negatively affecting the prairie chub's ability to successfully reproduce. According to projections supplied by the ACE, the project would result in average annual streamflow reductions ranging from a 4.5 percent reduction in the Elm Fork of the Red River to a 52 percent reduction in the South Fork of the Wichita River (Service 1996, p. iii). The project, in combination with irrigation withdrawals anticipated following project implementation, is expected to increase the number of average annual no-flow days from a low of 3 days at the Benjamin, Texas, gage to a high of 67 days at the Vernon, Texas, gage (Service 1996, p. iii). This decrease in flows could eliminate existing resources, such as food and habitat, and could result in less dilution of environmental contaminants that are known to exist in the system (Adornato and Martin 1995, p. 18; EPA 2008, p. 1). By limiting resources and potentially increasing the concentrations of contaminants, the Red River Chloride Control Project could possibly have negative impacts on the prairie chub.

Also, an increase in no-flow days would affect the prairie chub's ability to spawn. Because discharge is necessary for successful reproduction (Durham and Wilde 2006, p. 1647), any increase in the number of no-flow days would decrease the number of days prairie chubs have available to spawn. Because prairie chub eggs disperse downstream after spawning (Platania and Altenbach 1998, p. 566), more frequent no-flow days in combination with lower overall flows could minimize dispersal and potentially cause an overall reduction in populations.

After reviewing information provided by the petitioner and readily available in our files, we find that substantial information exists indicating that the Red River Chloride Control Project, including impacts of reduced stream flow and degraded water quality may be a threat to the prairie chub, such that listing may be warranted.

Land Use

Information Provided in the Petition

The petitioner asserts that land use changes are a threat to the prairie chub. In support of this claim, the petitioner references Steuter *et al.* (2003, p. 53) to describe how southern short- and mid-grass river systems, including Red River basin streams, have been altered by land use changes like oil and gas production and agriculture.

Evaluation of Information Provided in the Petition and Available in Service Files

Regarding the petitioner's claim that land use changes are a threat to the prairie chub, the information appears to be reliable. Agriculture is the principal land use throughout the Red River basin. Floodplain soils are generally well suited for alfalfa, wheat, corn, cotton, peanuts, grain sorgum, and other small grains. Consequently, native floodplain vegetation has been cleared or fragmented into small, isolated patches and replaced with pasture, hay, vegetables, and small grains. Contaminants widely known to originate from agricultural operations also appear to negatively impact fish and wildlife in the upper Red River basin and are described above under *Water Quality*. Besides agriculture-related contaminants, the information provided by the petitioner and readily available in our files does not indicate that any other agriculture-related activities are impacting the prairie chub in a way that may pose a threat to the species.

In reference to the petitioner's claims that oil and gas production has altered Red River basin streams, information available in our files indicates that oil and gas production has eliminated or fragmented native plant communities throughout the Red River basin (Service 1996, p. 5); however, the petitioner provided no information indicating how this potential impact may be acting on the species. Therefore, the petitioner has not provided substantial information indicating that land use changes from oil and gas production may be a threat to the prairie chub.

In summary, we find the petition, along with information readily available in our files, presents substantial information indicating that agricultural-related contaminants, which are described above under *Water Quality*, may pose a threat to the prairie chub such that listing may be warranted. However, neither the petition or information in our files, present substantial information to suggest that oil and gas production impacts the prairie chub at a level where listing may be warranted.

Agricultural Water Use

Information Provided in the Petition

The petitioner asserts that agricultural water use is a threat to the prairie chub. The petitioner provided information from Steuter *et al.* (2003, p. 53) stating that river flows have been greatly altered by dams and excessive groundwater withdrawals for irrigation. In addition, the petitioner cited Eisenhour (2004, pp. 30–31) to describe the potential disruptive impacts from water modification (reservoir construction, channelization, and groundwater withdrawals) on reproduction and recruitment of the prairie chub.

Evaluation of Information Provided in the Petition and Available in Service Files

In reference to the petitioner's claim that water use, primarily irrigation, is a threat to the prairie chub, the information appears to be reliable. Ground and surface water withdrawals for irrigation can have significant negative impacts on the prairie chub. One of the major factors contributing to the decline of the Federally listed Arkansas River shiner (*Notropis girardi*) is water depletion due to irrigation for agriculture (Service 1998, pp. 64773, 64779). Irrigation, in combination with water depletions from the Red River Chloride Control Project, could significantly reduce flows in the upper Red River basin (Service 1996, p. iii). The detrimental effects of decreased water flows on the prairie chub are described above under *Impoundments* and *Red River Chloride Control Project*. Based on the effects of reduced flows, the information provided by the petitioner and readily available in our files indicates that agricultural water use and subsequent stream flow reduction may be a threat to the prairie chub, such that listing may be warranted.

Invasive Plants

Information Provided in the Petition

The petitioner asserts that invasive plants are a threat to the prairie chub.

In support of this threat, the petitioner states that saltcedar (*Tamarix spp.*) and Russian olive (*Elaeagnus angustifolia*) are prolific along the Red River and its tributaries (DeLoach 2009, p. 1). Further, the petitioner claims that both plants can be detrimental to native plains fishes by decreasing stream flows.

Evaluation of Information Provided in the Petition and Available in Service Files

Regarding the petitioner's claims that invasive plants may be a threat to the prairie chub, the information appears to be reliable. The banks of the Red River once sustained growth of tall willows (*Salix spp.*) and cottonwoods (*Populus deltoides*), but these trees have been supplanted by saltcedar and Russian olive (Texas Parks and Wildlife Department 2005, p. 151). Early studies of water use by saltcedar have led many to assume that removal of saltcedar would result in water savings, primarily as increased flows in rivers (U.S. Geological Survey 2009, p. 43). Some research has shown that removal of saltcedar from spring ecosystems may be beneficial to fish species by increasing groundwater inputs and available habitat (DeLoach 2009, p. 1). However, saltcedar and Russian olive removal projects on larger streams and rivers, which were intended to increase stream flows, have provided mixed results (U.S. Geological Survey 2009, pp. 43–44). In a few cases, clearing saltcedar resulted in temporary increases in stream flow (U.S. Geological Survey 2009, pp. 43–44). But, most studies found no significant long-term changes in stream flow (U.S. Geological Survey 2009, pp. 43–44). A U.S. Geological Survey (2009, p. ix) report suggests that additional research is needed at a scale large enough to detect changes to the water budget, and that all variables associated with the water budget should be examined. Based on information provided by the petitioner and readily available in our files, it appears that more research is needed to determine the actual impacts of saltcedar and Russian olive on stream flows in the upper Red River and to determine the extent that this impact may have on the prairie chub. At this time, it is unclear whether invasive plants may be a threat to the prairie chub. Therefore, we will analyze this issue further in the 12-month finding.

Additionally, saltcedar and Russian olive encroachment has been shown to alter stream geomorphology by narrowing and deepening channels through dense accumulation along the banks (Hultine *et al.* 2009, p. 469). This alteration to stream morphology limits the stream's connectivity with the floodplain, which is needed for native plant establishment (Hultine *et al.* 2009, p. 469) and refugia habitat for fishes. However, the petitioner provided no information to indicate that saltcedar and Russian olive within the current range of the prairie chub are at high enough densities, nor will be in the future, to alter stream morphology and affect the prairie chub's habitat.

In conclusion, information provided by the petition, and readily available in our files, is unclear about whether invasive plants, particularly saltcedar or Russian olive, may be a threat to the prairie chub because of stream flow alterations. Therefore, we will investigate this issue further in the 12-month finding.

In summary of the Factor A analysis, we find that the petition, along with information available in our files, has presented substantial information indicating that the prairie chub may warrant listing due to the present or threatened destruction, modification, or curtailment of its habitat or range, primarily due to impoundments altering stream flows, degraded water quality, the Red River Chloride Control Project, and irrigation.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Information Provided in the Petition

The petition does not present any information concerning impacts from overutilization for commercial, recreational, scientific, or educational purposes to the prairie chub.

Evaluation of Information Provided in the Petition and Available in Service Files

We have no information available in our files to indicate that any impact from overutilization is occurring to the prairie chub. Therefore, we find that the petition, along with information readily available in our files, has not presented substantial information that the prairie chub may warrant listing due to overutilization for commercial, recreational, scientific, or educational purposes.

C. Disease or Predation

Information Provided in the Petition

The petitioner asserts that nonnative species, such as bullfrogs (*Rana catesbeiana*), may be a threat to the prairie chub. However, the petitioner does not provide any information indicating how nonnative species may be impacting the prairie chub.

Evaluation of Information Provided in the Petition and Available in Service Files

We have no information available in our files to indicate that nonnative species, disease, or predation are impacting the prairie chub. Therefore, we find that the petition, along with information readily available in our files, has not presented substantial information that the prairie chub may warrant listing due to disease or predation.

D. The Inadequacy of Existing Regulatory Mechanisms

Information Provided in the Petition

The petitioner asserts that the inadequacy of existing regulatory mechanisms is a threat to the prairie chub. In support of this claim, the petitioner states that the prairie chub receives no Federal or State protection, even though the prairie chub is listed as a Tier-I priority species in Oklahoma under the State's Comprehensive Wildlife Conservation Strategy, and the Texas Comprehensive Conservation Strategy lists the prairie chub as a medium-priority Species of Concern. Also, the petitioner states that the Oklahoma Comprehensive Conservation Strategy does not identify specific conservation actions that will benefit the species.

Evaluation of Information Provided in the Petition and Available in Service Files

In reference to the petitioner's claim that the inadequacy of existing regulatory mechanisms is a threat to the species, the information appears reliable. However, in 2007 the State of Texas developed legislation that authorized a program that could be beneficial to the prairie chub by requiring an instream flow. An instream flow requirement, as defined by the National Academy of Sciences (NAS), is the amount of water flowing through a natural stream course that is needed to sustain, rehabilitate, or restore the ecological functions of a stream in terms of hydrology, biology, geomorphology, connectivity, and water quality at a particular level (NAS 2005, p. 139). Although this could be beneficial to the prairie chub, we have no information in our files showing that any parts of the program have been implemented for the Red River. No such instream flow legislation exists in the State of Oklahoma. Without protection of existing flows, the prairie chub's habitat could be significantly altered. The alteration of natural flows could disrupt the species' ability to successfully

spawn and disperse throughout the upper Red River basin. For more details on how reduced flows impact the prairie chub, see discussion in the *Impoundments* and *Red River Chloride Control Project* sections.

Also, the EPA (2008, p. 1) established Total Maximum Daily Loads for many of the streams occupied by the prairie chub in order to reduce water degradation. However, we have no information in our files to suggest that measures to meet the established Total Maximum Daily Loads standards have been implemented.

In summary, we find that the petition, along with information readily available in our files, presents substantial information indicating that prairie chub may warrant listing due to the inadequacy of existing regulatory mechanisms, primarily due to inadequate protections of water quality and stream flow.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Invasive Aquatic Species

Information Provided in the Petition

The petitioner asserts that nonnative aquatic species are threats to the prairie chub. In support of this claim, the petitioner references Gido *et al.* (2004, p. 128) to assert that invasive nonnative species may cause fish population declines in the southern Great Plains river systems. Additionally, the petitioner states that nonnative species that have invaded the Red River basin include common carp (*Cyprinus carpio*), threadfin shad (*Dorosoma petensense*), and inland silverside (*Menidia beryllina*). However, neither the petitioner, nor the references provided, identifies how nonnative species impact the prairie chub.

Evaluation of Information Provided in the Petition and Available in Service Files

Information in our files supports the assertion that nonnative fish species may cause native fish population declines in the southern Great Plains river systems, but there is no evidence that nonnative species are impacting the prairie chub. Gido (2004, p. 129) found that Great Plains streams appear to be gaining introduced species at the rate of 0.5 species every 18 years. One example is the introduction and establishment of the Red River shiner (*Notropis bairdi*), a species endemic to the Red River drainage, into the Cimarron River in Oklahoma and Kansas, which has had a detrimental effect on the Arkansas River shiner by competing for limited resources (Cross *et al.* 1983, pp. 93–98; Felley and Cothran 1981, p. 564). The Red River shiner was first recorded from the Cimarron River in 1976 (Marshall 1978, p. 109). It has since colonized the Cimarron River and may be a dominant component of the fish community (Cross *et al.* 1983, pp. 93–98; Felley and Cothran 1981, p. 564; Service unpublished data 2007–2010). However, we do not consider the Red River shiner to be a threat to the prairie chub. Because the Red River shiner is endemic to the Red River basin, it has adapted and evolved with the prairie chub. Therefore, it is not considered an invasive species, and there is no evidence indicating that competition with the Red River shiner has any impacts on the prairie chub.

In addition, the petitioners have provided no information indicating how the three invasive species mentioned in the petition (common carp, threadfin shad, and inland silverside) may be acting on the prairie chub, or whether an impact from these species may actually be occurring within the chub's range. Although the adverse effects from invasive aquatic species are evident for other native fish species, neither the petition nor information available in our files presented substantial information indicating that nonnative species may be a threat to the prairie chub, such that listing may be warranted.

Climate Change

Information Provided in the Petition

The petitioner asserts that climate change is a threat to the prairie chub, and further notes that climate change poses a fundamental challenge for all species' survival in the coming years and decades. The petitioner provided information suggesting that climate change is already causing a rise in temperatures across the United States and is increasing extreme weather events such as droughts and increased rainfall (NSC 2003, pp. 43–44; USCCSP 2008, pp. 35–36). The petitioner referenced the Intergovernmental Panel on Climate Change (IPCC) (2007, p. 30) and stated that 11 of the 12 years from 1995 through 2006 ranked among the 11 warmest years on instrumental record. The petitioner also cites an IPCC 2007 report (p. 48) to discuss how resilience of many ecosystems is likely to be exceeded, and that 20 to 30 percent of plant and animal species assessed are likely to be at increased risk of extinction.

In further support of climate change being a threat to the prairie chub, the petitioner provided information on climate change within the Great Plains, where more extreme and frequent weather events are expected, including droughts, heavy rainfall, and heat waves (Karl *et al.* 2009, pp. 123–128). The petitioner asserts that some species may not be able to adapt to projected changes in temperature and climate change when combined with human-induced stresses (Karl *et al.* 2009, pp. 123–128). In referencing Matthews and Marsh-Matthews (2003, p. 1232), the petitioner asserts that the additional stress of drought will only be exacerbated if climate change is already increasing the severity and duration of droughts in the southern Great Plains. The petitioner cited Matthews and Marsh-Matthews (2003, p. 1232) in stating that projected climate change may result in massive changes in fish biodiversity and widespread extirpation of fish species in many regions.

Evaluation of Information Provided in the Petition and Available in Service Files

In reference to the petitioner's claim that climate change is a threat to the prairie chub, the information appears reliable; however, we are lacking information that links reliable impacts from climate change to effects on prairie chub populations. According to the IPCC (2007, p. 1), "Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level." Average Northern Hemisphere temperatures during the second half of the 20th century were very likely higher than during any other 50-year period in the last 500 years and likely the highest in at least the past 1,300 years (IPCC 2007, p. 1). It is very likely that over the past 50 years, cold days, cold nights, and frosts have become less frequent over most land areas, and hot days and hot nights have become more frequent (IPCC 2007, p. 1). Data suggest that heat waves are occurring more often over most land areas, and the frequency of heavy precipitation events has increased over most areas (IPCC 2007, p. 1).

Regional analysis for the Great Plains from North Dakota to Texas predicts that hot extremes, heat waves, and heavy precipitation events will increase in frequency (IPCC 2007, p. 8). Milly *et al.* (2005, p. 349) projected a 10 to 30 percent decrease in runoff in mid-latitude western North America by the year 2050, based on an ensemble of 12 climate models. However, predictions for smaller subregions, such as Oklahoma and Texas, are not presented in the petition or readily available in our files. In addition, the petitioner did

not provide information indicating how climate change might potentially impact the prairie chub. The prairie chub has persisted for millennia with periods of extreme weather events, such as droughts and floods. If climate change causes more extreme weather events, there is no information to indicate that such events will have a negative impact on the prairie chub. At this time, we lack sufficient certainty to know specifically how climate change will affect the species. We are not aware of any data at an appropriate scale to evaluate habitat or population trends for the prairie chub within its range, make predictions about future trends, or determine whether the species will actually be impacted. Therefore, based on information presented by the petitioner and readily available in our files, we do not consider climate change to be a threat to the species; however, we intend to investigate this factor more thoroughly in our status review of the species.

In summary, we find that the petition, along with information readily available in our files, has not presented substantial information that the prairie chub may warrant listing due to other natural or manmade factors.

Finding

On the basis of our determination under section 4(b)(3)(A) of the Act, we have determined that the petition presents substantial scientific or commercial information indicating that listing the prairie chub throughout its entire range may be warranted. This finding is based on information provided under factors A and D about the potential threats from altered stream flows and degraded water quality, and inadequacy of existing regulatory mechanisms to protect prairie chubs from altered stream flows or degraded water quality. We determine that the information provided under factors B, C, and E is not substantial. In considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant a threat it is. If the threat is significant, it may drive or contribute to the risk of extinction of the species such that the species may warrant listing as threatened or endangered as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The mere identification of factors that could impact a species negatively may not be sufficient to compel a finding that listing may be warranted. The information must contain evidence sufficient to suggest that these factors may be operative threats that act on the species to the point that the species may meet the definition of threatened or endangered under the Act.

Because we have found that the petition presents substantial information indicating that listing the prairie chub may be warranted, we are initiating a status review to determine whether listing the prairie chub as threatened or endangered under the Act is warranted.

The "substantial information" standard for a 90-day finding differs from the Act's "best scientific and commercial data" standard that applies to a status review to determine whether a petitioned action is warranted. A 90-day finding does not constitute a status review under the Act. In a 12-month finding, we will determine whether a petitioned action is warranted after we have completed a thorough status review of the species, which is conducted following a substantial 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not mean that the 12-month finding will result in a warranted finding.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary author of this notice is the staff of the Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: April 4, 2011.

Rowan W. Gould,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2011–9089 Filed 4–13–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2010–0031; MO 92210–0–0008–B2]

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Hermes Copper Butterfly as Endangered or Threatened

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list Hermes copper butterfly (*Hermelycaena [Lycaena] hermes*) as endangered and to designate critical habitat under the Endangered Species Act of 1973, as amended (Act).

After review of all available scientific and commercial information, we find that listing Hermes copper butterfly as endangered or threatened is warranted. Currently, however, listing Hermes copper butterfly is precluded by higher priority actions to amend the Lists of Endangered and Threatened Wildlife and Plants. Upon publication of this 12-month petition finding, we will add Hermes copper butterfly to our candidate species list. We will develop a proposed rule to list Hermes copper butterfly as our priorities allow. We will make any determination on critical habitat during development of the proposed listing rule. During any interim period, we will address the status of the candidate taxon through our annual Candidate Notice of Review (CNOR).

DATES: The finding announced in this document was made on April 14, 2011.

ADDRESSES: This finding is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–R8–ES–2010–0031. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011. Please submit any new information, materials, comments, or questions concerning this finding to the above internet address or the mailing address listed under **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, Carlsbad Fish

and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; by telephone at 760–431–9440; or by facsimile at 760–431–9624. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*) requires that, for any petition to revise the Federal Lists of Threatened and Endangered Wildlife and Plants that contains substantial scientific or commercial information that listing a species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding, we determine whether the petitioned action is: (a) Not warranted, (b) warranted, or (c) warranted, but immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are endangered or threatened, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Wildlife and Plants. Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12-month findings in the **Federal Register.**

Previous Federal Actions

On October 26, 2004, we received a petition dated October 25, 2004, from the Center for Biological Diversity (CBD) and David Hogan, requesting that Hermes copper butterfly be listed as endangered under the Act and that critical habitat be designated. Included in the petition was supporting information regarding the species' taxonomy, biology, ecology, historical and current distribution, status of population, and actual and potential threats affecting the species and its habitat.

On August 8, 2006, we published a 90-day finding for Hermes copper butterfly in the **Federal Register** (71 FR 44966). The finding concluded that the petition and information in our files did not present substantial scientific or commercial information indicating that listing Hermes copper butterfly may be warranted. For a detailed history of Federal actions involving Hermes copper butterfly prior to the 2006 90-day finding, please see the August 8, 2006, **Federal Register** finding (71 FR 44966).

On March 17, 2009, CBD and David Hogan filed a complaint for declaratory and injunctive relief challenging the Service's decision not to list Hermes copper butterfly as endangered or threatened under the Act. In a settlement agreement dated October 23, 2009, (Case No. 09–0533 S.D. Cal.), the Service agreed to submit a new 90-day petition finding to the **Federal Register** by May 13, 2010, for Hermes copper butterfly. As part of the settlement agreement, we agreed to evaluate the October 25, 2004, petition filed by CBD and David Hogan, supporting information submitted with the petition, and information available in the Service's files, including information that has become available since the August 8, 2006, publication of the negative 90-day finding (71 FR 44966). If the 90-day finding determined that listing may be warranted, we agreed to submit a 12-month finding for Hermes copper butterfly to the **Federal Register** by April 15, 2011.

On May 4, 2010, we published a 90-day finding in the **Federal Register** (75 FR 23654) that determined listing of Hermes copper butterfly as endangered or threatened may be warranted. This notice constitutes the 12-month finding on the October 25, 2004, petition to list Hermes copper butterfly as endangered.

Species Information

It is our intent to discuss only those topics directly relevant to the listing of Hermes copper butterfly under the Act in this 12-month finding. For more information on the taxonomy, biology, and ecology of Hermes copper butterfly, please refer to the 90-day finding published in the **Federal Register** on May 4, 2010 (75 FR 23654). That document is available on the Internet at *http://www.regulations.gov* under docket number FWS–R8–ES–2010–0031.

Taxonomy and Species Description

Hermes copper butterfly was first described as *Chrysophanus hermes* by Edwards (1870, p. 21). Scudder (1876, p. 125) placed this species in the genus *Tharsalea* based on the presence of hindwing tails. Freeman (1936, p. 279) placed Hermes copper butterfly in the genus *Lycaena* as *L. hermes* based on the assessment of the male genetalia, finding that *L. hermes* was distinctly a lycaenid and not typical of the other taxa of *Tharsalea*. Miller and Brown (1979, p. 22) erected a monotypic genus to accommodate Hermes copper butterfly as *Hermelycaena hermes*. This segregation appears to be supported by allozyme data presented by Pratt and Wright (2002, p. 223); although these authors did not recommend separate genus or subgenus placement (Pratt and Wright 2002, p. 225). The broadly based morphological assessment of Miller and Brown (1979) coupled with the more recent allozyme work of Pratt and Wright (2002) support recognition of Hermes copper butterfly as a distinct genus; however, *Lycaena hermes* is the name predominantly used in recent literature (Scott 1986, p. 392; Faulkner and Brown 1993, p. 120; Emmel 1998, p. 832; Opler and Warren 2005, p. 22), and we recognize it as such for the purposes of this finding. Any data or information relevant to the taxonomic status of Hermes copper butterfly will be fully addressed in any proposed rule, and as such will be available for public comment. However, there is no question that as a unique species, Hermes copper butterfly is a listable entity under the Act.

Hermes copper butterfly is a small, brightly-colored butterfly approximately 1 to 1.25 inches (2.5 to 3.2 centimeters (cm)) in length, with one tail on the hindwing. On the upperside, the forewing is brown with a yellow or orange area enclosing several black spots, and the hindwing has orange spots that may be merged into a band along the margin. On the underside, the forewing is yellow with four to six black spots, and the hindwing is bright yellow with three to six black spots (USGS 2006). Mean last instar (period between molts) larval body length is 0.6 inches (in) (15 millimeters (mm)) (Ballmer and Pratt 1988, p. 4). Emmel and Emmel (1973, pp. 62, 63) provide a full description of the early stages of the species (eggs, larvae, and pupae).

Biology

Females deposit single eggs on *Rhamnus crocea* (spiny redberry) in the early summer, often where a branch splits or on a leaf (Marschalek and Deutschman 2009, p. 401). Eggs overwinter, with larvae reported from mid-April to mid-May (Marschalek and Deutschman 2009, p. 400) followed by pupation on the host plant (Emmel and Emmel 1973, p. 63). Not much is known regarding larval biology, as this life stage is little-studied and extremely difficult to find in the field (Marschalek and Deutschman 2009, pp. 400, 401). Hermes copper butterflies have one flight period (termed univoltine) typically occurring in mid-May to early July, depending on weather conditions and elevation (Marschalek and Deutschman 2008, p. 100; Marschalek and Klein 2010, p. 5). Emergence appears to be influenced by weather;

however this relationship is not well understood. For example, weather conditions in the spring of 2010 were cool and moist and resulted in a late emergence; however, the spring of 2006 was hot and dry and also resulted in a late emergence period (Deutschman *et al.* 2010, p. 4). We have no information regarding the ability of immature life stages to undergo multiple-year diapause (a low metabolic rate resting stage) during years with poor conditions (Deutschman *et al.* 2010, p. 4). Multiple year diapause is rare and can occur in stages more advanced than the egg, such as pupae or larvae, after larvae have fed and accumulated energy reserves (Gullan and Cranston 2010, p. 169, Service 2003, p. 8); it is less likely to occur with Hermes copper butterflies because they overwinter (diapause) as eggs.

Deutschman *et al.* (2010, p. 8) used 145 Amplified Fragment Length Polymorphism (AFLP) markers to estimate fundamental Hermes copper butterfly population genetic parameters (i.e., polymorphism, expected heterozygosity, F_{ST} values, and private alleles) that allowed them to evaluate the magnitude of genetic differentiation within and among sampled populations, an indicator of dispersal ability (gene flow). The AFLP process was able to detect genetic differences among individuals, even those captured within several meters of each other. Deutschman *et al.* (2010, pp. 8–17) indicated that butterflies can show differentiation even when close in proximity, presumably due to physical barriers. Alternately, butterflies sampled at locations that are not close have shown little differentiation, indicating that butterflies can also disperse long distances under the right conditions. Deutschman *et al.* (2010, pp. 8–17) sampled at one location (Wildwood Glen) before and after a fire and found genetically differentiated groups, indicating that Hermes copper butterfly individuals are capable of movement between populations. Landscape features may enhance or restrict dispersal which overall, may have several implications regarding population structure and dynamics (Deutschman *et al.* 2010, p. 16). Genetic differentiation of individuals from proximal locations could be a result of dispersal barriers, genetic drift, original colonizers, or a combination of factors (Deutschman *et al.* 2010, p. 16). The genetic similarity of widely geographically separate sample locations indicates that recolonization events by females occur at much further distances than implied by previous studies that suggest most individuals move less than 656 ft (200 m) (Marschalek and Deutschman 2008, p. 102; Marschalek and Klein 2010, p. 7). Deutschman *et al.* (2010, p. 16) noted the majority of genetically similar individuals were territorial males, so it is possible Hermes copper butterfly exhibits sex-biased long-distance dispersal by females, as has been noted for other lycaenids (Robbins and Small 1981, pp. 312–313). In general, Hermes copper butterflies have limited directed movement ability (Marschalek and Klein 2010, p. 1), though lyceanids can be dispersed by the wind (Robbins and Small 1981 p. 312). Deutschman *et al.* (2010, p. 16) analysis also showed the genetic composition of individuals at any location exhibited a high degree of temporal variability, possibly due to biotic (drift, dispersal) and abiotic (landscape, fire regime) influences.

Habitat

Hermes copper butterfly inhabits coastal sage scrub and southern mixed chaparral (Marschalek and Deutschman 2008, p. 98). Hermes copper butterfly larvae use only *Rhamnus crocea* as a host plant (Thorne 1963, p. 143; Emmel and Emmel 1973, p. 62). The range of *R. crocea* extends throughout coastal northern California, as far north as San Francisco (Consortium of California Herbaria 2010); however, Hermes copper butterfly has never been documented north of San Diego County (Carlsbad Fish and Wildlife Office (CFWO) GIS database). Therefore, some factor other than host plant availability apparently has historically limited or currently limits the range of the species. Researchers report adults are rarely found far from *R. crocea* (Thorne 1963, p. 143) and take nectar almost exclusively from *Eriogonum fasciculatum* (California buckwheat) (Marschalek and Deutschman 2008, p. 5). The densities of host plants and nectar sources required to support a Hermes copper population are not known. Recent research has not added much to Thorne's (1963, p. 143) basic description of Hermes copper butterfly habitat: "It is very difficult to analyze the complex factors which determine why a certain plant has been successful in a given spot * * * In the case of *Rhamnus crocea*, the only consistent requirement seems to be a well-drained soil of better than average depth, yet not deep enough to support trees. Such soils occur along canyon bottoms and on hillsides with a northern exposure; therefore, it is in these situations that [Hermes copper butterfly] is generally found."

Hermes copper butterflies exhibit a preference for micro-sites within stands of *Rhamnus crocea*, which may be related to temperature because adults become active around 72 degrees Fahrenheit (°F) (22 degrees Celsius (°C)) (Marschalek and Deutschman 2008, p. 5). Marschalek and Deutschman (2008, p. 3) recorded densities of Hermes copper butterflies on paired transects along edges and within the interior of host plant stands in rural areas. Their study indicates that Hermes copper butterfly densities are significantly higher near host plant stand edges than in the interior (Marschalek and Deutschman 2008, p. 102). Adult males have a strong preference for openings in the vegetation, including roads and trails, specifically for the north and west sides of canopy openings (Marschalek and Deutschman 2008, p. 102). These areas capture the first morning light and reach the temperature threshold for activity more quickly than other areas (Deutschman *et al.* 2010, p. 4). Hermes copper butterflies tend to remain inactive under conditions of heavy cloud cover and cooler weather (Marschalek and Deutschman 2008, p. 5). Across all four sites sampled by Marschalek and Deutschman, Hermes copper butterfly presence was positively associated with *Eriogonum fasciculatum*, but negatively associated with *Adenostema fasciculatum* (chamise) (Marschalek and Deutschman 2008, p. 102). Therefore, woody canopy openings with a northern exposure in stands of *R. crocea* and adjacent stands of *Eriogonum fasciculatum* appear to be components of suitable habitat for Hermes copper butterfly.

Marschalek and Klein (2010) studied intra-habitat movement of Hermes copper butterflies using mark-release-recapture techniques. They found the highest median dispersal distance for a given site in a given year was 146 ft (44.5 m), and their maximum recapture distance was 0.7 miles (mi) (1.1 kilometers (km)) (Marschalek and Klein 2010, p. 1). They also found no adult movement across non-habitat areas, such as type-converted grassland or riparian woodland (Marschalek and Klein 2010, p. 6). Hermes copper butterfly is typically relatively sedentary (Marschalek and Klein 2010, p. 1), although winds may aid dispersal (Robbins and Small 1981, p. 312). Studies to date infer that most individuals typically move less than 656 ft. (200 m) (Marschalek and Deutschman 2008, p. 102, Marschalek and Klein 2010, pp. 725–726), supporting the assumption that Hermes copper butterflies are typically sedentary

compared to other butterfly species such as painted ladies—(*Vanessa cardui*). However, as discussed above, genetic research indicates that females may disperse longer distances than males (Deutschman *et al.* 2010, p. 16) contradicting previous methods used such as mark-release-recapture (Marschalek and Deutschman 2008, p. 102) that may not detect the movement of females and over sample territorial males. More information is needed to fully understand movement patterns of Hermes copper butterfly; however, dispersal is likely inhibited by lack of available habitat in many areas (Deutschman et al. 2010, p. 17).

Range and Population Distribution Status

Hermes copper butterfly is endemic to the southern California region, primarily occurring in San Diego County, California (Thorne 1963, p. 143). All records of Hermes copper butterflies in the United States are within San Diego County, with most occurrences concentrated in the southwest portion of the County (Marschalek and Klein 2010, p. 4). Notable exceptions to the "southwestern distribution pattern" are two old museum specimens collected in north San Diego County, one from the vicinity of the community of Bonsall in 1934, and another from the vicinity of the community of Pala in 1932. Historical data indicate Hermes copper butterflies ranged from the vicinity of the community of Pala, California, in northern San Diego County (CFWO GIS database) to approximately 18 mi (29 km) south of Santo Tomas in Baja California, Mexico, and from Pine Valley in eastern San Diego County to Mira Mesa, Kearny Mesa, and Otay Mesa in western San Diego County (Thorne 1963, pp. 143, 147). They have never been recorded immediately adjacent to the coast, and have not been found east of the western slopes of the Cuyamaca Mountains above approximately 4,264 ft (1,300 m) (Marschalek and Klein 2010, p. 4).

The distribution of Hermes copper butterfly in Mexico is not well-known and researchers have not explored this area (Marschalek and Klein 2010, p. 4). Of the two museum specimens from Mexico, one collected in 1936 was labeled "12 miles north of Ensenada," and another collected in 1983 was labeled "Salsipuedes" (Marschalek and Klein 2010, p. 4). Assuming older specimens were usually collected relatively close to roads that existed at the time (Thorne 1963, p. 145), these Mexican locations probably were collected from approximately the same location, which is a popular surf destination known as Salsipuedes, located approximately 12 mi (19 km) north of Ensenada off the Esconica Tijuana-Ensenada (coastal highway to Ensenada). The known distribution in Mexico of *Rhamnus crocea* is relatively contiguous with that in the U.S., extending to approximately 190 mi (312 km) south of the border into Mexico along the western Baja California Peninsula (Little 1976, p. 150). Hermes copper butterflies have been recorded as far south into Mexico as 18 mi (29 km) south of Santo Tomas, which is approximately half the distance of the extent of *Rhamus crocea*'s Mexican range; (Thorne 1963, p. 143). As stated in our 2006, 90-day finding (71 FR 44969; August 8, 2006), there have been recent discoveries (post-1993) of extant populations within the species' known historical range in the United States. These include Black Mountain, Crestridge and two populations on the San Diego National Wildlife Refuge. However, there is still uncertainty as to the distribution of Hermes copper butterfly within the known historical range because we have very little information on the status of the species in Mexico.

A species' range can be defined at varying relevant scales of resolution, from maximum geographic range capturing all areas within the outermost record locations (coarsest scale, hereafter called "known historical range"), to the scale of individual population distributions (finest scale, hereafter called "population distributions"). This concept was discussed by Thorne (1963, p. 143): "However within this range [Hermes copper butterfly] distribution is limited to pockets where the larval food plant occurs, so that the total area where the insect actually flies is probably not more than a fraction of one percent of the maximum area."

To more precisely determine the historical range of Hermes copper butterfly, we entered all Hermes copper butterfly observation records that had information about collection location in our GIS database, and mapped all observed and museum specimen records with an appropriate level of detail and location description. To better determine the geographic locations of historical Hermes copper butterfly records mapped by Thorne (1963, p. 147), we overlaid a transparent image of his map on Google Earth imagery, and scaled it appropriately to ensure that geographic features and community locations corresponded with those of the imagery. Examination of Thorne's (1963 p. 147) map expanded the known historical range as described by Deutschman *et al.* (2010, p. 3) to the southeast in the vicinity of the community of Pine Valley and Corte Madera Valley. The resulting known historical range of Hermes copper butterfly within the United States can be described as comprised of a narrow northern portion within the Central Valley and Central Coast ecoregions, north of Los Penasquitos Canyon and Scripps Poway Parkway (latitude midway between the northernmost record location and the international border), and a wider southern portion encompassing the Southern Coast, Southern Valley, and Southern Foothills ecoregions (see Figure 1 and Table 1 below; San Diego County Plant Atlas 2010). Although the distribution of Hermes copper butterfly populations in Mexico is not well understood, United States populations minimally encompass half the species' known historical latitudinal range. The results of our population distribution analysis indicate areas in the United States most likely to harbor possible extant undiscovered Hermes copper butterfly populations within the known historical range are primarily limited to a relatively narrow area within the southern portion of the range bordered on the north and south by the 2003 Cedar Fire and 2007 Harris Fire perimeters, and on the west and east roughly by Sycuan Peak and Long Valley (see Figure 1 and Table 1 below).

TABLE 1—ALL KNOWN HERMES COPPER BUTTERFLY POPULATIONS IN THE UNITED STATES AND MEXICO

Map No.	Population name (other names)	Last observed	Presumed status	Extant in 2000 *	Fire	Extirpated why?
1	Elfin Forest (Onyx Ridge).	2002	Unknown	Y	2007	
2	Rancho Santa Fe (Del Dios)	2004	Extirpated	Y	2007	Fire, Development.
3	Black Mountain	2004	Unknown	Y		
4	Van Dam Peak (Meadowbrook)	2003	Extirpated	Y		Isolation (Development).
5	Lopez Canyon	2008	Extant	Y		

TABLE 1—ALL KNOWN HERMES COPPER BUTTERFLY POPULATIONS IN THE UNITED STATES AND MEXICO—Continued

Map No.	Population name (other names)	Last observed	Presumed status	Extant in 2000 *	Fire	Extirpated why?
6	Sycamore Canyon	2003	Extirpated	Y	2003	Fire.
7	North Santee (Fanita Ranch)	2005	Unknown	Y	2003	
8	Mission Trails (Mission Gorge, Mission Dam).	2010	Extant	Y	2003	
9	Crestridge	2007	Extirpated ***	Y	2003	Fire.
10	Anderson Truck Trail	2003	Extirpated	Y	2003	Fire.
11	Alpine (Wright's Field)	2010	Extant	Y		
12	North McGinty Mountain	2010	Extant	Y		
13	South McGinty Mountain	2010	Extant	Y		
14	Los Montanas	2010	Extant	Y		
15	Rancho San Diego	2009	Extant	Y	2007	
16	San Miguel Mountain	2006	Extirpated	Y	2007	Fire.
17	Rancho Jamul	2007	Extirpated	Y	2003, 2007	Fire.
18	North Jamul	2004	Unknown	Y	2003	
19	East McGinty Mountain	2001	Unknown	Y		
20	Loveland Reservoir	2010	Extant	Y		
21	Sycuan Peak	2010	Extant	Y		
22	Skyline Truck Trail (Lawson Valley)	2010	Extant	Y		
23	Lyons Peak	2003	Unknown	Y	2007	
24	Hollenbeck Canyon	2007	Extirpated	Y	2003, 2007	Fire.
25	Dulzura (Near Marron Valley Road)	2005	Extirpated	Y	2003, 2007	Fire.
26	Lawson Valley (Lawson Peak)	2010	Extant	Y	2006, 2007	
27	Hidden Glen (Japutal Valley, Lyons Valley Road).	2008	Extant	Y		
28	Willows (Viejas Grade Road)	2003	Extirpated	Y	2003	Fire.
29	North Guatay Mountain	2004	Unknown	Y	2003	
30	North Descanso (Wildwood Glen, Descanso).	2010	Extant	Y	2003	
31	South Descanso (Roberts Ranch)	2010	Extant	Y	2003	
32	Japutal (Japutal Valley)	2009	Extant	Y		
33	South Guatay Mountain	2008	Extant	Y		
34	Hartley Peak (Portrero)	2010	Extant	Y	2007	
35	Pala	1932	Extirpated			Unknown.
36	Bonsall	1934	Extirpated			Unknown.
37	San Elijo Hills (San Marcos Creek, San Elijo Road and Questhaven Road).	1979	Extirpated			Development.
38	Lake Hodges	1982	Extirpated		2007	Fire.
39	Sabre Springs (Poway Road and 395).	2001	Extirpated	Y		Development.
40	Miramar	1996	Extirpated			Development.
41	Mira Mesa	Prior to 1963	Extirpated			Development.
42	Cowles Mountain (Big Rock Road Park).	1973	Extirpated			Isolation.
43	Kearny Mesa	1939	Extirpated			Development.
44	Mission Valley (Fairmont Canyon, Canyons near Mission Valley).	1908	Extirpated			Development.
45	San Diego State University (San Diego State College).	1957	Extirpated			Development.
46	El Monte (El Monte Park, El Monte Road).	1960	Extirpated			Fire, Development.
47	Pine Valley	Pre-1963	Unknown.			
48	Corte Madera	Pre-1963	Unknown.			
49	Tecate Peak	1980	Extirpated		2007	Fire.
50	Deerhorn Valley	1970	Extirpated		2007	Fire.
51	Dictionary Hill	1962	Extirpated			Isolation (Development).
52	Otay Mountain (Little Cedar Canyon, Otay foothill).	1979	Extirpated		2003, 2007	Fire.
53	South Otay Mesa	Pre-1920	Extirpated			Development.
54	Salsipuedes (12 miles North of Ensenada) **.	1983	Unknown.			
55	Santo Tomas (18 miles south of Santo Tomas) **.	Pre-1920	Unknown.			
56	South Santee	1967	Extirpated			Development.
57	North Ensenada (Bajamar) **	1936	Unknown.			

* Populations with last observation prior to 2000 have lower geographic accuracy.
** Map Nos. 54, 55, and 57 are populations in Mexico that are not represented on Figure 1 in this document.
*** Extirpation was a result of high mortality from fire, followed by reduced population density. Only one male was observed in 2007, and none after that.

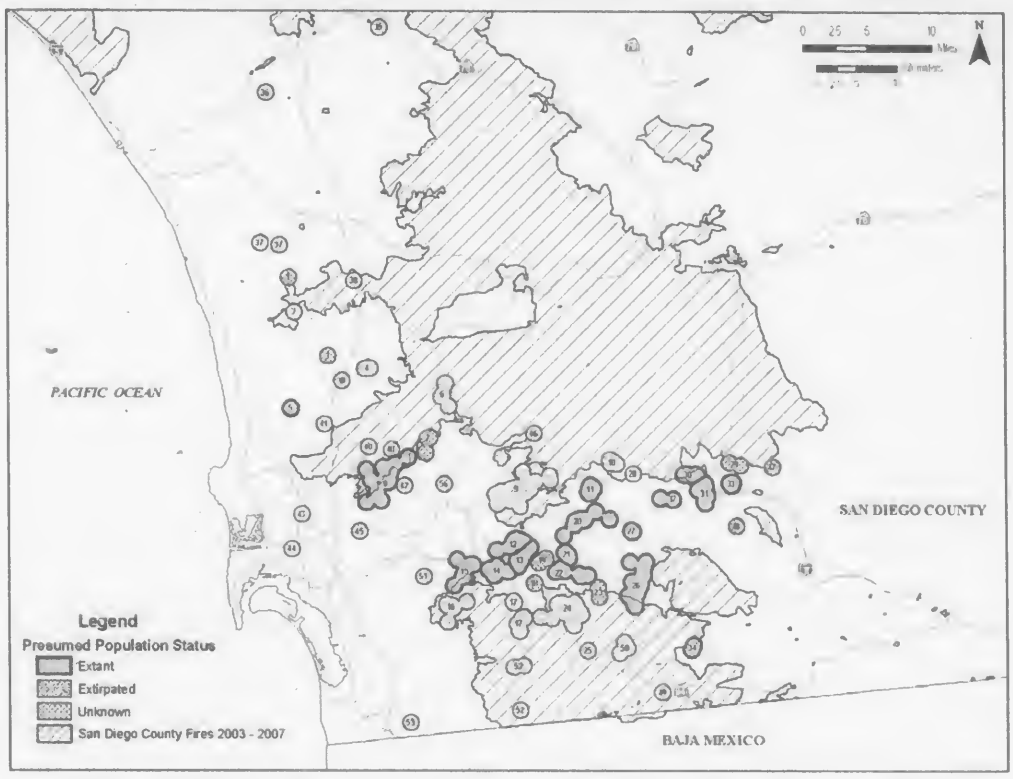

Figure 1. Hermes copper butterfly populations in the United States and their current presumed status.

To evaluate the status of Hermes copper butterfly's current range and populations, we considered all available historical data and recent research results, including record locations (CFWO GIS databases), monitoring data, (Marschalek and Deutschman 2008; Marschalek and Klein 2010), movement data (Marschalek and Deutschman 2009; Marschalek and Klein 2010), and data from a recent distribution study (Deutschman *et al.* 2010). To estimate the geographic population distribution of Hermes copper butterfly, we used all occurrence records and mapped areas within approximately 0.6 mi (1 km) of known observation sites. This distance is greater than the average recapture distance recorded by Marschalek and Klein (2010, p. 1), but just under the maximum recorded recapture distance, an approximate within-population movement distance further supported by Deutschman *et al.*'s (2010, p. 26) genetic data (see *Habitat* section above). Locations within approximately 1.2 mi (2 km) (where 0.6 mi (1 km) movement distances overlapped) were considered part of the same population, unless topographic or genetic information indicated the possibility of barriers to movement. We used recent fire footprint data and aerial GIS information, in addition to the information referenced above, to determine which Hermes copper butterfly populations may be extant, extirpated, or of unknown status. A Hermes copper population was considered to be "extant" if the species was recorded based on recent survey records and not affected by recent fires. A Hermes copper population was considered to be extirpated if the area had been developed and no habitat remained, a fire footprint encompassed the area and subsequent surveys were negative, or if the record was very old with no recent detections. In some instances, we had no recent information to make a determination on Hermes copper butterfly's current status and it was therefore classified as "unknown." See Figure 1 and Table 1 above for a list of populations and information used to determine population status.

In summarizing the results of our analysis of Hermes copper butterfly's current range and population distributions (see Figure 1 and Table 1 above), we estimated there were at least 57 known separate historical populations throughout the species' range since the species was first described. In the year 2000, 35 populations were thought to be extant. Since that time, 11 populations have been extirpated (2 by development, 1 by fire and development, 8 by fire alone) and 7 are of unknown status. As of 2011, of the 57 known populations, 17 Hermes copper butterfly populations are extant, 28 populations are believed to have been extirpated, and 12 populations are of unknown status. In the northern portion of the range, most remaining suitable habitat is limited to the relatively isolated and fragmented undeveloped lands between the cities of San Marcos, Carlsbad, and Escondido and the community of Rancho Santa Fe, and the habitat "islands" containing the Black Mountain and Van Dam Peak observation locations; however, no new populations have been discovered. In the southern portion of the range, all extant populations except Lopez Canyon and the southern portion of Mission Trails Park (both isolated from other extant populations by development and fire) are within

relatively well-connected undeveloped lands east of the City of El Cajon between the 2003 Cedar Fire and 2007 Harris Fire perimeters (see Figure 1 and Table 1 above). The Mission Trails Park population remains extant even after approximately 74 percent of the population area burned in 2003, presumably because burned areas were recolonized (after host plant and nectar sources regrew) by Hermes copper butterflies from nearby unburned areas. The best information available leads us to conclude that the northern portion of the species' known historical range has contracted or may no longer exist, and we estimate that approximately 27 percent of the populations within the southern portion of the species' known historical U.S. range that were extant in 2000 have been extirpated (see Figure 1 and Table 1 above; Map #s 6, 9, 10, 16, 17, 24, 25, 28). Further investigation is needed to accurately determine the status of Hermes copper butterfly in Mexico (Marschalek and Klein 2010, p. 2). Klein (2010a, p. 1) visited the Salsipuedes location in the first week of June 2005 for approximately 30 minutes. He did not observe any Hermes copper butterflies; however, he described the habitat as having a "decent number of [*Rhamnus crocea*], a large amount of *Eriogonum fasciculatum*," and said he felt the area was "very good" for Hermes copper butterfly (Klein 2010, p. 1).

Summary of Information Pertaining to Five Factors

Section 4 of the Act (16 U.S.C. 1533) and implementing regulations (50 CFR part 424) set forth procedures for adding species to, removing species from, or reclassifying species on the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, a species may be determined to be endangered or threatened based on any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In making this finding, information pertaining to Hermes copper butterfly in relation to the five factors provided in section 4(a)(1) of the Act is discussed below.

In considering whether a species warrants listing under any of the five factors, we look beyond the species' exposure to a potential threat or aggregation of threats under any of the factors, and evaluate whether the species responds to those potential threats in a way that causes actual impact to the species. The identification of threats that might impact a species negatively is not sufficient to compel a finding that the species warrants listing. The information must include evidence indicating that the threats are operative and, either singly or in aggregation, affect the status of the species. Threats are significant if they drive, or contribute to, the risk of extinction of the species, such that the species warrants listing as endangered or threatened, as those terms are defined in the Act.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Here we describe the primary threats that result in Hermes copper butterfly habitat destruction and modification, describe how those threats interact to cause long-term or permanent range curtailment, and provide an assessment of the likelihood of those threats continuing into the foreseeable future.

Development

The current distribution of Hermes copper butterfly habitat in San Diego County is largely due to previous urban development within coastal and interior San Diego County which resulted in the loss and fragmentation of Hermes copper butterfly habitat (CalFlora 2010; Consortium of California Herbaria 2010; San Diego Plant Atlas 2010). Of the 28 known extirpated Hermes copper butterfly populations, loss and fragmentation of habitat as a result of development has contributed to the extirpation of 14 populations (50 percent) (see **Background** section above and, Table 1 above, and Factor E discussion below). Since the year 2000, occupied habitats containing Hermes copper butterfly's host plant, *Rhamnus crocea*, in Rancho Santa Fe and Sabre Springs were lost due to urban development. In the City of San Marcos, one *R. crocea* stand near Jacks Pond was lost to development (Anderson 2010a, pp. 1, 2) and another *R. crocea* stand was significantly reduced in the vicinity of Palomar College (Anderson 2010b, pp. 1, 2). The *R. crocea* stand in Lopez Canyon is currently found within a relatively small preserve (roughly rectangular area 0.4 mi (0.6 km) by 0.5 mi (0.8 km)) that is contiguous with suitable Hermes copper butterfly habitat in Del Mar Mesa where development is ongoing. This stand of *R. crocea* is likely all that remains of what was once a wider distribution, encompassing the community of Mira Mesa and the western portion of Miramar Naval Air Station (per Thorne's 1963 map, p. 147).

Although a significant amount of habitat has been lost due to development throughout the range of Hermes copper butterfly within the United States, the remaining currently occupied population areas are protected from destruction by development due to their presence on federally owned lands, on lands conserved under regional habitat conservation plans, or on lands subject to local resource protection ordinances in San Diego County (approximately 66 percent of the total area currently occupied by Hermes copper butterfly populations occurs on federal and non-federal conserved lands; see Figure 1 above) and the remaining 34 percent of occupied habitat occurs on lands subject to local resource protection ordinances in San Diego County. Our GIS analysis indicates that of the total conserved area discussed above (66 percent of all occupied areas), approximately 27 percent (encompassing portions of 10 populations) is located within established regional habitat conservation plan preserve lands (see Factor D San Diego Multiple Species Conservation Program (MSCP) discussion below), approximately 38 percent (encompassing portions of 7 populations) falls within U.S. Forest Service lands, and approximately 1 percent (encompassing portions of 3 populations) falls within Bureau of Land Management (BLM) land. These lands are therefore afforded protection from development. Additionally, as described in Factor D below, the County of San Diego now has in place two ordinances that restrict new development or other proposed projects within sensitive habitats. The Biological Mitigation Ordinance of the County of San Diego Subarea Plan (County of San Diego, 1998b, Ord. Nos. 8845, 9246) regulates development within coastal sage scrub and mixed chaparral habitats that currently support portions of 10 extant Hermes copper butterfly populations on non-Federal land within the boundaries of the County's MSCP subarea plan. The County of San Diego Resource Protection Ordinance (County of San Diego 2007) restricts development within coastal sage scrub and mixed chaparral habitats that currently support all extant Hermes copper butterfly populations on non-Federal lands throughout the county. These ordinances provide some regulatory measures of protection for the

remaining 34 percent of extant Hermes copper butterfly habitat throughout the species occupied range. Although past development in occupied Hermes copper butterfly habitat resulted in a substantial number of extirpations of Hermes copper butterfly populations, restrictions are in place to limit development and the corresponding destruction and modification of Hermes copper butterfly habitat in the future. Therefore, we do not believe future development alone will significantly reduce or fragment remaining Hermes copper butterfly habitat on non-federal lands. However, as discussed below under "Habitat Fragmentation," we believe that the combined impacts of existing development, limited future small-scale development, existing dispersal barriers, and megafires could further fragment Hermes copper butterfly habitat and threaten the species. Within U.S. Forest Service lands, we anticipate that future development, if any, will be limited, and the Forest Service has incorporated measures to address threats to Hermes copper butterfly and its habitat as it implements specific activities within forest lands (see Factor D below for additional discussion). The very limited number of Hermes copper butterfly populations within BLM lands are unlikely to face future development pressure. Therefore, we conclude that Hermes copper butterfly is not currently threatened by habitat loss due to future development alone.

Wildfire

The historical fire regime in southern California likely was characterized by many small lightning-ignited fires in the summer and a few, infrequent large fires in the fall of varying fire intensity (Keeley and Fotheringham 2003, p. 242–243). These infrequent, large, high-intensity wildfires, so-called "megafires" (greater than 123,553 ac (50,000 ha) in size), burned the landscape long before Europeans settled the Pacific coast (Keeley and Zedler 2009, p. 90). As such, modern fire regimes in southern California "have much in common with historical regimes" (Keeley and Zedler 2009, p. 69). While some researchers claim that the fire regime of chaparral growing in adjacent Baja California is not affected by megafires due to a lack of fire suppression activities (cf. Minnich and Chou 1997, Minnich 2001), Keeley and Zedler (2009, p. 86) believe that the fire regime in Baja California similarly consists of "small fires punctuated at periodic intervals by large fire events." The current fire regime in southern California consists of numerous small fires that are periodically impacted by megafires that are generally driven by extreme "Santa Ana" weather conditions of high temperatures, low humidity, and strong erratic winds (Keeley and Zedler 2009, p. 90). The primary difference between the current fire regime and historical fire regimes in southern California is that human-induced or anthropogenic ignitions have increased the frequency of fires, and in particular, megafires, far above historical levels. While this change may not have demonstrably affected the nectar sources of Hermes copper butterfly in San Diego County, especially within chaparral (Franklin *et al.* 2004, p. 701), frequent fires open up the landscape, particularly coastal sage scrub, making the habitat more vulnerable to invasive, nonnative plants (Keeley *et al.* 2005, p. 2117). However the primary concern with frequent megafires is the Hermes copper butterfly mortality associated with these extensive and intense events (see Factor E discussion below) which precludes recolonization of burned areas by Hermes copper butterfly.

The significance of this concern can be seen in the current distribution of the species in southern California. Analysis of GIS information indicates approximately 66 percent of the extant occurrences are found within the footprint of the 1970 Laguna Fire, which Minnich and Chou (1997, p. 240) reported last burned in 1920. In contrast, the areas north and south of the extant Hermes copper butterfly occurrences reburned several times between 2001 and 2007 (Keeley *et al.* 2009, pp. 287, 293). We examined maps of current high fire threat areas in San Diego County based on recent reports by the Forest Area Safety Task Force (Jones 2008, p. 1; SANDAG 2010, p. 1). Areas identified as most vulnerable include all occupied and potentially occupied Hermes copper butterfly habitats in San Diego County within the species' known historical range, with the exception of Black Mountain, Van Dam Peak, Lopez Canyon, and the unburned southern portion of Mission Trails Park. In light of the recent spate of drought-influenced wildfires in southern California, especially the 2007 fires, a future megafire affecting most or all of the area burned by the Laguna Fire in 1970 (40-year chaparral) is likely to occur and would pose a significant threat to Hermes copper butterfly in the United States because it would encompass the majority of extant populations (see Factor E below for direct mortality effects discussion).

As described in our August 8, 2006, 90-day finding (71 FR 44966), *Rhamnus crocea* are "obligate resprouters" after fires and are resilient to frequent burns (Keeley 1998, p. 258). Additionally, although Keeley and Fotheringham (2003, p. 244) indicated that continued habitat disturbance, such as fire, will result in conversion of native shrublands to nonnative grasslands, Keeley (2004, p. 7) also noted that invasive, nonnative plants will not typically displace obligate resprouting plant species in mesic shrublands that burn once every 10 years. Therefore, because *R. crocea* is an obligate resprouter, it will likely recover in those areas that retain this burn frequency. Specific information regarding Hermes copper butterfly's primary nectar source (*Eriogonum fasciculatum* (California buckwheat)) is less understood. *Eriogonum fasciculatum* is a facultative seeder and high proportions of this nectar source are likely killed by fire, and densities are reduced the following year within burned areas (Zedler *et al.* 1983, p. 814); however, *E. fasciculatum* does show minimal resprouting capability (approximately 10 percent) if individuals are young (Keeley 2006, p. 375). The extent of invasion of nonnative plants and type conversion in areas specifically inhabited by Hermes copper butterfly are unknown. However, information clearly indicates that wildfire results in at least temporary reductions in suitable habitat for Hermes copper butterfly and may result in lower densities of *E. fasciculatum* (Zedler *et al.* 1983, p. 814; Keeley 2006, p. 375; Marschalek and Klein 2010, p. 728). In areas where *R. crocea* is capable of resprouting, the quantity of *E. fasciculatum* nectar source necessary to support a persisting Hermes copper butterfly population may be temporarily unavailable due to recent fire impacts. If areas are repeatedly burned, *E. fasciculatum* will not have the time necessary to become reestablished, rendering the habitat unsuitable for Hermes copper butterfly (Marschalek and Klein 2010, p. 728). Increased fire frequency may also pose a threat to Hermes copper butterfly through loss of host plant and nectar source habitat, and fire management plans are not expected to provide protection from megafires such as those that occurred in 2003 and 2007. Based on the above, we consider wildfire, specifically megafires that encompass vast areas and are increasing in frequency, a significant threat to Hermes copper butterfly.

Habitat Fragmentation

Habitat fragmentation can result in smaller, more vulnerable Hermes copper butterfly populations (see Factor E discussion below). The presence of suitable habitat on which Hermes

copper butterflies depend often determines the size and range of the local population. Wildfires and past development have caused habitat fragmentation that separates populations and inhibits movement by creating a gap in area that Hermes copper butterflies are not capable of traversing. The connectivity of habitat occupied by a butterfly population is not defined by host plant distribution at the scale of host plant stands or patches, but rather by adult butterfly movement that results in interbreeding (see Service 2003, pp. 22, 162–165). Any loss of resource contiguity on the ground that does not affect butterfly movement, such as burned vegetation, may degrade habitat, but may not fragment habitat. Therefore, in order for habitat to be fragmented, movement must be prevented by a barrier, or the distance between remaining host plants where larvae develop must be greater than adult butterflies will move to mate or deposit eggs. Genetic analysis (Deutschman *et al.* 2010; p. 16) indicates that butterflies can show differentiation even when close in proximity, presumably due to physical barriers that may be a result of development or a landscape feature (i.e., the three McGinty Mountain sites that are on opposite sides of the mountain may be separated by topography). Alternately, sampling locations that are not close have shown little genetic differentiation, indicating that butterflies can also disperse long distances under the right conditions. Sampling at one location before and after a fire found genetically differentiated groups. Deutschman *et al.* (2010, p. 16) concluded their findings supported the idea that Hermes copper butterfly individuals are capable of long-distance movement, but developed areas and natural landscape features may enhance or restrict dispersal. It is important to note that although movement may be possible, the habitat must be suitable at the time Hermes copper butterflies arrive to ensure successful recolonization.

As described in our 90-day finding published in 2010 (75 FR 23658, May 4, 2010) Hermes copper butterfly habitat has become fragmented by both past urban development (permanently) and wildfires. Comparison of Hermes copper butterfly occurrences and host plant distribution with mapped wildfire perimeters indicates that wildfires cause short-term fragmentation of habitat, and, historically, Hermes copper butterfly habitat in San Diego County has been fragmented and lost due to the progression of development over the last 50 years. Analysis of the Hermes copper butterfly populations indicates that in the northern portion of the U.S. range, the habitat has been fragmented (and lost) permanently by development and further fragmented temporally by wildfires, resulting in extirpation of at least four Hermes copper butterfly populations (see Table 1 above). As described in the Background section above and Factor E below, two historical Hermes copper butterfly populations (Rancho Santa Fe and Van Dam Peak) in the northern portion of the range have been lost since the year 2000, presumably because the habitat became isolated to an extent that connectivity with other populations was lost. Neither the Rancho Santa Fe habitat area nor Van Dam Peak habitat area is expected to be recolonized because the distance to the next nearest source population (13 mi (20 km) and 7 mi (11 km), respectively) exceeds the dispersal capability of the species. In the southern portion of the range, Lopez Canyon and the extant portion of Mission Trails Park are both isolated (7 mi (11 km) separation) from other extant populations by development and burned areas that are no longer likely occupied. Although the Mission Trails Park population remains extant this population was likely reduced up to 74 percent by the 2003 fire, and remaining unburned habitat is surrounded by development, functionally isolating it from any potential source populations thought to be extant (see Figure 1 above). While we do not expect future development alone to threaten Hermes copper butterfly habitat, we believe that the combined impacts attributable to wildfire and small scale development may fragment habitat further and hence, threaten the species' continued existence. Based on the above, we consider habitat fragmentation, due to the combined impact of existing development, possible future (limited) development, existing dispersal barriers, and megafires, a significant threat to Hermes copper butterfly.

Summary of Factor A

Based on the above information, we consider Hermes copper butterfly to be threatened by the present or threatened destruction, modification, or curtailment of the species habitat or range. Specifically, we consider Hermes copper butterfly threatened by habitat fragmentation and wildfire. The combination of habitat fragmentation (as a result of past and potential limited future urban development), existing dispersal barriers, and megafires (that encompass vast areas and are increasing in frequency) that fragment, limit, and degrade Hermes copper butterfly habitat threaten the species with extirpation throughout its range. These threats are evidenced by the loss and isolation of many populations throughout the range; those remaining extant populations fall within areas of high megafire risk. Thus, we consider threats under this factor to be significant.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

We found two Internet postings (accessed in June 2004) offering to sell specimens of Hermes copper butterfly (Martin 2004, pers. comm.). We found no evidence that Hermes copper butterflies, whole or in parts, were being used in a commercial "butterfly essence" process (Morning Star Essences 2006, pers. comm.) and we have no other information to indicate that other commercial business activities are a threat to Hermes copper butterfly. Neither of these previously viewed Web sites offered Hermes copper butterfly for sale during a more recent search (November 22, 2010), nor did we locate any additional commercially available specimens. We found no other information to indicate Hermes copper butterfly is used for commercial, scientific, or educational purposes. Therefore, based on our review of the best available scientific and commercial information, we do not consider overutilization for commercial, recreational, scientific, or educational purposes a current threat to Hermes copper butterfly.

Factor C. Disease or Predation

Disease

We evaluated the potential of disease to threaten Hermes copper butterfly rangewide and found no information indicating disease to be current threat to Hermes copper butterfly.

Predation

Predation (including parasitism) is a factor that is known to cause mortality in butterflies, and therefore could potentially threaten any butterfly species. Faulkner and Klein (2005, p. 26) stated that "no papers have reported any parasites or predators for the Hermes copper butterfly, though they obviously exist." Birds may consume Hermes copper butterfly larvae, although we are not aware of any data that indicate bird predation is a significant threat to Hermes copper butterfly. Furthermore, heavy predation of adult insects and their progeny is a common ecological phenomenon, and most species have evolved under

conditions where high mortality due to natural enemies has shaped their evolution (see Ehrlich *et al.* 1988). However, we found no information to indicate predation to be current threat to Hermes copper butterfly.

Therefore, based on our review of the best available scientific and commercial information, we do not consider disease or predation a current threat to Hermes copper butterfly.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

The Act requires us to examine the adequacy of existing regulatory mechanisms, with respect to threats, that may ameliorate the danger of Hermes copper butterfly becoming either endangered or threatened. Existing regulatory mechanisms that may have an effect on potential threats to Hermes copper butterfly can be placed into two general categories: (1) Federal mechanisms, and (2) State and local mechanisms.

Federal Mechanisms

There are five primary Federal regulatory mechanisms that we discuss below: the National Forest Management Act (16 U.S.C. 1600 *et seq.*); the Federal Land Policy and Management Act; the Sikes Act as amended (16 U.S.C. 670a *et seq.*); the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6501 *et seq.*); and the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*).

Under the National Forest Management Act of 1976, the U.S. Forest Service (Forest Service) is required to prepare a comprehensive land and natural resource management plan for each unit of the Forest Service, in accordance with NEPA's procedural requirements, to guide the maintenance and use of resources within national forests. The plans require an interdisciplinary approach, including a provision providing for diversity for plant and animal communities (16 U.S.C. 1604(g)(3)(B)). The Forest Service is currently operating under the transition provisions of the 2000 Planning Rule (65 FR 67514; November 9, 2000) as an interim measure until a new planning rule is issued (see 74 FR 67059; December 18, 2009). The 2000 rule allows forests to develop, revise and amend forest plans using the procedures of the 1982 Rule (47 FR 43037; September 30, 1982). All existing forest plans have been developed using the 1982 Planning Rule procedures, including the Cleveland National Forest Plan.

In preparing the Cleveland National Forest (CNF) Plan, the Forest Service evaluated and identified Hermes copper butterfly as a species of concern and then evaluated this species relative to its potential of risk from Forest Service activities and plan decisions in its 2005 Final Environmental Impact Statement (USFS 2005). Hermes copper butterfly, along with 148 other species, was defined as a "species-at-risk" (USFS 2005, Appendix B, p. 36), requiring a further individual viability assessment. The subsequent threat category identified for Hermes copper butterfly was "5" or "Uncommon, narrow endemic, disjunct, or peripheral in the plan area with substantial threats to persistence or distribution from Forest Service activities" (USFS 2005, Appendix B, p. 43). The specific threat associated with Hermes copper butterfly and Forest Service management activities is described as "Prescribed fire or fuel reduction projects in habitat (affecting host plant, *Rhamnus crocea*)" (USFS 2005, Appendix B, p. 52). There are approximately 7,860 acres (ac) (3,181 hectares (ha)) of extant Hermes copper butterfly habitat (encompassing 7 populations) within the CNF and approximately 2,100 ac (850 ha) of Hermes copper butterfly habitat that has been extirpated or is of unknown status. The Forest Service incorporates measures into its planning efforts to address identified threats as it implements specific activities on forest lands. As an example, in 2007, measures were included to protect Hermes copper butterfly habitat ahead of the Horsethief Fuels Reduction Project (Jennings 2007, pers. comm.). Although the proposed project has not yet been implemented, the recommendations of flagging and avoidance of all *R. crocea* bushes are standard management measures for relevant CNF activities (Winter 2010, pers. comm.).

The CNF has also initiated two projects for restoration of habitat at Barber Mountain related to impacts from the Harris Fire (Metz 2010, pers. comm.). In an effort to restore nectar and host plants at this site, seeds from both *Eriogonum fasciculatum* and *Rhamnus crocea* plants have been collected locally and *E. fasciculatum* seeds have already been planted (Metz 2010, pers. comm.).

Because fires, particularly recent wildfires (megafires), have been identified as a factor affecting the distribution of this species, the CNF has been monitoring Hermes copper butterfly populations in burned and unburned areas of CNF to assist in monitoring the recovery and management of this species on its lands (HDR and E2M, 2009, p. 1). As part of the Forest Service's approach to management of Hermes copper butterfly and its habitat, the Forest Service commissioned a 2009 survey to determine the current status of Hermes copper butterfly populations at eight locations in the Descanso Ranger District of the CNF. A total of 16 Hermes copper butterflies were observed at 12 locations at 5 study sites (HDR and E2M, 2009, p. 11). The 2009 study concluded that the low number of observations were reflective of the on-going recovery of Hermes copper butterfly habitats from the effects of wildfires, the precipitation pattern in Hermes copper butterfly habitat in 2009, and host plant health (HDR and E2M, 2009, p. 25).

Previous monitoring surveys conducted on CNF lands include a 2005 survey for assessment of recolonization at Viejas Mountain, an area impacted by the Cedar Fire in 2003, in which no Hermes copper butterflies were observed (Klein 2005, pers. comm.). Additionally, a 2005 survey at Barber Mountain, an area that had not recently burned, revealed 95 specimens of Hermes copper butterflies (Faulkner 2005, pers. comm.), while a wider 2008 survey of the area after the Witch Fire in 2007 found scattered populations with only two sites containing more than a single specimen (Faulkner 2008 pers. comm.). Locations were marked for revegetation with *Eriogonum fasciculatum* and *Rhamnus crocea* in an attempt to extend the unburned chaparral habitat so as to expand the existing Hermes copper butterfly populations or establish new populations (Faulkner 2008, pers. comm.).

Recent fire events appear to have negatively affected the current occupancy of Hermes copper butterfly at the surveyed locations on CNF lands. The 2009 survey results indicate that of the study sites affected by fires in 2003 and 2007, Hermes copper butterfly was only found at one site (North Descanso), an area located on the southern edge of the area affected by the 2003 Cedar Fire and adjacent to unburned private lands, which the authors speculate contain a source population of Hermes copper butterflies (HDR and E2M, 2009, p. 25). The current monitoring, management efforts, and conservation measures implemented and planned by the Forest Service indicate that the CNF is actively working towards conservation of Hermes copper butterfly and its habitat.

The Federal Land Policy and Management Act of 1976 (FLPMA) governs the management of public lands under the jurisdiction of the BLM. The legislative goals of FLPMA are to establish public land policy; to establish guidelines for its [BLM's]

administration; and to provide for the management, protection, development and enhancement of the public lands. While FLPMA generally directs that public lands be managed on the basis of multiple use, the statute also directs that such lands be managed to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; * * * [to] preserve and protect certain public lands in their natural condition; [and to] provide food and habitat for fish and wildlife * * *." (43 U.S.C. 1701(a)(8)). Although the BLM has a multiple-use mandate under the FLPMA which allows for grazing, mining, and off-road vehicle use, the BLM also has the ability under the FLPMA to establish and implement special management areas such as Areas of Critical Environmental Concern, wilderness areas, research areas, etc. BLM's South Coast Resource Management Plan covers the San Diego County area. Approximately 1 percent, or 411 ac (166 ha) of the total Hermes copper butterfly habitat occupied by extant populations (3 populations in this case) occur within the BLM owned lands. An additional approximately 289 ac (117 ha) of Hermes copper butterfly habitat that supported populations believed to have been extirpated or that are of unknown status (encompassing 3 populations) also occurs on BLM lands. Hermes copper butterfly was a species considered but not addressed in the BLM's South Coast Resource Management Plan (SCRMP; BLM 1994, p. 76) but many components of Hermes copper butterfly habitat (coastal sage scrub and chaparral) are contained within the SCRMP planning area, and receive some regulatory protection under the plan. Approximately half of Hermes copper butterfly habitat supporting extant populations on BLM lands, a 201 ac (81 ha) portion of the Descanso South population (see Table 1 and Figure 1 above; Map #31) falls within the Pine Creek Wilderness Area and therefore benefits from BLM's wilderness protection policies. The Pine Creek Wilderness Area is managed in accordance with the provisions of the Wilderness Act of 1964 (16 U.S.C. 1131 *et seq.*). The Wilderness Act of 1964 strictly limits use of wilderness areas, imposing restrictions on use of vehicles, new developments, chainsaw use, mountain bike use, leasing, and mining, in order to protect the natural habitats of the areas, maintain species diversity, and enhance biological values. Lands acquired by BLM within wilderness area boundaries become part of the designated wilderness area and are managed in accordance with all provisions of the Wilderness Act and applicable laws. We believe existing BLM regulations provide adequate protection from the threat of development described in Factor A above, but not from mortality and habitat fragmentation due to megafire as described in Factors A above and E below. However, megafire is not a threat that is susceptible to reduction or elimination by regulatory mechanisms.

The Sikes Act requires the Department of Defense to develop and implement integrated natural resources management plans (INRMPs) for military installations across the United States. We are not aware of any currently extant Hermes copper butterfly populations on military installations; however there are historical Hermes copper butterfly observation locations and potential Hermes copper butterfly habitat (see Table 1 and Figure 1 above, Map #40) on Miramar Naval Air Station and the adjacent Mission Gorge Recreational Facility (MGRF) (also known as Admiral Baker Field). Through the 2002 Naval Base San Diego INRMP, which is currently under revision, the Navy manages its open space areas using an ecosystem-level approach that includes invasive species removal, habitat restoration and enhancement, and natural resource inventories (Stathos 2010, pers. comm.). In the 2002 INRMP, the Navy identified the following focus areas for management actions: Wildlife conservation and management, rare wildlife species, exotic vegetation control, habitat restoration, and fire management (U.S. Navy 2002, section 3, pp. 37–40 and 45–47). Hermes copper butterfly is not identified as a rare species in the INRMP; however, some existing management recommendations and actions may also be beneficial to Hermes copper butterfly, if it is rediscovered on Navy lands. The INRMPs are reviewed every year by military installations and modified as needed, and are reviewed at least every 5 years with the Service and States.

The Healthy Forests Restoration Act of 2003 includes the first meaningful statutory incentive for the U.S. Forest Service and the Bureau of Land Management to give consideration to prioritized fuel reduction projects identified by local communities. In order for a community to take advantage of this opportunity, a Community Wildfire Protection Plan (CWPP) must be prepared. The process of developing a CWPP can help a community identify and clarify priorities for the protection of life, property and critical infrastructure in the wildland-urban interface (WUI) (Fire Safe Council of San Diego County 2011). See our discussion of CWPPs below under the State and Local Regulations subsection. Combined, the Healthy Forests Restoration Act and the Community Wildfire Protection Plan emphasize the need for federal, state and local agencies to work collaboratively with communities in developing hazardous fuel reduction projects, and place priority on treatment areas identified by the communities themselves in a CWPP (Fire Safe Council of San Diego County 2011). While these regulations reduce the impact of wildfire to some extent, especially with regard to human property and safety, the impact of megafires on wildlands is not a threat that is susceptible to elimination by such regulatory mechanisms.

All Federal agencies are required to adhere to the National Environmental Policy Act (NEPA) of 1970 for projects they fund, authorize, or carry out. The Council on Environmental Quality's regulations for implementing NEPA (40 CFR parts 1500–1518) state that in their environmental impact statements agencies shall include a discussion on the environmental impacts of the various project alternatives (including the proposed action), any adverse environmental effects which cannot be avoided, and any irreversible or irretrievable commitments of resources involved (40 CFR part 1502). NEPA itself is a disclosure law that provides an opportunity for the public to submit comments on the particular project and propose other conservation measures that may directly benefit listed species; however, it does not require subsequent minimization or mitigation measures by the Federal agency involved. Although Federal agencies may include conservation measures for listed species as a result of the NEPA process, Hermes copper butterfly may be provided indirect protections due to its co-occurrence with listed species. Any such measures are typically voluntary in nature and are not required by the statute. Additionally, activities on non-Federal lands are subject to NEPA if there is a Federal nexus.

As stated above, land and resource management plans prepared by the Forest Service and BLM must be developed in accordance with NEPA requirements and, as noted above, the Forest Service prepared an environmental impact statement for its 2005 Land Management Plans (including the Cleveland National Forest Plan) and will be required to meet NEPA requirements in preparing its revised plan. Similarly, the U.S. Navy must meet the procedural

requirements of NEPA in developing its INRMPs.

State and Local Mechanisms

The California Environmental Quality Act (CEQA) (Public Resources Code 21000–21177) and the CEQA Guidelines (California Code of Regulations, Title 14, Division 6, Chapter 3, sections 15000–15387) requires State and local agencies to identify the significant environmental impacts of their actions and to avoid or mitigate those impacts, if feasible. CEQA applies to projects proposed to be undertaken or requiring approval by State and local government agencies and the lead agency must complete the environmental review process required by CEQA, including conducting an initial study to identify the environmental impacts of the project and determine whether the identified impacts are "significant." If significant impacts are determined, then an environmental impact report must be prepared to provide State and local agencies and the general public with detailed information on the potentially significant environmental effects (CERES 2010). "Thresholds of Significance" are comprehensive criteria used to define environmental significant impacts based on quantitative and qualitative standards and include impacts to biological resources such as candidate, sensitive, or special status species identified in local or regional plans, policies, or regulations, or by the California Department of Fish and Game (CDFG) or the Service; or impacts to any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the CDFG or Service (Appendix G, CEQA 2010). Defining these significance thresholds helps ensure a "rational basis for significance determinations" and provides support to the final determination and appropriate revisions or mitigation actions to a project in order to develop a mitigated negative declaration rather than an environmental impact report (Governor's Office of Planning and Research, 1994, p. 5).

The County of San Diego has developed the *Guidelines for Determining Significance and Report Format and Content Requirements—Biological Resources* (Guidelines) (County of San Diego, 2010) to review discretionary projects and environmental documents pursuant to the CEQA. The Guidelines provide guidance for evaluating adverse environmental effects that a proposed project may have on biological resources and are consulted during the evaluation of any biological resource pursuant to CEQA. Included in the specific guidelines, under Special Species Status, is a determination as to whether a project will impact occupied Hermes copper butterfly habitat. Section 4.1 K (p. 14) of the guidelines states:

"Though not state or federally listed, the Hermes copper meets the definition of endangered under CEQA Sec. 15380 because its 'survival and reproduction in the wild are in immediate jeopardy from one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, disease, or other factors.' The County's determination that the Hermes copper meets the definition of endangered under CEQA is based on the loss of Hermes copper populations by development and wildfire, and the review of published and unpublished literature. Interim guidelines for surveying, assessing impacts, and designing mitigation for Hermes copper are provided in Attachment C of the Report Format and Content Requirements—Biological Resources." (County of San Diego, 2010, p. 14).

The newly added Hermes copper butterfly section of the guidelines offers a proactive requirement for project review under CEQA that can provide a specific protective measure to the species and its habitat.

The San Diego Multiple Species Conservation Program (MSCP) is a subregional habitat conservation plan (HCP) and Natural Community Conservation Plan (NCCP) made up of several subarea plans that have been in place for more than a decade. Under the umbrella of the MSCP, each of the 12 participating jurisdictions is required to prepare a subarea plan that implements the goals of the MSCP within that particular jurisdiction. The MSCP covers 582,243 ac (235,625 ha) and the County of San Diego Subarea Plan covers 252,132 ac (102,035 ha) of unincorporated county lands in the southwestern portion of the MSCP plan area. The County subarea plan is implemented in part by the Biological Mitigation Ordinance (BMO), which outlines specific project design criteria and species and habitat protection and mitigation requirements for projects within subarea boundaries (see MSCP Subarea Plan, County of San Diego 2007, and Biological Mitigation Ordinance (Ord. Nos. 8845, 9246), County of San Diego 1998b). All projects within the County's subarea plan boundaries must comply with both the MSCP requirements and the County's policies under CEQA. Hermes copper butterfly is not a covered species under any MSCP subarea plans; however, the protections afforded by the BMO indirectly benefit the species by establishing mitigation ratios and project development conditions that restrict development within coastal sage scrub and mixed chaparral habitats. Of the 17 currently extant Hermes copper butterfly populations, the BMO affords some indirect protection to the 10 that fall all or partially within the County's subarea plan boundaries.

The County of San Diego Resource Protection Ordinance (RPO) (County of San Diego 2007) applies to all non-federal lands within the County located within and outside of the County of San Diego subarea plan boundaries. The RPO imposes restrictions on development to reduce impacts to natural resources including sensitive habitat lands. Sensitive habitat lands are those that support unique vegetation communities or those that are either necessary to support a viable population of sensitive species, are critical to the proper functioning of a balanced natural ecosystem, or which serve as a functioning wildlife corridor (County of San Diego, 2007, p. 3). They can include areas that contain maritime succulent scrub, southern coastal bluff scrub, coastal and desert dunes, calcicolous scrub, and maritime chaparral, among others. Impacts to RPO sensitive habitat lands, which include lands with potential host and nectar plant habitat for Hermes copper butterfly (i.e., scrub and chaparral), are only allowed when all feasible measures have been applied to reduce impacts and when mitigation provides an equal or greater benefit to the affected species (County of San Diego, 2007, p. 13).

The California Department of Forestry and Fire Protection (CAL FIRE) is an emergency response and resource protection department. CAL FIRE protects lives, property and natural resources from fire, and protects and preserves timberlands, wildlands, and urban forests. The CAL FIRES's varied programs work together to plan protection strategies incorporating concepts of the National Fire Plan, the California Fire Plan, individual CAL FIRE Unit Fire Plans, and Community Wildfire Protection Plans (CWPPs). Fire Plans outline the fire situation within each CAL FIRE Unit, and CWPPs do the same for communities (CALFIRE 2011a, p. 1; County of San Diego 2011a). Each plan identifies prevention measures to reduce risks, informs and involves the local communities in the area, and provides a framework to diminish potential wildfire losses and implement all applicable fire management regulations and policies (CALFIRE 2011b; County of San Diego 2011a). Planning includes other state, federal

and local government agencies as well as Fire Safe Councils (CALFIRE 2011a, p. 1). Cooperative efforts via contracts and agreements between state, federal, and local agencies are essential to respond to wildland fires (CALFIRE 2011a, p. 1). Because of these types of cooperative efforts, fire engines and crews from many different agencies may respond at the scene of an emergency (CALFIRE 2011a, p. 1); however CALFIRE typically takes the lead with regard to planning for megafire, prevention, management, and suppression, and CAL FIRE is in charge of incident command during a wildfire. The San Diego County Fire Authority (SDCFA), local governments, and CAL FIRE cooperatively protect 1.42 million acres of land with 54 fire stations throughout San Diego County (County of San Diego 2011b, p. 1). Wildfire management plans and associated actions can help to reduce the impacts of wildfire on natural resources, including Hermes copper butterfly, but their first priority is human health and safety. While these plans and associated measures ameliorate the impacts of wildfire to some extent, especially with regard to human property and safety, the impact of megafires on wildlands is not a threat that is susceptible to elimination by such regulatory mechanisms.

Summary of Factor D

In summary, we considered the adequacy of existing regulatory mechanisms to protect Hermes copper butterfly. On Forest Service lands, the Cleveland National Forest Plan addresses the conservation of natural resources, including Hermes copper butterfly, and specific management practices have been identified and are being implemented to conserve existing populations of Hermes copper butterfly and its habitat. Approximately 1 percent of Hermes copper butterfly habitat occurs on BLM lands and is afforded some protection through the South Coast Management Plan and Wilderness Area designation through management of habitat areas for listed and other sensitive species and land use limitation. Although the Navy has not recorded extant populations of Hermes copper butterfly on their lands in San Diego County, we believe the management measures identified in their INRMP for the Mission Gorge Recreational Facility provides an adequate protective mechanism for existing coastal sage habitat suitable for Hermes copper butterfly. Hermes copper butterfly and its habitat may also receive protection under NEPA as land management plans, INRMPs, and activity level plans are developed on Forest Service, BLM and U.S. Navy lands either occupied by or that contain suitable habitat for the species.

On State and county lands occupied by Hermes copper butterfly or containing its habitat, we believe the requirements of CEQA and the two County ordinances are adequate regulatory mechanisms that protect the species and its habitat from development related impacts. The Biological Mitigation Ordinance of the County of San Diego Subarea Plan and the County of San Diego Resource Protection Ordinance impose restrictions on development within coastal sage scrub and mixed chaparral habitats that support half of the historical distribution of Hermes copper butterfly populations. Although Federal, State, and local regulatory mechanisms help to reduce wildfire impacts, primarily to property and human safety, they do not adequately protect Hermes copper butterfly from direct mortality or habitat fragmentation due to megafires. However, we do not consider the impact of megafire on wildlands to be a threat that is susceptible to elimination by regulatory mechanisms.

Therefore, based on our review of the best available scientific and commercial information, we do not consider the inadequacy of existing regulatory mechanisms to be a threat to Hermes copper butterfly.

Factor E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

Wildfire

As discussed in the **Background** section and Factor A discussions above, wildfire can result in temporal loss of Hermes copper butterfly habitat. However, the most significant threat posed by wildfire to Hermes copper butterfly is the direct loss (*i.e.*, mortality) of butterflies associated with extensive and intense fire events. The magnitude of this threat is increased by the periodic occurrence of megafires, which are typically created by extreme "Santa Ana" weather conditions of high temperatures, low humidity, and strong erratic winds (see **Background** section and Factor A's wildfire discussion above; Keeley and Zedler 2009, p. 90). Human-induced or anthropogenic ignitions have increased the frequency of fire far above historical levels (Keeley and Fotheringham 2003, p. 240). Recolonization of burned areas by Hermes copper butterfly can be precluded when fires, and particularly megafires, occur too frequently. The significance of this concern can be seen in the current distribution of the species in southern California; analysis of GIS information indicates approximately 66 percent of the extant occurrences are found within the footprint of the 1970 Laguna Fire, which Minnich and Chou (1997, p. 240) reported last burned in 1920. In contrast, the areas north and south of the extant Hermes copper butterfly occurrences burned several times from 2001 to 2007 (Keeley *et al.* 2009, pp. 287, 293). A single megafire burning most or all of the 40-year old chaparral in the footprint of the Laguna fire would likely imperil the species in the United States (see Figure 1 above). Additionally, as discussed in the **Background** section above, the 2003 Otay and Cedar fires and the 2007 Harris and Witch fires in particular have negatively impacted the species, resulting in or contributing to the extirpation of 9 of 35 populations (see Table 1 above).

It is well-documented that wildfires that occur in occupied Hermes copper butterfly habitat result in loss of Hermes copper butterflies (Klein and Faulkner 2003, pp. 96, 97; Marschalek and Klein 2010, pp. 4, 5). The butterflies rarely survive wildfire because life stages of the butterfly inhabit host plant foliage, and *Rhamnus crocea* typically burns to the ground and resprouts from stumps (Deutschman *et al.* 2010, p. 8; Marschalek and Klein 2010, p. 8). This results in at least the temporal loss of both the habitat (until the *R. crocea* and nectar source regrowth occurs) and the presence of butterflies (occupancy) in the area. Wildfires can also leave patches of unburned occupied habitat that are functionally isolated (e.g., further than the dispersal distance of the butterfly) from other occupied habitat. Furthermore, large fires can eliminate source populations before previously burned habitat can be recolonized, and can result in long-term or permanent loss of butterfly populations. For example, in Mission Trails Park the 7,303 ac (2596 ha) "Assist #59" Fire in 1981 and the smaller 126 ac (51 ha) "Assist #14" Fire in 1983 (no significant overlap between fires), resulted in an approximate 18-year extirpation of the Mission Trails Park Hermes copper butterfly population (Klein and Faulkner 2003, pp. 96, 97). More recent examples include extirpations of the monitored Crestridge, Rancho Jamul, Anderson Road, Hollenbeck Canyon, and San Miguel Mountain populations, as well as other less-monitored populations (Marschalek and Klein 2010, pp. 4, 5; Deutschman *et al.* 2010, p. 36). After the 2003 Cedar Fire, Hermes copper butterfly records at the

regularly monitored Crestridge population, once considered the largest and most robust population within the species' range (Klein and Faulkner 2003, p. 86), were limited to presumably the same male for a 6-day period in 2005, and another single male observed in 2007 (Marschalek and Klein 2010, p. 4; Deutschman *et al.* 2010, p. 33). Marschalek (2010a, p. 2) described how when his study "colonies" in the Rancho Jamul population were extirpated by fire in 2003, he discovered additional occupied habitat on the other side of a nearby firebreak in 2004; however the remaining population distribution was extirpated in the 2007 Harris Fire (Marschalek 2010a, p. 1). Data indicate all historical populations burned in both the 2003 and 2007 fires were extirpated except North Descanso, where record locations were within a narrow extension of the fire perimeter surrounded on three sides by unburned habitat (see Table 1 and Figure 1 above). We know this habitat was recolonized because genetic research determined the colonizing individuals were not related to those collected before the fire (Deutschman *et al.* 2010, p. 26). These facts underscore the importance of having available Hermes copper butterfly source populations to recolonize habitat after fire. As discussed in the **Background** section above, of the 35 known Hermes copper butterfly populations in 2000, 1 northern Hermes copper butterfly population and 8 southern populations are believed to have been extirpated by fire or a combination of fire and development since 2003 (see Table 1 above).

As discussed above under Factor A, we examined maps of current high fire threat areas in San Diego County based on recent reports by the Forest Area Safety Task Force (Jones 2008; SANDAG 2010). Areas identified as most vulnerable include all occupied and potentially occupied Hermes copper butterfly habitats in San Diego County within the species' known historical range, with the exception of Black Mountain, Van Dam Peak, Lopez Canyon, and the unburned southern portion of Mission Trails Park. Nineteen potential source populations for recolonization of habitats burned in the past 10 years (extant or of unknown status) fall within a contiguous area that has not recently burned (southeastern populations in Figure 1), and where the threat of fire is considered high (SANDAG 2010). All except 3 of these potential source populations (North Descanso, Hartley Peak, and North Guatay Mountain) also fall within the 174,026 ac (70,426 ha) 1970 Laguna Fire perimeter (similar in size to the 2003 and 2007 fires), and the 3 that do not fall within the Laguna Fire perimeter fall partially within the 2003 and 2007 fire perimeters. This analysis of current fire danger and fire history illustrates the potential for permanent loss of the majority, if not all, remaining butterfly populations should another large fire occur prior to recolonization of burned habitats (per discussion above, recolonization may not occur for up to 18 years). As discussed by Marschalek and Klein (2010, p. 9) and Deutschman *et al.* (2010, p. 42), there is a risk that one or more wildfires could extirpate the majority of extant Hermes copper butterfly populations. Based on the above, we consider wildfire, specifically megafires that encompass vast areas and are increasing in frequency, a significant threat to Hermes copper butterfly.

Vulnerability of Small and Isolated Populations

Small population size, low population numbers, and population isolation are not necessarily independent factors that threaten a species. Typically, it is the combination of small size and number and isolation of populations in conjunction with other threats (such as the present or threatened destruction and modification of the species' habitat or range) that may significantly increase the probability of species' extinction.

Population isolation renders smaller populations more vulnerable to stochastic extirpation. Small populations and isolation could also subject Hermes copper butterfly to genetic drift and restricted gene flow that may decrease genetic variability over time and could adversely affect species' viability (Allee 1931, pp. 12–37; Stephens *et al.* 1999, pp. 185–190; Dennis 2002, pp. 389–401). The best available scientific information indicates adult Hermes copper butterfly densities have been reduced to low or no detectability, or occupancy has been entirely eliminated in some burned areas (for example Crestridge, see Factor A discussion above), and habitat has been fragmented and isolated by development (Deutschman *et al.* 2010, p. 33). As discussed in the Background section and Factor A discussion above, most remaining northern habitats are limited to the relatively isolated and fragmented undeveloped lands between the cities of San Marcos, Carlsbad, and Escondido and the community of Rancho Santa Fe. The nearest occupied Hermes copper butterfly location (Mission Trails) to the habitat "islands" containing the Black Mountain and Van Dam Peak observation locations are approximately 9 mi (14 km) and 7 mi (11 km) away, respectively, and separated by highly developed areas. Future recolonization of Hermes copper butterfly to these areas, which appear to contain suitable habitat, is not likely due to their isolation. One population isolated by development was extirpated due to the 2007 Witch Fire (Rancho Santa Fe), and a second isolated population was extirpated for unknown reasons (Van Dam Peak). As discussed above under Factor A, neither the Rancho Santa Fe habitat area nor the Van Dam Peak habitat area is expected to be recolonized because the distance to the next nearest source population exceeds the dispersal capability of the species. In the southern portion of the range, Lopez Canyon and the extant portion of Mission Trails Park are both isolated from other extant populations by development and burned areas that are no longer likely occupied. Although the Mission Trails Park population remains extant this population was likely reduced up to 74 percent by the 2003 fire, and remaining unburned habitat is surrounded by development, functionally isolating it from any potential source populations thought to be extant (see Figure 1 above). Therefore, we consider the effects of restricted geographical range, population isolation, and reduced population size a significant threat to Hermes copper butterfly.

Global Climate Change

Evaluations by Parmesan and Galbraith (2004, pp. 1–2, 29–33) indicate whole ecosystems may be shifting northward and upward in elevation, or are otherwise being altered by differing climate tolerance among species within communities. Climate change may be causing changes in the arrangement and community composition of occupied habitat patches. Current climate change predictions for terrestrial areas in the Northern Hemisphere and the southwestern United States indicate warmer air temperatures, more intense precipitation events, and increased summer drying (Field *et al.* 1999, pp. 1–3; Hayhoe *et al.* 2004, p. 12422; Cayan *et al.* 2005, p. 6; Intergovernmental Panel on Climate Change (IPCC) 2007, p. 11). However, predictions of climatic conditions for smaller subregions, such as San Diego County, remain less certain. Tabor and Williams (2010, p. 562) summarized the four major sources of uncertainty in downscaled climate projections: (1) Uncertainties in future greenhouse gas emissions and atmospheric composition (scenario uncertainty); (2) uncertainties in

modeling the climate response (Global Circulation Model uncertainty); (3) uncertainties in the observational data sets used as the basemap for the debiasing procedure (historical observational uncertainty); and (4) uncertainty over the validity of assumptions underlying the change-factor approach (change-factor uncertainty). These uncertainties are a general phenomenon of climate model downscaling and they can be substantial, especially the first two (Tabor and Williams 2010, pp. 562, 564). Thus, discretion is necessary when using downscaled climate projections, because downscaling Global Circulation Models to the finest available resolution may produce misleading results (Tabor and Williams 2010, p. 564). Southern California has a unique and globally rare Mediterranean climate. Summers are typically dry and hot while winters are cool, with minimal rainfall averaging about 10 inches per year. The maritime influence of the Pacific Ocean combined with the coastal and inland mountain ranges creates an inversion layer typical of Mediterranean-like climates, particularly in southern California. These conditions also create microclimates, where the weather can be highly variable within small geographic areas at the same time. These microclimates are difficult to model and make it even more difficult to predict meaningful changes in climate for this region, specifically for small local areas, and the resultant impact on the Hermes copper butterfly and its habitat.

We evaluated the available historical weather data and the species biology to determine the likelihood of effects assuming the climate has been and will continue to change. The typical effect of a warmer climate, as observed with Hermes copper butterfly in lower, warmer elevation habitats compared to higher, cooler elevations, is an earlier flight season by several days (Thorne 1963, p. 146; Marschalek and Deutschman 2008, p. 98). Marschalek and Klein (2010, p. 2) noted that past records suggest a slightly earlier flight season in recent years compared to the 1960s. The earliest published day of flight prior to 1963, after "30 years of extensive collecting," was May 20 (Thorne 1963, pp. 143, 146), but adults began flying on May 16 and May 12 in 2003 and 2004, respectively (Marschalek and Deutschman 2008, p. 100), and were reported as early as April 29 in 2003, and May 14 in 2008 (CFWO GIS database). The record early observation on April 29, 2003, was from Fortuna Mountain in Mission Trails Park, a well-collected population with records dating back to 1958, including collections by Thorne (called "Mission Gorge" or "Mission Dam" on museum specimen labels) where May 21 was the earliest documented record from the 1960s and early 1970s (before climate change trends were reasonably detectable as described by the IPCC (2007, pp. 2, 4)). The historical temperature trend in Hermes copper butterfly habitats for the month of April (when larvae are typically developing and pupating) from 1957 to 2006 can be calculated with relatively high confidence (p values from 0.001 to 0.05). The rate of temperature change has been an increase of 0.04 to 0.07 °F (0.07 to 0.13 °C) per year (Climate Wizard 2010), a total increase of which could explain the earlier than average flight seasons. The latest published observation date (presumed end of flight season) of an adult prior to 1970 was on July 30, 1967 (museum specimen collected by Thorne at "Suncrest"); however, the latest observation date from monitoring and data and other records in the past 10 years was on July 2 in 2010, despite an uncharacteristically late start to the flight season (May 29). Shorter flight seasons are also consistent with higher average temperatures, as a higher metabolism in these exothermic short-lived invertebrates typically results in faster growth and earlier death. Nevertheless, given the temporal and geographical availability of their widespread perennial host plant, and exposure to extremes of climate throughout their known historical range (Thorne 1963, p. 144), Hermes copper butterfly and its host and nectar plants are not likely to be negatively affected throughout the majority of the species' range by phenological shifts in development of a few days (unlike species such as Edith's checkerspot (*Euphydryas editha*) that depend on annual host plants; Service 2003, pp. 63, 64). While it is possible the species' climatic tolerance, such as temperature thresholds for activity (see **Background** section above), could result in a change in the species niche and distribution of suitable habitat as the climate changes, predicting any such changes would be speculative because we do not understand what currently limits the species' range to a much smaller geographic area than its host plant. Based on the above, we do not consider global climate change a current threat to Hermes copper butterfly.

Mexico Populations

Although wildfire and isolation of small populations may be threats to Hermes copper butterfly and its habitat in Mexico, especially near the U.S. border where the human population and development is most concentrated (see for example National Aeronautics and Space Administration's 2010 October 24 update wildfire satellite imagery that includes Baja California, Mexico), these threats are likely of less magnitude because there is far less development in the more remote areas of Baja California that may support Hermes copper butterfly. We are not aware of any conservation activities related to Hermes copper butterfly in Mexico.

Summary of Factor E

In summary, we consider Hermes copper butterfly threatened by other natural or manmade factors affecting the species' continued existence. Specifically, Hermes copper butterfly is threatened with extirpation due to wildfire (megafire), restricted geographical range, and population isolation. The loss of populations, due to megafires and population fragmentation and isolation, inhibits the ability of Hermes copper butterfly to rebound from stochastic events such as megafires. These threats are evidenced by the loss of populations in the north and south of the U.S. range and subsequent isolation of other populations throughout the range. The remaining extant populations fall within a restricted area bounded by development and face high megafire risk. Thus, we consider threats under this factor to be significant.

Finding

As required by the Act, we conducted a review of the status of the species and considered the five factors in assessing whether Hermes copper butterfly is endangered or threatened throughout all or a significant portion of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by Hermes copper butterfly. We reviewed the petition, information available in our files, other available published and unpublished information, and we consulted with Hermes copper butterfly experts and other Federal, State, and local jurisdictions.

This status review identified threats to Hermes copper butterfly attributable primarily to "megafires" (large wildfires) and small and isolated populations (Factor E), and to a lesser extent, habitat loss due to increased wildfire frequency and due to fragmentation resulting from the combined impacts of existing development, possible future (limited) development, existing dispersal barriers, and megafires (Factor A). The primary

threats to the species are mortality from wildfire and small population size. These threats increase the risk of extirpation of Hermes copper butterfly populations rangewide. Hermes copper butterfly occupies scattered areas of sage scrub and chaparral habitat in an arid region susceptible to wildfires of increasing frequency and size. The likelihood that the species will be burned by catastrophic wildfires, combined with the isolation and small size of extant populations makes Hermes copper butterfly particularly vulnerable to population extirpation rangewide. Therefore, we find that there are threats of sufficient imminence, intensity, or magnitude to indicate that Hermes copper butterfly is in danger of extinction (endangered), or likely to become endangered within the foreseeable future (threatened), throughout its range or a significant portion of its range based on the threats described above.

On the basis of the best scientific and commercial information available, we find that the petitioned action to list Hermes copper butterfly is warranted. We will make a determination on the status of the species as endangered or threatened when we do a proposed listing determination. However, as explained in more detail below, immediate proposal of a regulation to implement this finding is precluded by higher priority listing actions, and we are making expeditious progress to add or remove qualified species from the Lists of Endangered and Threatened Wildlife and Plants.

We reviewed the available information to determine if the existing and foreseeable threats render Hermes copper butterfly at risk of extinction now such that issuing an emergency regulation temporarily listing the species under section 4(b)(7) of the Act is warranted. We determined that issuing an emergency regulation temporarily listing the species is not warranted at this time, because the threat of extinction is not immediate. However, if at any time we determine that issuing an emergency regulation temporarily listing the species is warranted, we will initiate such action at that time.

Listing Priority Number

The Service adopted guidelines on September 21, 1983 (48 FR 43098) to establish a rational system for utilizing available resources for the highest priority species when adding species to the Lists of Endangered or Threatened Wildlife and Plants or reclassifying species listed as threatened to endangered status. The system places the greatest emphasis on taxonomic distinctiveness by assigning priority in descending order to monotypic genera (genus with one species), full species, and subspecies.

Using the Service's LPN guidance, we assign each candidate an LPN of 1 to 12, depending on the magnitude of threats (high vs. moderate to low), immediacy of threats (imminent or nonimminent), and taxonomic status of the species (in order of priority: Monotypic genus (a species that is the sole member of a genus), species, or part of a species (subspecies, distinct population segment, or significant portion of the range)). The lower the listing priority number, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority).

Under the Service's guidelines, the magnitude of threat is the first criterion we look at when establishing a listing priority. The guidance indicates that species with the highest magnitude of threat are those species facing the greatest threats to their continued existence. These species receive the highest listing priority. The threats that Hermes copper butterfly faces are high in magnitude because the major threats (particularly mortality due to wildfire and increased wildfire frequency) occur throughout all of the species' range and are likely to result in adverse impacts to the status of the species. Based on an evaluation of all known historical populations, approximately 49 percent are believed to have been extirpated. Historical records indicate that development has isolated and modified habitats in the northern portion of the U.S. range. The isolation of these habitats has inhibited the species' ability to recolonize after stochastic events such as wildfires. When a wildfire passes through an occupied area, it is highly likely that all individuals or eggs, if present, within the area are killed (see discussion under Factor E: Wildfire above). As populations become more isolated from other occupied areas, their ability to recolonize after such events is lost. As described in the discussions of wildlife under Factors A and E above, wildfires are increasing in frequency and magnitude which increases the potential for isolation of populations and, in turn, increases the risk of extirpation rangewide.

Under our LPN guidelines, the second criterion we consider in assigning a listing priority is the immediacy of threats. This criterion is intended to ensure that the species that face actual, identifiable threats are given priority over those for which threats are only potential or that are intrinsically vulnerable but are not known to be presently facing such threats. Hermes copper butterfly faces actual, identifiable threats as discussed under Factors A and E of this finding, including the threat of a large, high-intensity wildfire (megafire) capable of killing Hermes copper butterfly populations and destroying or modifying the species' habitat in a way that would cause a rangewide reduction in populations; however, the impact of wildfire to Hermes copper butterfly and its habitat occurs on a sporadic basis and we do not have the ability to predict when wildfires will occur. While we conclude that listing Hermes copper butterfly is warranted, an immediate proposal to list this species is precluded by other higher priority listings, which we address below.

The third criterion in our LPN guidance is intended to devote resources to those species representing highly distinctive or isolated gene pools as reflected by taxonomy. Hermes copper butterfly is a valid taxon at the species level. Hermes copper butterfly faces high magnitude, non-imminent threats, and is a valid taxon at the species level. Thus, in accordance with our LPN guidance (48 FR 43098, September 21, 1983), we have assigned Hermes copper butterfly an LPN of 5.

As a result of our analysis of the best available scientific and commercial information, we assigned Hermes copper butterfly a Listing Priority Number of 5, based on species level taxonomic classification and high magnitude but nonimminent threats. Hermes copper butterfly is threatened by megafires, habitat fragmentation, and the effects of restricted range and small population size throughout all of the known populations in the United States. The effect of past habitat fragmentation is considered irreversible and has continuing impacts over the range of the species. The threat of wildfire continues to exist throughout the species range; however, the impact of wildfire on Hermes copper butterfly and its habitat occurs on a sporadic basis and we do not have the ability to predict when wildfires will occur. While we conclude that listing Hermes copper butterfly is warranted, an immediate proposal to list this species is precluded by other higher priority listings, which we address below.

We will continue to monitor the threats to Hermes copper butterfly, and the species' status on an annual basis, and should the magnitude or the imminence of the threats change, we will revisit our assessment of the LPN.

Work on a proposed listing determination for Hermes copper

butterfly is precluded by work on higher priority listing actions with absolute statutory, court-ordered, or court-approved deadlines and final listing determinations for those species that were proposed for listing with funds from Fiscal Year 2011. This work includes all the actions listed in the tables below under expeditious progress.

Preclusion and Expeditious Progress

Preclusion is a function of the listing priority of a species in relation to the resources that are available and the cost and relative priority of competing demands for those resources. Thus, in any given fiscal year (FY), multiple factors dictate whether it will be possible to undertake work on a listing proposal or whether promulgation of such a proposal is precluded by higher priority listing actions.

The resources available for listing actions are determined through the annual Congressional appropriations process. The appropriation for the Listing Program is available to support work involving the following listing actions: Proposed and final listing rules; 90-day and 12-month findings on petitions to add species to the Lists of Endangered and Threatened Wildlife and Plants (Lists) or to change the status of a species from threatened to endangered; annual "resubmitted" petition findings on prior warranted-but-precluded petition findings as required under section 4(b)(3)(C)(i) of the Act; critical habitat petition findings; proposed and final rules designating critical habitat; and litigation-related, administrative, and program-management functions (including preparing and allocating budgets, responding to Congressional and public inquiries, and conducting public outreach regarding listing and critical habitat). The work involved in preparing various listing documents can be extensive and may include, but is not limited to: Gathering and assessing the best scientific and commercial data available and conducting analyses used as the basis for our decisions; writing and publishing documents; and obtaining, reviewing, and evaluating public comments and peer review comments on proposed rules and incorporating relevant information into final rules. The number of listing actions that we can undertake in a given year also is influenced by the complexity of those listing actions; that is, more complex actions generally are more costly. The median cost for preparing and publishing a 90-day finding is $39,276; for a 12-month finding, $100,690; for a proposed rule with critical habitat, $345,000; and for a final listing rule with critical habitat, $305,000.

We cannot spend more than is appropriated for the Listing Program without violating the Anti-Deficiency Act (see 31 U.S.C. 1341(a)(1)(A)). In addition, in FY 1998 and for each fiscal year since then, Congress has placed a statutory cap on funds that may be expended for the Listing Program, equal to the amount expressly appropriated for that purpose in that fiscal year. This cap was designed to prevent funds appropriated for other functions under the Act (for example, recovery funds for removing species from the Lists), or for other Service programs, from being used for Listing Program actions (see House Report 105–163, 105th Congress, 1st Session, July 1, 1997).

Since FY 2002, the Service's budget has included a critical habitat subcap to ensure that some funds are available for other work in the Listing Program ("The critical habitat designation subcap will ensure that some funding is available to address other listing activities" (House Report No. 107–103, 107th Congress, 1st Session, June 19, 2001)). In FY 2002 and each year until FY 2006, the Service has had to use virtually the entire critical habitat subcap to address court-mandated designations of critical habitat, and consequently none of the critical habitat subcap funds have been available for other listing activities. In some FYs since 2006, we have been able to use some of the critical habitat subcap funds to fund proposed listing determinations for high-priority candidate species. In other FYs, while we were unable to use any of the critical habitat subcap funds to fund proposed listing determinations, we did use some of this money to fund the critical habitat portion of some proposed listing determinations so that the proposed listing determination and proposed critical habitat designation could be combined into one rule, thereby being more efficient in our work. At this time, for FY 2011, we do not know if we will be able to use some of the critical habitat subcap funds to fund proposed listing determinations.

We make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first and also because we allocate our listing budget on a nationwide basis. Through the listing cap, the critical habitat subcap, and the amount of funds needed to address court-mandated critical habitat designations, Congress and the courts have in effect determined the amount of money available for other listing activities nationwide. Therefore, the funds in the listing cap, other than those needed to address court-mandated critical habitat for already listed species, set the limits on our determinations of preclusion and expeditious progress.

Congress identified the availability of resources as the only basis for deferring the initiation of a rulemaking that is warranted. The Conference Report accompanying Public Law 97–304 (Endangered Species Act Amendments of 1982), which established the current statutory deadlines and the warranted-but-precluded finding, states that the amendments were "not intended to allow the Secretary to delay commencing the rulemaking process for any reason other than that the existence of pending or imminent proposals to list species subject to a greater degree of threat would make allocation of resources to such a petition [that is, for a lower-ranking species] unwise." Although that statement appeared to refer specifically to the "to the maximum extent practicable" limitation on the 90-day deadline for making a "substantial information" finding (see 16 U.S.C. 1533(b)(3)(A)), that finding is made at the point when the Service is deciding whether or not to commence a status review that will determine the degree of threats facing the species, and therefore the analysis underlying the statement is more relevant to the use of the warranted-but-precluded finding, which is made when the Service has already determined the degree of threats facing the species and is deciding whether or not to commence a rulemaking.

In FY 2011, on March 18, 2010, Congress passed a continuing resolution which provides funding at the FY 2010 enacted level through April 8, 2011. Until Congress appropriates funds for FY 2011 at a different level, we will fund listing work based on the FY 2010 amount. Thus, at this time in FY 2011, the Service anticipates an appropriation of $22,103,000 based on FY 2010 appropriations. Of that, the Service must dedicate $11,632,000 for determinations of critical habitat for already listed species. Also $500,000 is appropriated for foreign species listings under the Act. The Service thus has $9,971,000 available to fund work in the following categories: compliance with court orders and court-approved settlement agreements requiring that petition findings or listing determinations be completed by a specific date; section 4 (of the Act) listing actions with absolute statutory deadlines; essential litigation-related, administrative, and listing program-management functions; and high-priority listing actions for some of our

candidate species. In FY 2010, the Service received many new petitions and a single petition to list 404 species. The receipt of petitions for a large number of species is consuming the Service's listing funding that is not dedicated to meeting court-ordered commitments. Absent some ability to balance effort among listing duties under existing funding levels, it is unlikely that the Service will be able to initiate any new listing determinations for candidate species in FY 2011.

In 2009, the responsibility for listing foreign species under the Act was transferred from the Division of Scientific Authority, International Affairs Program, to the Endangered Species Program. Therefore, starting in FY 2010, we used a portion of our funding to work on the actions described above for listing actions related to foreign species. In FY 2011, we anticipate using $1,500,000 for work on listing actions for foreign species, which reduces funding available for domestic listing actions; however, currently only $500,000 has been allocated for this function. Although there are no foreign species issues included in our high-priority listing actions at this time, many actions have statutory or court-approved settlement deadlines, thus increasing their priority. The budget allocations for each specific listing action are identified in the Service's FY 2011 Allocation Table (part of our administrative record).

For the above reasons, funding a proposed listing determination for the Hermes copper butterfly is precluded by court-ordered and court-approved settlement agreements, listing actions with absolute statutory deadlines, work on final listing determinations for those species that were proposed for listing with funds from FY 2011, and work on proposed listing determinations for those candidate species with a higher listing priority (i.e., candidate species with LPNs of 1 to 4).

Based on our September 21, 1983, guidelines for assigning an LPN for each candidate species (48 FR 43098), we have a significant number of species with a LPN of 2. Using these guidelines, we assign each candidate an LPN of 1 to 12, depending on the magnitude of threats (high or moderate to low), immediacy of threats (imminent or nonimminent), and taxonomic status of the species (in order of priority: monotypic genus (a species that is the sole member of a genus); species; or part of a species (subspecies, distinct population segment, or significant portion of the range)). The lower the listing priority number, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority).

Because of the large number of high-priority species, we have further ranked the candidate species with an LPN of 2 by using the following extinction-risk type criteria: International Union for the Conservation of Nature and Natural Resources (IUCN) Red list status/rank; Heritage rank (provided by NatureServe); Heritage threat rank (provided by NatureServe); and species currently with fewer than 50 individuals, or 4 or fewer populations. Those species with the highest IUCN rank (critically endangered); the highest Heritage rank (G1); the highest Heritage threat rank (substantial, imminent threats); and currently with fewer than 50 individuals, or fewer than 4 populations, originally comprised a group of approximately 40 candidate species ("Top 40"). These 40 candidate species have had the highest priority to receive funding to work on a proposed listing determination. As we work on proposed and final listing rules for those 40 candidates, we apply the ranking criteria to the next group of candidates with an LPN of 2 and 3 to determine the next set of highest priority candidate species. Finally, proposed rules for reclassification of threatened species to endangered are lower priority, because as listed species, they are already afforded the protections of the Act and implementing regulations. However, for efficiency reasons, we may choose to work on a proposed rule to reclassify a species to endangered if we can combine this with work that is subject to a court-determined deadline.

With our workload so much bigger than the amount of funds we have to accomplish it, it is important that we be as efficient as possible in our listing process. Therefore, as we work on proposed rules for the highest priority species in the next several years, we are preparing multi-species proposals when appropriate, and these may include species with lower priority if they overlap geographically or have the same threats as a species with an LPN of 2. In addition, we take into consideration the availability of staff resources when we determine which high-priority species will receive funding to minimize the amount of time and resources required to complete each listing action.

As explained above, a determination that listing is warranted but precluded must also demonstrate that expeditious progress is being made to add and remove qualified species to and from the Lists of Endangered and Threatened Wildlife and Plants. As with our "warranted-but-precluded" finding, the evaluation of whether progress in adding qualified species to the Lists has been expeditious is a function of the resources available for listing and the competing demands for those funds. (Although we do not discuss it in detail here, we are also making expeditious progress in removing species from the list under the Recovery program in light of the resource available for delisting, which is funded by a separate line item in the budget of the Endangered Species Program. So far during FY 2011, we have completed one delisting rule; see 76 FR 3029.) Given the limited resources available for listing, we find that we are making expeditious progress in FY 2011. This progress includes preparing and publishing the following determinations:

FY 2011 Completed Listing Actions

Publication date	Title	Actions	FR pages
10/6/2010	Endangered Status for the Altamaha Spinymussel and Designation of Critical Habitat.	Proposed Listing, Endangered	75 FR 61664–61690.
10/7/2010	12-Month Finding on a Petition to list the Sacramento Splittail as Endangered or Threatened.	Notice of 12-month petition finding, Not warranted.	75 FR 62070–62095.
10/28/2010 ...	Endangered Status and Designation of Critical Habitat for Spikedace and Loach Minnow.	Proposed Listing, Endangered (uplisting). ,	75 FR 66481–66552.
11/2/2010	90-Day Finding on a Petition to List the Bay Springs Salamander as Endangered.	Notice of 90-day Petition Finding, Not substantial.	75 FR 67341–67343.
11/2/2010	Determination of Endangered Status for the Georgia Pigtoe Mussel, Interrupted Rocksnail, and Rough Hornsnail and Designation of Critical Habitat.	Final Listing, Endangered	75 FR 67511–67550.

FY 2011 COMPLETED LISTING ACTIONS—Continued

Publication date	Title	Actions	FR pages
11/2/2010	Listing the Rayed Bean and Snuffbox as Endangered	Proposed Listing, Endangered	75 FR 67551–67583.
11/4/2010	12-Month Finding on a Petition to List Cirsium wrightii (Wright's Marsh Thistle) as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 67925–67944.
12/14/2010 ...	Endangered Status for Dunes Sagebrush Lizard	Proposed Listing, Endangered	75 FR 77801–77817.
12/14/2010 ...	12-Month Finding on a Petition to List the North American Wolverine as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 78029–78061.
12/14/2010 ...	12-Month Finding on a Petition to List the Sonoran Population of the Desert Tortoise as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 78093–78146.
12/15/2010 ...	12-Month Finding on a Petition to List *Astragalus microcymbus* and *Astragalus schmolliae* as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 78513–78556.
12/28/2010 ...	Listing Seven Brazilian Bird Species as Endangered Throughout Their Range.	Final Listing, Endangered	75 FR 81793–81815.
1/4/2011	90-Day Finding on a Petition to List the Red Knot subspecies *Calidris canutus roselaari* as Endangered.	Notice of 90-day Petition Finding, Not substantial.	76 FR 304–311.
1/19/2011	Endangered Status for the Sheepnose and Spectaclecase Mussels	Proposed Listing, Endangered	76 FR 3392–3420.
2/10/2011	12-Month Finding on a Petition to List the Pacific Walrus as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	76 FR 7634–7679.
2/17/2011	90-Day Finding on a Petition to List the Sand Verbena Moth as Endangered or Threatened.	Notice of 90-day Petition Finding, Substantial.	76 FR 9309–9318.
2/22/2011	Determination of Threatened Status for the New Zealand-Australia Distinct Population Segment of the Southern Rockhopper Penguin.	Final Listing, Threatened	76 FR 9681–9692.
2/22/2011	12-Month Finding on a Petition to List *Solanum conocarpum* (marron bacora) as Endangered.	Notice of 12-month petition finding, Warranted but precluded.	76 FR 9722–9733.
2/23/2011	12-Month Finding on a Petition to List Thorne's Hairstreak Butterfly as Endangered.	Notice of 12-month petition finding, Not warranted.	76 FR 991–1003.
2/23/2011	12-Month Finding on a Petition to List *Astragalus hamiltonii, Penstemon flowersii, Eriogonum soredium, Lepidium ostleri,* and *Trifolium friscanum* as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded & Not Warranted.	76 FR 10166–10203.
2/24/2011	90-Day Finding on a Petition to List the Wild Plains Bison or Each of Four Distinct Population Segments as Threatened.	Notice of 90-day Petition Finding, Not substantial.	76 FR 10299–10310.
2/24/2011	90-Day Finding on a Petition to List the Unsilvered Fritillary Butterfly as Threatened or Endangered.	Notice of 90-day Petition Finding, Not substantial.	76 FR 10310–10319.
3/8/2011	12-Month Finding on a Petition to List the Mt. Charleston Blue Butterfly as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	76 FR 12667–12683.
3/8/2011	90-Day Finding on a Petition to List the Texas Kangaroo Rat as Endangered or Threatened.	Notice of 90-day Petition Finding, Substantial.	76 FR 12683–12690.
3/10/2011	Initiation of Status Review for Longfin Smelt	Notice of Status Review	76 FR 13121–31322.
3/15/2011	Withdrawal of Proposed Rule to List the Flat-tailed Horned Lizard as Threatened.	Proposed rule withdrawal	76 FR 14210–14268.
3/22/2011	12-Month Finding on a Petition to List the Berry Cave Salamander as Endangered.	Notice of 12-month petition finding, Warranted but precluded.	76 FR 15919–15932.
4/1/2011	90-Day Finding on a Petition to List the Spring Pygmy Sunfish as Endangered.	Notice of 90-day Petition Finding, Substantial.	76 FR 18138–18143.
4/5/2011	12-Month Finding on a Petition to List the Bearmouth Mountainsnail, Byrne Resort Mountainsnail, and Meltwater Lednian Stonefly as Endangered or Threatened.	Notice of 12-month petition finding, Not Warranted and Warranted but precluded.	76 FR 18684–18701.
4/5/2011	90-Day Finding on a Petition To List the Peary Caribou and Dolphin and Union population of the Barren-ground Caribou as Endangered or Threatened.	Notice of 90-day Petition Finding, Substantial.	76 FR 18701–18706.

Our expeditious progress also includes work on listing actions that we funded in FY 2010 and FY 2011 but have not yet been completed to date. These actions are listed below. Actions in the top section of the table are being conducted under a deadline set by a court. Actions in the middle section of the table are being conducted to meet statutory timelines, that is, timelines required under the Act. Actions in the bottom section of the table are high-priority listing actions. These actions include work primarily on species with an LPN of 2, and, as discussed above, selection of these species is partially based on available staff resources, and when appropriate, include species with a lower priority if they overlap geographically or have the same threats as the species with the high priority. Including these species together in the same proposed rule results in considerable savings in time and funding, when compared to preparing separate proposed rules for each of them in the future.

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED

Species	Action
Actions Subject to Court Order/Settlement Agreement	
Mountain plover[4]	Final listing determination.

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED—Continued

Species	Action
Hermes copper butterfly [3]	12-month petition finding.
4 parrot species (military macaw, yellow-billed parrot, red-crowned parrot, scarlet macaw) [5]	12-month petition finding.
4 parrot species (blue-headed macaw, great green macaw, grey-cheeked parakeet, hyacinth macaw) [5]	12-month petition finding.
4 parrots species (crimson shining parrot, white cockatoo, Philippine cockatoo, yellow-crested cockatoo) [5]	12-month petition finding.
Utah prairie dog (uplisting)	90-day petition finding.
Actions With Statutory Deadlines	
Casey's june beetle	Final listing determination.
6 Birds from Eurasia	Final listing determination.
5 Bird species from Colombia and Ecuador	Final listing determination.
Queen Charlotte goshawk	Final listing determination.
5 species southeast fish (Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace) [4]	Final listing determination.
Ozark hellbender [4]	Final listing determination.
Altamaha spinymussel [3]	Final listing determination.
3 Colorado plants (*Ipomopsis polyantha* (Pagosa Skyrocket), *Penstemon debilis* (Parachute Beardtongue), and *Phacelia submutica* (DeBeque Phacelia)) [4].	Final listing determination.
Salmon crested cockatoo	Final listing determination.
6 Birds from Peru & Bolivia	Final listing determination.
Loggerhead sea turtle (assist National Marine Fisheries Service) [5]	Final listing determination.
2 mussels (rayed bean (LPN = 2), snuffbox No LPN) [5]	Final listing determination.
CA golden trout [4]	12-month petition finding.
Black-footed albatross	12-month petition finding.
Mojave fringe-toed lizard [1]	12-month petition finding.
Kokanee—Lake Sammamish population [1]	12-month petition finding.
Cactus ferruginous pygmy-owl [1]	12-month petition finding.
Northern leopard frog	12-month petition finding.
Tehachapi slender salamander	12-month petition finding.
Coqui Llanero	12-month petition finding/ Proposed listing.
Dusky tree vole	12-month petition finding.
5 WY plants (*Abronia ammophila, Agrostis rossiae, Astragalus proimanthus, Boechere* (*Arabis*) *pusilla, Penstemon gibbensii*) from 206 species petition.	12-month petition finding.
Leatherside chub (from 206 species petition)	12-month petition finding.
Frigid ambersnail (from 206 species petition) [3]	12-month petition finding.
Platte River caddisfly (from 206 species petition) [5]	12-month petition finding.
Gopher tortoise—eastern population	12-month petition finding.
Grand Canyon scorpion (from 475 species petition)	12-month petition finding.
Anacroneuria wipukupa (a stonefly from 475 species petition) [4]	12-month petition finding.
3 Texas moths (*Ursia furtiva, Sphingicampa blanchardi, Agapema galbina*) (from 475 species petition)	12-month petition finding.
2 Texas shiners (*Cyprinella* sp., *Cyprinella lepida*) (from 475 species petition)	12-month petition finding.
3 South Arizona plants (*Erigeron piscaticus, Astragalus hypoxylus, Amoreuxia gonzalezii*) (from 475 species petition).	12-month petition finding.
5 Central Texas mussel species (3 from 475 species petition)	12-month petition finding.
14 parrots (foreign species)	12-month petition finding.
Striped newt [1]	12-month petition finding.
Fisher—Northern Rocky Mountain Range [1]	12-month petition finding.
Mohave ground squirrel [1]	12-month petition finding.
Puerto Rico harlequin butterfly [3]	12-month petition finding.
Western gull-billed tern	12-month petition finding.
Ozark chinquapin (*Castanea pumila* var. *ozarkensis*) [4]	12-month petition finding.
HI yellow-faced bees	12-month petition finding.
Giant Palouse earthworm	12-month petition finding.
Whitebark pine	12-month petition finding.
OK grass pink (*Calopogon oklahomensis*) [1]	12-month petition finding.
Ashy storm-petrel [5]	12-month petition finding.
Honduran emerald	12-month petition finding.
Southeastern pop snowy plover & wintering pop. of piping plover [1]	90-day petition finding.
Eagle Lake trout [1]	90-day petition finding.
Smooth-billed ani [1]	90-day petition finding.
32 Pacific Northwest mollusks species (snails and slugs) [1]	90-day petition finding.
42 snail species (Nevada & Utah)	90-day petition finding.
Peary caribou	90-day petition finding.
Spring Mountains checkerspot butterfly	90-day petition finding.
Spring pygmy sunfish	90-day petition finding.
Bay skipper	90-day petition finding.
Spot-tailed earless lizard	90-day petition finding.
Eastern small-footed bat	90-day petition finding.
Northern long-eared bat	90-day petition finding.
Prairie chub	90-day petition finding.
10 species of Great Basin butterfly	90-day petition finding.
6 sand dune (scarab) beetles	90-day petition finding.

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED—Continued

Species	Action
Golden-winged warbler[4]	90-day petition finding.
404 Southeast species	90-day petition finding.
Franklin's bumble bee[4]	90-day petition finding.
2 Idaho snowflies (straight snowfly & Idaho snowfly)[4]	90-day petition finding.
American eel[4]	90-day petition finding.
Gila monster (Utah population)[4]	90-day petition finding.
Arapahoe snowfly[4]	90-day petition finding.
Leona's little blue[4]	90-day petition finding.
Aztec gilia[5]	90-day petition finding.
White-tailed ptarmigan[5]	90-day petition finding.
San Bernardino flying squirrel[5]	90-day petition finding.
Bicknell's thrush[5]	90-day petition finding.
Chimpanzee	90-day petition finding.
Sonoran talussnail[5]	90-day petition finding.
2 AZ Sky Island plants (*Graptopetalum bartrami* & *Pectis imberbis*)[5]	90-day petition finding.
I'iwi[5]	90-day petition finding.
High-Priority Listing Actions	
19 Oahu candidate species[2] (16 plants, 3 damselflies) (15 with LPN = 2, 3 with LPN = 3, 1 with LPN = 9)	Proposed listing.
19 Maui-Nui candidate species[2] (16 plants, 3 tree snails) (14 with LPN = 2, 2 with LPN = 3, 3 with LPN = 8)	Proposed listing.
2 Arizona springsnails[2] (*Pyrgulopsis bernadina* (LPN = 2), *Pyrgulopsis trivialis* (LPN = 2))	Proposed listing.
Chupadera springsnail[2] (*Pyrgulopsis chupaderae* (LPN = 2))	Proposed listing.
8 Gulf Coast mussels (southern kidneyshell (LPN = 2), round ebonyshell (LPN = 2), Alabama pearlshell (LPN = 2), southern sandshell (LPN = 5), fuzzy pigtoe (LPN = 5), Choctaw bean (LPN = 5), narrow pigtoe (LPN = 5), and tapered pigtoe (LPN = 11))[4].	Proposed listing.
Umtanum buckwheat (LPN = 2) and white bluffs bladderpod (LPN = 9)[4]	Proposed listing.
Grotto sculpin (LPN = 2)[4]	Proposed listing.
2 Arkansas mussels (Neosho mucket (LPN = 2) & rabbitsfoot (LPN = 9))[4]	Proposed listing.
Diamond darter (LPN = 2)[4]	Proposed listing.
Gunnison sage-grouse (LPN = 2)[4]	Proposed listing.
Coral Pink Sand Dunes Tiger Beetle (LPN = 2)[5]	Proposed listing.
Miami blue (LPN = 3)[3]	Proposed listing.
Lesser prairie chicken (LPN = 2)	Proposed listing.
4 Texas salamanders (Austin blind salamander (LPN = 2), Salado salamander (LPN = 2), Georgetown salamander (LPN = 8), Jollyville Plateau (LPN = 8))[3].	Proposed listing.
5 SW aquatics (Gonzales Spring Snail (LPN = 2), Diamond Y springsnail (LPN = 2), Phantom springsnail (LPN = 2), Phantom Cave snail (LPN = 2), Diminutive amphipod (LPN = 2))[3].	Proposed listing.
2 Texas plants (Texas golden gladecress (*Leavenworthia texana*) (LPN = 2), Neches River rose-mallow (*Hibiscus dasycalyx*) (LPN = 2))[3].	Proposed listing.
4 AZ plants (Acuna cactus (*Echinomastus erectocentrus* var. *acunensis*) (LPN = 3), Fickeisen plains cactus (*Pediocactus peeblesianus fickeiseniae*) (LPN = 3), Lemmon fleabane (*Erigeron lemmonii*) (LPN = 8), Gierisch mallow (*Sphaeralcea gierischii*) (LPN = 2))[5].	Proposed listing.
FL bonneted bat (LPN = 2)[3]	Proposed listing.
3 Southern FL plants (Florida semaphore cactus (*Consolea corallicola*) (LPN = 2), shellmound applecactus (*Harrisia* (=*Cereus*) *aboriginum* (=*gracilis*)) (LPN = 2), Cape Sable thoroughwort (*Chromolaena frustrata*) (LPN = 2))[5].	Proposed listing.
21 Big Island (HI) species[5] (includes 8 candidate species—5 plants & 3 animals; 4 with LPN = 2, 1 with LPN = 3, 1 with LPN = 4, 2 with LPN = 8).	Proposed listing.
12 Puget Sound prairie species (9 subspecies of pocket gopher (*Thomomys mazama* ssp.) (LPN = 3), streaked horned lark (LPN = 3), Taylor's checkerspot (LPN = 3), Mardon skipper (LPN = 8))[3].	Proposed listing.
2 TN River mussels (fluted kidneyshell (LPN = 2), slabside pearlymussel (LPN = 2))[5]	Proposed listing.
Jemez Mountain salamander (LPN = 2)[5]	Proposed listing.

[1] Funds for listing actions for these species were provided in previous FYs.
[2] Although funds for these high-priority listing actions were provided in FY 2008 or 2009, due to the complexity of these actions and competing priorities, these actions are still being developed.
[3] Partially funded with FY 2010 funds and FY 2011 funds.
[4] Funded with FY 2010 funds.
[5] Funded with FY 2011 funds.

We have endeavored to make our listing actions as efficient and timely as possible, given the requirements of the relevant law and regulations, and constraints relating to workload and personnel. We are continually considering ways to streamline processes or achieve economies of scale, such as by batching related actions together. Given our limited budget for implementing section 4 of the Act, these actions described above collectively constitute expeditious progress.

The Hermes copper butterfly will be added to the list of candidate species upon publication of this 12-month finding. We will continue to monitor the status of this species as new information becomes available. This review will determine if a change in status is warranted, including the need to make prompt use of emergency listing procedures.

We intend that any proposed classification of the Hermes copper butterfly will be as accurate as possible. Therefore, we will continue to accept additional information and comments from all concerned governmental agencies, the scientific community, industry, or any other interested party concerning this finding.

References Cited

A complete list of references cited is available on the internet at *http://www.regulations.gov* and upon request from the Carlsbad Fish and Wildlife Office (see **ADDRESSES**).

Authors

The primary authors of this notice are the staff members of the Carlsbad Fish and Wildlife Office.

Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: March 29, 2011.

Rowan W. Gould,

Acting Director, Fish and Wildlife Service.

[FR Doc. 2011–9028 Filed 4–13–11; 8:45 am]

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Notices

Federal Register
Vol. 76, No. 72
Thursday, April 14, 2011

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Troy Mine, Incorporated, Troy Mine Revised Reclamation Plan, Kootenai National Forest, Lincoln County, MT

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The U.S. Department of Agriculture, Forest Service, Kootenai National Forest (KNF), in conjunction with Montana Department of Environmental Quality (DEQ), will prepare an environmental impact statement (EIS) to document the analysis and disclose the environmental impacts of the proposed action and alternatives to reclaim facilities, safely close the underground mine, and protect water quality at the Troy Mine, located in Lincoln County, Montana. The mine is located on public and private lands approximately 15 miles south of Troy, Montana. Genesis Incorporated (Genesis), a wholly owned subsidiary of Revett Silver Company, submitted the Troy Mine Revised Reclamation Plan (Revised Reclamation Plan or Proposed Action) on February 27, 2006, pursuant to U.S. Forest Service (USFS) locatable mineral regulations, 36 Code of Federal Regulations (CFR) 228, Subpart A, and the State of Montana Metal Mine Reclamation Act, 82–4–301 *et seq.*, Montana Codes Annotated. On December 30, 2010 Genesis Incorporated changed their name to Troy Mine, Incorporated. A single EIS, evaluating all components of the proposed reclamation project will be prepared.

DATES: The public involvement process for the Revised Reclamation Plan began with a press release that was published in area newspapers and announced on local TV and radio stations on October 11, 2007. Advertisements were also published in four area newspapers October 21, 2007 through October 25, 2007. The comment period was extended from October 11, 2007 through December 28, 2007. There is no additional formal scoping period for this proposed action. The agencies completed an initial analysis in December 2010. Based on the analysis and potential water quality issues, the agencies decided to prepare a draft EIS. The draft EIS is expected to be available for review and public comment in May 2011. The comment period for the Draft EIS will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**. The final EIS is expected to be released in December 2011.

FOR FURTHER INFORMATION CONTACT: Bobbie Lacklen, Project Coordinator, Kootenai National Forest, 31374 U.S. Hwy 2, Libby, MT 59923. Phone (406) 283–7681, or e-mail at *blacklen@fs.fed.us*, or consult *http://www.fs.usda.gov/goto/kootenai/projects*. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Troy Mine is located about 15 miles south of Troy, Montana, in Lincoln County. The nearest towns to Troy are Libby, Montana, located 18 miles to the east and Bonners Ferry, Idaho, located 33 miles to the west. The Troy Mine is accessible from Montana Highway 56 and National Forest System Road 4626, both of which are paved. Approximately 57 percent of the project area is on private land, and the other 43 percent is on the KNF. The project area lies within the KNF immediately west and north of Bull Lake and encompasses a major portion of the Stanley Creek drainage and a portion of the Lake Creek drainage.

The American Smelting and Refining Company, (ASARCO) permitted the Troy Mine in 1978 with the USFS and State of Montana as an 8,500 ton-per-day underground copper/silver mine. The ore is mined using the "room-and-pillar method." The mine permit area covers 2,782 acres of public and private land. The Troy Mine is comprised of 24 patented lode-mining claims and 188 unpatented lode-mining claims that are situated on National Forest System Lands managed by KNF. Patented lode-mining claims owned by Troy Mine, Inc. were acquired from ASARCO in September of 1999. The existing facilities at the Troy Mine consist of an underground mine, surface mill, office facilities; tailings and reclaim water pipelines; a power line; a tailings impoundment; and associated support facilities. Production stopped in 1993 and reinitiated in 2005 and is projected to continue for 3–5 years until the approved ore body is depleted. Troy Mine Inc. posted a 12.9 million dollar bond for the project that covers the existing reclamation plan. The final draft of the Revised Reclamation Plan is the subject of this environmental impact statement.

Purpose and Need for Action: The purpose of the proposed reclamation plan is to return lands disturbed by mining to a condition appropriate for subsequent use of the area. The need for the Revised Reclamation Plan stems from several objectives that need to be met after closure:

- The approved (1978) reclamation plan does not meet State or Federal requirements for mine adit water discharge;
- Protection of surface and groundwater quality;
- Protection of public health and safety;
- Minimization of environmental risk; and Restoration of productive land use.

Proposed Action: The Revised Reclamation Plan, which is the Proposed Action, was submitted to the agencies in March 2006. Troy Mine, Inc. proposes to reclaim lands disturbed by mining activities with the following reclamation elements:

- Removal of buildings, structures, and selected roads;
- Non-hydraulic plugging (backfilling) of the adits and recontouring the slope of the South Portal patio;
- Limited regrading of slopes and benches to fit with the surrounding natural environment;
- Revegetation of most of the disturbed areas;
- Mine water disposal to the tailings impoundment decant ponds by using the existing tailings pipelines and reclaim water line until the water meets water quality standards; and

• Monitoring of surface water bodies and tailings embankment stability.

Under the Proposed Action, the proposed reclamation would be accomplished in three phases: Pre-closure, closure, and post-closure. Pre-closure tasks include on-going monitoring, testing, and evaluations necessary to complete design of reclamation elements that include a short-term water management plan and engineering design of the adit. Closure tasks would take place two years after final cessation of mining and would include facility removal, regrading, revegetation, and maintenance of short-term components of the water management plan. Adit plugs would be installed during the closure period. Post-closure tasks would include long-term management of mine water flowing through pipelines, maintenance of pipelines and monitoring of water quality and surface/groundwater. Under the Proposed Action, the post-closure phase is estimated to last two to five years after mining ends, but post-closure water management facilities would be maintained until mine water meets water quality standards.

No Action Alternative: The No Action Alternative consists of the 1978 Reclamation Plan and includes the reclamation activities that have already been completed at the existing Troy Mine site. This reclamation plan was first analyzed and approved by the agencies in 1978.

Agency-Mitigated Alternative: The Agency-Mitigated Alternative is based upon the Proposed Action, but includes additional mitigation measures and monitoring requirements that address major issues identified during the earlier scoping and review process. The Agency-Mitigated Alternative includes the following major modifications to the Proposed Action:

• Hydraulic plugs would not be used at the Service and Conveyor adits. Concrete structures would be constructed to capture mine water and route it to the tailings impoundment for long-term passive treatment and disposal.

• A new water pipeline would be built to transport water from the mine to the decant ponds rather than using the 30+ year-old tailings lines.

• Additional monitoring of seeps and springs would be required to verify that State of Montana water quality standards were met.

Lead and Cooperating Agencies: The U.S. Department of Agriculture, Forest Service, Kootenai National Forest, and the Montana Department of Environmental Quality are joint lead agencies for preparing this environmental impact statement.

Issues: Issues were identified during the scoping and review from interdisciplinary specialists. The key issues identified primarily relate to adit closure, mine water distribution, mine water treatment and disposal, longevity and success of copper attenuation mechanisms, disposition of building materials, subsidence, and the source of reclamation materials.

Nature of Decision To Be Made: The nature of the decisions to be made is to select an action that meets the legal rights of the proponent, while protecting the environment in compliance with applicable laws, regulations, and policies. The Forest Supervisor will use the EIS process to develop the necessary information to make an informed decision as required by 36 CFR 228 subpart A. The Director of DEQ will use the EIS process in a similar fashion to make informed decisions on a number of State permits and permit modifications according to State laws and regulations. Based on the analysis and alternatives developed in the EIS, the following decisions are possible:

(1) Approval of the Troy Mine Revised Reclamation Plan as submitted;

(2) Approval of the Troy Mine Revised Reclamation Plan modified by the incorporation of agency mitigations and stipulations to meet the mandates of applicable laws, regulations, and policies;

(3) Approval of an Agency-Mitigated Alternative developed during the analysis process; or

(4) Approval of the No Action Alternative or rather denial of the Proposed Action such that reclamation would follow the existing approved plan and details contained in the approved reclamation bond calculations and specifications.

Permits or Licenses Required and Disposition: Various permits and licenses have been in effect during mine operations and may need to be modified. In some cases, new permits or licenses would be needed prior to implementation of the Revised Reclamation Plan. The major permits or licenses required or needing modification for this Proposed Action and the issuing agencies are:

• A Revised Reclamation Plan modifying the approved Troy Mine Plan of Operations and State Operating Permit #00093 approved by the KNF, and DEQ.

• A revised Storm Water Permit and a new Montana Pollution Discharge Elimination System (MPDES) Permit from DEQ.

• A 310 Permit from the Montana Department of Fish, Wildlife and Parks and Lincoln County Conservation District.

Draft Environmental Impact Statement: A draft EIS will be prepared for comment. The comment period on the draft EIS ends 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**. The USFS believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of a draft EIS must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC, 435 U.S. 519, 553 (1978).* Also, environmental objections that could be raised at the draft EIS stage but that are not raised until after completion of the final EIS may be waived or dismissed by the courts. *City of Angoon* v. *Hodel, 803 F.2d 1016, 1022 (9th Cir. 1986)* and *Wisconsin Heritages, Inc.* v. *Harris, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980).* Because of these court rulings, it is very important that those interested in this Proposed Action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the USFS and DEQ at a time when the agencies can meaningfully consider and respond to them in the final EIS. To assist the USFS and DEQ in identifying and considering issues and concerns on the Proposed Action, comments on the draft EIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft EIS. Comments may also address the adequacy of the draft EIS or the merits of the alternatives formulated and discussed in the draft EIS. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal, and will be available for public inspection.

Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21.

Responsible Officials: Paul Bradford, Forest Supervisor, Kootenai National Forest, 31374 U.S. Hwy 2, Libby, MT 59923 and Richard Opper, Director,

Montana Department of Environmental Quality, Director's Office, 1520 E 6th Ave., Helena, MT 59620–9601, will be jointly responsible for the EIS. These two officials will make decisions regarding this proposal after considering comments and responses pertaining to environmental consequences discussed in the final EIS and all applicable laws, regulations, and policies. The decisions of a selected alternative, permits, licenses, approvals, and rationale will be documented in a joint Record of Decisions.

Dated: April 7, 2011.

Maggie Pittman,

Acting Forest Supervisor, Kootenai National Forest.

[FR Doc. 2011–9086 Filed 4–13–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Pennington County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Pennington County Resource Advisory will meet in Rapid City, SD. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L 110–343) and in compliance with the Federal Advisory Committee Act. The purpose of the meetings is to begin formation of the Resource Advisory Committee.

DATES: The meetings will be held May 3, May 10, and May 17, 2011, at 5 p.m.

ADDRESSES: The meetings will be held at the Mystic Ranger District Office at 8221 South Highway 16. Written comments should be sent to Robert J. Thompson, 8221 South Highway 16, Rapid City, SD 57702. Comments may also be sent via e-mail to *rjthompson@fs.fed.us,* or via facsimile to 605–343–7134.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Mystic Ranger District office. Visitors are encouraged to call ahead at 605–343–1567 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Robert J. Thompson, District Ranger, Mystic Ranger District, 605–343–1567.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Meetings are open to the public. The following business will be conducted: establishing goals and objectives for the committee, discussing timelines and procedures, and a broad discussion on project proposals. Persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: April 7, 2011.

Craig Bobzien,

Forest Supervisor.

[FR Doc. 2011–9090 Filed 4–13–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Elko County Resource Advisory Committee (RAC)

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Elko County Resource Advisory Committee (RAC) will hold its first meeting.

DATES: The meeting will be held on Friday, April 29th, 2011 and will begin at 10 a.m.

ADDRESSES: The meeting will be held in the Forest Service office at 2035 Last Chance Road. Elko, NV 89801.

FOR FURTHER INFORMATION CONTACT: Doug Clarke, RAC Coordinator, USDA, Humboldt-Toiyabe National Forest, Mountain City Ranger District, 2035 Last Chance Road, Elko, NV 89801 (775) 778–6127; e-mail: *dclarke@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items include: (1) Remarks by Forest Supervisor and Mountain City District Ranger; (2) Review of Secure Rural Schools and Community Self-Determination Act; (3) Role of RAC committee members; (4) Selection of RAC Committee Chairman; (5) Overview of project selection process; and (6) Public Comment. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: April 8, 2011.

Jeanne M. Higgins,

Forest Supervisor.

[FR Doc. 2011–9098 Filed 4–13–11; 8:45 am].

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Humboldt (NV) Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Humboldt (NV) Resource Advisory Committee will meet in Winnemucca, Nevada. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The purpose is to hold the first meeting of the newly formed committee.

DATES: The meeting will be held May 21, 2011 from 9:30 a.m. to 5:30 p.m.

ADDRESSES: The meeting will be held at the Humboldt County Court House Room 201, 50 West 5th Street, Winnemucca, Nevada. Written comments should be sent to USDA Forest Service, 1500 E. Winnemucca Blvd., Winnemucca, NV 89445. Comments may also be sent via e-mail to *sjingram@fs.fed.us,* or via facsimile to 775–625–1200.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at *http://fs.usda.gov/goto/htnf/rac.*

FOR FURTHER INFORMATION CONTACT: Shonna Ingram, RAC Coordinator, Santa Rosa Ranger District Humboldt-Toiyabe National Forest, 775–623–5025 Ext 117.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: (1) Introductions of all committee members and Forest Service personnel; (2) orientation to the process of considering and recommending Title II projects; (3) committee members to select a chairperson; (4) committee members to establish RAC operating guidelines; and (5) public Comment. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Public input sessions will be provided and individuals who made written requests by May 13, 2011 will have the opportunity to address the Committee at those sessions.

Dated: April 6, 2011.

Jeanne M. Higgins,

Forest Supervisor, Humboldt-Toiyabe National Forest.

[FR Doc. 2011–9095 Filed 4–13–11: 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Notice of Funds Availability (NOFA) Inviting Applications for the Rural Energy for America Program

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice of funding availability.

SUMMARY: This Notice announces the acceptance of applications for funds available under the Rural Energy for America Program (REAP) for Fiscal Year 2011 for financial assistance as follows: grants, guaranteed loans, and combined grants and guaranteed loans for the development and construction of renewable energy systems and for energy efficiency improvement projects; grants for conducting energy audits; grants for conducting renewable energy development assistance; and grants for conducting renewable energy system feasibility studies. The Notice also announces the availability of $70 million of Fiscal Year 2011 budget authority to fund these REAP activities, which will support at least $42 million in grant program level and up to $61 million in guaranteed loan program level. If additional funding becomes available by a Fiscal Year 2011 Appropriations Act, a subsequent NOFA will be published in the **Federal Register**.

DATES: In order to be considered for Fiscal Year 2011 funds, complete applications under this Notice must be received by the appropriate USDA Rural Development State Office no later than 4:30 p.m. local time of the dates as follows:

For renewable energy system and energy efficiency improvement grant applications and combination grant and guaranteed loan applications: June 15, 2011.

For renewable energy system and energy efficiency improvement guaranteed loan only applications: June 15, 2011.

For renewable energy system feasibility study applications: June 30, 2011.

For energy audits and renewable energy development assistance applications: June 30, 2011.

ADDRESSES: See the **SUPPLEMENTARY INFORMATION** for addresses concerning applications for the Rural Energy for America Program for Fiscal Year 2011 funds.

FOR FURTHER INFORMATION CONTACT: For information about this Notice, please contact Mr. Kelley Oehler, Branch Chief, USDA Rural Development, Energy Division, 1400 Independence Avenue, SW., Washington, DC 20250. Telephone: (202) 720–6819. E-mail: *kelley.oehler@wdc.usda.gov.*

For further information on this program, please contact the applicable USDA Rural Development Energy Coordinator for your respective State, as provided in the **SUPPLEMENTARY INFORMATION** section of this Notice.

SUPPLEMENTARY INFORMATION:

Fiscal Year 2011 Applications for the Rural Energy for America Program

Applications. Application materials may be obtained by contacting one of Rural Development's Energy Coordinators. In addition, for grant applications, applicants may access the electronic grant application for the Rural Energy for America Program at *http://www.Grants.gov.* To locate the downloadable application package for this program, the applicant must use the program's Catalog of Federal Domestic Assistance (CFDA) Number 10.868 or FedGrants Funding Opportunity Number, which can be found at *http://www.Grants.gov.*

Application submittal. For renewable energy system, energy efficiency improvement, and feasibility study applications, submit complete paper applications to the Rural Development State Office in the State in which the applicant's proposed project is located. For energy audit and renewable energy development assistance applications, submit complete paper applications to the Rural Development State Office in the State in which the applicant's principal office is located.

Submit electronic grant only applications at *http://www.grants.gov,* following the instructions found on this Web site.

Rural Development Energy Coordinators

Note: Telephone numbers listed are not toll-free.

Alabama

Quinton Harris, USDA Rural Development, Sterling Centre, Suite 601, 4121 Carmichael Road, Montgomery, AL 36106–3683, (334) 279–3623, *Quinton.Harris@al.usda.gov.*

Alaska

Chad Stovall, USDA Rural Development, 800 West Evergreen, Suite 201, Palmer, AK 99645–6539, (907) 761–7718, *chad.stovall@ak.usda.gov.*

American Samoa (See Hawaii)

Arizona

Alan Watt, USDA Rural Development, 230 North First Avenue, Suite 206, Phoenix, AZ 85003–1706, (602) 280–8769, *Alan.Watt@az.usda.gov.*

Arkansas

Tim Smith, USDA Rural Development, 700 West Capitol Avenue, Room 3416, Little Rock, AR 72201–3225, (501) 301–3280, *Tim.Smith@ar.usda.gov.*

California

Philip Brown, USDA Rural Development, 430 G Street, #4169, Davis, CA 95616, (530) 792–5811, *Phil.brown@ca.usda.gov.*

Colorado

Jerry Tamlin, USDA Rural Development, 655 Parfet Street, Room E–100, Lakewood, CO 80215, (720) 544–2907, *Jerry.Tamlin@co.usda.gov.*

Commonwealth of the Northern Marianas Islands-CNMI (See Hawaii)

Connecticut (see Massachusetts)

Delaware/Maryland

Bruce Weaver, USDA Rural Development, 1221 College Park Drive, Suite 200, Dover, DE 19904, (302) 857–3626, *Bruce.Weaver@de.usda.gov.*

Federated States of Micronesia (See Hawaii)

Florida/Virgin Islands

Matthew Wooten, USDA Rural Development, 4440 NW. 25th Place, Gainesville, FL 32606, (352) 338–3486, *Matthew.wooten@fl.usda.gov.*

Georgia

J. Craig Scroggs, USDA Rural Development, 111 E. Spring St., Suite B. Monroe, GA 30655, Phone 770–267–1413 ext. 113, *craig.scroggs@ga.usda.gov.*

Guam (See Hawaii)

Hawaii/Guam/Republic of Palau/ Federated States of Micronesia/Republic of the Marshall Islands/American Samoa/Commonwealth of the Northern Marianas Islands—CNMI

Tim O'Connell, USDA Rural Development, Federal Building, Room 311, 154 Waianuenue Avenue, Hilo, HI 96720, (808) 933–8313, *Tim.Oconnell@hi.usda.gov.*

Idaho

Brian Buch, USDA Rural Development, 9173 W. Barnes Drive, Suite A1, Boise, ID 83709, (208) 378–5623, *Brian.Buch@id.usda.gov.*

Illinois

Molly Hammond, USDA Rural Development, 2118 West Park Court, Suite A, Champaign, IL 61821, (217) 403–6210, *Molly.Hammond@il.usda.gov.*

Indiana

Jerry Hay, USDA Rural Development, 5975 Lakeside Boulevard, Indianapolis, IN 46278, (812) 346–3411, Ext. 126, *Jerry.Hay@in.usda.gov.*

Iowa

Teresa Bomhoff, USDA Rural Development, 873 Federal Building, 210 Walnut Street, Des Moines, IA 50309, (515) 284–4447, *teresa.bomhoff@ia.usda.gov.*

Kansas

David Kramer, USDA Rural Development, 1303 SW. First American Place, Suite 100, Topeka, KS 66604–4040, (785) 271–2730, *david.kramer@ks.usda.gov.*

Kentucky

Scott Maas, USDA Rural Development, 771 Corporate Drive, Suite 200, Lexington, KY 40503, (859) 224–7435, *scott.maas@ky.usda.gov.*

Louisiana

Kevin Boone, USDA Rural Development, 905 Jefferson Street, Suite 320, Lafayette, LA 70501, (337) 262–6601, Ext. 133, *Kevin.Boone@la.usda.gov.*

Maine

John F. Sheehan, USDA Rural Development, 967 Illinois Avenue, Suite 4, P.O. Box 405, Bangor, ME 04402–0405, (207) 990–9168, *john.sheehan@me.usda.gov.*

Maryland (see Delaware)

Massachusetts/Rhode Island/ Connecticut

Charles W. Dubuc, USDA Rural Development, 451 West Street, Suite 2, Amherst, MA 01002, (401) 826–0842 x 306, *Charles.Dubuc@ma.usda.gov.*

Michigan

Traci J. Smith, USDA Rural Development, 3001 Coolidge Road, Suite 200, East Lansing, MI 48823, (517) 324–5157, *Traci.Smith@mi.usda.gov.*

Minnesota

Lisa L. Noty, USDA Rural Development, 1400 West Main Street, Albert Lea, MN 56007, (507) 373–7960 Ext. 120, *lisa.noty@mn.usda.gov.*

Mississippi

G. Gary Jones, USDA Rural Development, Federal Building, Suite 831, 100 West Capitol Street, Jackson, MS 39269, (601) 965–5457, *george.jones@ms.usda.gov.*

Missouri

Matt Moore, USDA Rural Development, 601 Business Loop 70 West, Parkade Center, Suite 235, Columbia, MO 65203, (573) 876–9321, *matt.moore@mo.usda.gov.*

Montana

Michael Drewiske, USDA Rural Development, 2229 Boot Hill Court, Bozeman, MT 59715–7914, (406) 585–2554, *Michael.drewiske@mt.usda.gov.*

Nebraska

Debra Yocum, USDA Rural Development, 100 Centennial Mall North, Room 152, Federal Building, Lincoln, NE 68508, (402) 437–5554, *Debra.Yocum@ne.usda.gov.*

Nevada

Mark Williams, USDA Rural Development, 1390 South Curry Street, Carson City, NV 89703, (775) 887–1222, *mark.williams@nv.usda.gov.*

New Hampshire (See Vermont)

New Jersey

Victoria Fekete, USDA Rural Development, 8000 Midlantic Drive, 5th Floor North, Suite 500, Mt. Laurel, NJ 08054, (856) 787–7752, *Victoria.Fekete@nj.usda.gov.*

New Mexico

Jesse Bopp, USDA Rural Development, 6200 Jefferson Street, NE., Room 255, Albuquerque, NM 87109, (505) 761–4952, *Jesse.bopp@nm.usda.gov.*

New York

Scott Collins, USDA Rural Development, 9025 River Road, Marcy, NY 13403, (315) 736–3316 Ext. 4, *scott.collins@ny.usda.gov.*

North Carolina

David Thigpen, USDA Rural Development, 4405 Bland Rd. Suite 260, Raleigh, NC 27609, 919–873–2065, *David.Thigpen@nc.usda.gov.*

North Dakota

Dennis Rodin, USDA Rural Development, Federal Building, Room 208, 220 East Rosser Avenue, P.O. Box 1737, Bismarck, ND 58502–1737, (701) 530–2068, *Dennis.Rodin@nd.usda.gov.*

Ohio

Randy Monhemius, USDA Rural Development, Federal Building, Room 507, 200 North High Street, Columbus, OH 43215–2418, (614) 255–2424, *Randy.Monhemius@oh.usda.gov.*

Oklahoma

Jody Harris, USDA Rural Development, 100 USDA, Suite 108, Stillwater, OK 74074–2654, (405) 742–1036, *Jody.harris@ok.usda.gov.*

Oregon

Don Hollis, USDA Rural Development, 200 SE. Hailey Ave. Suite 105, Pendleton, OR 97801, (541) 278–8049, Ext. 129, *Don.Hollis@or.usda.gov.*

Pennsylvania .

Bob Schoenfeldt, USDA Rural Development, 14699 North Main Street Ext., Meadville, PA 16335, (814) 336–6155, Ext. 114, *robert.schoenfeldt@pa.usda.gov.*

Puerto Rico

Luis Garcia, USDA Rural Development, IBM Building, 654 Munoz Rivera Avenue, Suite 601, Hato Rey, PR 00918–6106, (787) 766–5091, Ext. 251, *Luis.Garcia@pr.usda.gov.*

Republic of Palau (See Hawaii)

Republic of the Marshall Islands (See Hawaii)

Rhode Island (see Massachusetts)

South Carolina

Shannon Legree, USDA Rural Development, Strom Thurmond Federal Building, 1835 Assembly Street, Room 1007, Columbia, SC 29201, (803) 253–3150, *Shannon.Legree@sc.usda.gov.*

South Dakota

Kenneth Lynch, USDA Rural Development, Federal Building, Room 210, 200 4th Street, SW., Huron, SD 57350, (605) 352–1120, *ken.lynch@sd.usda.gov.*

Tennessee

Will Dodson, USDA Rural Development, 3322 West End Avenue, Suite 300, Nashville, TN 37203–1084, (615) 783–1350, *will.dodson@tn.usda.gov.*

Texas

Billy Curb, USDA Rural Development, Federal Building, Suite 102, 101 South Main Street, Temple, TX 76501, (254) 742–9775, *billy.curb@tx.usda.gov.*

Utah

Roger Koon, USDA Rural Development, Wallace F. Bennett Federal Building, 125 South State Street, Room 4311, Salt Lake City, UT 84138, (801) 524–4301, *Roger.Koon@ut.usda.gov.*

Vermont/New Hampshire

Cheryl Ducharme, USDA Rural Development, 89 Main Street, 3rd Floor, Montpelier, VT 05602, 802–828–6083, *cheryl.ducharme@vt.usda.gov.*

Virginia

Laurette Tucker, USDA Rural Development, Culpeper Building, Suite 238, 1606 Santa Rosa Road, Richmond, VA 23229, (804) 287–1594, *Laurette.Tucker@va.usda.gov.*

Virgin Islands (see Florida)

Washington

Mary Traxler, USDA Rural Development, 1835 Black Lake Blvd. SW., Suite B, Olympia, WA 98512, (360) 704–7762, *Mary.Traxler@wa.usda.gov.*

West Virginia

Richard E. Satterfield, USDA Rural Development, 75 High Street, Room 320, Morgantown, WV 26505–7500, (304) 284–4874, *Richard.Satterfield@wv.usda.gov.*

Wisconsin

Brenda Heinen, USDA Rural Development, 4949 Kirschling Court, Stevens Point, WI 54481, (715) 345–7615, Ext. 139, *Brenda.Heinen@wi.usda.gov.*

Wyoming

Jon Crabtree, USDA Rural Development, Dick Cheney Federal Building, 100 East B Street, Room 1005, P.O. Box 11005, Casper, WY 82602, (307) 233–6719, *Jon.Crabtree@wy.usda.gov.*

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the information collection requirements associated with renewable energy system and energy efficiency improvement grants and guaranteed loans, as covered in this Notice, has been approved by the Office of Management and Budget (OMB) under OMB Control Number 0570–0050. The information collection requirements associated with energy audit and renewable energy development assistance grants and with renewable energy feasibility study grants have also been approved by OMB under OMB Control Number 0570–0059 and OMB Control Number 0570–0061, respectively.

Overview

Federal Agency Name: Rural Business-Cooperative Service.

Contract Proposal Title: Rural Energy for America Program.

Announcement Type: Initial announcement.

Catalog of Federal Domestic Assistance Number. 10.868.

Dates: Grant applications and combined grant and guaranteed loan applications for renewable energy systems and energy efficiency improvement projects under this Notice will be accepted up to June 15, 2011. Guaranteed loan only applications for renewable energy system and energy efficiency improvement projects will be accepted on a continuous basis, but to compete for FY 2011 funding, complete applications must be submitted to the Agency by June 15, 2011. Applications for renewable energy feasibility studies, energy audits, and renewable energy development assistance grants will be accepted up to June 30, 2011.

For all applications submitted under this Notice, complete applications must be received by the appropriate USDA Rural Development State Office no later than 4:30 p.m. local time of the applicable application deadline date in order to be considered for Fiscal Year 2011 funds. Any application received after its applicable date and time, regardless of the postmark on the application, will not be considered for Fiscal Year 2011 funds.

Availability of Notice. This Notice for the Rural Energy for America Program is available on the USDA Rural Development Web site at *http://www.rurdev.usda.gov/rbs/farmbill/index.html.*

I. Funding Opportunity Description

A. *Purpose of the Rural Energy for America Program.* This Notice is issued pursuant to section 9001 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill), which amends Title IX of the Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) and establishes the Rural Energy for America Program under section 9007 thereof. The program is designed to help agricultural producers and rural small businesses reduce energy costs and consumption and help meet the Nation's critical energy needs.

B. *Statutory Authority.* This program is authorized under 7 U.S.C. 8107.

C. *Definition of Terms.* The definitions applicable to this Notice are published at 7 CFR 4280.103. In addition, the following definition of "hybrid" applies to this Notice.

Hybrid. A combination of two or more renewable energy technologies that are incorporated into a unified system to support a single project.

II. Award Information

A. *Available funds:* The amount of grant funds available for energy audits and renewable energy development assistance in Fiscal Year 2011 is approximately $2.8 million. The amount of grant funds available for renewable energy system feasibility studies in Fiscal Year 2011 is $2.0 million. The budget authority available for renewable energy system and energy efficiency improvement projects in Fiscal Year 2011 is $51.2 million. For renewable energy system and energy efficiency improvement projects only, there will be an allocation of funds to each State, and the Rural Development's National Office will maintain a reserve of funds.

In order to ensure that small projects have a fair opportunity to compete for the funding and are consistent with the priorities set forth in the statute, the Agency will set-aside $14 million of the $70 million budget authority available to fund grants of $20,000 or less.

B. *Approximate number of awards:* The number of awards will depend on the number of eligible applicants participating in this program.

C. *State and National competitions.* Renewable energy system and energy efficiency improvement applications for Fiscal Year 2011 funds will compete for funds allocated to their State (State competition) as described under the competition deadline in this Notice. All unfunded eligible State applications will be competed against other applications from other States at a final National competition. Separate competitions will be held on guaranteed loan only applications and on grant only and grant and guaranteed loan combination applications for both State and National competitions. If funds remain after the National guaranteed loan only application competition, the Agency may elect to utilize budget authority to fund additional grant only and grant and guaranteed loan combination applications in the National competition.

D. *Type of instrument.* Grant, guaranteed loan, and grant/guaranteed loan combinations.

E. *Funding limitations.* The following funding limitations apply to applications submitted under to this Notice.

(1) *Maximum grant assistance to an individual or entity.* For the purposes of this Notice, the maximum amount of grant assistance to one individual or entity will not exceed $750,000 for Fiscal Year 2011 based on the total amount of renewable energy system.

energy efficiency improvement, and renewable energy feasibility study grants awarded to the individual or entity under the Rural Energy for America Program.

(2) *Maximum percentage of Agency funding.* The 2008 Farm Bill mandates the maximum percentages of funding that USDA Rural Development will provide. Within the maximum funding amounts specified in this Notice, renewable energy system and energy efficiency improvement funding approved for guaranteed loan only requests and for combination guaranteed loan and grant requests will not exceed 75 percent of eligible project costs, with the grant portion not to exceed 25 percent of total eligible project costs, whether the grant is part of a combination request or is a stand-alone grant.

(3) *Reallocation of grants funds.* Based on the quality of the applications received under this Notice and subject to statutory limitations, the Agency reserves the right, at its discretion, to move funds among the various grant allocations identified under Section II.A. of this Notice.

(4) *Renewable energy system and energy efficiency improvement grant-only applications.* For renewable energy system grants, the minimum grant is $2,500 and the maximum is $500,000. For energy efficiency improvement grants, the minimum grant is $1,500 and the maximum grant is $250,000.

(5) *Renewable energy system and energy efficiency improvement loan guarantee-only applications.* For renewable energy system and energy efficiency improvement loan guarantees, the minimum guaranteed loan amount is $5,000 and the maximum amount of a guarantee to be provided to a borrower is $25 million.

(6) *Renewable energy system and energy efficiency improvement guaranteed loan and grant combination applications.* Funding for grant and loan combination packages for renewable energy systems and energy efficiency improvement projects are subject to the funding limitations specified in Section II.E.(2). The maximum amount for the grant portion is $500,000 for renewable energy systems and $250,000 for energy efficiency improvements. The minimum amount of the grant portion is $1,500 for either renewable energy systems or energy efficiency improvements. For the guarantee portion, the maximum amount is $25 million and the minimum amount is $5,000.

(7) *Renewable energy system feasibility study grant applications.* The maximum amount of grant funds that will be made available for an eligible feasibility study project under this subpart to any one recipient will not exceed $50,000 or 25 percent of the total eligible project cost of the study, whichever is less.

(8) *Energy audit and renewable energy development assistance grant applications.* The maximum aggregate amount of energy audit and renewable energy development assistance grants awarded to any one recipient under this Notice cannot exceed $100,000. In addition, the 2008 Farm Bill mandates that the recipient of a grant that conducts an energy audit for an agricultural producer or a rural small business require the agricultural producer or rural small business to pay at least 25 percent of the cost of the energy audit, which shall be retained by the eligible entity for the cost of the audit.

III. Eligibility Information

A. *Eligible applicants.* To be eligible for this program, an applicant must meet the eligibility requirements specified in 7 CFR 4280.109, 7 CFR 4280.110(c), and, as applicable, 7 CFR 4280.112, 7 CFR 4280.122, 7 CFR 4280.170, or 7 CFR 4280.186.

B. *Eligible lenders.* To be eligible for this program, lenders must meet the eligibility requirements in 7 CFR 4280.130.

C. *Eligible projects.* To be eligible for this program, a project must meet the eligibility requirements specified in 7 CFR 4280.113, 7 CFR 4280.123, 7 CFR 4280.171, and 7 CFR 4280.187, as applicable.

IV. Fiscal Year 2011 Application and Submission Information

Applicants seeking to participate in this program must submit applications in accordance with this Notice and 7 CFR part 4280, subpart B, as applicable. Applicants must submit complete applications in order to be considered.

A. Where To Obtain Applications

Applicants may obtain applications from any USDA Rural Development Energy Coordinator, as provided in the **ADDRESSES** section of this Notice. In addition, for grant applications, applicants may access the electronic grant application for the Rural Energy for America Program at *http://www.Grants.gov*. To locate the downloadable application package for this program, the applicant must use the program's CFDA Number 10.868 or FedGrants Funding Opportunity Number, which can be found at *http://www.Grants.gov*.

When you enter the Grants.gov site, you will find information about submitting an application electronically through the site. To use Grants.gov, all applicants must have a Dun and Bradstreet Data Universal Numbering System (DUNS) number (unless the applicant is an individual), which can be obtained at no cost via a toll-free request line at 1–866–705–5711 or online at *http://fedgov.dnb.com/webform*. USDA Rural Development strongly recommends that applicants do not wait until the application deadline date to begin the application process through Grants.gov.

B. When To Submit

Renewable Energy System and Energy Efficiency Improvement Grant and Combined Grant and Guaranteed Loan Applications. Grant applications and combined grant and guaranteed loan applications for renewable energy systems and energy efficiency improvement projects under this Notice will be accepted up to June 15, 2011. Complete applications under this Notice must be received by the appropriate USDA Rural Development State Office no later than 4:30 p.m. local time on June 15, 2011, in order to be considered for Fiscal Year 2011 funds. Any application received after this date and time, regardless of the postmark on the application, will not be considered for Fiscal Year 2011 funds.

Renewable Energy System and Energy Efficiency Improvement Guaranteed Loan Only Applications. Guaranteed loan only applications for renewable energy system and energy efficiency improvement projects will be accepted on a continuous basis, but to be considered for Fiscal Year 2011 funds, complete applications must be received by the appropriate USDA Rural Development State Office no later than 4:30 p.m. local time on June 15, 2011. Any application received after this date and time, regardless of the postmark on the application, will be considered for Fiscal Year 2012 funds.

Renewable Energy System Feasibility Study Applications. Applications for RES feasibility study grants under this Notice will be accepted up to June 30, 2011. Complete applications under this Notice must be received at the appropriate State Office by 4:30 p.m. local time on June 30, 2011, in order to be considered for Fiscal Year 2011 funds. Any application received after this date and time, regardless of the application's postmark, will not be considered for Fiscal Year 2011 funds.

Energy Audits and Renewable Energy Development Assistance Applications. Applications for EA and REDA grants under this Notice will be accepted up to June 30, 2011. Complete applications

under this Notice must be received at the appropriate State Office by 4:30 p.m. local time on June 30, 2011, in order to be considered for Fiscal Year 2011 funds. Any application received after this date and time, regardless of the application's postmark, will not be considered for Fiscal Year 2011 funds.

C. Where To Submit

All renewable energy system, energy efficiency improvement, and renewable energy system feasibility study applications are to be submitted to the USDA Rural Development Energy Coordinator in the State in which the applicant's proposed project is located. All energy audit and renewable energy development assistance applications are to be submitted to the USDA Rural Development Energy Coordinator in the State in which the applicant's principal office is located. A list of USDA Rural Development Energy Coordinators is provided in the **ADDRESSES** section of this Notice. Alternatively, for grant only applications, applicants may submit their electronic applications to the Agency via the Grants.gov Web site.

D. How To Submit

Applicants may submit their applications either as hard copy or electronically as specified in the following paragraphs. When submitting an application as hard copy, applicants must submit one original and one copy of the complete application.

(1) *Grant applications.* All grant applications may be submitted either as hard copy to the appropriate Rural Development Energy Coordinator or electronically using the Government-wide Grants.gov Web site. Users of Grants.gov who download a copy of the application package may complete it off line and then upload and submit the application via the Grants.gov site, including all information typically included on the application, and all necessary assurances and certifications. After electronically submitting an application through the Web site, the applicant will receive an automated acknowledgement from Grants.gov that contains a Grants.gov tracking number.

(2) *Guaranteed loan applications.* Guaranteed loan only applications (*i.e.*, those that are not part of a guaranteed loan/grant combination request) must be submitted as hard copy.

(3) *Guaranteed loan/grant combination applications.* Applications for guaranteed loans/grants (combination applications) must be submitted as hard copy.

E. Other Submission Requirements and Information

(1) *Application restrictions.* Applicants may apply for only one renewable energy system project and one energy efficiency improvement project in Fiscal Year 2011. A renewable energy system application cannot be submitted in Fiscal Year 2011 if a REAP feasibility study grant application for the same renewable energy system is submitted in Fiscal Year 2011 and vice versa.

Applicants may apply for only one renewable energy system feasibility study grant under this Notice for Fiscal Year 2011 funds.

Applicants may only submit one energy audit grant application and one renewable energy development assistance grant application for Fiscal Year 2011 funds.

(2) *Environmental information.* For the Agency to consider an application, the application must include all environmental review documents with supporting documentation in accordance with 7 CFR part 1940, subpart G. Applications for financial assistance for planning purposes or management and feasibility studies are typically categorically excluded from the environmental review process by 7 CFR 1940.310(e)(1).

(3) *Original signatures.* USDA Rural Development may request that the applicant provide original signatures on forms submitted through Grants.gov at a later date.

(4) *Award considerations.* In determining the amount of a renewable energy system or energy efficiency improvement grant or loan guarantee, the Agency will consider the six criteria specified in 7 CFR 4280.115(g) or 7 CFR 4280.124(f), as applicable.

(5) *Hybrid projects.* If the application is for a hybrid project, technical reports, as required under 7 CFR 4280.116(b)(7), must be prepared for each technology that comprises the hybrid project.

(6) *Multiple facilities.* Applicants may submit a single application that proposes to apply the same renewable energy system (including the same hybrid project) or energy efficiency improvement across multiple facilities. For example, a rural small business owner owns five retail stores and wishes to install solar panels on each store. The rural small business owner may submit a single application for installing the solar panels on the five stores. However, if this same owner wishes to install solar panels on three of the five stores and wind turbines for the other two stores, the owner can only submit an application for either the solar panels or for the wind turbines in the same fiscal year.

V. Program Provisions

This section of the Notice identifies the provisions of the interim rule applicable to each type of funding available under REAP.

A. General

The provisions specified in 7 CFR 4280.101 through 4280.111 apply to this Notice.

B. Renewable Energy System and Energy Efficiency Improvement Project Grants

In addition to the other provisions of this Notice, the requirements specified in 7 CFR 4280.112 through 4820.121 apply to renewable energy system and energy efficiency improvement projects grants.

C. Renewable Energy System and Energy Efficiency Improvement Project Guaranteed Loans

In addition to the other provisions of this Notice, the requirements specified in 7 CFR 4280.122 through 4820.160 apply to guaranteed loans for renewable energy system and energy efficiency improvement projects. For Fiscal Year 2011, the guarantee fee amount is 1 percent of the guaranteed portion of the loan and the annual renewal fee is 0.250 percent (one-quarter of one percent) of the guaranteed portion of the loan.

D. Renewable Energy System and Energy Efficiency Improvement Project Grant and Guaranteed Loan Combined Requests

In addition to the other provisions of this Notice, the requirements specified in 7 CFR 4280.165 apply to a combined grant and guaranteed loan for renewable energy system and energy efficiency improvement projects.

E. Renewable Energy System Feasibility Study Grants

In addition to the other provisions of this Notice, the requirements specified in 7 CFR 4280.170 through 4820.182 apply to renewable energy system feasibility study grants.

F. Energy Audit and Renewable Energy Development Assistance Grants

In addition to the other provisions of this Notice, the requirements specified in 7 CFR 4280.186 through 4820.196 apply to energy audit and renewable energy development assistance grants.

G. Resubmittal of Fiscal Year 2010 Renewable Energy System and Energy Efficiency Improvement Applications

If an applicant or lender submitted an application for funding in Fiscal Year

2010 and that application was determined eligible but was not funded, the Agency will consider that Fiscal Year 2010 application for funding in Fiscal Year 2011 as provided in this section.

(1) *Written request.* An applicant or lender must submit a written request for the Agency to consider its Fiscal Year 2010 application for Fiscal Year 2011 funds. For a guarantee loan and grant combination application, both the lender and applicant must submit the written request to the Agency in order to be considered for Fiscal Year 2011 funds.

(i) Except for simplified applications, applicants must provide current financial statements that meet the program requirements outlined in 7 CFR 4280.116(b)(4) with the written request.

(ii) Written requests to consider Fiscal Year 2010 applications for Fiscal Year 2011 funds may be submitted at any time during Fiscal Year 2011 up to and including 4:30 pm local time on June 15, 2011, to be considered for Fiscal Year 2011 funds. Written requests received after this time and date will not be accepted by the Agency and the applicant's Fiscal Year 2010 application will not be considered for Fiscal Year 2011 funds.

(2) *Revisions to Fiscal Year 2010 applications.* If an applicant makes any revision to its Fiscal Year 2010 application that are not necessitated by the REAP interim rule, a new application meeting the requirements of this Notice must be submitted in order to be considered for Fiscal Year 2011 funds and a new date the complete application was received will be recorded. However, if a revision to the Fiscal Year 2010 application is necessitated by the REAP interim rule or the Agency requests an update of information in the original application (for example, required current financial statements), there will be no change in the date the complete application was received.

(3) *No revisions to Fiscal Year 2010 applications.* If an applicant does not plan to make any revisions to its Fiscal Year 2010 application, a new application is not required and the date the complete application was received remains unchanged from its original Fiscal Year 2010 receipt date.

H. *Award Process.* In addition to the process for awarding funding under 7 CFR 4280, subpart B, the Agency will make awards using the following considerations:

(1) *Funding renewable energy system and energy efficiency improvement grant and grant/guaranteed loan awards.* Considering the availability of funds, the Agency will fund those grant only applications and grant/guaranteed loan applications that score the highest based on the grant score of the application; that is, the grant score an application receives will be compared to the grant scores of other applications, with higher scoring applications receiving first consideration for funding.

(2) *Guaranteed loan only awards.* Considering the availability of funds, the Agency will fund those guaranteed loan only applications that score the highest compared to the scores of other applications, with higher scoring applications receiving first consideration for funding.

(3) *Evaluation criteria.* Agency personnel will score each application based on the evaluation criteria specified in 7 CFR 4280.117(c), 7 CFR 4280.129(c), 7 CFR 4280.178, or 7 CFR 4280.192, as applicable.

For hybrid applications, each technical report will be evaluated and scored based on its own merit. The scores for the technologies will be consolidated using a weighted average approach based on the percentage of the cost for each system to the total project cost.

Example: A hybrid project contains a wind and solar photovoltaic components. The wind system will cost the $30,000 (75 percent of total eligible project cost) and the solar will cost $10,000 (25 percent of total eligible project cost). The wind technical report was evaluated and assigned a total score of 22 points, while the solar report was evaluated and assigned a total score of 31 points. In this scenario, the final technical score would be assigned as follows: (22 × 75 percent) + (31 × 25 percent) = 24.25.

(4) *Applications that receive the same score.* If applications score the same and if remaining funds are insufficient to fund each such application, the Agency will distribute the remaining funds to each such application on a pro-rata basis.

VI. Administration Information

A. Notifications

(1) *Applicants.* The notification provisions of 7 CFR 4280.111 apply to this Notice.

(2) *Lenders.* The notification provisions of 7 CFR 4280.129(a) apply to this Notice.

B. Administrative and National Policy requirements

(1) *Exception authority.* The provisions of 7 CFR 4280.104 apply to this Notice.

(2) *Appeals.* A person may seek a review of an Agency decision or appeal to the National Appeals Division in accordance with 7 CFR 4280.105.

(3) *Conflict of interest.* The provisions of 7 CFR 4280.106 apply to this Notice.

(4) *USDA Departmental Regulations and other laws that contains other compliance requirements.* The provisions of 7 CFR 4280.107 and 7 CFR 4280.108 apply to this Notice.

VII. Agency Contacts

For assistance on this program, please contact a USDA Rural Development Energy Coordinator, as provided in the Addresses section of this Notice.

VIII. Nondiscrimination Statement

USDA prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, *etc.*) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

To file a complaint of discrimination write to USDA, Director, Office of Adjudication and Compliance, 1400 Independence Avenue SW., Washington, DC 20250–9410 or call (800) 795–3272 (voice) or (202) 720–6382 (TDD). USDA is an equal opportunity provider, employer, and lender.

Dated: April 1, 2011.

Dallas Tonsager,

Under Secretary, Rural Development.

[FR Doc. 2011–8456 Filed 4–13–11; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Sensors and Instrumentation Technical Advisory Committee; Notice of Partially Closed Meeting

The Sensors and Instrumentation Technical Advisory Committee (SITAC) will meet on May 3, 2011, 9:30 a.m., in the Herbert C. Hoover Building, Room 3884, 14th Street between Constitution and Pennsylvania Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to sensors

and instrumentation equipment and technology.

Agenda

Public Session

1. Welcome and Introductions.

2. Remarks from the Bureau of Industry and Security Management.

3. Industry Presentations.

4. New Business.

Closed Session

5. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yspringer@bis.doc.gov* no later than April 26, 2011.

A limited number of seats will be available during the public session of the meeting. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that the materials be forwarded before the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on December 14, 2010 pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § 10(d)), that the portion of this meeting dealing with pre-decisional changes to the Commerce Control List and U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information contact Yvette Springer on (202) 482–2813.

Dated: April 8, 2011.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2011–8954 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Materials Processing Equipment Technical Advisory Committee; Notice of Partially Closed Meeting

The Materials Processing Equipment Technical Advisory Committee (MPETAC) will meet on May 3, 2011, 9 a.m., Room 6087B, in the Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to materials processing equipment and related technology.

Agenda

Open Session

1. Opening Remarks and Introductions.
2. Presentation of Papers and Comments by the Public.
3. Discussion on Proposals from last and for next Wassenaar Meeting.
4. Report on Proposed changes to the Export Administration Regulation.
5. Other Business.

Closed Session

6. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yspringer@bis.doc.gov* no later than April 27, 2011.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via e-mail.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on January 25, 2011, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended, that the portion of the meeting dealing with matters the premature disclosure of which would be likely to frustrate significantly implementation of a proposed agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)1 and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: April 8, 2011.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2011–8949 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Transportation and Related Equipment Technical Advisory Committee; Notice of Partially Closed Meeting

The Transportation and Related Equipment Technical Advisory Committee will meet on May 5, 2011, 9:30 a.m., in the Herbert C. Hoover Building, Room 6087B, 14th Street between Constitution & Pennsylvania Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to transportation and related equipment or technology.

Public Session

1. Welcome and Introductions.
2. Review Status of Working Groups.
3. Proposals from the Public.

Closed Session

4. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yspringer@bis.doc.gov* no later than April 28, 2011.

A limited number of seats will be available during the public session of the meeting. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that presenters forward the

public presentation materials prior to the meeting to Ms. Springer via e-mail.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on October 15, 2010, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 §§ (10)(d)), that the portion of the meeting dealing with matters the disclosure of portion of the meeting dealing with matters the disclosure of which would be likely to frustrate significantly implementation of an agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)1 and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: *April 8, 2011.*

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2011–8939 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–810]

Stainless Steel Bar From India: Extension of Time Limit for the Final Results of the 2009–2010 Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* April 14, 2011.

FOR FURTHER INFORMATION CONTACT: Scott Holland or Yasmin Nair, 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) 482–1279 and (202) 482–3813, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 4, 2011, the Department of Commerce ("Department") published its preliminary results of the 2009–2010 antidumping duty administrative review. *See Stainless Steel Bar From India: Preliminary Results of, and Partial Rescission of, the Antidumping Duty Administrative Review, and Intent Not To Revoke the Order, in Part,* 76 FR 12044 (March 4, 2011) ("*Preliminary Results*"). The final results for this review are currently due no later than July 2, 2011.

Extension of Time Limit for Final Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("Act"), requires that the Department issue the final results of an administrative review within 120 days after the date on which the preliminary results are published. If it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend the deadline for the final results to a maximum of 180 days after the date on which the preliminary results are published.

The Department has determined that it requires additional time to complete this review. After publishing the *Preliminary Results,* the Department conducted a verification of the cost of production responses for Venus Wire Industries Pvt. Ltd. and its affiliate, Sieves Manufacturers (India) Private Limited. The Department intends to issue a comprehensive report of the results of this verification. Further, the Department needs to allow time for parties to review this verification report, which further delays the briefing schedule. Thus, it is not practicable to complete this review by July 2, 2011, and the Department is extending the time limit for completion of the final results by an additional 60 days to August 31, 2011.

This notice is published pursuant to sections 751(a) and 777(i) of the Act.

Dated: April 7, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–9115 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–941]

Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Extension of Time Limits for the Preliminary Results of the First Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* April 14, 2011.

FOR FURTHER INFORMATION CONTACT: Katie Marksberry or Kabir Archuletta, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC 20230; telephone: (202) 482–7906 or (202) 482–2593, respectively.

Background

On October 28, 2010, the Department of Commerce ("Department") initiated an administrative review of certain kitchen appliance shelving and racks from the People's Republic of China ("PRC") for the period March 5, 2009, through August 31, 2010. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 75 FR 66349 (October 28, 2010) ("*First Initiation*").[1]

On January 20, 2011, the Department selected two mandatory respondents in the above referenced administrative review pursuant to section 777A(c)(2)(B) of the Tariff Act of 1930, as amended ("the Act"): Guangdong Wireking Housewares & Hardware Co., Ltd. ("Wireking") and Jiangsu Weixi Group Co. ("Weixi").[2]

The Department sent its antidumping duty questionnaire to Weixi and Wireking on January 20, 2011.[3] In its questionnaire, the Department requested that the two firms provide a response to

[1] Nashville Wire Products Inc. and SSW Holding Company, Inc. (collectively, "Petitioners") initially requested that the Department initiate an administrative review of ten companies; however, we required additional information concerning why, pursuant to 19 CFR 351.213(b)(1), Petitioners desired a review of five of these companies. *See First Initiation,* 75 FR at 66352. Accordingly, the Department postponed initiation of this administrative review with respect to five companies requested by Petitioners. *See id.* and *Initiation of Antidumping and Countervailing Duty Administrative Reviews; Correction,* 75 FR 69054 (November 10, 2010). After reviewing additional information placed on the record of this administrative review by Petitioners, we determined that, for three of the five postponed companies, Petitioners did not provide any reason, other than alleged transshipment, for initiation; therefore, we declined to initiate a review for Asia Pacific CIS (Thailand) Co., Ltd., Taiwan Rail Company, and King Shan Wire Co., Ltd. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 75 FR 73036, 73039 (November 29, 2010). However, we did, at this point, also determine that it was appropriate to initiate this review with respect to two additional companies originally requested by Petitioners: Asia Pacific CIS (Wuxi) Co., Ltd.; and Hengtong Hardware Manufacturing (Huizhou) Co., Ltd. *See id.*

[2] *See* Memorandum to James C. Doyle, Office Director, Office 9, through Catherine Bertrand, Program Manager, Office 9, from Kabir Archuletta, International Trade Analyst, Office 9, "Selection of Respondents for the Antidumping Review of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China," dated January 20, 2011.

[3] *See* Letters to Weixi and Wireking from Catherine Bertrand, Program Manager, AD/CVD Operations, Office 9, regarding "Kitchen Appliance Shelving and Racks from the People's Republic of China," dated January 20, 2011.

Section A of the Department's questionnaire by February 10, 2011, and Sections C and D of the questionnaire by February 28, 2011.

On February 2, 2011, eight days prior to the Department's February 10, 2011, deadline for Section A questionnaire responses, the Department received a request on behalf of New King Shan (Zhuhai) Co., Ltd. ("NKS"), a mandatory respondent in the original investigation and a separate rate company in this review, to be selected as a replacement mandatory respondent in the event of a non-responsive mandatory respondent and for a 28-day extension to submit questionnaire responses.[4] On February 4, 2011, Wireking filed a request for an extension of the deadline to submit its Section A response, which the Department extended to February 22, 2011, for Wireking and any potential voluntary respondents.[5] The Department did not receive an extension request from Weixi and did not receive its Section A response by the appointed deadline.

On February 23, 2011, the Department received an unsolicited Section A questionnaire response from NKS.[6] On March 1, 2011, because Weixi did not cooperate with our request for information, the Department selected NKS, the third largest exporter by volume, as a replacement mandatory respondent.[7] We also determined that it was appropriate to use the Section A response already submitted by NKS as the basis for that company's response as a mandatory respondent.[8] On March 1, 2011, the Department sent its antidumping questionnaire to NKS and assigned a deadline of March 22, 2011, for its Sections C and D responses.[9] The preliminary results of this review are currently due on June 2, 2011.

[4] *See* Letter from NKS regarding "Request for Extension of Time to File Voluntary Response and Request for Clarification of Reporting of Sales," dated February 2, 2011.

[5] *See* Memorandum to the File from Kabir Archuletta, International Trade Analyst, Office 9, regarding "Guangdong Wireking Housewares & Hardware Co., Ltd. Section A Questionnaire Extension Request," dated February 10, 2011.

[6] *See* "Voluntary Response to Section A by New King Shan (Zhuhai) Co., Ltd.," dated February 23, 2011.

[7] *See* Memorandum to James C. Doyle, Office Director, Office 9, through Catherine Bertrand, Program Manager, Office 9, from Kabir Archuletta, International Trade Analyst, Office 9, "Antidumping Review of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Selection of an Additional Mandatory Respondent," dated March 1, 2011.

[8] *See id.*

[9] *See* Letter to NKS from Catherine Bertrand, Program Manager, Office 9, "Kitchen Appliance Shelving and Racks from the People's Republic of China," dated March 1, 2011.

Statutory Time Limits

Section 751(a)(3)(A) of the Act requires the Department to issue the preliminary results of an administrative review within 245 days after the last day of the anniversary month of an order for which a review is requested. Consistent with section 751(a)(3)(A) of the Act, the Department may extend the 245-day period to 365 days if it is not practicable to complete the review within a 245-day period.

Extension of Time Limit of Preliminary Results

The preliminary results are currently due on June 2, 2011. The non-responsiveness of one of the initial mandatory respondents, Weixi, and the selection of an additional mandatory respondent, NKS, restricted the time that the Department has available to gather and analyze additional information related to the sales process, affiliations, establishing the proper date of sale, surrogate values for all factors of production, and the methodology used to report factors of production. As the Department has yet to receive all responses to its supplemental questionnaires, we require more time to analyze the responses and issue any additional supplemental questionnaires, as needed. Therefore, we find that it is not practicable to complete these preliminary results within the current 245 day deadline.

Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time limit for issuing the preliminary results by 120 days until September 30, 2011. The final results continue to be due 120 days after the publication of the preliminary results.

This notice is published pursuant to section 777(i)(1) of the Act and 19 CFR 351.213(h)(2).

Dated: April 7, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–9114 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–840]

Lightweight Thermal Paper from Germany: Notice of Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* April 14, 2011.

FOR FURTHER INFORMATION CONTACT: Stephanie Moore or George McMahon, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street, and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–3692 or (202) 482–1167, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 1, 2010, the Department of Commerce (the Department) published in the **Federal Register** a notice of "Opportunity to Request Administrative Review" of the antidumping duty order on lightweight thermal paper (thermal paper) from Germany for the period of review (POR) November 1, 2009, through October 31, 2010. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 75 FR 67079 (November 1, 2010).

On November 30, 2010, the Department received a timely request filed on behalf of Appleton Papers Inc. (petitioner) to conduct an administrative review of Mitsubishi HiTec Paper Flensburg GmbH, Mitsubishi HiTec Paper Bielefeld GmbH, and Mitsubishi International Corp. (collectively, Mitsubishi), and Papierfabrik August Koehler AG (Koehler). On November 30, 2010, the Department also received a request filed on behalf of Koehler to conduct an administrative review of Koehler.

Pursuant to the aforementioned requests, the Department published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order on thermal paper from Germany, covering two respondents, Mitsubishi and Koehler. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 75 FR 81565 (December 28, 2010) (*Notice of Initiation*).

Scope of the Order

The merchandise covered by this order includes certain lightweight thermal paper, which is thermal paper with a basis weight of 70 grams per square meter (g/m^2) (with a tolerance of $\pm$ 4.0 g/m^2) or less; irrespective of dimensions;[1] with or without a base coat[2] on one or both sides; with thermal active coating(s)[3] on one or both sides that is a mixture of the dye and the developer that react and form an image when heat is applied: with or without a top coat;[4] and without an adhesive backing. Certain lightweight thermal paper is typically (but not exclusively) used in point-of-sale applications such as ATM receipts, credit card receipts, gas pump receipts, and retail store receipts. The merchandise subject to these orders may be classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 3703.10.60, 4811.59.20, 4811.90.8020, 4811.90.8040, 4811.90.9010, 4811.90.9090, 4820.10.20, and 4823.40.00.[5] Although HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these orders is dispositive.

Partial Rescission of the 2009–2010 Administrative Review

On March 28, 2011, petitioner withdrew its request for review of Mitsubishi. Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of the notice of initiation of the requested review. The instant review was initiated on December 28, 2010. *See Notice of Initiation.* The petitioner's withdrawal of request for a review of Mitsubishi falls within the 90-day deadline for rescission by the Department, and no other party requested an administrative review of this particular respondent. Therefore, in accordance with 19 CFR 351.213(d)(1), and consistent with our practice, we are rescinding this review with respect to Mitsubishi. *See, e.g., Certain Lined Paper Products From India: Notice of Partial Rescission of Antidumping Duty Administrative Review and Extension of Time Limit for the Preliminary Results of Antidumping Duty Administrative Review,* 74 FR 21781 (May 11, 2009). The instant review will continue with respect to Koehler.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR § 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the disposition of proprietary information disclosed under an APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We have been enjoined from liquidating entries of the subject merchandise produced and/or exported by Mitsubishi. Therefore, we do not intend to issue liquidation instructions to U.S. Customs and Border Protection (CBP) for such entries entered on or after November 1, 2009, until such time as the preliminary injunction issued on March 17, 2009, is lifted.

This notice is issued and published in accordance with sections 751(a)(1), 751(a)(3)(A), and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: April 8, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–9110 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–DS–P

[1] Thermal paper is typically produced in jumbo rolls that are slit to the specifications of the converting equipment and then converted into finished slit rolls. Both jumbo and converted rolls (as well as LWTP in any other form, presentation, or dimension) are covered by the scope of these orders.

[2] A base coat, when applied, is typically made of clay and/or latex and like materials and is intended to cover the rough surface of the paper substrate and to provide insulating value.

[3] A thermal active coating is typically made of sensitizer, dye, and co-reactant.

[4] A top coat, when applied, is typically made of polyvinyl acetone, polyvinyl alcohol, and/or like materials and is intended to provide environmental protection, an improved surface for press printing, and/or wear protection for the thermal print head.

[5] HTSUS subheading 4811.90.8000 was a classification used for LWTP until January 1, 2007. Effective that date, subheading 4811.90.8000 was replaced with 4811.90.8020 (for gift wrap, a non-subject product) and 4811.90.8040 (for "other" including LWTP). HTSUS subheading 4811.90.9000 was a classification for LWTP until July 1, 2005. Effective that date, subheading 4811.90.9000 was replaced with 4811.90.9010 (for tissue paper, a non-subject product) and 4811.90.9090 (for "other," including LWTP). See Memorandum to the File, dated February 9, 2011, regarding the addition of HTSUS numbers: 4811.90.8020 and 4811.90.9010, per the request of the National Import Specialist of Customs and Border Protection.

DEPARTMENT OF COMMERCE

International Trade Administration

Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before May 4, 2011. Address written comments to Statutory Import Programs Staff, Room 3720, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. at the U.S. Department of Commerce in Room 3720.

Docket Number: 11–019. *Applicant:* University of Wyoming, 1000 East University Avenue Laramie, WY 82072. *Instrument:* Electron Microscope. *Manufacturer:* Hitachi High-Technologies Corporation, Japan. *Intended Use:* The instrument will be used to examine animal tissues to diagnose diseases, especially those caused by viral infections. For some diseases, electron microscopy provides the most accurate and timely method of arriving at a presumptive or definitive diagnosis. *Justification for Duty-Free Entry:* There are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* March 11, 2011.

Docket Number: 11–020. *Applicant:* U.S. Department of Agriculture, Agricultural Research Service. 10300 Baltimore Ave Beltsville, MD 20705. *Instrument:* Electron Microscope. *Manufacturer:* Hitachi High-Technologies Corporation, Japan. *Intended Use:* The instrument will be used to identify and characterize new viruses, bacteria, fungi, parasites, and plant and animal cell structures. Standard electron microscopy

techniques will be utilized to observe the samples. *Justification for Duty-Free Entry:* There are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* March 11, 2011.

Docket Number: 11–024. *Applicant:* Mayo Clinic. 200 First St SW Rochester, MN 55905. *Instrument:* Electron Microscope. *Manufacturer:* FEI Company, the Netherlands. *Intended Use:* The instrument will be used to evaluate tissue looking for ultrastructural indicators of disease, as well as other experiments including cell culture morphology, transplant and host tissue interactions, and implant artifacts and breakage. Techniques to be used include standard transmission electron microscopy preparative procedures as well as specialized techniques including immunoelectron microscopy, negative staining and electron tomography. *Justification for Duty-Free Entry:* There are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* March 14, 2011.

Docket Number: 11–025. *Applicant:* California State University—Long Beach, 1250 Bellflower Blvd., Long Beach, CA 90840. *Instrument:* Electron Microscope. *Manufacturer:* Neaspec GmbH, Germany. *Intended Use:* The instrument will be used to study plasmonic metal-based materials as well as phonon modes of thin surfaces such as silica, silicon nitride or silicon carbide materials. Experiments will be performed using near-field microscopy measurements, coupling light with an atomic microscope tip and recording optical signals in amplitude and phase. *Justification for Duty-Free Entry:* There are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* March 30, 2011.

Dated: April 8, 2011.

Gregory Campbell,

Director, IA Subsidies Enforcement Office.

[FR Doc. 2011–9108 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before May 4, 2011. Address written comments to Statutory Import Programs Staff, Room 3720, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. at the U.S. Department of Commerce in Room 3720.

Docket Number: 11–023. Applicant: UChicago Argonne, LLC., 9700 South Cass Ave., Lemont, IL 60439. *Instrument:* Mythen 1K Detector System. *Manufacturer:* Dectris Ltd., Switzerland. *Intended Use:* The instrument will be used for resonant inelastic x-ray scattering (RIXS) to study the electronic structure of highly correlated systems. This instrument is unique in that it has a small pixel pitch (50 microns); high detection efficiency, single photon counting with high dynamic range; and a small, lightweight and compact design. Justification for Duty-Free Entry: There are no instruments of the same general category being manufactured in the United States. *Application accepted by Commissioner of Customs:* March 29, 2011.

Dated: April 8, 2011.

Gregory Campbell,

Acting Director, IA Subsidies Enforcement Office.

[FR Doc. 2011–9107 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

University of Colorado, et al.; Notice of Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Room 3720, U.S. Department of Commerce, 14th and Constitution Ave, NW., Washington, DC.

Docket Number: 11–009. *Applicant:* University of Chicago Argonne, LLC., Lemont, IL 60439–4873. *Instrument:* Electrode Coater. *Manufacturer:* A–Pro Co., Ltd., South Korea. *Intended Use:* See notice at 76 FR 11200, March 1, 2011. *Comments:* None received. *Decision:* Approved. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of its order. *Reasons:* This instrument is unique in that it is semi-automated and suitable for a laboratory environment, and specially tailored for lithium-ion electrodes.

Docket Number: 11–010. *Applicant:* University of Wisconsin-Madison, Madison, WI 53706. *Instrument:* Vitrobot Mark IV. *Manufacturer:* FEI Company, the Netherlands. *Intended Use:* See notice at 76 FR 11200, March 1, 2011. *Comments:* None received. *Decision:* Approved. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of its order. *Reasons:* This instrument is unique in following ways: the instrumental parameters must be computer controlled and enable storing of parameter protocols, including humidity, blotting time and pressure, and equilibration time; mitigation of errors must be derived from the handling of TEM grids including loading, application of sample, plunging, and transfer to storage by automating some of these tasks; and sample blotting must be done automatically with user controlled programmable blot times and pressures.

Docket Number: 11–011. *Applicant:* National Superconducting Cyclotron Laboratory (NSCL) at Michigan State University. *Instrument:* Differential Plunger Device. *Manufacturer:* Institut fur Kernphysik-Universitat zu koln (Cologne University), Germany. *Intended Use:* See notice at 76 FR 1120, March 1, 2011. *Comments:* None received. *Decision:* Approved. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of its order. *Reasons:* The instrument is specific to the research in level lifetime measurements of rare isotopes.

Docket Number: 11–014. *Applicant:* Purdue University, West Lafayette, IN 47907. *Instrument:* Vibration Test System-Shaker in Trunion with Matching Amplifier and Cooling Blower. *Manufacturer:* TIRA, Germany. *Intended Use:* See notice at 76 FR 11200, March 1, 2011. *Comments:* None received. *Decision:* Approved. We know

of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of its order. *Reasons:* Unique features of this instrument include its arbitrary excitation angle, large frequency, force, displacement range and spectral output purity. It is also unique in that it included the ability to rotate to varying degrees.

Docket Number: 11–017. *Applicant:* University of Chicago Argonne, LLC, Lemont, IL 60439. *Instrument:* Electron Guns for Caribu EBIS Charge Breeder. *Manufacturer:* Budker Institute of Nuclear Physics, Russia. *Intended Use:* See notice at 76 FR 11200, March 1, 2011. *Comments:* None received. *Decision:* Approved. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of its order. *Reasons:* The main requirement to the EBIS charge breeder is its high efficiency and long maintenance free operational period.

Dated: April 8, 2011.

Gregory W. Campbell,

Director, Subsidies Enforcement Office, Import Administration.

[FR Doc. 2011–9109 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–580–818]

Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Extension of Time Limit for Preliminary Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: Effective Date: April 14, 2011.

FOR FURTHER INFORMATION CONTACT: Gayle Longest, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–3338.

SUPPLEMENTARY INFORMATION:

Background

On August 17, 1993, the Department published in the **Federal Register** the countervailing duty order on corrosion-resistant carbon steel flat products (CORE) from Korea. *See Countervailing Duty Orders and Amendments of Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Korea,* 58 FR 43752 (August 17, 1993). On August 2, 2010, the Department published a notice of "Opportunity to Request Administrative Review" of this countervailing duty order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 75 FR 45094 (August 2, 2010). In accordance with 19 CFR 351.221(c)(1)(i), we published a notice of initiation of the administrative review on September 29, 2010, for the January 1, 2009, through December 31, 2009, period of review (POR). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 75 FR 60076 (September 29, 2010). The preliminary results for this review are currently due no later than May 3, 2011.

Extension of Time Limits for Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to issue the preliminary results of an administrative review within 245 days after the last day of the anniversary month of an order for which a review is requested and the final results of review within 120 days after the date on which the preliminary results are published. If it is not practicable to complete the review within the time period, section 751(a)(3)(A) of the Act allows the Department to extend these deadlines to a maximum of 365 days and 180 days, respectively.

Because the Department will require additional time to review and analyze supplemental information expected from the Government of Korea and the respondent, Hyundai HYSCO Ltd., and may issue further supplemental questionnaires, it is not practicable to complete this review by the original deadline (*i.e.,* May 3, 2011). Therefore, the Department is extending the time limit for completion of the preliminary results by 120 days to not later than August 31, 2011, in accordance with section 751(a)(3)(A) of the Act.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: April 8, 2011.

Gary Taverman,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–9111 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–843]

Certain Lined Paper Products From India: Amended Final Determination of Sales at Less Than Fair Value

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On December 13, 2010, the United States Court of Appeals for the Federal Circuit ("CAFC") affirmed the United States Court of International Trade's ("CIT's") decision sustaining the Department of Commerce's ("the Department's") redetermination on remand of the final results of the antidumping duty investigation on certain lined paper products ("CLPP") from India. *See Association of American School Paper Suppliers* v. *United States,* Court No. 2010–1219 (CAFC December 13, 2010) (CAFC Rule 36 affirmance); *see also Association of American School Paper Suppliers* v. *United States,* Consol. Court No. 06–00395, Slip Op. 09–136 (CIT December 10, 2009) ("*AASPS,* Slip. Op. 09–136").[1] This case arises out of the Department's final determination of sales at less than fair value ("LTFV") in the antidumping duty investigation of CLPP from India.[2] As there is now a final and conclusive court decision in this action, the Department is amending the *Final Determination* and *Antidumping Duty Order.*[3]

FOR FURTHER INFORMATION CONTACT: Christopher Hargett, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution

[1] This action includes Court No. 06–00395 and Court No. 06–00399.

[2] *See Notice of Final Determination of Sales at Less Than Fair Value, and Negative Determination of Critical Circumstances: Certain Lined Paper Products from India,* 71 FR 45012 (August 8, 2006) ("*Final Determination*").

[3] *Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Lined Paper Products from the People's Republic of China; Notice of Antidumping Duty Orders: Certain Lined Paper Products from India, Indonesia and the People's Republic of China; and Notice of Countervailing Duty Orders: Certain Lined Paper Products from India and Indonesia,* 71 FR 56949 (September 28, 2006) ("*Antidumping Duty Order*").

Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–4161.

SUPPLEMENTARY INFORMATION:

Background

On August 8, 2006, the Department published the final determination of sales at LTFV in the antidumping duty investigation of CLPP from India for the period of investigation ("POI") of July 1, 2004, through June 30, 2005. *See Final Determination.* The Association of American School Paper Suppliers [4] ("AASPS") and Kejriwal Paper Limited ("Kejriwal") filed lawsuits challenging the *Final Determination.*

In its November 17, 2008 opinion,[5] the CIT partially remanded the *Final Determination.* Specifically, the CIT ordered the Department to further explain (1) how the general and administrative ("G&A") expense ratio reasonably identifies and fairly allocates G&A expenses in light of the evidence on the record; and (2) how its G&A expense ratio is consistent with its treatment of Kejriwal's financial expense ratio.

In accordance with the CIT's remand order in *AASPS,* Slip Op. 08–122, the Department filed its redetermination on remand of the *Final Determination* ("Remand Final Determination") on March 16, 2009. In its redetermination, the Department provided further explanation on its calculation methodology, and also determined that certain additional expenses should be attributed directly to Kejriwal's newsprint operations.

On December 10, 2009, the CIT sustained the Department's redetermination on remand of the final results of the antidumping duty investigation on CLPP from India.[6] By sustaining the remand results, the CIT affirmed all of the issues in which the Department was challenged, including the Department's explanation of how the G&A expense ratio it calculated (1) reasonably identifies and fairly allocates G&A expenses in light of the evidence on the record, and (2) is consistent with the Department's treatment of Kejriwal's financial expense ratio.

Pursuant to the Department's redetermination, Kejriwal's G&A expense ratio changed.[7] As a result of the change to Kejriwal's G&A expense ratio, Kejriwal's calculated margin for the POI has changed from 3.91 percent in the *Final Determination* to 3.06 percent in the redetermination issued on March 16, 2009.

Consistent with the decision in the CAFC in *Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990), the Department published in the **Federal Register** a notice of a court decision that is not "in harmony" with the Department's final determination.[8] In this notice, the Department stated that we would amend our final determination of this investigation to reflect the recalculation of the margin for Kejriwal upon a final and conclusive court decision in this action.

Kejriwal appealed the CIT's decision affirming the Department's remand results. On December 13, 2010, the CAFC affirmed the CIT's decision under CAFC Rule 36, which allows the Court to enter judgment of affirmance without a written opinion. The period for appeal expired on March 14, 2011. Accordingly, the Department is amending its *Final Determination* and *Antidumping Duty Order.*

Amendment to Final Determination and Antidumping Duty Order

Because there is now a final and conclusive court decision in this proceeding, the revised dumping margin for Kejriwal in the *Final Determination* is as follows:

Manufacturer/exporter	Original final margin (percent)	Amended final margin (percent)
Kejriwal Paper Limited	3.91	3.06

On April 14, 2009, the Department issued the final results of the first administrative review covering Kejriwal and the period April 17, 2006, to August 31, 2007. *See Certain Lined Paper Products from India: Notice of Final Results of the First Antidumping Duty Administrative Review;* 74 FR 17149 (April 14, 2009). Therefore, in accordance with section 19 CFR 351.212(b), the Department will issue liquidation instructions to U.S. Customs and Border Protection ("CBP") 15 days after publication of this amended final determination in the **Federal Register.** Specifically, the Department will instruct CBP to assess antidumping duties, as appropriate, for merchandise produced and/or exported by Kejriwal entered, or withdrawn from warehouse, for consumption in the United States during the periods April 17, 2006, to August 31, 2007, September 1, 2007, to August 31, 2008, September 1, 2008, to August 31, 2009, and September 1, 2009, to August 31, 2010.[9]

This notice is issued and published in accordance with sections 735(d) and 777(i) of the Tariff Act of 1930, as amended.

April 8, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011–9113 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–DS–P

[4] The Association consists of MeadWestvaco Corporation, Norcom, Inc., and Top Flight, Inc.

[5] *See Association of American School Paper Suppliers v. United States,* Consol. Court No. 06–00395, Slip Op. 08–122 (CIT November 17, 2008) ("*AASPS,* Slip Op. 08–122").

[6] *See AASPS,* Slip. Op. 09–136.

[7] Due to the proprietary nature of Kejriwal's G&A expenses, see the Department's proprietary calculation memorandum, titled "Remand for the Antidumping Investigation of Certain Lined Paper Products from India," dated March 13, 2009, for further discussion.

[8] *See Certain Lined paper Products from India: Notice of Court Decision not in Harmony with Final Determination of Sales at Less Than Fair Value,* 74 FR 68779 (December 29, 2009) ("*Timken Notice*").

[9] *See Certain Lined Paper Products from India: Notice of Final Results of the First Antidumping Duty Administrative Review,* 74 FR 17149 (April 14, 2009); *Certain Lined Paper Products from India: Notice of Final Results of Antidumping Duty Administrative Review,* 75 FR 7563 (February 22, 2010); *Certain Lined Paper Products From India: Notice of Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review,* 76 FR 10876 (February 28, 2011); and *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 75 FR 66349 (October 28, 2010), respectively. Kejriwal was not reviewed in the 07–08, 08–09, and 09–10 administrative reviews of CLPP from India. *See also* Memo from Christopher Hargett through Melissa Skinner to the File, dated April 08, 2011, entitled "Certain Lined Paper Products from India: Kejriwal Liquidation Instructions (4/17/2006–8/31/2010)" for a detailed discussion on liquidations for Kejriwal.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA350

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Notice; availability of fishery plans and request for comment.

SUMMARY: Notice is hereby given that the Idaho Department of Fish and Game (IDFG) has submitted a Fishery Management and Evaluation Plan (FMEP) pursuant to the protective regulations promulgated for salmon and steelhead listed under the Endangered Species Act (ESA). The FMEP specifies the future management of freshwater inland recreational fisheries potentially affecting listed salmon and steelhead in the State of Idaho. This document serves to notify the public of the availability of the FMEPs for review and comment before final approval or disapproval is made by NMFS.

DATES: Comments on the FMEPs must be received at the appropriate address or fax number (*see* **ADDRESSES**) no later than 5 p.m. Pacific time on May 16, 2011.

ADDRESSES: Written comments on the application should be addressed to the NMFS Salmon Management Division, 1201 NE. Lloyd Boulevard, Suite 1100, Portland, OR 97232, or faxed to 503–872–2737. Comments may be submitted by e-mail. The mailbox address for providing e-mail comments is *IdahoFisheriesPlans.nwr@noaa.gov*. Include in the subject line of the e-mail comment the following identifier: *Comments on Idaho's FMEPs*.

FOR FURTHER INFORMATION CONTACT: Brett Farman, Portland, OR, at phone number: (503) 231–6222, or e-mail: *brett.farman@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Species Covered in This Notice

This notice is relevant to the Snake River Spring/summer Chinook Salmon (*Oncorhynchus tshawytscha*), Snake River Fall-run Chinook Salmon (*O. tshawytscha*), and Snake River Sockeye Salmon (*O. nerka*) evolutionarily significant units (ESU), and the Snake River Steelhead (*O. mykiss*) distinct population segment (DPS).

IDFG has submitted to NMFS two FMEPs describing design and implementation of State-managed fisheries targeting spring and summer Chinook salmon and general fisheries for non-listed resident species. The objective of the fishery management described in these two FMEPs is to harvest spring Chinook salmon and resident species in a manner that does not exceed the harvest impact limits developed by State, Tribal, and Federal co-managers consistent with conservation needs of the listed species. Implementation of the FMEPs would assure that spawning escapements, hatchery brood stock requirements, and supplemental adult releases would be achieved in accordance with cooperative agreements. A variety of monitoring and evaluation tasks are specified in the FMEPs to assess the abundance of listed species, determine fishery effort and catch, and monitor angler compliance. A review of compliance within the provisions of the FMEP will be conducted by IDFG annually, and a comprehensive review of each FMEP would be required every five years. Each year's upcoming recreational fishery management intentions will be required to get NMFS concurrence beforehand to ensure compliance with the proposed FMEP.

As specified in the July 10, 2000, Endangered Species Act (ESA) 4(d) rule for salmon and steelhead (65 FR 42422) and updated June 28, 2005 (70 FR 37160), NMFS may approve an FMEP if it meets criteria set forth in 50 CFR 223.203(b)(4)(i)(A) through (I). Prior to final approval of an FMEP, NMFS must publish notification announcing its availability for public review and comment.

Authority

Under section 4 of the ESA, the Secretary of Commerce is required to adopt such regulations as he deems necessary and advisable for the conservation of species listed as threatened. The ESA salmon and steelhead 4(d) rule (65 FR 42422, July 10, 2000, as updated in 70 FR 37160, July 28, 2005) specifies categories of activities that contribute to the conservation of listed salmonids and sets out the criteria for such activities. The rule further provides that the prohibitions of paragraph (a) of the rule do not apply to activities associated with fishery harvest provided that an FMEP has been approved by NMFS to be in accordance with the salmon and steelhead 4(d) rule (65 FR 42422, July 10, 2000, as updated in 70 FR 37160, July 28, 2005).

Dated: April 7, 2011.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–9017 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA351

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Application for a new scientific research permit.

SUMMARY: Notice is hereby given that NMFS has received a scientific research permit application request relating to salmonids listed under the Endangered Species Act (ESA). The proposed research is intended to increase knowledge of the species and to help guide management and conservation efforts. The application and related documents may be viewed online at: *https://apps.nmfs.noaa.gov/preview/preview_open_for_comment.cfm*. These documents are also available upon written request or by appointment by contacting NMFS by phone (707) 825–5185 or fax (707) 825–4840.

DATES: Written comments on the permit application must be received at the appropriate address or fax number (*see* **ADDRESSES**) no later than 5 p.m. Pacific standard time on May 16, 2011.

ADDRESSES: Written comments on this application should be submitted to the Protected Resources Division, NMFS, 1655 Heindon Road, CA 95521. Comments may also be submitted via fax to (707) 825–4840 or by e-mail to *FRNpermits.ar@noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Diane Ashton, Arcata, CA (ph.: 707–825–5185, e-mail: *diane.ashton@noaa.gov*).

SUPPLEMENTARY INFORMATION:

Species Covered in This Notice

This notice is relevant to federally threatened California Southern Oregon/Northern California Coast (SONCC) coho salmon (*Oncorhynchus kisutch*).

Authority

Scientific research permits are issued in accordance with section 10(a)(1)(A)

of the ESA of 1973 (16 U.S.C. 1531–1543) and regulations governing listed fish and wildlife permits (50 CFR Parts 222–226). NMFS issues permits based on findings that such permits: (1) Are applied for in good faith; (2) if granted and exercised, would not operate to the disadvantage of the listed species which are the subject of the permits; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. The authority to take listed species is subject to conditions set forth in the permits.

Anyone requesting a hearing on the application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate *(see* **ADDRESSES**). Such hearings are held at the discretion of the Assistant Administrator for Fisheries, NMFS.

Application Received

Permit 16344

Dr. Jerri Bartholomew, Oregon State University at Corvalis, is requesting a 5-year permit to annually take 580 juvenile SONCC coho salmon of hatchery origin associated with two research projects to study the effects of the myxozoan parasite *Ceratomyxa shasta* on salmon and steelhead in the Klamath River in Northern California. In the two projects described below, Dr. Bartholomew and her co-investigators will utilize fish obtained from the Iron Gate Hatchery in California, transport fish to the John L. Fryer Disease Laboratory in Oregon, and will euthanize all individuals at the end of the experiments.

Project 1 is a study to determine the annual incidence of disease in May and June in the Klamath River (Humboldt County), California, following a 3-day exposure of individuals at the Beaver Creek and Seiad Valley sentinel sites. The study will compare trends in *C. shasta* infection prevalence, fish mortality, and time to death of juvenile fish of hatchery origin among years. Annually, Dr. Bartholomew proposes to collect, transport, and euthanize 220 juvenile SONCC coho salmon of hatchery origin for this project. Data from this study will provide information to estimate annual exposure of both wild and hatchery SONCC coho salmon to, and subsequent disease effects from, *C. shasta* among years; and to inform potential management actions to reduce infection rates.

Project 2 is a laboratory study to test whether sequential exposure of fish to a less virulent (IIR) strain of *C. shasta*, followed by exposure to a more virulent (IIC) strain, lessens disease effects (mortality, parasite production) within the juvenile SONCC coho salmon host. Annually, Dr. Bartholomew proposes to collect, transport, and euthanize 360 juvenile SONCC coho salmon of hatchery origin for this project. Data collected from these experiments will be used to inform potential disease management strategies for *C. shasta* in the Klamath River.

This notice is provided pursuant to section 10(c) of the ESA. NMFS will evaluate the application, associated documents, and comments submitted to determine whether the applications meet the requirements of section 10(a) of the ESA and Federal regulations.

The final permit decision will not be made until after the end of the 30-day comment period. NMFS will publish notice of its final action in the **Federal Register.**

Dated: April 7, 2011.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–9014 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA363

Marine Mammals; File No. 14352

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

ACTION: Notice; issuance of permit amendment.

SUMMARY: Notice is hereby given that Dr. Gregory Bossart, Georgia Aquarium, 225 Baker Street, NW., Atlanta, GA 30313 has been issued a major amendment to Permit No. 14352.

ADDRESSES: The permit amendment and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 713–0376; and

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, Florida 33701; phone (727) 824–5312; fax (727) 824–5309.

FOR FURTHER INFORMATION CONTACT: Carrie Hubard or Kristy Beard, (301) 713–2289.

SUPPLEMENTARY INFORMATION: On August 6, 2010, notice was published in the **Federal Register** (75 FR 47537) that a request for an amendment to Permit No. 14352 to conduct research on bottlenose dolphins (*Tursiops truncatus*) had been submitted by the above-named applicant. The requested permit amendment has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The permit has been amended to authorize research in a new study area: Charleston, South Carolina. Fifty bottlenose dolphins may be captured, sampled, and released in Charleston annually. Captured dolphins will receive a health assessment clinical workup. All captured animals will receive a roto tag. Up to ten animals per year will also receive a VHF tag. Samples will be analyzed to examine a variety of health topics such as: infectious diseases, immune status, contaminant exposure, antibiotic resistance, and genetics. An additional 400 dolphins per year may be harassed during pre- and post-capture surveys. The amended permit is valid until October 31, 2014.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: April 6, 2011.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–9019 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA365

Gulf of Mexico Fishery Management Council: Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene Public Hearings on: Amendment 18 to the Fishery Management Plan for Coastal Migratory Pelagic Resources in the Atlantic and Gulf of Mexico; Joint

Amendment 10 to the Spiny Lobster Fishery Management Plan for the Gulf of Mexico and South Atlantic; Generic Annual Catch Limits/Accountability Measures Amendment for the Gulf of Mexico Fishery Management Council's Red Drum, Reef Fish, Shrimp, Coral and Coral Reefs, and Stony Crab Fishery Management Plans.

DATES: The public meetings will be held on May 2, 2011 through May 18, 2011 at fourteen locations throughout the Gulf of Mexico. The public hearings will begin at 6 p.m. and will conclude no later than 9 p.m. For specific dates, see **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The public meetings will be held at locations listed in the **SUPPLEMENTARY INFORMATION.**

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Dr. Richard Leard, Deputy Executive Director/Senior Fishery Biologist, Dr. Steven Atran, Population Dynamics Statistician and Dr. Carrie Simmons, Fishery Biologist; Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Coastal Migratory Pelagic Resources

The Gulf of Mexico Fishery Management Council will hold public hearings on Amendment 18 to the Fishery Management Plan for Coastal Migratory Pelagic Resources in the Atlantic and Gulf of Mexico Including Environmental Assessment, Regulatory Impact Review, and Regulatory Flexibility Act Analysis. Amendment 18 contains alternatives for actions to set Annual Catch Limits and Accountability Measures if such limits are exceeded for Gulf group king mackerel, Gulf group Spanish mackerel, and Gulf group cobia. It also contains measures to remove cero, little tunny, dolphin, and bluefish from the fishery management plan, revise the framework procedure, and separate cobia into Atlantic and Gulf migratory groups. Similar measures are being proposed for the Atlantic migratory stocks.

Spiny Lobster

Public hearings will be held on Joint Amendment 10 to the Spiny Lobster Fishery Management Plan for the Gulf of Mexico and South Atlantic. Joint Amendment 10 establishes Annual Catch Limits and Accountability Measures for Caribbean spiny lobster as required by the Magnuson-Stevens Act. This amendment includes additional actions addressing modifications to the Fishery Management Unit, updates to protocol for Enhanced Cooperative Management, regulations regarding the possession of undersized lobsters or "shorts" as attractants for the commercial trap fishery, permit requirements for tailing spiny lobster, sector allocations, limiting spiny lobster fishing areas to protect threatened staghorn and elkhorn corals, and requirements for gear marking of all spiny lobster trap lines.

Reef Fish

Amendment 32—This amendment will establish annual catch limits and annual catch targets for 2012 to 2015 for gag and for 2012 for red grouper, and contains actions to establish a rebuilding plan for gag, set recreational bag limits, size limits and closed seasons for gag/red grouper in 2012, consider a commercial gag and shallow-water grouper quota adjustment to account for dead discards, make adjustment to multi-use IFQ shares in the grouper individual fishing quota program, reduce the commercial gag size limit, modify the offshore time and areas closures, and establish gag, red grouper, and shallow-water grouper accountability measures.

Generic Amendment

Public hearings will also be held to receive comments on the Generic Annual Catch Limits/Accountability measures Amendment for the Gulf of Mexico Fishery Management Council's Red Drum, Reef Fish, Shrimp, Coral and Coral Reefs, and Stone Crab Fishery Management Plans. This amendment contains actions to delegate management of selected species to the other agencies, remove selected species from the fishery management plans, group species for purposes of setting annual catch limits and annual catch targets, establish and acceptable biological catch control rule, establish an annual catch limit/annual catch target control rule, establish a generic framework procedure for implementing management changes, establish the initial specification of annual catch limits and annual catch targets for stocks and stock groups still in need of such specification, establish the apportionment of the black grouper, yellow tail snapper, and mutton snapper stocks between the Gulf and South Atlantic Council jurisdictions, set a commercial and recreational allocation of black grouper within in the Gulf Council's jurisdiction, and establish accountability measures to keep catch levels within their annual catch limits or take corrective action if they exceed the limits.

The Public Hearings will begin at 6 p.m. and conclude at the end of public testimony or no later than 9 p.m. at the following locations:

Monday, May 2, 2011

- ACL—Hilton St. Petersburg Carillon Parkway, 950 Lake Carillon Drive, St. Petersburg, FL, telephone: (727) 540–0050;
- ACL—Clarion Hotel, 12635 South Cleveland Avenue, Fort Myers, FL 33907, telephone: (239) 936–4300;
- Mackerel—Best Western, 7921 Lamar Poole Road, Biloxi, MS 39532, telephone: (228) 875–7111;

Tuesday, May 3, 2011

- Amend 32—Hilton St. Petersburg Carillon Parkway, 950 Lake Carillon Drive, St. Petersburg, FL, telephone: (727) 540–0050;
- Amend 32—Clarion Hotel, 12635 South Cleveland Avenue, Fort Myers, FL 33907, telephone: (239) 936–4300;
- Mackerel—Fairfield Inn & Suites, 3111 Loop Road, Orange Beach, FL 36561, telephone: (251) 543–4444;

Wednesday, May 4, 2011

- Amend 32—Banana Bay Resort, 4590 Overseas Highway, Marathon, FL 33050, telephone: (305) 743–3500;
- Mackerel—Boardwalk—Royal American Beach Getaways, 9400 S. Thomas Drive, Panama City Beach, FL 32408, telephone: (850) 230–4681;

Thursday, May 5, 2011

- ACL—Banana Bay Resort, 4590 Overseas Highway, Marathon, FL 33050, telephone: (305) 743–3500;

Monday, May 9, 2011

- Mackerel/Spiny Lobster, Sirata Beach Resort, 5300 Gulf Boulevard, St. Pete Beach, FL 33706, telephone: (727) 363–5176;
- ACL/Amend 32—Renaissance Riverview Plaza, 64 South Water Street, Mobile, AL 36602;
- ACL—Boardwalk—Royal American Beach Getaways, 9400 S. Thomas Drive, Panama City Beach, FL 32408, telephone: (850) 230–4681;

Tuesday, May 10, 2011

- Amend 32/ACL—Hilton, 5400 Seawall Blvd., Galveston, TX 77551, telephone: (409) 744–1757;
- Amend 32/ACL—Best Western, 7921 Lamar Poole Road, Biloxi, MS 39532, telephone: (228) 875–7111;
- Amend 32—Boardwalk—Royal American Beach Getaways, 9400 S. Thomas Drive, Panama City Beach, FL 32408, telephone: (850) 230–4681;

Wednesday, May 11, 2011

• Amend 32—Harte Research Institute, Conference Room, 6300 Ocean Drive, Corpus Christi, TX 78412–5869, telephone: (361) 825–2000;

• Amend 32/ACL—Hilton Garden Inn, 4535 Williams Blvd., Kenner, LA 70065, telephone: (504) 712–0109;

Thursday, May 12, 2011

• ACL—Plantation Suites and Conference Center, 1909 Highway 361, Port Aransas, TX 78373, telephone: (361) 749–3866;

Monday, May 16, 2011

• Mackerel—Fisheries Research Lab, 195 Ludwig Annex, Grand Isle, LA 70358, telephone: (985) 787–2163;

Tuesday, May 17, 2011

• Mackerel—Hampton Inn, 506 West Bay Area Blvd., Webster, TX 77598, telephone: (281) 332–7952;

Wednesday, May 18, 2011

• Mackerel—Plantation Suites and Conference Center, 1909 Highway 361, Port Aransas, TX 78373, telephone: (361) 749–3866.

Copies of the documents can be obtained by calling (813) 348–1630.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: April 11, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–9055 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA366

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Pacific Fishery Management Council (Pacific Council) will convene a Pacific mackerel Stock Assessment Review (STAR) Panel meeting that is open to the public.

DATES: The meeting will be held Monday, May 2, 2011 through Thursday, May 5, 2011. Business will begin each day at 8:30 a.m. the first day, and at 8 a.m. each subsequent day. The meeting will conclude each day at 5 p.m. or until business for the day is completed. The meeting may conclude before 5 p.m. on Thursday if business has been completed.

ADDRESSES: The meeting will be held in the Green Room of the National Marine Fisheries Service's Southwest Fisheries Science Center; 8604 La Jolla Shores Drive, La Jolla, CA 92037.

FOR FURTHER INFORMATION CONTACT: Kerry Griffin, Staff Officer; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The primary purpose of the meeting is to review the Pacific mackerel stock assessment for 2011, in order to inform fisheries management decisions for the 2011–12 fishery. Other issues relevant to Pacific mackerel management and science may be addressed as time permits.

Although non-emergency issues not contained in the meeting agenda may come before the STAR Panel for discussion, those issues may not be the subject of formal action during this meeting. STAR Panel action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the STAR Panel's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: April 11, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–9056 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 101014509–1211–02]

RIN 0648–XZ62

Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions

AGENCY: Office of General Counsel (OGC), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice of issuance; final policy.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) announces the publication and issuance of a final Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions (Penalty Policy).

DATES: The final Penalty Policy was issued on March 16, 2011, and became effective on that date.

ADDRESSES: The final Penalty Policy is available electronically on NOAA's website at *http://www.gc.noaa.gov/enforce-office1.html.* A paper copy of the Penalty Policy may be requested by sending a self-addressed envelope (size 8.5 x 11 inches) to the individual under the heading **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: Frank Sprtel by telephone at (301) 496–7147; by fax at (301) 427–2210; by e-mail at *frank.sprtel@noaa.gov;* or by mail at: Office of General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

SUPPLEMENTARY INFORMATION: The Penalty Policy is intended to provide guidance for the assessment of civil administrative penalties and permit sanctions under the statutes and regulations enforced by NOAA. As explained more fully in the text of the policy, the purpose of the Penalty Policy is to ensure that: (1) Civil administrative penalties and permit sanctions are assessed in accordance with the laws that NOAA enforces in a fair and consistent manner; (2) penalties and permit sanctions are appropriate for the gravity of the violation; (3) penalties and permit sanctions are sufficient to deter both individual violators and the regulated community as a whole from committing violations; (4) economic incentives for noncompliance are eliminated; and (5) compliance is expeditiously achieved and maintained to protect natural resources. Under this

Policy, NOAA expects to improve consistency at a national level, provide greater predictability for the regulated community and the public, improve transparency in enforcement, and more effectively protect natural resources.

Under the new Penalty Policy, penalties and permit sanctions are based on two criteria: (1) A "base penalty" calculated by adding an initial base penalty amount and permit sanction reflective of the gravity of the violation and the culpability of the violator and adjustments to the initial base penalty and permit sanction upward or downward to reflect the particular circumstances of a specific violation; and (2) an additional amount added to the base penalty to recoup the proceeds of any unlawful activity and any additional economic benefit of noncompliance. We note that the new Penalty Policy is a departure from NOAA's prior practice of developing detailed penalty schedules by region and by specific types of violations with broad ranges for both penalty and permit sanctions. The new policy uses a simplified approach of one penalty and permit sanction matrix for each major statute that NOAA enforces, to be applied nationally, with narrower penalty and permit sanction ranges. This approach assures that NOAA attorneys are provided with greater guidance in recommending penalties, and should assure fairness and consistency of approach across NOAA statutes, across fisheries, and across the country.

NOAA sought public comment on the proposed draft penalty policy between October 21, 2010 and December 20, 2010. NOAA received written input on the proposed policy from regional fishery management councils, industry trade groups, commercial interests, nonprofit organizations, academic institutions, and federal, state, and interstate agencies. A summary of the comments received along with NOAA's responses to these comments is available at the website above.

The final Penalty Policy supersedes previous guidance regarding assessment of penalties or permit sanctions and previous penalty and permit sanction schedules issued by the NOAA Office of General Counsel, and goes into effect immediately for any cases charged after its issuance date. This Penalty Policy provides guidance for the NOAA Office of General Counsel, but does not, nor is it intended to, create a right or benefit, substantive or procedural, enforceable at law or in equity, in any person or company.

The full final Penalty Policy, along with examples, matrixes, and schedules, may be found at *http://www.gc.noaa.gov/enforce-office1.html.*

Dated: April 5, 2011.

Lois J. Schiffer,

General Counsel, National Oceanic and Atmospheric Administration.

[FR Doc. 2011–9021 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–12–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–C–2011–0022]

Public Advisory Committees

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice and request for nominations.

SUMMARY: On November 29, 1999, the President signed into law the Patent and Trademark Office Efficiency Act (the "Act"), Public Law 106–113, which, among other things, established two Public Advisory Committees to review the policies, goals, performance, budget and user fees of the United States Patent and Trademark Office (USPTO) with respect to patents, in the case of the Patent Public Advisory Committee, and with respect to trademarks, in the case of the Trademark Public Advisory Committee, and to advise the Director on these matters (now codified at 35 U.S.C. 5). The USPTO is requesting nominations for three (3) members to each Public Advisory Committee for terms of three years that begin at the expiration of the predecessors' terms, or on October 6, 2011.

DATES: Nominations must be postmarked or electronically transmitted on or before May 20, 2011.

ADDRESSES: Persons wishing to submit nominations should send the nominee's resumé to Chief of Staff, Office of the Under Secretary of Commerce for Intellectual Property and Director of the USPTO, Post Office Box 1450, Alexandria, Virginia 22313–1450; by electronic mail to: *PPACnominations@uspto.gov* for the Patent Public Advisory Committee or *TPACnominations@uspto.gov* for the Trademark Patent Public Advisory Committee; by facsimile transmission marked to the Chief of Staff's attention at (571) 273–0464, or by mail marked to the Chief of Staff's attention and addressed to the Office of the Under Secretary of Commerce for Intellectual Property and Director of the USPTO, Post Office Box 1450, Alexandria, Virginia 22313–1450.

FOR FURTHER INFORMATION CONTACT: Andrew H. Hirshfeld, Chief of Staff, by facsimile transmission marked to his attention at (571) 273–0464, or by mail marked to his attention and addressed to the Office of the Under Secretary of Commerce for Intellectual Property and Director of the USPTO, Post Office Box 1450, Alexandria, Virginia 22313–1450.

SUPPLEMENTARY INFORMATION: The Advisory Committees' duties include:

- Review and advise the Under Secretary of Commerce for Intellectual Property and Director of the USPTO on matters relating to policies, goals, performance, budget, and user fees of the USPTO relating to patents and trademarks, respectively; and
- Within 60 days after the end of each fiscal year: (1) Prepare an annual report on matters listed above; (2) transmit a report to the Secretary of Commerce, the President, and the Committees on the Judiciary of the Senate and the House of Representatives; and (3) publish the report in the Official Gazette of the USPTO.

Advisory Committees

The Public Advisory Committees are each composed of nine (9) voting members who are appointed by the Secretary of Commerce (the "Secretary") and serve at the pleasure of the Secretary for three (3)-year terms. The Public Advisory Committee members must be United States citizens and represent the interests of diverse users of the USPTO, both large and small entity applicants in proportion to the number of such applications filed. The Committees must include members who have "substantial backgrounds and achievement in finance, management, labor relations, science, technology, and office automation." 35 U.S.C. 5(b)(3). In the case of the Patent Public Advisory Committee, at least twenty-five (25) percent of the members must represent "small business concerns, independent inventors, and nonprofit organizations," and at least one member must represent the independent inventor community (35 U.S.C. 5(b)(2)). Each of the Public Advisory Committees also includes three (3) non-voting members representing each labor organization recognized by the USPTO. Administration policy discourages the appointment of Federally registered lobbyists to agency advisory boards and commissions (Lobbyists on Agency Boards and Commissions, *http://www.whitehouse.gov/blog/2009/09/23/lobbyist-agency-boards-and-commissions* (Sept. 23, 2009, 2:33PM EST)); cf. Exec. Order No. 13490, 74 FR 4673 (January 21, 2009) (while Executive Order 13490 does not

specifically apply to Federally registered lobbyists appointed by agency or department heads, it sets forth the Administration's general policy of decreasing the influence of special interests in the Federal Government).

Procedures and Guidelines of the Patent and Trademark Public Advisory Committees

Each newly appointed member of the Patent and Trademark Public Advisory Committees will serve for a term of three years beginning at the expiration of his or her predecessor's term. As required by the Act, members of the Patent and Trademark Public Advisory Committees will receive compensation for each day while the member is attending meetings or engaged in the business of that Advisory Committee. The enabling statute states that members are to be compensated at the daily equivalent of the annual rate of basic pay in effect for level III of the Executive Schedule under section 5314 of Title 5, United States Code. Committee members are compensated on an hourly basis, calculated at the daily rate. While away from home or regular place of business, each member will be allowed travel expenses, including per diem in lieu of subsistence, as authorized by Section 5703 of Title 5, United States Code. The USPTO will provide clerical and other support services for the Committees as the Director may determine to be necessary and proper.

Applicability of Certain Ethics Laws

Members of each Public Advisory Committee shall be Special Government Employees within the meaning of Section 202 of Title 18, United States Code. The following additional information includes several, but not all, of the ethics rules that apply to members, and assumes that members are not engaged in Public Advisory Committee business more than sixty days during any period of 365 consecutive days.

- Each member will be required to file a confidential financial disclosure form within thirty (30) days of appointment. 5 CFR 2634.202(c), 2634.204, 2634.903, and 2634.904(b).
- Each member will be subject to many of the public integrity laws, including criminal bars against representing a party, 18 U.S.C. 205(c), in a particular matter that came before the member's committee and that involved at least one specific party. *See also* 18 U.S.C. 207 for post-membership bars. A member also must not act on a matter in which the member (or any of certain closely related entities) has a financial interest (18 U.S.C. 208).
- Representation of foreign interests may also raise issues (35 U.S.C. 5(a)(1) and 18 U.S.C. 219).

Meetings of the Patent and Trademark Public Advisory Committees

Meetings of each Advisory Committee will take place at the call of the respective Committee Chair to consider an agenda set by that Chair. Meetings may be conducted in person, electronically through the Internet, or by other appropriate means. The meetings of each Advisory Committee will be open to the public except each Advisory Committee may, by majority vote, meet in confidential executive sessions when considering personnel, privileged, or other confidential matters. Nominees must have the ability to participate in Committee business through the Internet.

Procedures for Submitting Nominations

Submit resumés for nomination for the Patent Public Advisory Committee and the Trademark Public Advisory Committee to: Chief of Staff to the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, utilizing the addresses provided above.

Dated: April 8, 2011.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2011–9085 Filed 4–13–11; 8:45 am]

BILLING CODE 3510–16–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday, April 20, 2011; 10 a.m.—11 a.m.

PLACE: Room 410, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Closed to the public.

MATTER TO BE CONSIDERED:

Compliance Status Report

The Commission staff will brief the Commission on the status of compliance matters.

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: April 12, 2011.

Todd A Stevenson,

Secretary.

[FR Doc. 2011–9218 Filed 4–12–11; 4:15 pm]

BILLING CODE 6355–01–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Information Collection; Submission for OMB Review, Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the "Corporation"), has submitted a public information collection request (ICR) entitled Assessment of the National Conference on Volunteering and Service (formerly known as National Conference Surveys), for review and approval in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, (44 U.S.C. Chapter 35). Copies of this ICR, with applicable supporting documentation, may be obtained by calling the Corporation for National and Community Service, Nathan Dietz, at (202) 606–6633 or e-mail to *ndietz@cns.gov*. Individuals who use a telecommunications device for the deaf (TTY–TDD) may call (202) 606–3472 between 8:30 a.m. and 5 p.m. Eastern Time, Monday through Friday.

ADDRESSES: Comments may be submitted, identified by the title of the information collection activity, to the Office of Information and Regulatory Affairs, Attn: Ms. Sharon Mar, OMB Desk Officer for the Corporation for National and Community Service, by any of the following two methods within 30 days from the date of publication in the **Federal Register**:

(1) By fax to: (202) 395–6974, Attention: Ms. Sharon Mar, OMB Desk Officer for the Corporation for National and Community Service; and

(2) Electronically by e-mail to *smar@omb.eop.gov*.

SUPPLEMENTARY INFORMATION: The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, 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;

• Propose ways to enhance the quality, utility, and clarity of the information to be collected; and

• Propose ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Comments

A 60-day public comment Notice was published in the **Federal Register** on December 16, 2010. This comment period ended February 16, 2011. No public comments were received from this Notice.

Description: The Corporation is seeking approval of the Assessment of the National Conference on Volunteering and Service (formerly known as the Conference Surveys) which is completed by the conference's attendees to assess the satisfaction of participants with the conference's activities, and gather feedback about the informational and other needs of conference attendees. Data are collected using the following surveying methods as described below.

• NCVS Registration Survey Form—data collected via the Conference registration system that provides demographic data on registered attendees, expectations and previous experiences.

• Workshop Survey Form—onsite and online surveys administered in all Conference sessions to learn about the workshop/session experience from the perspective of attendees.

• Post-Conference Online Survey—an online survey administered to registered attendees (excluding Conference exhibitors) to gather information about participation, quality and satisfaction.

• Follow-up Survey—an online survey administered to registered attendees (excluding Conference exhibitors) to gather information about participants' utilization of knowledge and resources gained during the Conference.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: Assessment of the National Conference on Volunteering and Service (formerly known as National Conference Surveys).

OMB Number: #6045–0128.

Agency Number: None.

Affected Public: Individuals and households, community and faith-based organizations, non-profits, state and local government and educational institutions and businesses.

Total Respondents: 5,000.

Frequency: Annual.

Average Time per Response: Fifteen minutes per survey.

Estimated Total Burden Hours: 6,667 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Dated: April 8, 2011.

Heather Peeler,

Chief Strategy Officer, Strategy Office.

[FR Doc. 2011–9023 Filed 4–13–11; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Native American-Serving Nontribal Institutions Part F Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

Overview Information:

Native American-Serving Nontribal Institutions (NASNTI) Part F Program.

Notice inviting applications for new awards using fiscal year (FY) 2010 funds.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.382C.

DATES: *Applications Available:* April 14, 2011.

Deadline for Transmittal of Applications: May 31, 2011.

Deadline for Intergovernmental Review: July 28, 2011.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The NASNTI Part F Program provides grants and related assistance to Native American-Serving Nontribal Institutions to enable these institutions to improve and expand their capacity to serve Native Americans and low-income individuals by increasing their self-sufficiency in improving academic programs, institutional management, and fiscal stability. To qualify for funds under the NASNTI Program, an institution of higher education (IHE) must; have an enrollment of undergraduate students that is at least 10 percent Native American at the time of application for a grant; and not be a Tribal College or University under section 316 of the HEA.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed program requirements. Section 437(d)(1) of the General Education Provisions Act (GEPA), however, allows the Secretary to exempt from rulemaking requirements, regulations governing the first grant competition under a new or substantially revised program authority. The Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) (Reconciliation Act) provided new authority to implement the NASNTI Part F Program authorized under section 371 of the HEA. This is the first grant competition for this program since the Reconciliation Act; therefore, this competition qualifies for the exemption.

Under section 437(d)(1) of GEPA, in order to ensure timely grant awards, the Secretary has decided to forego public comment on the following requirements for this competition: the requirements *established* in Notes 1 and 2 in the *Relationship between the Title III, Part F Programs* section of this notice.

Priorities: These priorities are from the notice of supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486).

Competitive Preference Priorities: For FY 2011, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award an additional two and one-half points to an application that meets one of the priorities, or an additional five points to an application that meets both of these priorities.

These priorities are:

Priority I—Increasing Postsecondary Success

Increasing the number and proportion of high-need students (as defined in this notice) who persist in and complete college or other postsecondary education and training; and,

Priority II—Enabling More Data-Based Decision-Making

Projects that are designed to collect (or obtain), analyze, and use high-quality and timely data, including data on program participant outcomes, in accordance with privacy requirements (as defined in this notice), in the following priority area:

Improving postsecondary student outcomes relating to enrollment, persistence, and completion and leading to career success.

Definitions: These definitions are from the notice of final supplemental priorities and definitions for discretionary grant programs, published

in the **Federal Register** on December 15, 2010.

High-need children and high-need students means children and students at risk of educational failure, such as children and students who are living in poverty, who are English learners, who are far below grade level or who are not on track to becoming college- or career-ready by graduation, who have left school or college before receiving, respectively, a regular high school diploma or a college degree or certificate, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who are pregnant or parenting teenagers, who have been incarcerated, who are new immigrants, or who have disabilities.

Privacy requirements means the requirements of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and its implementing regulations in 34 CFR part 99, the Privacy Act, 5 U.S.C. 552a, as well as all applicable Federal, State and local requirements regarding privacy.

Program Authority: 20 U.S.C. 1067q.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 82, 84, 85, 86, 97, 98, and 99. (b) The notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486).

Note: The regulations in 34 CFR part 79 apply to all applicants except Federally recognized Indian tribes.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $5,000,000.

Note: These funds were appropriated for FY 2010, but have been carried over into FY 2011 pursuant to 20 U.S.C. 1067q (b)(1)(B) and are available for obligation in FY 2011.

Estimated Average Size of Awards: $350,000—$400,000.

Estimated Number of Awards: 12.

Note: The Department is not bound by any estimates in this notice. Applicants should periodically check the Title III Program's Web site for further information. The address is: *http://www.ed.gov/about/offices/list/ope/idues/index.html.*

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* An IHE is eligible to receive funds under this program if it is a Native American-Serving Nontribal Institution (NASNTI).

Native American. The term 'Native American' means an individual who is of a tribe, people, or culture that is indigenous to the United States. As part of the application for a grant, applicants will be required to complete and submit a certification assurance form on which the applicant provides their total undergraduate headcount enrollment and certifies that 10 percent of its enrollment is Native American for the purpose of the NASNTI Part F Program. The form must be submitted and signed by an official with the authority to represent the institution.

To qualify as an eligible institution under the NASNTI Part F Program, an institution must, among other requirements—

(1) Be accredited or preaccredited by a nationally recognized accrediting agency or association that the Secretary has determined to be a reliable authority as to the quality of education or training offered; and

(2) Be legally authorized by the State in which it is located to be a junior college or to provide an educational program for which it awards a bachelor's degree; *Relationship between the Title III, Part F Programs.*

Note 1: A grantee under the NASNTI Part F Program, the Asian American and Native American Pacific Islander-Serving Institutions (AANAPISI), Hispanic Serving Institutions–STEM and Articulation (HSI–STEM), and Predominantly Black Institutions (PBI) programs authorized by Title III, Part F, section 371 of the HEA, may apply for a FY 2011 grant under all Title III, Part F programs for which it is eligible. However, a successful applicant may receive only one grant.

Note 2: The Department will make grant awards in rank order from the funding slates according to the average score received from a panel of three readers.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:* LaTonya Brown or Darlene Collins, U.S. Department of Education, 1990 K Street, NW., 6th floor, Washington, DC 20006–8513. You may contact these individuals at the following e-mail addresses or telephone numbers:

LaTonya.Brown@ed.gov; (202) 502–7619,

Darlene.Collins@ed.gov; (202) 502–7576.

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative [Part III] to no more than 50 pages, using the following standards:

- A "page" is 8.5" x 11", on one side only, with 1" margins at the top, bottom, and both sides. Page numbers and an identifier may be outside of the 1" margin.
- Double space (no more than three lines per vertical inch) all text in the application narrative, *except* titles, headings, footnotes, quotations, references, and captions. Charts, tables, figures, and graphs in the application narrative may be single spaced and will count toward the page limit.
- Use a font that is either 12-point or larger or no smaller than 10 pitch (characters per inch). However, you may use a 10-point font in charts, tables, figures, graphs, footnotes, and endnotes.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the Application for Federal Assistance (SF 424-cover sheet); the Supplemental Information for SF 424 Form required by the Department of Education; Part II, the budget section, Budget Information—Non-Construction Programs (ED 524), including the Narrative Budget Justification; Part IV, the Assurances and Certifications; or the one-page word document Program Abstract, the resumes, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section [Part III]. If you include any attachments or appendices not specifically requested in the program narrative, (Part III of the application) these items will be counted as part of the Program Narrative for purposes of the page limit requirement. You must include your complete response to the selection criteria in the program narrative.

Note: Partial pages (pages on which the narrative or data do not take up the full page) are counted as whole pages for purposes of the page limitation.

We will reject your application if you exceed the page limit.

3. *Submission Dates and Times:*

Applications Available: April 14, 2011.

Deadline for Transmittal of Applications: May 31, 2011.

Applications for grants under this program must be submitted electronically using the Grants.gov apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV.7. *Other Submission in Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice. Deadline for Intergovernmental Review: July 28, 2011.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference the regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined in the Grants.gov 3–Step Registration Guide (*see http://www.grants.gov/section910/GrantsgovRegistrationBrochure.pdf*).

7. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the NASNTI Program, CFDA Number 84.382C, must be submitted electronically using the Government-wide Grants.gov Apply site at *http://www.Grants.gov*. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions to the electronic submission *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for NASNTI Part F Program at *http://www.Grants.gov*. You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.*, search for 84.382, not 84.382C).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this program to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov*.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for

an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

• You must upload any narrative sections and all other attachments to your application as files in a .PDF (Portable Document) format only. If you upload a file type other than a .PDF or submit a password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time, or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system; and

• No later than two weeks before the application deadline date (14 calendar days; or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: LaTonya Brown, U.S. Department of Education, 1990 K Street, NW., Room 6029, Washington, DC 20006–8513. *Fax:* (202) 502–7861.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.382C), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.382C), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this

grant notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 75.210 in the Education Department General Administrative Regulations (EDGAR) and are described in the following paragraphs. Applicants must address each of the following selection criteria. The total weight of the selection criteria is 100 points; the weight of each criterion is noted in parentheses.

(a) *Need for the project.* (Maximum 20 points) The Secretary considers the need for the proposed project. In determining the need for the proposed project, the Secretary considers:

(1) The magnitude of the need for the services to be provided or the activities to be carried out by the proposed project. (10 points)

(2) The extent to which the proposed project will focus on serving or otherwise addressing the needs of disadvantaged individuals. (5 points)

(3) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses. (5 points)

(b) *Quality of the project design.* (Maximum 15 points) The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers:

(1) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable. (10 points)

(2) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs. (5 points)

(c) *Quality of project services.* (Maximum 15 points) The Secretary considers the quality of the services to be provided by the proposed project. In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. In addition, the Secretary considers:

(1) The extent to which the services provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services. (10 points)

(2) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice. (5 points)

(d) *Quality of project personnel.* (Maximum 10 points) The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

In addition, the Secretary considers:

(1) The qualifications, including relevant training and experience, of the project director or principal investigator. (5 points)

(2) The qualifications, including relevant training and experience, of key project personnel. (5 points)

(e) *Adequacy of resources.* (Maximum 5 points) The Secretary considers the adequacy of resources for the proposed project. In determining the adequacy of resources for the proposed project, the Secretary considers:

(1) The extent to which the budget is adequate to support the proposed project. (3 points)

(2) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project. (2 points)

(f) *Quality of the management plan.* (Maximum 20 points) The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks. (10 points)

(2) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project. (5 points)

(3) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project. (5 points)

(g) *Quality of the project evaluation.* (Maximum 15 points) The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers:

(1) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project. (5 points)

(2) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible. (5 points)

(3) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes. (5 points)

2. *Scoring Process:* For five-year individual development grants, awards will be made in rank order according to the average score received from a panel of three readers. All NASNTI, Part F applications for individual development grants will be ranked together from the highest to the lowest score for funding purposes.

3. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

4. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification

(GAN). We may notify you informally also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section in this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The Secretary has established the following key performance measures for assessing the effectiveness of the NASNTI Part F Program:

a. The percentage change, over a five-year period, of the number of full-time degree-seeking undergraduates enrolling at NASNTIs. Note that this is a long-term measure, which will be used to periodically gauge performance;

b. The percentage of first-time, full-time degree-seeking undergraduate students at four-year NASNTIs who were in their first year of postsecondary enrollment in the previous year and are enrolled in the current year at the same NASNTI;

c. The percentage of first-time, full-time degree-seeking undergraduate students at two-year NASNTIs who were in their first year of postsecondary enrollment in the previous year and are enrolled in the current year at the same NASNTI;

d. The percentage of first-time, full-time degree-seeking undergraduate students enrolled at four-year NASNTIs who graduate within six years of enrollment; and

e. The percentage of first-time, full-time degree-seeking undergraduate students enrolled at two-year NASNTIs who graduate within three years of enrollment.

In addition, the Department has developed the following efficiency measure for the NASNTI Part F Program. Efficiency measure: Federal cost per undergraduate degree at NASNTIs.

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made "substantial progress toward meeting the objectives in its approved application." This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contacts

FOR FURTHER INFORMATION CONTACT: LaTonya Brown or Darlene Collins, U.S. Department of Education, 1990 K Street, NW., 6th floor, Washington, DC 20006–8513. You may contact these individuals at the following e-mail addresses or telephone numbers:

LaTonya.Brown@ed.gov; (202) 502–7619,

Darlene.Collins@ed.gov; (202) 502–7576.

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) on request to the program contact persons listed in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

Dated: April 11, 2011.

Eduardo M. Ochoa,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2011–9117 Filed 4–13–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: U.S. Department of Energy.

ACTION: 30-Day notice of submission of information collection approval from the Office of Management and Budget and request for comments.

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, the Department of Energy 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 May 16, 2011.

ADDRESSES: Written comments may be submitted to: DOE Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 735 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: To request additional information: DOE PRA Officer, Christina Rouleau IM–23, U.S. Department of Energy, Corp. 270 room 4002, 1000 Independence Ave., SW., Washington, DC 20585, *Christina.Rouleau@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

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. Qualitative feedback means 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 reliable actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

The 60-day notice was published in the **Federal Register** of December 22, 2010 (75 FR 80542).

Below we provide the Department of Energy projected average estimates for the next three years: [1]

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: 100.

Respondents: 2,220.

Annual Responses: 222,000.

Frequency of Response: Once per request.

Average Minutes per Response: 30.

Burden hours: 111,000.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget control number.

Statutory Authority: Due to the special circumstances regarding this initiative led by OIRA, there are no statutory authorities reported for this notice.

John E. Davenport, Sr.,

Director, Records Management Division, Office of the ACIO for IT Planning, Architecture and E-Government, Office of the Chief Information Officer, U.S. Department of Energy.

[FR Doc. 2011–9080 Filed 4–13–11; 8:45 am]

BILLING CODE 6450–01–P

[1] The 60-day notice included the following estimate of the aggregate burden hours for this generic clearance Federal-wide:

Average Expected Annual Number of Activities: 25,000.

Average Number of Respondents per Activity: 200.

Annual Responses: 5,000,000.

Frequency of Response: Once per request.

Average Minutes per Response: 30.

Burden hours: 2,500,000.

DEPARTMENT OF ENERGY

[OE Docket No. EA–377]

Application To Export Electric Energy; DC Energy Texas, LLC

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of application.

SUMMARY: DC Energy Texas, LLC (DCE Texas) has requested authority to transmit electric energy from the United States to Mexico pursuant to section 202(e) of the Federal Power Act (FPA).

DATES: Comments, protests, or requests to intervene must be submitted to DOE and received on or before May 16, 2011.

ADDRESSES: Comments, protests, or requests to intervene should be addressed to: Lamont Jackson, Office of Electricity Delivery and Energy Reliability, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350. Because of delays in handling conventional mail, it is recommended that documents be transmitted by overnight mail, by electronic mail to *Lamont.Jackson@hq.doe.gov,* or by facsimile to 202–586–8008.

FOR FURTHER INFORMATION CONTACT: Lamont Jackson (Program Office) 202–586–0808.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of the FPA (16 U.S.C. 824a(e)).

On March 18, 2011, DOE received an application from DCE Texas requesting authority to transmit electric energy from the United States to Mexico for five years as a power marketer. DCE Texas proposes to use existing authorized international electric transmission facilities that are appropriate for open access by third parties, including facilities that have been authorized but not yet constructed and placed into operation. Neither DCE Texas nor any of its affiliates owns, controls or operates any electric transmission facilities, nor do they hold a franchise service area for sale, distribution or transmission of electricity.

The electric energy that DCE Texas proposes to export to Mexico would be surplus energy purchased from electric utilities, Federal power marketing agencies, and other entities within the United States. The existing international transmission facilities to be utilized by DCE Texas have previously been authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to become a party to these proceedings or to be heard by filing comments or protests to this application should file a petition to intervene, comment, or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the Federal Energy Regulatory Commission's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with DOE and must be received on or before the date listed above.

Comments on the DCE Texas application to export electric energy to Mexico should be clearly marked with OE Docket No. EA–377. An additional copy is to be filed directly with Stephen C. Palmer, Alston & Bird, LLC, Atlantic Building, 950 F Street, NW., Washington, DC 20004–1404 and Joelle K. Ogg, General Counsel, DC Energy,

LLC, 8065 Leesburg Pike, sixth floor, Vienna, VA 22182. A final decision will be made on this application after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR Part 1021) and after a determination is made by DOE that the proposed action will not have an adverse impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program Web site at *http://www.oe.energy.gov/permits_pending.htm*, or by emailing Odessa Hopkins at *Odessa.Hopkins@hq.doe.gov*.

Issued in Washington, DC, on April 8, 2011.

Anthony J. Como,

Director, Permitting and Siting, Office of Electricity Delivery and Energy Reliability.

[FR Doc. 2011–9078 Filed 4–13–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2230–044]

City and Borough of Sitka, AK; Notice of Application Accepted for Filing, Ready for Environmental Analysis, Soliciting Comments, Motions To Intervene, Protests, Recommendations, Terms and Conditions, and Fishway Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Amendment of License.

b. *Project No.:* 2230–044.

c. *Date Filed:* November 23, 2010; supplemented by filings on March 10 and April 6, 2011.

d. *Applicant:* City and Borough of Sitka, Alaska.

e. *Name of Project:* Blue Lake Project.

f. *Location:* The project is located on Sawmill Creek in the Borough of Sitka, Alaska. The project occupies federal lands managed by the U.S. Forest Service within the Tongass National Forest.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* City and Borough of Sitka, Electric Department, Attn: Christopher Brewton, Utility Director, 105 Jarvis Street, Sitka, Alaska 99835 (907) 747–1870.

i. *FERC Contact:* Mr. Steven Sachs (202) 502–8666 or *Steven.Sachs@ferc.gov*.

j. Deadline for filing motions to intervene and protests, comments, recommendations, terms and conditions, and fishway prescriptions is 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents may be filed electronically via the Internet. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp*. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments.

Please include the project number (P–2230–044) on any comments, motions, recommendations, or terms and conditions filed.

k. *Description of Request:* The applicant proposes to increase the height of the project's concrete arch dam by 83 feet and to construct a new water intake in the reservoir 109 feet above the existing intake. The higher maximum reservoir elevation would inundate an additional 362 acres of Forest Service lands within the Tongass National Forest. The proposal also includes the construction of a new Blue Lake Unit powerhouse containing three 5.3 megawatt (MW) turbine-generator units near the existing powerhouse. Additionally, the Fish Valve Unit would be replaced with a new 1 MW turbine-generator unit and the 870 kilowatt Pulp Mill Feeder Unit would be decommissioned. The project's total installed capacity would change from an existing 7.5 MWs to 16.9 MWs. The licensee also proposes to construct a new underground surge chamber located about a quarter mile up the power conduit from the powerhouse on land owned by the licensee.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp*. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* All filings must (1) Bear in all capital letters the title "COMMENTS", "PROTEST", "MOTION TO INTERVENE", "TERMS AND CONDITIONS" or "FISHWAY PRESCRIPTIONS" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the amendment. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

p. As provided for in 18 CFR 4.34(b)(5)(i), a license applicant must file, no later than 60 days following the date of issuance of this notice of acceptance and ready for environmental analysis: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Dated: April 8, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–9068 Filed 4–13–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 739–022–VA]

Appalachian Power Company; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission (Commission) regulations, 18 CFR Part 380 (Order No. 486, 52 FR 47879), the Office of Energy Projects has reviewed the application for a new license for the Claytor Hydroelectric Project, located on the New River in Pulaski County, Virginia, and prepared a final environmental assessment (EA). In the final EA, Commission staff analyzes the potential environmental effects of licensing the project and conclude that issuing a license for the project, with appropriate environmental measures, would not constitute a major Federal action significantly affecting the quality of the human environment.

A copy of the final EA is on file with the Commission and is available for public inspection. The final EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

For further information, contact Emily Carter at (202) 502–6512.

Dated: April 8, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–9067 Filed 4–13–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Availability of the Draft Environmental Impact Statement for the Relicensing of the Boundary Hydroelectric Project and the Surrender of the Sullivan Creek Project and Intention To Hold Public Meetings

Boundary Hydroelectric Project
Project No. 2144–038
Sullivan Creek Project
Project No. 2225–015

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission (Commission or FERC) regulations contained in the Code of Federal Regulations (CFR)(18 CFR part 380 [FERC Order No. 486, 52 FR 47897]), the Office of Energy Projects has reviewed the applications for license for the Boundary Hydroelectric Project (FERC No. 2144–38), and the surrender of the Sullivan Creek Project (FERC No. 2225–015). The Boundary Project is located on the Pend Oreille River in Pend Oreille County, Washington. The Sullivan Creek Project is located on Sullivan Lake, and Sullivan Creek and Outlet Creeks, tributaries to the Pend Oreille River that empty into the Boundary Project reservoir. Both projects occupy lands within the Colville National Forest.

This draft EIS contains staff evaluations of the applicants' proposals and the alternatives for relicensing the Boundary Project and surrendering the Sullivan Creek Project. The draft EIS documents the views of governmental agencies, non-governmental organizations, affected Indian Tribes, the public, the license applicants, and Commission staff.

A copy of the draft EIS is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the "e-Library" link. Enter the docket number of either project, excluding the last three digits, to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to these or other pending projects. For assistance, contact FERC Online Support.

All comments must be filed by May 31, 2011, and should reference either Project No. 2144–038, 2225–015, or both as appropriate. Comments may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the "eFiling" link. For a simpler method of submitting text only comments, click on "eComment." For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Anyone may intervene in this proceeding based on this draft EIS (18 CFR 380.10). You must file your request to intervene as specified above.[1] You do not need intervenor status to have your comments considered.

In addition to or in lieu of sending written comments, you are invited to attend a public meeting that will be held to receive comments on the draft EIS. The time and location of the meetings are as follows:

Nighttime Meeting

Date and Time: May 10, 2011, 6:30 p.m. up to 8:30 p.m. (PST)
Location: Cutter Theater, 302 Park Street, Metaline Falls, Washington, 99153

Daytime Meeting

Date and Time: May 11, 2011, 8:30 a.m. to 12 p.m. (PST)
Location: Doubletree Hotel City Center, 322 North Spokane Falls Court, Spokane, Washington, 99201

At these meetings, resource agency personnel and other interested persons will have the opportunity to provide oral and written comments and recommendations regarding the draft EIS. The meetings will be recorded by a court reporter, and all statements (verbal and written) will become part of the Commission's public record for the project. These meetings are posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/*

[1] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

EventsList.aspx along with other related information.

For further information, please contact David Turner at (202) 502–6191 or at *david.turner@ferc.gov*.

Dated: April 8, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–9065 Filed 4–13–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–120–001]

Eagle Rock Desoto Pipeline, L.P.; Notice of Filing

Take notice that on April 7, 2011, Eagle Rock Desoto Pipeline, L.P. filed a revised Statement of Operating Conditions to comply with an unpublished delegated letter order issued on November 12, 2010.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Tuesday, April 19, 2011.

Dated: April 8, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–9064 Filed 4–13–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. P–13346–001]

Free Flow Power Corporation; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.* 13346–001.

c. *Dated Filed:* February 18, 2011.

d. *Submitted By:* Free Flow Power Corporation (Free Flow Power), on behalf of its subsidiary Paynebridge, LLC.

e. *Name of Project:* Williams Dam Water Power Project.

f. *Location:* At the existing Williams dam owned by the Indiana Department of Natural Resources on the East Fork of the White River in Lawrence County, Indiana. No Federal lands are occupied by the project works or located within the project boundary.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 808(b)(1) and 18 CFR 5.5 of the Commission's regulations.

h. *Potential Applicant Contact:* Ramya Swaminathan, Chief Operating Officer, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114–2130; or at (978) 283–2822.

i. *FERC Contact:* Aaron Liberty at (202) 502–6862; or e-mail at *aaron.liberty@ferc.gov*.

j. On February 18, 2011, Free Flow Power filed its request to use the Traditional Licensing Process and provided public notice of its request. On April 7, 2011, the Director, Division of Hydropower Licensing, approved the request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR part 402 and (b) the Indiana State Historic Preservation Officer, as required by section 106 of the National Historic Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Free Flow Power as the Commission's non-Federal representative for carrying out informal consultation pursuant to section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act.

m. Free Flow Power filed a Pre-Application Document (PAD), including a proposed process plan and schedule with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the "eLibrary" link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

o. Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Dated: April 8, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–9070 Filed 4–13–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2299–075]

Turlock Irrigation District and Modesto Irrigation District; Notice of Intent To File License Application, Filing of Pre-Application Document (PAD), Commencement of Pre-Filing Process, and Scoping; Request for Comments on the PAD and Scoping Document, and Identification of Issues and Associated Study Requests

a. *Type of Filing:* Notice of Intent to File License Application for a New License and Commencing Pre-filing Process.

b. *Project No.:* 2299–075.

c. *Dated Filed:* February 10, 2011.

d. *Submitted By:* Turlock Irrigation District and Modesto Irrigation District.

e. *Name of Project:* Don Pedro Hydroelectric Project.

f. *Location:* The Don Pedro Project facilities are located on the Tuolomne River in Tuolomne County, California. Portions of the Don Pedro Project occupy lands of the Bureau of Land Management Sierra Resource Management Unit.

g. *Filed Pursuant to:* 18 CFR part 5 of the Commission's Regulations.

h. *Potential Applicant Contact:* Robert M. Nees, Director of Water Resources and Regulatory Affairs, Turlock Irrigation District, P.O. Box 949, Turlock, California 95381, 209–883–8241 and Greg Dias, Project Manager, Modesto Irrigation District, P.O. Box 4060, Modesto, California 95352, 209–526–7566.

i. *FERC Contact:* Jim Hastreiter at (503) 552–2760 or *james.hastreiter@ferc.gov*.

j. *Cooperating agencies:* Federal. state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item o below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See* 94 FERC ¶ 61,076 (2001).

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR part 402 and (b) the California State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating the Turlock Irrigation District and Modesto Irrigation District as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act.

m. Turlock Irrigation District and Modesto Irrigation District filed with the Commission a Pre-Application Document (PAD; including a proposed process plan and schedule), pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the "eLibrary" link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. With this notice, we are soliciting comments on the PAD and Commission's staff Scoping Document 1 (SD1), as well as study requests. All comments on the PAD and SD1, and study requests should be sent to the address above in paragraph h. In addition, all comments on the PAD and SD1, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application must be filed with the Commission. Documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

All filings with the Commission must include on the first page, the project name (Don Pedro Hydroelectric Project) and number (P–2299–075), and bear the appropriate heading: "Comments on Pre-Application Document," "Study Requests," "Comments on Scoping Document 1," "Request for Cooperating Agency Status," or "Communications to and from Commission Staff." Any individual or entity interested in submitting study requests, commenting on the PAD or SD1, and any agency requesting cooperating status must do so by June 10, 2011.

p. Our current intent is to prepare an Environmental Impact Statement (EIS). This meeting will satisfy the NEPA scoping requirements.

Scoping Meetings and Environmental Site Review

Commission staff will hold two scoping meetings in the vicinity of the project at the time and place noted below. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meeting is primarily for receiving input from the public. We invite all interested individuals, organizations, and agencies to attend one or both of the meetings, and to assist staff in identifying particular study needs, as well as the scope of environmental issues to be addressed in the environmental document. The times and locations of these meetings are as follows:

Daytime Scoping Meeting

Date and Time: Wednesday, May 11, 2011, 9 a.m. (PST)

Location: CSU–Stanislaus, University Student Union-Events Center, 801 W. Monte Vista, Turlock, California

Evening Scoping Meeting

Date and Time: Wednesday, May 11, 2011, 7 p.m. (PST)

Location: Double Tree Hotel-Modesto, Ballroom 3, 1150 Ninth Street, Modesto, California

Scoping Document 1 (SD1), which outlines the subject areas to be addressed in the environmental document, was mailed to the individuals and entities on the Commission's and Turlock Irrigation District and Modesto Irrigation District mailing lists. Copies of SD1 will be available at the scoping meetings, or may be viewed on the web at *http://www.ferc.gov*, using the "eLibrary" link. Follow the directions for accessing information in paragraph n. Based on all oral and written comments, a Scoping Document 2 (SD2) may be issued. SD2 may include a revised process plan and schedule, as well as a list of issues, identified through the scoping process.

Environmental Site Review

Date and Time: Tuesday, May 10, 2011, 9 a.m.–4:30 p.m. (PST)

Location: meet at the Don Pedro Recreation Agency Headquarters & Visitor Center, 10200 Bonds Flat Road, La Grange, California 95329.

Please notify Jim Hastreiter at 503–552–2760 or *james.hastreiter@ferc.gov* by May 2, 2011, if you plan to attend the site visit.

Meeting Objectives

At the scoping meetings, staff will: (1) Initiate scoping of the issues; (2) review and discuss existing conditions and resource management objectives; (3) review and discuss existing information and identify preliminary information and study needs; (4) review and discuss the process plan and schedule for pre-filing activity that incorporates the time frames provided for in Part 5 of the Commission's regulations and, to the extent possible, maximizes coordination of federal, state, and tribal permitting and certification processes; and (5) discuss the appropriateness of any federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document.

Meeting participants should come prepared to discuss their issues and/or concerns. Please review the PAD in preparation for the scoping meetings. Directions on how to obtain a copy of the PAD and SD1 are included in item n. of this document.

Meeting Procedures

The meetings will be recorded by a stenographer and will be placed in the public record of the project.

Dated: April 8, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–9069 Filed 4–13–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL11–33–000]

Northeast Transmission Development, LLC; Notice of Petition for Declaratory Order

Take notice that on April 6, 2011, pursuant to section 219 of the Federal Power Act,[1] Rule 207 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.207, and Order No. 679,[2] Northeast Transmission Development, LLC filed a Petition for Declaratory Order (Petition) requesting that the Commission grant their request for incentive rate treatments, as more fully described in its Petition.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on May 6, 2011.

Dated: April 8, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–9066 Filed 4–13–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13843–000]

FFP Qualified Hydro 24, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On September 28, 2010, FFP Qualified Hydro 24, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Cle Elum Dam Hydroelectric Project (project) to be located at the U.S. Bureau of Reclamation's Cle Elum dam on the Cle Elum River, near Cle Elum in Kittitas County, Washington. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would utilize the Cle Elum dam and would consist of the following: (1) A new 1,000-foot-long, 12-foot-wide steel liner penstock; (2) a new 70-foot-long, 100-foot-wide reinforced concrete powerhouse with turbine/generating units with an installed capacity of 18 megawatts; (3) a new 15-megawatt substation adjacent to the powerhouse; (4) a new 0.75-mile-long, 34.5-kilovolt overhead transmission line; and (5) appurtenant facilities. The estimated annual generation of the project would be 40 gigawatt-hours.

Applicant Contact: Ms. Ramya Swaminathan, 33 Commercial Street, Gloucester, Massachusetts 01930; phone: (978) 226–1531.

FERC Contact: Kelly Wolcott; phone: (202) 502–6480.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters,

[1] 16 U.S.C. 824s (2007); *Energy Policy Act of 2005*, Pub. L. 109–58, 1241, 119 Stat. 594,961–62 (2005) (EPAct 2005), amended the FPA by adding section 219.

[2] *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 2006–2007 FERC Stats. & Regs., Regs. Preambles ¶ 31,222, *order on reh'g*, Order No. 679–A, 2006–2007 FERC Stats. & Regs., Regs. Preambles ¶ 31,236 (2006), *order on reh'g*, Order No. 679–A, 119 FERC ¶ 61,062 (2007).

without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13843–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: April 8, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–9071 Filed 4–13–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14060–000]

Owyhee Hydro, LLC; of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On January 18, 2011, Owyhee Hydro, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Owyhee Pumped Storage Project (project) to be located on Lake Owyhee, near Adrian, Malheur County, Oregon. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project has three alternatives and would consist of the following:

Owyhee Ridge Alternative A

Utilizing the existing Lake Owyhee as the lower reservoir and constructing: (1) A 50-foot-high, 9,900-foot-long earthen or rockfill upper reservoir embankment; (2) a artificial, lined upper reservoir with a storage capacity of 8,235-acre-foot; (3) a 600-foot-long, 15.5-foot diameter concrete-lined low-pressure tunnel; (4) a 5,870-foot-long, 15.5-foot-diameter concrete-lined pressure shaft; (5) a 1,815-foot-long, 18.6-foot-diameter concrete-lined tailrace; (6) a 100-foot-long, 350-foot-wide, 120-foot-high underground powerhouse; (7) a 4.85-mile-long, 230 or 345-kilovolt (kV) transmission line interconnecting with either the existing Midpoint-Summer Lake line or the planned Boardman-Hemingway line; and (8) appurtenant facilities.

Owyhee Ridge Alternative B

Utilizing the existing Lake Owyhee as the lower reservoir and constructing: (1) A 50-foot-high, 9,900-foot-long earthen or rockfill upper reservoir embankment; (2) a artificial, lined upper reservoir with a storage capacity of 8,235-acre-foot; (3) a 1,190-foot-long, 15.5-foot-diameter concrete-lined low-pressure tunnel; (4) an 8,100-foot-long, 15.5-foot-diameter concrete-lined pressure shaft; (5) a 2,000-foot-long, 18.6-foot-diameter concrete-lined tailrace; (6) a 100-foot-long, 350-foot-wide, 120-foot-high underground powerhouse; (7) a 2.7-mile-long, 230 or 354-kV transmission line interconnecting with either the existing Midpoint-Summer Lake line or the planned Boardman-Hemingway line; and (8) appurtenant facilities.

Long Draw Alternative

Utilizing the existing Lake Owyhee as the lower reservoir and constructing: (1) A artificial, lined upper reservoir with a storage capacity of 8,235-acre-foot; (2) a 210-foot-high, 2,165-foot-long zoned earth and rockfill dam with impervious core or concrete-face earth and rockfill dam; (3) a 2,100-foot-long, 16.4-foot-diameter concrete-lined low-pressure tunnel; (4) a 8,070-foot-long, 16.4-foot-diameter concrete-lined pressure tunnel; (5) a 2,110-foot-long, 19.7-foot-diameter concrete-lined tailrace; (6) an 80-foot-high, 280-foot-wide, 120-foot-high underground powerhouse; (7) a 2.5-mile-long, 230-kV transmission line interconnecting with either the existing Midpoint-Summer Lake line or the planned Boardman-Hemingway line; and (8) appurtenant facilities.

All of the alternatives would include four reversible pump-turbines with a total installed capacity of 500 megawatts.

The estimated annual generation of the project would be 1,533 gigawatt-hours.

Applicant Contact: Mr. Matthew Shapiro, Owyhee Hydro, LLC, 1210 W. Franklin Street, Suite 2, Boise, Idaho 83702; phone: (208) 246–9925.

FERC Contact: Kelly Wolcott; phone: (202) 502–6480.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov*. or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–14060–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: April 8, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–9072 Filed 4–13–11; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9295–7; Docket ID No. EPA–HQ–ORD–2011–0368]

Implications of Climate Change for Bioassessment Programs and Approaches To Account for Effects

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Peer review Workshop and Public Comment Period.

SUMMARY: EPA is announcing that Eastern Research Group, Inc. (ERG), an EPA contractor for external scientific peer review, will convene an independent panel of experts and organize and conduct an external peer review workshop to review the external review draft report titled, "Implications of Climate Change for Bioassessment Programs and Approaches to Account for Effects" (EPA/600/R–11/036A) and its supporting document, "Freshwater Biological Traits Database" (EPA/600/R–11/038). The EPA also is announcing a 30-day public comment period for both documents. These draft documents were prepared by the National Center for Environmental Assessment (NCEA) within EPA's Office of Research and Development.

The main report identifies the components of state and tribal bioassessment programs that may be affected by climate change. The study (1) Investigates the potential to identify biological response signals to climate change within existing bioassessment data from Maine, North Carolina, Ohio, and Utah; (2) analyzes how biological responses can be categorized and interpreted; and, (3) assesses how the programs may influence decision-making processes. The study focused on benthic macroinvertebrates, i.e. animals without backbones that are larger than the size of a pencil point, which are important indicators used in bioassessments of shallow rivers and streams. The ultimate goals of the main report are (1) to provide a foundation for understanding the potential climatic vulnerability of bioassessment indicators, and, (2) to advance the development of specific strategies to ensure the effectiveness of monitoring and management plans under changing conditions. The results of the study support research needs and key actions identified in the "National Water Program Strategy: A Response to Climate Change" (U.S. EPA, 2008; *http://water.epa.gov/scitech/climatechange/strategy.cfm*).

The public comment period and the external peer review workshop are separate processes that provide opportunities for all interested parties to comment on the documents. EPA intends to forward public comments that are submitted in accordance with this notice and received by 5 p.m. on Friday, May 6, 2011, to the external peer review panel prior to the meeting for their consideration. When finalizing the draft documents, EPA will consider all public comments received throughout the 30-day period in accordance with this notice.

EPA is releasing these draft documents solely for the purpose of pre-dissemination peer review under applicable information quality guidelines. These documents have not been formally disseminated by EPA. They do not represent and should not be construed to represent any Agency policy or determination.

ERG invites the public to register to attend this workshop as observers. In addition, ERG invites the public to give oral and/or provide written comments at the workshop regarding the draft documents under review. The draft documents and EPA's peer review charge are available primarily via the Internet on NCEA's home page under the Recent Additions and the Data and Publications menus at *http://www.epa.gov/ncea*. In preparing final reports, EPA will consider ERG's report of the comments and recommendations from the external peer review workshop and any public comments that EPA receives in accordance with this notice.

DATES: The peer review panel workshop will begin on Wednesday, May 11, 2011, at 8:30 a.m. and end at 4:30 p.m. The 30-day public comment period begins April 14, 2011, and ends May 16, 2011. Technical comments should be in writing and must be received by EPA by May 16, 2011.

ADDRESSES: The peer review workshop will be held at the Navy League Building, 2300 Wilson Boulevard, 1st Floor (Mtg. Rm. to the Left of Concierge Desk), Arlington, VA 22204. The EPA contractor, ERG, is organizing, convening, and conducting the peer review workshop. To attend the workshop, register by Wednesday, May 4, 2011, by calling ERG's subcontractor LCLM at 301–593–2800 (ask for Diedre Watkins), sending a facsimile to 301–593–5800 (please reference: "Bioassessment peer review workshop" and include your name, title, affiliation, full address, and contact information, and whether you wish to make oral comments), or sending an e-mail to *dwatkins@lclmllc.com* (subject line: "Bioassessment peer review workshop" and include your name, title, affiliation, full address, and contact information, and whether you wish to make oral comments). You may also register via the Internet at *http://www.regonline.com/implicationsofclimatechangeforbioassessmentprogram*.

The draft report "Implications of Climate Change for Bioassessment Programs and Approaches to Account for Effects" and its supporting draft document, "Freshwater Biological Traits Database," are available primarily via the Internet on the National Center for Environmental Assessment's home page under the Recent Additions and the Data and Publications menus at *http://www.epa.gov/ncea*. A limited number of paper copies are available from the Information Management Team, NCEA; telephone: 703–347–8561; facsimile: 703–347–8691. If you are requesting a paper copy, please provide your name, mailing address, and the document titles, "Implications of Climate Change for Bioassessment Programs and Approaches to Account for Effects" and "Freshwater Biological Traits Database." Copies are not available from ERG.

Comments may be submitted electronically via *http://www.regulations.gov*, by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions as provided in the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Questions regarding information, registration, access, or services for individuals with disabilities, or logistics for the external peer review workshop should be directed to ERG's subcontractor, LCLM, 1299 Lamberton Drive, Suite 205, Silver Spring, MD 20902; telephone: 301–593–2800 (ask for Diedre Watkins); facsimile: 301–593–5800; e-mail: *dwatkins@lclmllc.com* (subject line: Bioassessment peer-review workshop). To request accommodation of a disability, please contact LCLM (ask for Diedre Watkins), preferably at least 10 days prior to the meeting, to give as much time as possible to process your request.

For information on the public comment period, contact the Office of Environmental Information Docket; telephone: 202–566–1752; facsimile: 202–566–1753; or e-mail: *ORD.Docket@epa.gov*.

If you need technical information about the document, please contact Britta Bierwagen, National Center for Environmental Assessment (NCEA); telephone: 703–347–8613; facsimile: 703–347–8694; or e-mail: *bierwagen.britta@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Summary of Information About the Project/Documents

Bioassessment is used for resource management to determine the ecological consequences of environmental stressors. All states utilize some form of bioassessment as part of their implementation of the Clean Water Act. The report identifies the components of state and tribal bioassessment programs

that may be affected by climate change. The study describes biological responses to changes in temperature, precipitation and flow that will, in the long term, affect the metrics and indices used to define ecological status. Not all regions are equally threatened or responsive because of large-scale variability in climate and other environmental factors. We found that climatically vulnerable components of bioassessment programs include:

- Assessment design (*e.g.*, multi-metric indices [MMIs], selection of reference sites and determination of reference condition).
- Implementation (*e.g.*, data collection and analysis).
- Environmental management (*e.g.*, determination of impairment and water quality standards).

The main report identifies methods that can assist with detecting climate change-related effects and analytically controlling them. The appendices to the main report provide more detailed information on data, analyses and results, while the supporting document describes the compilation of a species traits database used in the analyses in the main report. Implementing the recommendations in the main report will allow programs to continue to meet their goals for resource protection and restoration in the context of climate change.

II. Workshop Information

Members of the public may attend the workshop as observers, and there will be a limited time for comments from the public during the morning session. Please let ERG's subcontractor, LCLM, know if you wish to make comments during the workshop. Space is limited, and reservations will be accepted on a first-come, first-served basis.

III. How To Submit Technical Comments to the Docket at www.regulations.gov

Submit your comments, identified by Docket ID No. EPA–HQ–ORD 2011–0368, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: ORD.Docket@epa.gov.*
- *Fax:* 202–566–1753.
- *Mail:* Office of Environmental Information (OEI) Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. The phone number is 202–566–1752.
- *Hand Delivery:* The OEI Docket is located in the EPA Headquarters Docket Center, Room 3334 EPA West Building, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center 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. Deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

If you provide comments by mail or hand delivery, please submit three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2011–0368. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked "late," and may only be considered if time permits. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *http://www.regulations.gov*, including any personal information provided, unless a comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: Documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other materials, such as copyrighted material, are publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the OEI Docket in the EPA Headquarters Docket Center.

Dated: April 7, 2011.

Darrell A. Winner,

Acting Director, National Center for Environmental Assessment.

[FR Doc. 2011–9097 Filed 4–13–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[WC Docket No. 06–122; DA 11–400]

Wireline Competition Bureau Releases 2011 Annual Telecommunications Reporting Worksheet (FCC Form 499–A) and Accompanying Instructions

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Wireline Competition Bureau released the revised annual Telecommunications Reporting Worksheet (FCC Form 499–A) and accompanying instructions. Filers may now submit their FCC Form 499–A to the Universal Service Administrative Company.

DATES: Filers must submit the FCC Form 499–A reporting 2010 revenues by April 1, 2011.

FOR FURTHER INFORMATION CONTACT: Nicholas Degani, Wireline Competition Bureau, Competition Policy Division, at (202) 418–7400 or via the Internet at *nicholas.degani@fcc.gov.*

SUPPLEMENTARY INFORMATION: The Bureau revised the Form and instructions to make the process of preparing Form 499–A more user-friendly for filers. Many changes are intended to replace technical language with plain language to aid the filer. These non-substantive revisions include:

(1) Revising the formatting throughout for consistency of presentation and readability. (2) Consolidating the contact information and how-to-file information into single sections. (3) Moving the table used to determine whether a filer is *de minimis* for universal service purposes to Appendix A and adjusting the factors used therein to estimate whether a filer will be *de*

minimis in 2011. (4) Moving the list of Line 105 categories (describing a filer's principal telecommunications activities) into Appendix B. (5) Noting that email addresses are generally required so that the Commission and the administrators may contact filers electronically. Filers must now use Line 208.1 of the Form to specify a contact email address for ITSP regulatory fee purposes. (6) Reorganizing the sections discussing reporting revenues in Blocks 3 and 4 so that it parallels the steps that filers typically take when filing out the form to report revenues. (7) Consolidating the discussion of specific line revenues for ease of reference. (8) Referring to filers consistently as "filers" rather than as "contributors" or "reporting entities" in some places. (9) Deleting information of historical value but unnecessary for reporting purposes. (10) Updating references to precedent as appropriate to better track the language in relevant Commission precedent.

In compliance with 47 CFR 1.47, 52.17(b), 52.32(b), 54.711(a), and 64.604(c)(5)(iii)(B), attached to this notice is a copy of the FCC Form 499–A for 2011 and the FCC Form 499–A instructions can be found at: *http://www.fcc.gov/Forms/Form499-A/499a-2011.pdf.*

Federal Communications Commission.

Vickie Robinson,

Deputy Chief, Telecommunications Access Policy Division.

BILLING CODE 6712–01–P

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Approval by OMB
3060-0855

>>> Please read instructions before completing. <<<

Annual Filing -- due April 1, 2011

During the year, filers must refile Blocks 1, 2 and 6 if there are any changes in Lines 104 or 112. See Instructions

101	Filer 499 ID [If you don't know your number, contact the administrator at (888) 641-8722. If you are a new filer, write "NEW" in this block and a Filer 499 ID will be assigned to you.]	
102	Legal name of reporting entity	
103	IRS employer identification number	[Enter 9 digit number]
104	Name telecommunications provider is doing business as	

105 Telecommunications activities of filer [Select up to 5 boxes that best describe the reporting entity. Enter numbers starting with "1" to show the order of importance -- see instructions.]

☐ Audio Bridging (teleconferencing) Provider		☐ CAP/CLEC	☐ Cellular/PCS/SMR (wireless telephony incl. by resale	☐ Coaxial Cable
☐ Incumbent LEC	☐ Interconnected VoIP	☐ Interexchange Carrier (IXC)	☐ Local Reseller	☐ Operator Service Provider (OSP)
☐ Paging & Messaging	☐ Payphone Service Provider	☐ Prepaid Card	☐ Private Service Provider	☐ Satellite Service Provider
☐ Shared-Tenant Service Provider / Building LEC		☐ SMR (dispatch)	☐ Toll Reseller	☐ Wireless Data
If Other Local, Other Mobile or Other Toll is checked describe carrier type / services provided. →		☐ Other Local	☐ Other Mobile	☐ Other Toll

106.1	Holding company name (All affiliated companies must show the same name on this line.)	
106.2	Holding company IRS employer identification number	[Enter 9 digit number]
107	FCC Registration Number (FRN) [https://fjallfoss.fcc.gov/coresWeb/publicHome.do] [For assistance, contact the CORES help desk at 877-480-3201 or CORES@fcc.gov]	[Enter 10 digit number]

108	Management company [if filer is managed by another entity]				
109	Complete mailing address of reporting entity corporate headquarters	Street1 Street2 Street3 City	State	Zip (postal code)	Country if not USA
110	Complete business address for customer inquiries and complaints check if same address as Line 109 ☐	Street1 Street2 Street3 City	State	Zip (postal code)	Country if not USA
111	Telephone number for customer complaints and inquiries [Toll-free number if available]	( ) -		ext -	

112 List all trade names used in the past 3 years in providing telecommunications. Include all names by which you are known by customers.

a		g	
b		h	
c		i	
d		j	
e		k	
f		l	

Use an additional sheet if necessary. Each reporting entity must provide all names used for telecommunications activities.

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

201	Filer 499 ID [from Line 101]	
202	Legal name of reporting entity [from Line 102]	
203	Person who completed this Worksheet	First MI Last
204	Telephone number of this person	( ) - ext -
205	Fax number of this person	( ) -
206	Email of this person ‖ not for public release ‖	
207	Corporate office, attn. name, and mailing address to which future Telecommunications Reporting Worksheets should be sent check if same name as Line 203 ☐ check if same address as Line 109 ☐	Office Attn: First name MI Last Email ‖not for public release‖ Phone ( ) - ext- Fax ( ) - Street1 Street2 Street3 City State Zip (postal code) Country if not USA
208	Billing address and billing contact person [Plan administrators will send bills for contributions to this address. Please attach a written request for alternative billing arrangements.] check if name and address same as Line 207 ☐	Company Attn: First name MI Last Email ‖not for public release‖ Phone ( ) - ext- Fax ( ) - Street1 Street2 Street3 City State Zip (postal code) Country if not USA
208.1	Email address where ITSP regulatory fee bill should be sent	‖not for public release‖

All carriers and providers of interconnected VoIP must complete Lines 209 through 213. During the year, carriers and providers of interconnected VoIP must refile Blocks 1, 2, and 6 if there are any changes in this section. See Instructions.

209	D.C. Agent for Service of Process per 47 U.S.C. § 413	Company Attn First name MI Last
210	Telephone number of D.C. agent	( ) - ext -
211	Fax number of D.C. agent	( ) -
212	Email of D.C. agent	
213	Complete business address of D.C. agent for hand service of documents	Street1 Street2 Street3 City State DC Zip
214	Local/alternate Agent for Service of Process (optional)	Company Attn First name MI Last
215	Telephone number of local/alternate agent	( ) - ext -
216	Fax number of local/alternate agent	( ) -
217	Email of local/alternate agent	
218	Complete business address of local/alternate agent for hand service of documents	Street1 Street2 Street3 City State Zip (postal code) Country if not USA

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Approval by OMB
3060-0855

>>> Please read instructions before completing.

Annual Filing – due April 1, 2011

Blocks 1, 2, Contact Info — 11 Carrier Information — During the year, filers must refile Blocks 1, 2 and 6 if there are any changes in Lines 104 or 112. See Instructions

101	Filer 499 ID [If you don't know your number, contact the administrator at (888) 641-8722. If you are a new filer, write "NEW" in this block and a Filer 499 ID will be assigned to you.]	
102	Legal name of reporting entity	
103	IRS employer identification number	[Enter 9 digit number]
104	Name telecommunications provider is doing business as	

105 Telecommunications activities of filer [Select up to 5 boxes that best describe the reporting entity. Enter numbers starting with "1" to show the order of importance -- see instructions.]

- ☐ Audio Bridging (teleconferencing) Provider
- ☐ CAP/CLEC
- ☐ Cellular PCS SMR (wireless telephony incl. by resale
- ☐ Coaxial Cable
- ☐ Incumbent LEC
- ☐ Interconnected VoIP
- ☐ Interexchange Carrier (IXC
- ☐ Local Reseller
- ☐ Operator Service Provider (OSP)
- ☐ Paging & Messaging
- ☐ Payphone Service Provider
- ☐ Prepaid Card
- ☐ Private Service Provider
- ☐ Satellite Service Provider
- ☐ Shared-Tenant Service Provider / Building LEC
- ☐ SMR (dispatch)
- ☐ Toll Reseller
- ☐ Wireless Data

If Other Local, Other Mobile or Other Toll is checked describe carrier type / services provided: →

- ☐ Other Local
- ☐ Other Mobile
- ☐ Other Toll

106.1	Holding company name (All affiliated companies must show the same name on this line.)	
106.2	Holding company IRS employer identification number	[Enter 9 digit number]
107	FCC Registration Number (FRN) [https://fjallfoss.fcc.gov/coresWeb/publicHome.do] [For assistance, contact the CORES help desk at 877-480-3201 or CORES@fcc.gov]	[Enter 10 digit number]
108	Management company [if filer is managed by another entity]	
109	Complete mailing address of reporting entity corporate headquarters	Street1 Street2 Street3 City State Zip (postal code) Country if not USA
110	Complete business address for customer inquiries and complaints check if same address as Line 109 ☐	Street1 Street2 Street3 City State Zip (postal code) Country if not USA
111	Telephone number for customer complaints and inquiries [Toll-free number if available]	( ) - ext -

112 List all trade names used in the past 3 years in providing telecommunications. Include all names by which you are known by customers.

a		g	
b		h	
c		i	
d		j	
e		k	
f		l	

Use an additional sheet if necessary. Each reporting entity must provide all names used for telecommunications activities

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE. 18 U.S.C. § 1001

Save time, avoid problems – file electronically at http://forms.universalservice.org

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Block 2-A: Regulatory Contact Information		
201	Filer 499 ID [from Line 101]	
202	Legal name of reporting entity [from Line 102]	
203	Person who completed this Worksheet	First MI Last
204	Telephone number of this person	( ) - ext -
205	Fax number of this person	( ) -
206	Email of this person [not for public release]	
207	Corporate office, attn. name, and mailing address to which future Telecommunications Reporting Worksheets should be sent check if same name as Line 203 ☐ check if same address as Line 109 ☐	Office Attn. First name MI Last Email [not for public release] Phone ( ) - ext- Fax ( ) - Street1 Street2 Street3 City State Zip (postal code) Country if not USA
208	Billing address and billing contact person [Plan administrators will send bills for contributions to this address. Please attach a written request for alternative billing arrangements.] check if name and address same as Line 207 ☐	Company Attn. First name MI Last Email [not for public release] Phone ( ) - ext- Fax ( ) - Street1 Street2 Street3 City State Zip (postal code) Country if not USA
208.1	Email address where ITSP regulatory fee bill should be sent	[not for public release]

Block 2-B: Agent for Service of Process		
		All carriers and providers of interconnected VoIP must complete Lines 209 through 213. During the year, carriers and providers of interconnected VoIP must refile Blocks 1, 2, and 6 if there are any changes in this section. See Instructions.
209	D.C. Agent for Service of Process per 47 U.S.C. § 413	Company Attn First name MI Last
210	Telephone number of D.C. agent	( ) - ext -
211	Fax number of D.C. agent	( ) -
212	Email of D.C. agent	
213	Complete business address of D.C. agent for hand service of documents	Street1 Street2 Street3 City State DC Zip
214	Local/alternate Agent for Service of Process (optional)	Company Attn First name MI Last
215	Telephone number of local alternate agent	( ) - ext -
216	Fax number of local alternate agent	( ) -
217	Email of local alternate agent	
218	Complete business address of local alternate agent for hand service of documents	Street1 Street2 Street3 City State Zip (postal code) Country if not USA

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE. 18 U.S.C. § 1001

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Filers must refile Blocks 1, 2 and 6 if there are any changes in this section. See Instructions.

219	Filer 499 ID [from Line 101]	
220	Legal name of reporting entity [from Line 102]	
221	Chief Executive Officer (or, highest ranking company officer if the filing entity does not have a chief executive officer)	First MI Last
222	Business address of individual named on Line 221 check if same as Line 109 ☐	Street1 Street2 Street3 City State Zip (postal code) Country if not USA
223	Second ranking company officer, such as Chairman (Must be someone other than the individual listed on Line 221)	First MI Last
224	Business address of individual named on Line 223 check if same as Line 109 ☐	Street1 Street2 Street3 City State Zip (postal code) Country if not USA
225	Third ranking company officer, such as President or Secretary (Must be someone other than individuals listed on Lines 221 and 223)	First MI Last
226	Business address of individual named on Line 225 check if same as Line 109 ☐	Street1 Street2 Street3 City State Zip (postal code) Country if not USA

227 Indicate jurisdictions in which the filing entity provides service. Include jurisdictions in which service was provided in the past 15 months and jurisdictions in which service is likely to be provided in the next 12 months

☐ Alabama	☐ Guam	☐ Massachusetts	☐ New York	☐ Tennessee
☐ Alaska	☐ Hawaii	☐ Michigan	☐ North Carolina	☐ Texas
☐ American Samoa	☐ Idaho	☐ Midway Atoll	☐ North Dakota	☐ Utah
☐ Arizona	☐ Illinois	☐ Minnesota	☐ Northern Mariana Islands	☐ U.S. Virgin Islands
☐ Arkansas	☐ Indiana	☐ Mississippi	☐ Ohio	☐ Vermont
☐ California	☐ Iowa	☐ Missouri	☐ Oklahoma	☐ Virginia
☐ Colorado	☐ Johnston Atoll	☐ Montana	☐ Oregon	☐ Wake Island
☐ Connecticut	☐ Kansas	☐ Nebraska	☐ Pennsylvania	☐ Washington
☐ Delaware	☐ Kentucky	☐ Nevada	☐ Puerto Rico	☐ West Virginia
☐ District of Columbia	☐ Louisiana	☐ New Hampshire	☐ Rhode Island	☐ Wisconsin
☐ Florida	☐ Maine	☐ New Jersey	☐ South Carolina	☐ Wyoming
☐ Georgia	☐ Maryland	☐ New Mexico	☐ South Dakota	

228 Year and month filer first provided (or expects to provide) telecommunications in the U.S ☐ Check if prior to 1/1/1999, otherwise: Year Month

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

301	Filer 499 ID [from Line 101]					
302	Legal name of reporting entity [from Line 102]					
	Report billed revenues for January 1 through December 31, 2010. Do not report any negative numbers. Dollar amounts may be rounded to the nearest thousand dollars. However, report all amounts as whole dollars.	Total Revenues	If breakouts are not book amounts, enter whole percentage estimates		Breakouts	
			Interstate	International	Interstate Revenues	International Revenues
	See instructions regarding percent interstate and international	(a)	(b)	(c)	(d)	(e)
	Revenues from Services Provided for Resale as Telecommunications by Other Contributors to Federal Universal Service Support Mechanisms					
	Fixed local service					
	Monthly service, local calling, connection charges, vertical features, and other local exchange service including subscriber line and PICC charges to IXCs					
303.1	Provided as unbundled network elements (UNEs)					
303.2	Provided under other arrangements					
	Per-minute charges for originating or terminating calls					
304.1	Provided under state or federal access tariff					
304.2	Provided as unbundled network elements or other contract arrangement					
	Local private line & special access service					
305.1	Provided to other contributors for resale as telecommunications					
305.2	Provided to other contributors for resale as interconnected VoIP					
306	Payphone compensation from toll carriers					
307	Other local telecommunications service revenues					
308	Universal service support revenues received from Federal or state sources					
	Mobile services (i.e., wireless telephony, paging, messaging, and other mobile services)					
309	Monthly, activation, and message charges except toll					
	Toll services					
310	Operator and toll calls with alternative billing arrangements (credit card, collect, international call-back, etc.)					
311	Ordinary long distance (direct-dialed MTS, customer toll-free (800/888 etc.) service, "10-10" calls, associated monthly account maintenance, PICC pass-through, and other switched services not reported above)					
312	Long distance private line services					
313	Satellite services					
314	All other long distance services					
315	Total revenues from resale [Lines 303 through 314]					

Note: As stated in the instructions, for all revenues reported on this page, you must retain the Filer 499 ID and contact information for the associated customers. You must verify that each of these customers was a direct contributor to the federal universal service support mechanism for calendar year 2010 and that the customer is purchasing service for resale as telecommunications. These records must be made available to the administrator or the FCC upon request. The FCC website contains information on federal universal service contributors. (See instructions.)

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Block 2-C: FCC Registration and Contact Information	Filers must refile Blocks 1, 2 and 6 if there are any changes in this section. See Instructions.
219 Filer 499 ID [from Line 101]	
220 Legal name of reporting entity [from Line 102]	
221 Chief Executive Officer (or, highest ranking company officer if the filing entity does not have a chief executive officer)	First MI Last
222 Business address of individual named on Line 221 check if same as Line 109 ☐	Street1 Street2 Street3 City State Zip (postal code) Country if not USA
223 Second ranking company officer, such as Chairman (Must be someone other than the individual listed on Line 221)	First MI Last
224 Business address of individual named on Line 223 check if same as Line 109 ☐	Street1 Street2 Street3 City State Zip (postal code) Country if not USA
225 Third ranking company officer, such as President or Secretary (Must be someone other than individuals listed on Lines 221 and 223)	First MI Last
226 Business address of individual named on Line 225 check if same as Line 109 ☐	Street1 Street2 Street3 City State Zip (postal code) Country if not USA

227 Indicate jurisdictions in which the filing entity provides service. Include jurisdictions in which service was provided in the past 15 months and jurisdictions in which service is likely to be provided in the next 12 months

☐ Alabama	☐ Guam	☐ Massachusetts	☐ New York	☐ Tennessee
☐ Alaska	☐ Hawaii	☐ Michigan	☐ North Carolina	☐ Texas
☐ American Samoa	☐ Idaho	☐ Midway Atoll	☐ North Dakota	☐ Utah
☐ Arizona	☐ Illinois	☐ Minnesota	☐ Northern Mariana Islands	☐ U.S Virgin Islands
☐ Arkansas	☐ Indiana	☐ Mississippi	☐ Ohio	☐ Vermont
☐ California	☐ Iowa	☐ Missouri	☐ Oklahoma	☐ Virginia
☐ Colorado	☐ Johnston Atoll	☐ Montana	☐ Oregon	☐ Wake Island
☐ Connecticut	☐ Kansas	☐ Nebraska	☐ Pennsylvania	☐ Washington
☐ Delaware	☐ Kentucky	☐ Nevada	☐ Puerto Rico	☐ West Virginia
☐ District of Columbia	☐ Louisiana	☐ New Hampshire	☐ Rhode Island	☐ Wisconsin
☐ Florida	☐ Maine	☐ New Jersey	☐ South Carolina	☐ Wyoming
☐ Georgia	☐ Maryland	☐ New Mexico	☐ South Dakota	

228 Year and month filer first provided (or expects to provide) telecommunications in the U.S ☐ Check if prior to 1/1/1999, otherwise: Year Month

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2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Block 3: Carrier's Carrier Revenue Information

301	Filer 499 ID [from Line 101]					
302	Legal name of reporting entity [from Line 102]					
	Report billed revenues for January 1 through December 31, 2010. Do not report any negative numbers. Dollar amounts may be rounded to the nearest thousand dollars. However, report all amounts as whole dollars See instructions regarding percent interstate and international	Total Revenues (a)	If breakouts are not book amounts, enter whole percentage estimates: Interstate (b)	If breakouts are not book amounts, enter whole percentage estimates: International (c)	Breakouts: Interstate Revenues (d)	Breakouts: International Revenues (e)
	Revenues from Services Provided for Resale as Telecommunications by Other Contributors to Federal Universal Service Support Mechanisms					
	Fixed local service					
	Monthly service, local calling, connection charges, vertical features, and other local exchange service including subscriber line and PICC charges to IXCs					
303.1	Provided as unbundled network elements (UNEs)					
303.2	Provided under other arrangements					
	Per-minute charges for originating or terminating calls					
304.1	Provided under state or federal access tariff					
304.2	Provided as unbundled network elements or other contract arrangement					
	Local private line & special access service					
305.1	Provided to other contributors for resale as telecommunications					
305.2	Provided to other contributors for resale as interconnected VoIP					
306	Payphone compensation from toll carriers					
307	Other local telecommunications service revenues					
308	Universal service support revenues received from Federal or state sources					
	Mobile services (i.e., wireless telephony, paging, messaging, and other mobile services)					
309	Monthly, activation, and message charges except toll					
	Toll services					
310	Operator and toll calls with alternative billing arrangements (credit card, collect, international call-back, etc.)					
311	Ordinary long distance (direct-dialed MTS, customer toll-free (800/888 etc.) service, "10-10" calls, associated monthly account maintenance, PICC pass-through, and other switched services not reported above)					
312	Long distance private line services					
313	Satellite services					
314	All other long distance services					
315	Total revenues from resale [Lines 303 through 314]					

Note: As stated in the Instructions, for all revenues reported on this page, you must retain the Filer 499 ID and contact information for the associated customers. You must verify that each of these customers was a direct contributor to the federal universal service support mechanism for calendar year 2010 and that the customer is purchasing service for resale as telecommunications. These records must be made available to the administrator or the FCC upon request. The FCC website contains information on federal universal service contributors. (See instructions.)

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

401	Filer 499 ID [from Line 101]					
402	Legal name of reporting entity [from Line 102]					
	Report billed revenues for January 1 through December 31, 2010. Do not report any negative numbers. Dollar amounts may be rounded to the nearest thousand dollars. However, report all amounts as whole dollars. See instructions regarding percent interstate and international	Total Revenues (a)	If breakouts are not book amounts, enter whole percentage estimates: Interstate (b)	If breakouts are not book amounts, enter whole percentage estimates: International (c)	Breakouts: Interstate Revenues (d)	Breakouts: International Revenues (e)
	Revenues from All Other Sources (end-user telecom. & non-telecom.)					
403	Surcharges or other amounts on bills identified as recovering State or Federal universal service contributions					
	Fixed local services					
	Monthly service, local calling, connection charges, vertical features, and other local exchange service charges except for federally tariffed subscriber line charges and PICC charges					
	Traditional Circuit Switched					
404.1	Provided at a flat rate including interstate toll service -- local portion					
404.2	Provided at a flat rate including interstate toll service -- toll portion					
404.3	Provided without interstate toll included (see instructions)					
	Interconnected VoIP					
404.4	Offered in conjunction with a broadband connection					
404.5	Offered independent of a broadband connection					
405	Tariffed subscriber line charges and PICC charges levied by a local exchange carrier on a no-PIC customer					
406	Local private line & special access service [Includes the transmission portion of wireline broadband Internet access provided on a common carrier basis.]					
407	Payphone coin revenues (local and long distance)					
408	Other local telecommunications service revenues					
	Mobile services (i.e., wireless telephony, paging, messaging, and other mobile services)					
409	Monthly and activation charges					
410	Message charges including roaming and air-time charges for toll calls, but excluding separately stated toll charges					

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2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

		Total Revenues (a)	If breakouts are not book amounts, enter whole percentage estimates		Breakouts	
			Interstate (b)	International (c)	Interstate Revenues (d)	International Revenues (e)
Toll services						
411	Prepaid calling card (including card sales to customers and non-carrier distributors) reported at face value of cards					
412	International calls that both originate and terminate in foreign points		0%	100%		
413	Operator and toll calls with alternative billing arrangements (credit card, collect, international call-back, etc.) other than revenues reported on Line 412					
414.1	Ordinary long distance (direct-dialed MTS, customer toll-free (800/888 etc.) service , "10-10" calls, associated monthly account maintenance, PICC pass-through, and other switched services not reported above) All, other than interconnected VoIP, including, but not limited to, itemized toll on wireline and wireless bills					
414.2	All interconnected VoIP long distance, including, but not limited to, itemized toll					
415	Long distance private line services					
416	Satellite services					
417	All other long distance services					
	Revenues other than U.S. telecommunications revenues, including information services, inside wiring maintenance, billing and collection customer premises equipment, published directory, dark fiber, Internet access, cable TV program transmission, foreign carrier operations, and non-telecommunications revenues (See instructions.)					
418.1	bundled with circuit switched local exchange service					
418.2	bundled with interconnected VoIP local exchange service					
418.3	other					
419	Gross billed revenues from all sources (incl. reseller & non-telecom.) [Lines 303 through 314 plus Lines 403 through 418]					
420	Gross universal service contribution base amounts [Lines 403 through 411 plus Lines 413 through 417] [See Table 3 in instructions.]					
421	Uncollectible revenue/bad debt expense associated with gross billed revenues amounts shown on Line 419 [See instructions.]					
422	Uncollectible revenue/bad debt expense associated with universal service contribution base amounts shown on Line 420					
423	Net universal service contribution base revenues [Line 420 minus line 422]					

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Block 4-A: End-User and Non-Telecommunications Revenue Information

401	Filer 499 ID [from Line 101]					
402	Legal name of reporting entity [from Line 102]					
	Report billed revenues for January 1 through December 31, 2010. Do not report any negative numbers. Dollar amounts may be rounded to the nearest thousand dollars. However, report all amounts as whole dollars. See instructions regarding percent interstate and international	Total Revenues (a)	If breakouts are not book amounts, enter whole percentage estimates: Interstate (b)	If breakouts are not book amounts, enter whole percentage estimates: International (c)	Breakouts: Interstate Revenues (d)	Breakouts: International Revenues (e)
	Revenues from All Other Sources (end-user telecom. & non-telecom.)					
403	Surcharges or other amounts on bills identified as recovering State or Federal universal service contributions					
	Fixed local services					
	Monthly service, local calling, connection charges, vertical features, and other local exchange service charges except for federally tariffed subscriber line charges and PICC charges					
	Traditional Circuit Switched					
404.1	Provided at a flat rate including interstate toll service -- local portion					
404.2	Provided at a flat rate including interstate toll service -- toll portion					
404.3	Provided without interstate toll included (see instructions)					
	Interconnected VoIP					
404.4	Offered in conjunction with a broadband connection					
404.5	Offered independent of a broadband connection					
405	Tariffed subscriber line charges and PICC charges levied by a local exchange carrier on a no-PIC customer					
406	Local private line & special access service [includes the transmission portion of wireline broadband Internet access provided on a common carrier basis.]					
407	Payphone coin revenues (local and long distance)					
408	Other local telecommunications service revenues					
	Mobile services (i.e., wireless telephony, paging, messaging, and other mobile services)					
409	Monthly and activation charges					
410	Message charges including roaming and air-time charges for toll calls, but excluding separately stated toll charges					

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Block 4 (continued)

		Total Revenues (a)	If breakouts are not book amounts, enter whole percentage estimates		Breakouts	
			Interstate (b)	International (c)	Interstate Revenues (d)	International Revenues (e)
Toll services						
411	Prepaid calling card (including card sales to customers and non-carrier distributors) reported at face value of cards					
412	International calls that both originate and terminate in foreign points		0%	100%		
413	Operator and toll calls with alternative billing arrangements (credit card, collect, international call-back, etc.) other than revenues reported on Line 412					
	Ordinary long distance (direct-dialed MTS, customer toll-free (800/888 etc.) service , "10-10" calls, associated monthly account maintenance, PICC pass-through, and other switched services not reported above)					
414.1	All, other than interconnected VoIP, including, but not limited to, itemized toll on wireline and wireless bills					
414.2	All interconnected VoIP long distance, including, but not limited to, itemized toll					
415	Long distance private line services					
416	Satellite services					
417	All other long distance services					
	Revenues other than U.S. telecommunications revenues, including information services, inside wiring maintenance, billing and collection customer premises equipment, published directory, dark fiber, Internet access, cable TV program transmission, foreign carrier operations, and non-telecommunications revenues (See instructions.)					
418.1	bundled with circuit switched local exchange service					
418.2	bundled with interconnected VoIP local exchange service					
418.3	other					
[illegible]						
419	Gross billed revenues from all sources (incl. reseller & non-telecom.) [Lines 303 through 314 plus Lines 403 through 418]					
420	Gross universal service contribution base amounts [Lines 103 through 411 plus Lines 413 through 417] [See Table 3 in instructions					
421	Uncollectible revenue/bad debt expense associated with gross billed revenues amounts shown on Line 419 [See instructions]					
422	Uncollectible revenue/bad debt expense associated with universal service contribution base amounts shown on Line 420					
423	Net universal service contribution base revenues [Line 420 minus line 422]					

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

501	Filer 499 ID [from Line 101]	
502	Legal name of reporting entity [from Line 102]	

Filers that report revenues in Block 3 and Block 4 must provide the percentages requested in Lines 503 through 510. See instructions for limited exceptions.

Percentage of revenues reported in Block 3 and Block 4 billed in each region of the country. Round or estimate to nearest whole percentage. Enter 0 if no service was provided in the region.

			Block 3 Carrier's Carrier (a)	Block 4 End-User Telecom. (b)
503	Southeast:	Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and U.S. Virgin Islands	%	%
504	Western:	Alaska, Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon. South Dakota, Utah, Washington, and Wyoming	%	%
505	West Coast:	California, Hawaii, Nevada, American Samoa, Guam, Johnston Atoll, Midway Atoll, Northern Mariana Islands, and Wake Island.	%	%
506	Mid-Atlantic:	Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Virginia, and West Virginia	%	%
507	Mid-West:	Illinois, Indiana, Michigan, Ohio, and Wisconsin	%	%
508	Northeast:	Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont	%	%
509	Southwest:	Arkansas, Kansas, Missouri, Oklahoma, and Texas	%	%
510	Total:	[Percentages must add to 0 or 100.]	%	%

511 Revenues from resellers that do not contribute to universal service support mechanisms are included in Block 4-B, Line 420 but may be excluded from a filer's TRS, NANPA, LNP, and FCC interstate telephone service provider regulatory fee contribution bases. To have these amounts excluded, the filer has the option of identifying such revenues below. **As stated in the instructions, you must have in your records the FCC Filer 499 ID for each customer whose revenues are included on Line 511. (See instructions.)**

	(a) Total Revenues	(b) Interstate and International
Revenues from resellers that do not contribute to Universal Service	$	$

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

601	Filer 499 ID [from Line 101]	
602	Legal name of reporting entity [from Line 102]	

Section IV of the instructions provides information on which types of reporting entities are required to file for which purposes. Any entity claiming to be exempt from one or more contribution requirements should so certify below and attach an explanation. [The Universal Service Administrator will determine which entities meet the *de minimis* threshold based on information provided in Block 4, even if you fail to so certify below.

603 I certify that the reporting entity is exempt from contributing to Universal Service ☐ TRS ☐ NANPA ☐ LNP Administration ☐

Provide explanation below:

604 Please indicate whether the reporting entity is **State or Local Government Entity** ☐ **I.R.C. § 501 or State Tax Exempt (see instructions)** ☐

605 I certify that the revenue data contained herein are privileged and confidential and that public disclosure of such information would likely cause substantial harm to the competitive position of the company. I request nondisclosure of the revenue information contained herein pursuant to sections 0.459, 52.17, 54.711 and 64.604 of the Commission's rules. ☐

I certify that I am an officer of the above-named reporting entity as defined in the instructions, that I have examined the foregoing report and, to the best of my knowledge, information and belief, all statements of fact contained in this Worksheet are true and that said Worksheet is an accurate statement of the affairs of the above-named company for the previous calendar year. In addition, I swear, under penalty of perjury, that all requested identification registration information has been provided and is accurate. If the above-named reporting entity is filing on a consolidated basis, I certify that this filing incorporates all of the revenues for the consolidated entities for the entire year and that the filer adhered to and continues to meet the conditions set forth in section II-C of the instructions.

606	Signature	
607	Printed name of officer	First MI Last
608	Position with reporting entity	
609	Business telephone number of officer	( ) - ext -
610	Email of officer ‖ not for public release ‖	
611	Date	

612 Check those that apply: ☐ Original April 1 filing for year ☐ New filer, registration only ☐ Revised filing with updated registration ☐ Revised filing with updated revenue data

Do not mail checks with this form. Send this form to: **Form 499 Data Collection Agent c/o USAC 2000 L Street, N.W. Suite 200, Washington, DC 20036**

For additional information regarding this worksheet contact: Telecommunications Reporting Worksheet information: (888) 641-8722 or via email: Form499@universalservice.org

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Block 5: Additional Revenue Breakouts

501	Filer 499 ID [from Line 101]	
502	Legal name of reporting entity [from Line 102]	

Filers that report revenues in Block 3 and Block 4 must provide the percentages requested in Lines 503 through 510. See instructions for limited exceptions.

Percentage of revenues reported in Block 3 and Block 4 billed in each region of the country. Round or estimate to nearest whole percentage. Enter 0 if no service was provided in the region.

			Block 3 Carrier's Carrier (a)	Block 4 End-User Telecom (b)
503	Southeast:	Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and U.S. Virgin Islands	%	%
504	Western:	Alaska, Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming	%	%
505	West Coast:	California, Hawaii, Nevada, American Samoa, Guam, Johnston Atoll, Midway Atoll, Northern Mariana Islands, and Wake Island.	%	%
506	Mid-Atlantic:	Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Virginia, and West Virginia	%	%
507	Mid-West:	Illinois, Indiana, Michigan, Ohio, and Wisconsin	%	%
508	Northeast:	Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont	%	%
509	Southwest:	Arkansas, Kansas, Missouri, Oklahoma, and Texas	%	%
510	Total:	[Percentages must add to 0 or 100.]	%	%

511 Revenues from resellers that do not contribute to universal service support mechanisms are included in Block 4-B, Line 420 but may be excluded from a filer's TRS, NANPA, LNP, and FCC interstate telephone service provider regulatory fee contribution bases. To have these amounts excluded, the filer has the option of identifying such revenues below. **As stated in the instructions, you must have in your records the FCC Filer 499 ID for each customer whose revenues are included on Line 511. (See instructions.)**

	(a) Total Revenues	(b) Interstate and International
Revenues from resellers that do not contribute to Universal Service	$	$

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE. 18 U.S.C. § 1001

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Block 6: CERTIFICATION: to be signed by an officer of the filer

601	Filer 499 ID [from Line 101]	
602	Legal name of reporting entity [from Line 102]	

Section IV of the instructions provides information on which types of reporting entities are required to file for which purposes. Any entity claiming to be exempt from one or more contribution requirements should so certify below and attach an explanation. [The Universal Service Administrator will determine which entities meet the *de minimis* threshold based on information provided in Block 4, even if you fail to so certify below.

603 I certify that the reporting entity is exempt from contributing to Universal Service ☐ TRS ☐ NANPA ☐ LNP Administration ☐

Provide explanation below:

604 Please indicate whether the reporting entity is **State or Local Government Entity** ☐ **I.R.C. § 501 or State Tax Exempt (see instructions)** ☐

605 I certify that the revenue data contained herein are privileged and confidential and that public disclosure of such information would likely cause substantial harm to the competitive position of the company. I request nondisclosure of the revenue information contained herein pursuant to sections 0.459, 52.17, 54.711 and 64.604 of the Commission's rules. ☐

I certify that I am an officer of the above-named reporting entity as defined in the instructions, that I have examined the foregoing report and, to the best of my knowledge, information and belief, all statements of fact contained in this Worksheet are true and that said Worksheet is an accurate statement of the affairs of the above-named company for the previous calendar year. In addition, I swear, under penalty of perjury, that all requested identification registration information has been provided and is accurate. If the above-named reporting entity is filing on a consolidated basis, I certify that this filing incorporates all of the revenues for the consolidated entities for the entire year and that the filer adhered to and continues to meet the conditions set forth in section II-C of the instructions.

606	Signature	
607	Printed name of officer	First MI Last
608	Position with reporting entity	
609	Business telephone number of officer	( ) - ext -
610	Email of officer — not for public release	
611	Date	

612 Check those that apply ☐ Original April 1 filing for year ☐ New filer, registration only ☐ Revised filing with updated registration ☐ Revised filing with updated revenue data

Do not mail checks with this form. Send this form to: **Form 499 Data Collection Agent c/o USAC 2000 L Street, N.W. Suite 200, Washington, DC 20036**

For additional information regarding this worksheet contact: Telecommunications Reporting Worksheet information (888) 641-8722 or via email: Form499@universalservice.org

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

[FR Doc. 2011–9026 Filed 4–13–11; 8:45 am]
BILLING CODE 6712–01–C

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 10:41 a.m. on Tuesday, April 12, 2011, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters related to the Corporation's supervision, corporate and resolution activities.

In calling the meeting, the Board determined, on motion of Director John E. Bowman (Acting Director, Office of Thrift Supervision), seconded by Director John G. Walsh (Acting Comptroller of the Currency), concurred in by Vice Chairman Martin J. Gruenberg, Director Thomas J. Curry (Appointive), and Chairman Sheila C. Bair, that Corporation business required its consideration of the matters which were to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10)).

The meeting was held in the Board Room of the FDIC Building located at 550—17th Street, NW., Washington, DC.

Dated: April 12, 2011.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2011–9180 Filed 4–12–11; 4:15 pm]
BILLING CODE P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than April 28, 2011.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Mark T. Mowat*, Omaha, Nebraska, as a member of a group acting in concert; to acquire control of Frontier Management, LLC, Omaha, Nebraska, and thereby indirectly acquire control of Frontier Holdings, LLC, Omaha, Nebraska; Frontier Bank, Madison, Nebraska; Frontier Bank, Davenport, Nebraska; and Pender State Bank, Pender, Nebraska.

Board of Governors of the Federal Reserve System, April 8, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–8946 Filed 4–13–11; 8:45 am]
BILLING CODE 6210–01–P

GENERAL SERVICES ADMINISTRATION

[Notice CIB–2011–1; Docket–2011–0006; Sequence 8]

Privacy Act of 1974; Notice of New System of Records

AGENCY: General Services Administration.

ACTION: New notice.

SUMMARY: GSA proposes to establish a new system of records subject to the Privacy Act of 1974, as amended, 5 U.S.C. 552a.

DATES: Effective May 16, 2011.

FOR FURTHER INFORMATION CONTACT: Call or e-mail the GSA Privacy Act Officer: telephone 202–208–1317; e-mail *gsa.privacyact@gsa.gov*.

ADDRESSES: GSA Privacy Act Officer (CIB), General Services Administration, 1275 First Street, NE., Washington, DC 20417.

SUPPLEMENTARY INFORMATION: GSA proposes to establish a new system of records subject to the Privacy Act of 1974, 5 U.S.C. 552a. The system will provide for the collection of information to track, manage, and process claims, protests, administrative actions, and litigation cases in the Office of General Counsel.

Dated: April 5, 2011.

Cheryl M. Paige,

Director, Office of Information Management.

SYSTEM NAME:

GSA/OGC–1 (Office of General Counsel Cases).

SYSTEM LOCATION:

The system is maintained electronically and in paper form in the Office of the General Counsel (OGC).

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who are parties to or are otherwise involved in claims, protests, administrative actions or other litigation with GSA. Individuals referenced in potential or actual cases and matters handled by the Office of General Counsel; and attorneys, paralegals, and other employees of the Office of General Counsel directly involved in these cases or matters.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system contains information routinely and necessarily obtained by the Office of General Counsel in the conduct of its official responsibility to represent and advise the Agency. Records in this system pertain to a broad variety of matters handled by the Office of General Counsel including, but not limited to, tort claims, contract disputes, transactional matters, employment matters, and other administrative actions or litigation. Records may include but are not limited to: name, social security number, addresses, phone numbers, e-mail address, birth date, financial information, medical records, or employment records. This system notice covers records not covered by other appropriate system of records notices.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

General authority to maintain the system is contained in 5 U.S.C. 301 and 302 and 44 U.S.C. 3101; 5 U.S.C. 1204 and 1221; Part III of Title 5 of the U.S. Code; 40 U.S.C. 501, *et seq.;* 41 U.S.C. 601, *et seq.;* E.O. 12979, 4 CFR part 21, and 28 U.S.C. 1491; 28 U.S.C. 2671, *et seq.;* E.O. 12549, E.O. 12689, and 48 CFR subpart 9.4; Chapter 37 of Title 31 of the U.S. Code; 5 U.S.C. 552; and 5 U.S.C. 552a.

PURPOSE:

Records are maintained by the Office of General Counsel for the purpose of providing representational and advisory legal services to the agency.

ROUTINE USES OF THE SYSTEM RECORDS, INCLUDING CATEGORIES OF USERS AND THEIR PURPOSES FOR USING THE SYSTEM:

In addition to the purpose for this system of records, information from this system also may be disclosed as a routine use:

a. In any criminal, civil or administrative legal proceeding where pertinent, to which GSA, a GSA employee, or the United States or other entity of the United States Government is a party before a court or administrative body.

b. To a Federal, State, local, or foreign agency responsible for investigating, prosecuting, enforcing, or carrying out a statute, rule, regulation, or order when GSA becomes aware of a violation or potential violation of civil or criminal law or regulation; or to an agency, individual or organization, if there is reason to believe that such agency, individual or organization possesses information or is responsible for acquiring information relating to the investigation, trial or hearing, and the dissemination is reasonably necessary to elicit such information or to obtain the cooperation of a witness or an informant.

c. To an appeal, grievance, hearing, or complaints examiner; an equal employment opportunity investigator, arbitrator, or mediator; and/or an exclusive representative or other person authorized to investigate or settle a grievance, complaint, or appeal filed by an individual who is the subject of the record.

d. To the Office of Personnel Management (OPM), the Office of Management and Budget (OMB), and the Government Accountability Office (GAO) in accordance with their responsibilities for evaluating Federal programs.

e. To a Member of Congress or his or her staff on behalf of and at the request of the individual who is the subject of the record.

f. To an expert, consultant, or contractor of GSA in the performance of a Federal duty related to the contract or appointment to which the information is relevant.

g. To the National Archives and Records Administration (NARA) for records management purposes.

h. To appropriate agencies, entities, and persons when (1) the Agency suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised, (2) the Agency has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by GSA or another agency or entity) that rely upon the compromised information, and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with GSA's efforts to respond to the suspected or confirmed compromise and prevent, minimize or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, AND RETAINING, AND DISPOSING OF SYSTEM RECORDS:

STORAGE:

Records are maintained in paper and/or electronic form in the Office of General Counsel.

RETRIEVABILITY:

Records may be retrieved based on any information captured, including but not limited to: name, case name, and social security number.

SAFEGUARDS:

Access is limited to authorized individuals with passwords or keys. Electronic files are maintained behind a GSA firewall certified by the National Computer Security Association, and paper files are stored in locked rooms or filing cabinets.

RETENTION AND DISPOSAL:

System records are retained and disposed of according to GSA records maintenance and disposition schedules and the requirements of the National Archives and Records Administration.

SYSTEM MANAGER AND ADDRESS:

Office of General Counsel, General Services Administration, 1275 First St., NE., Washington, DC 20417. OGC may also be contacted via telephone at (202) 501–2200.

NOTIFICATION PROCEDURE:

Individuals wishing to inquire if the system contains information about them should contact the system manager at the above address.

RECORD ACCESS PROCEDURES:

Individuals wishing to access their own records should contact the system manager at the address above.

CONTESTING RECORD PROCEDURE:

Individuals wishing to amend their records should contact the system manager at the address above. Applicable regulations are located at 41 CFR 105–64.

RECORD SOURCE CATEGORIES:

The sources for information in the system are data from other systems, information submitted by individuals or their representatives, information gathered from public sources, and information from other entities or individuals involved in the cases or matters.

[FR Doc. 2011–9022 Filed 4–13–11; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–New; 30-day notice]

Agency Information Collection Request; 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden. To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov*, or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above email address within 30-days.

Proposed Project: Evaluation of the IT Professionals in Health Care: University-Based Training—OMB No. 0090–NEW–ONC

Abstract: Currently, the Office of the National Coordinator for Health Information Technology's (ONC) Office of Economic Analysis, Evaluation, and Modeling is soliciting comments on a series of data collection efforts for the

Evaluation of the IT Professionals in Health Care: University-Based Training. The Workforce Program, created under Section 3016 of the HITECH Act, was intended to provide "assistance to institutions of higher education (or consortia thereof) to establish or expand health informatics education programs, including certification, undergraduate, and masters degree programs, for both health care and information technology students." The evaluation of the Workforce Program is a new information collection activity which will explore program challenges, provide critical formative feedback to the Workforce grantee institutions on their activities, and determine whether the Workforce Program overall was successful in helping to build a skilled workforce equipped to meet the heightened demands of the current environment. The data collection efforts include a web-based baseline survey and a web-based follow-up survey of university students.

ONC is interested in developing a comprehensive understanding of the planning, implementation, and effectiveness of the Workforce Grant Program. The evaluation will determine how the Workforce Grant Program has contributed to the development of comprehensive, integrated health IT training programs across community colleges, universities, and other programs. This study will use surveys and other forms of data collection, such as focus groups and interviews, to assess the outcomes associated with participation in the program and to provide useful feedback to the Workforce grantee institutions for continuous improvement. The data collection efforts include a web-based baseline survey and a web-based follow-up survey of university students enrolled in ONC funded programs.

The anticipated data collection will begin in June 2011. Data collection will occur continuously through the 24 months of the campaign. The data collected will help identify program challenges, provide critical formative feedback to the Workforce grantee institutions on their activities, and determine whether the Workforce Program overall was successful in helping to build a skilled workforce equipped to meet the heightened demands of the current environment.

ESTIMATED ANNUALIZED BURDEN TABLE

Forms	Type of respondent	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Web-based UBT Student Baseline Survey	Students enrolled in university-based Workforce program.	634	1	20/60	209
Web-based UBT Student Follow-up Survey.	Students enrolled in university-based Workforce program.	634	1	20/60	209
Total					418

Mary Forbes,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 2011–9062 Filed 4–13–11; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0278]

Agency Information Collection Request; 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden. To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov,* or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above e-mail address within 30-days.

Proposed Project: Federal-wide Assurance Forms—Extension—OMB No. 0990–0278—Assistant Secretary for Health, Office of Public Health and Science, Office for Human Research Protections.

Abstract: The Office for Human Research Protections (OHRP) is requesting a three year extension of the Federal-wide Assurance (FWA) forms. The FWA is designed to provide a simplified procedure for institutions engaged in HHS-conducted or supported research to satisfy the assurance requirements of Section 491(a) of the Public Health Service Act and HHS Regulations for the protection of human subjects at 45 CFR 46.103. The respondents are institutions engaged in human subjects research that is conducted or supported by HHS.

ESTIMATED ANNUALIZED BURDEN IN HOURS TABLE

Form name	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
Federal-wide Assurance (FWA)	11,000	2	30/60	11,000

Mary Forbes,

Office of the Secretary, Paperwork Reduction, Act Reports Clearance Officer.

[FR Doc. 2011–9063 Filed 4–13–11; 8:45 am]

BILLING CODE 4150–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) announces the Following Advisory Committee Meeting.

Name: National Committee on Vital and Health Statistics (NCVHS); Standards Subcommittee.

Time and Date: April 27, 2011, 8 a.m.–5 p.m.

Place: Marriott Washington Hotel, 1221 22nd Street, NW (Between M & N Sts), Washington, DC 20037, Phone: 202–872–1500, Fax: 202–872–1424.

Status: Open.

Purpose: The purpose of this upcoming meeting of the Subcommittee on Standards is to receive (1) industry input on the acknowledgements transaction as a standard to be adopted under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and (2) commentary and proposals pertaining to the maintenance and modification of standards and operating rules adopted under the Patient Protection and Affordable Care Act (ACA) of 2010. The Subcommittee will hear testimony with proposals and recommendations from individual, organizational and association subject matter experts.

The NCVHS has been named in the Patient Protection and Affordable Care Act (ACA) of 2010 to review and make recommendations on several operating rules and standards related to HIPAA transactions. This meeting will support these activities in the development of a set of recommendations for the Secretary, as required by § 1104 of the ACA. Text of the ACA can be found at *http://www.whitehouse.gov/healthreform.*

Contact Person for More Information: Substantive program information as well as summaries of meetings and a roster of committee members may be obtained from Lorraine Doo, lead staff for the Standards Subcommittee, NCVHS, Centers for Medicare and Medicaid Services, Office of E-Health Standards and Services, 7500 Security Boulevard, Baltimore, Maryland, 21244, telephone (410) 786–6597 or Marjorie S. Greenberg, Executive Secretary, NCVHS, National Center for Health Statistics, Centers for Disease Control and Prevention, 3311 Toledo Road, Room 2402, Hyattsville, Maryland 20782, telephone (301) 458–4245. Information also is available on the NCVHS home page of the HHS Web site: *http://www.ncvhs.hhs.gov/*, where further information including an agenda will be posted when available. Persons interested in providing oral or written testimony during the April 27th hearing should contact Lorraine Doo at *Lorraine.Doo@cms.hhs.gov.*

Should you require reasonable accommodation, please contact the CDC Office of Equal Employment Opportunity on (301) 458–4EEO (4336) as soon as possible.

Dated: April 6, 2011.

James Scanlon,

Deputy Assistant Secretary for Planning and Evaluation Science and Data Policy, Office of the Assistant Secretary for Planning and Evaluation.

[FR Doc. 2011–9084 Filed 4–13–11; 8:45 am]

BILLING CODE 4151–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: DRA TANF Final Rule.

OMB No.: 0970–0338.

Description

When the Deficit Reduction Act of 2005 (DRA) reauthorized the Temporary Assistance for Needy Families (TANF) program, it imposed a new data requirement that States prepare and submit data verification procedures and replaced other data requirements with new versions including: the TANF Data Report, the SSP–MOE Data Report, the Caseload Reduction Documentation Process, and the Reasonable Cause/Corrective Compliance Documentation Process. The Claims Resolution Act of 2010 extended the TANF program through September 2011. We are proposing to continue these information collections without change.

Respondents: States, Territories and Tribes.

ANNUAL BURDEN ESTIMATES

Instrument or requirement	Number of respondents	Yearly submittals	Average burden hours per response	Final rule total annual burden hours
Preparation and Submission of Data Verification Procedures—§§ 261.60–261.63	54	1	640	34,560
Caseload Reduction Documentation Process, ACF–202—§§ 261.41 & 261.44	54	1	120	6,480
Reasonable Cause/Corrective Compliance Documentation Process—§§ 262.4, 262.6, & 262.7; § 261.51	54	2	240	25,920
TANF Data Report—Part 265	54	4	2,201	475,416
SSP–MOE Data Report—Part 265	29	4	714	82,824

Total Burden Hours: 625,200.

Additional Information

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address *infocollection@acf.hhs.gov.*

OMB Comment

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register.** Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following:

Office of Management and Budget, Paperwork Reduction Project, *Fax:* 202–395–7285, *E-mail: OIRA_SUBMISSION@OMB.EOP.GOV,* Attn:

Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2011–9079 Filed 4–13–11; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB review; comment request

Title: IRS Project 1099.
OMB No.: 0970–0183.

Description: A voluntary program which provides State Child Support Enforcement agencies, upon their request, access to the earned and unearned income information reported to IRS by employers and financial institutions. The IRS 1099 information is used to locate noncustodial parents and to verify income and employment.

Respondents:

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
1099 Record Specifications	54	12	1.96	1,270.08
IRS Safeguarding Certification Letter	54	1	0.48	25.92
Estimated Total Annual Burden Hours:				1,296

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–7285, E-mail: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2011–9054 Filed 4–13–11; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0267]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Survey on Consumers' Emotional and Cognitive Reactions to Food Recalls

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 May 16, 2011.

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 e-mailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–new and "Survey on Consumers' Emotional and Cognitive Reactions to Food Recalls." Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

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.

Survey on Consumers' Emotional and Cognitive Reactions to Food Recalls—21 U.S.C. 393(d)(2)(C) (OMB Control Number 0910–NEW)

I. Background

The proposed "Survey on Consumers' Emotional and Cognitive Reactions to Food Recalls" will be conducted under a cooperative agreement between the Joint Institute for Food Safety and Applied Nutrition (JIFSAN) and the Center for Risk Communication Research at the University of Maryland. JIFSAN was established in 1996 and is a public and private partnership between FDA and the University of Maryland. The Center for Risk Communication Research will design and administer the study.

The proposed study will assess consumers' emotional and cognitive recollection of certain food recalls and gauge how these recollections affect their current perceptions about food recalls and their inclination to adhere to future recommended food recall behaviors. Existing data show that many consumers do not take appropriate protective actions during a foodborne illness outbreak or food recall (Refs. 1 and 2). For example, 41 percent of U.S. consumers say they have never looked for any recalled product in their home (Ref. 2). Conversely, some consumers overreact to the announcement of a foodborne illness outbreak or food recall. In response to the 2006 fresh, bagged spinach recall which followed a

multistate outbreak of *Escherichia coli* O157: H7 infections (Ref. 3), 18 percent of consumers said they stopped buying other bagged, fresh produce because of the spinach recall (Ref. 1).

Research shows that emotion plays a large role in decisionmaking, and that individuals may not be conscious of its effects on their behavior (Ref. 4). For example, when people are angry they are likely to place blame, take action, and want justice to be served (Ref. 5). If a particular food recall engenders widespread anger and the anger is coupled with behavior that is less than desirable from a food safety or nutritional standpoint, it is possible that anger will be the lens through which future food recall situations are viewed, thus resulting in similar undesirable behaviors. Findings from this study will help FDA understand the emotional response to food recalls. This will help FDA to design more effective consumer food recall messages during and after a recall.

FDA conducts research and educational and public information programs relating to food safety under its broad statutory authority, set forth in section 903(b)(2) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 393(b)(2)), to protect the public health by ensuring that foods are "safe, wholesome, sanitary, and properly labeled," and in section 903(d)(2)(C), to conduct research relating to foods, drugs, cosmetics, and devices in carrying out the FD&C Act.

FDA plans to survey U.S. consumers using a web-based panel of U.S. households to collect information on consumers' cognitive and emotional reaction to food recalls. The survey will query consumers on their recollection of food recalls within the past 5 years; attitude toward recalled foods; knowledge about particular food recalls; behavior during the food recall; and assessment and appraisals of susceptibility, severity, satisfaction, and self-efficacy.

The data will be collected using an online survey. A pool of 10,000 consumers from a Web-based consumer panel will be screened for eligibility based on age (18+ years) and familiarity with recent food recalls. One thousand of eligible consumers will be randomly selected to participate in the survey. The results of the survey will not be used to generate population estimates.

The estimated total hour burden of the collection of information is 354 hours (table 1 of this document). To help design and refine the questionnaire, the Center for Risk Communication Research will conduct cognitive interviews by screening 25 adult consumers in order to obtain 8 respondents for the cognitive interviews. Each screening is expected to take 5 minutes (0.083 hours) and each cognitive interview is expected to take 1 hour. The total for cognitive interview activities is 10 hours (2 hours + 8 hours). Subsequently, we will conduct pretests of the study questionnaire before it is administered. We expect that 100 invitations, each taking 2 minutes (0.033 hours), will need to be sent to adult members of the online consumer panel to have 40 of them complete a 10 minute (0.167 hours) pretest. The total for the pretest activities is 10 hours (3 hours + 7 hours). We estimate sending 10,000 survey screeners, each taking 1 minute (0.017 hours), to adult members of the online consumer panel to have 1,000 of them complete a 10 minute (0.167 hours) survey. The total for the survey activities is 337 hours (170 hours + 167 hours).

The burden estimate for this study published in the **Federal Register** of June 18, 2010 (75 FR 34745), has increased from 234 hours to 357 hours. The increase in burden hours represents the addition of cognitive interviews to the study design and correction of a math error.

In the **Federal Register** of June 18, 2010 (75 FR 34745), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received two letters containing multiple comments in response to the notice. One letter contained comments outside the scope of the four collection of information topics on which the notice solicits comments and, thus, will not be addressed here.

(Comment) One comment suggested that the survey should include consumers whose pets were sickened or had died because of mycotoxins in pet food that resulted in the 2004 pet food recall.

(Response) FDA agrees that consumers who were affected by the 2004 pet food recall should be included as survey respondents. These consumers will be included if they are members of the online consumer panel from which the survey sample will be drawn and they are randomly selected from the panel. FDA does not believe that the affected population should be target-sampled because the study focuses on human food recalls rather than pet food recalls.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Portion of study	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
Cognitive interview screener	25	1	25	5/60	2
Cognitive interview	8	1	8	1/60	8
Pretest screener	100	1	100	2/60	3
Pretest	40	1	40	10/60	7
Screener	10,000	1	10,000	1/60	170
Survey	1,000	1	1,000	10/60	167
Total					357

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

II. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Cuite, C., Condry, S., Nucci, M., and Hallman, W., "Public Response to the Contaminated Spinach Recall of 2006," Publication number RR–0107–013. New Brunswick, New Jersey: Rutgers, the State University of New Jersey, Food Policy Institute, 2007.

2. Hallman, W., Cuite, C., and Hooker, N., "Consumer Responses to Food Recalls: 2009 National Survey Report," Publication number RR–0109–018. New Brunswick, New Jersey: Rutgers, the

State University of New Jersey, Food Policy Institute, 2009.

3. Acheson, D., "Outbreak of Escherichia coli 0157 Infections Associated with Fresh Spinach—United States, August–September 2006," 2007. Available at *http://first.fda.gov/cafdas/documents/Acheson_Spinach_Outbreak_2006_FDA_pres.ppt.*

4. Han, S., Lerner, J.S., and Keltner, D., "Feelings and Consumer Decision Making: The Appraisal-Tendency Framework," *Journal of Consumer Psychology,* 17(3), 158–168, 2007.

5. Lazurus, R.S., Emotion and Adaptation. New York: Oxford University Press, 1991.

Dated: April 8, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–8936 Filed 4–13–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–C–0050]

Sun Chemical Corp.; Filing of Color Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Sun Chemical Corp. has filed a petition proposing that the color additive regulations for D&C Red No. 6 and D&C Red No. 7 be amended by replacing the current specification for "Ether-soluble matter" with a maximum limit of 0.015 percent for the recently identified impurity 1-[(4-methylphenyl)azo]-2-naphthalenol.

FOR FURTHER INFORMATION CONTACT: Teresa A. Croce, Center for Food Safety and Applied Nutrition (HFS–265), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 301–436–1281.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (section 721(d)(1) (21 U.S.C. 379e(d)(1))), notice is given that a color additive petition (CAP 1C0290) has been filed by Sun Chemical Corp., 5020 Spring Grove Ave., Cincinnati, OH 45232. The petition proposes to amend the color additive regulations for D&C Red No. 6 (21 CFR 74.1306 and 74.2306) and D&C Red No. 7 (21 CFR 74.1307 and 74.2307) by replacing the current specification for "Ether-soluble matter" with a maximum limit of 0.015 percent for the recently identified impurity 1-[(4-methylphenyl)azo]-2-naphthalenol and by removing Appendix A in 21 CFR part 74, which pertains to the "Ether-soluble matter" specification.

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.

Dated: April 4, 2011.

Mitchell A. Cheeseman,

Acting Director, Office of Food Additive Safety, Center for Food Safety and Applied Nutrition.

[FR Doc. 2011–8575 Filed 4–13–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0189]

Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: Low Level Laser System for Aesthetic Use; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled "Class II Special Controls Guidance Document: Low Level Laser System for Aesthetic Use." This guidance document describes a means by which low level laser systems for aesthetic use may comply with the requirement of special controls for class II devices. Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule to classify low level laser systems for aesthetic use into class II (special controls). This guidance document is being immediately implemented as the special control for low level laser systems for aesthetic use, but it remains subject to comment in accordance with the Agency's good guidance practices.

DATES: Submit either electronic or written comments on the guidance at any time. General comments on Agency guidances are welcome at any time.

ADDRESSES: Submit written requests for single copies of the guidance document entitled "Class II Special Controls Guidance Document: Low Level Laser System for Aesthetic Use" to the Division of Small Manufacturers, International, and Consumer Assistance, Office of Communication, Education and Radiation Programs, Center for Devices and Radiological Health (CDRH), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4613, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Richard Felten, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1436, Silver Spring, MD 20993–0002, 301–796–6392.

SUPPLEMENTARY INFORMATION:

I. Background

Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule classifying low level laser systems for aesthetic use into class II (special controls) under section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360c(f)(2)). This guidance document will serve as the special control for low level laser systems for aesthetic use. Section 513(f)(2) of the FD&C Act provides that any person who submits a premarket notification under section 510(k) of the FD&C Act (21 U.S.C. 360(k)) for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1) of the FD&C Act, request FDA to classify the device under the criteria set forth in section 513(a)(1) of the FD&C Act. FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing such classification. Because of the timeframes established by section 513(f)(2) of the FD&C Act, FDA has determined, under § 10.115(g)(2) (21 CFR 10.115(g)(2)), that it is not feasible to allow for public participation before issuing this guidance as a final guidance document. Thus, FDA is issuing this guidance document as a level 1 guidance document that is immediately in effect. FDA will consider any

comments that are received in response to this notice to determine whether to amend the guidance document.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on low level laser systems for aesthetic use. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm*. Guidance documents are also available at *http://www.regulations.gov*. To receive "Class II Special Controls Guidance Document: Low Level Laser System for Aesthetic Use," you may either send an e-mail request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy. Please use the document number 1735 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 807, subpart E, have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 820 have been approved under OMB control number 0910–0073; and the collections of information in 21 CFR 801 have been approved under OMB control number 0910–0485.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed 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.

Dated: April 7, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–8945 Filed 4–13–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget (OMB), in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). To request a copy of the clearance requests submitted to OMB for review, e-mail *paperwork@hrsa.gov* or call the HRSA Reports Clearance Office on (301) 443–1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995:

Proposed Project: Sickle Cell Disease Program Evaluations and Quality Improvement Activities—[NEW]

The Sickle Cell Disease and Newborn Screening Program (SCDNBSP) and the Sickle Cell Disease Treatment Demonstration Program (SCDTDP) are both administered by the Genetic Services Branch (GSB) of the Division of Services for Children with Special Health Needs in the Health Resources and Services Administration's (HRSA) Maternal and Child Health Bureau (MCHB). The SCDTDP is comprised of geographically distributed regional networks that provide coordinated, comprehensive, culturally competent, and family-centered care to families with sickle cell disease and a national coordinating center to support grantee activities. The SCDTDP is designed to improve access to services for individuals with sickle cell disease, improve/expand patient and provider education, and improve/expand the continuity and coordination of service delivery for individuals with sickle cell disease and carriers of the sickle cell gene mutation. The SCDNBSP is comprised of several national funded community-based sickle cell disease networks located in the U.S. and the National Coordinating and Evaluation Center. The community-based sickle cell disease networks partner with State newborn screening programs, comprehensive sickle cell treatment centers, and health care professionals to provide support to infants screened positive for sickle cell disease, carriers of the sickle cell gene mutation and their families.

HRSA seeks to conduct two evaluations (SCDTDP evaluation previously approved by OMB) and a quality improvement project, the purpose of which are to assess the service delivery processes and outcomes resulting from the systems of care delivered by the SCDNBSP and SCDTDP networks to individuals affected by sickle cell disease who present at their sites for care. The clients of the three programs will be the respondents for this data collection activity.

The annual estimate of burden for both the SCDNBSP and the SCDTDP evaluations and quality improvement effort is as follows:

ESTIMATED HOUR AND COST BURDEN OF THE DATA COLLECTION

Questionnaires	Number of respondents	Responses per respondent	Total responses	Average hours per response	Total hour burden	Wage rate	Total hour cost
MDP SCD Questionnaire	140	2	280	.45	126	$20.90	$2633.4
MDP SCT Questionnaire	1400	1	1400	.30	420	20.90	8778
Utilization Questionnaire (pre-demonstration)	900	1	900	.75	675	20.90	14,107.5

ESTIMATED HOUR AND COST BURDEN OF THE DATA COLLECTION—Continued

Questionnaires	Number of respondents	Responses per respondent	Total responses	Average hours per response	Total hour burden	Wage rate	Total hour cost
Utilization Questionnaire (post demonstration)	900	1	900	.50	450	20.90	9,405
SF–36 Health Survey for adults over 18 years of age	630	2	1260	.25	315	20.90	6,583.5
PedsQL for parents of children & adolescents 18 years or younger	270	2	540	.25	135	20.90	2,821.5
PedsQL for children & adolescents 18 years or younger	225	2	450	.25	112.5	20.90	2,351.25
The Medical Home Family Index (Health Care Satisfaction)	900	2	1800	.25	450	20.90	9,405
QI Instrument	9	12	108	4	432	20.90	9,028.80
Hemoglobinopathies Emerging Populations Form (Client Family Communication)	900	2	1800	.20	360	20.90	7,524
Total	6,274		9,438		3,475.5		72,637.95

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to the desk officer for HRSA, either by e-mail to *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974. Please direct all correspondence to the "attention of the desk officer for HRSA."

Dated: April 8, 2011.

Reva Harris,

Acting Director, Division of Policy and Information Coordination.

[FR Doc. 2011–9077 Filed 4–13–11; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Privacy Act of 1974; Deletion of an Existing System of Records

AGENCY: Department of Health and Human Services (HHS), Health Resources and Services Administration (HRSA).

ACTION: Notice to delete an existing HRSA system of records (SOR).

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, HRSA is deleting an existing system of records titled Record of Patient's Personal Valuables and Monies, HRSA SOR #09–15–0002, established at Vol. 59, No. 61 **Federal Register** pp 6854–6, December 28, 1994.

DATES: *Effective Date:* The deletion will be effective on April 14, 2011.

ADDRESSES: The public should address comments to Associate Administrator, Health Resources and Services Administration, 5600 Fishers Lane, Room 17–105, Rockville, Maryland 20857, Telephone number 301–594–4110. Comments received will be available for review at this location, by appointment, during regular business hours, Monday through Friday from 9 a.m. to 3 p.m., Eastern Time Zone.

SUPPLEMENTARY INFORMATION: HRSA's Bureau of Primary Health Care's National Hansen's Disease Program (NHDP) located in Baton Rouge, Louisiana, formerly leased hospital space where the elderly Hansen's disease resident patients resided. The purpose of this System of Records was to provide for the safekeeping of those residents' valuables as needed. In September 2009, when the hospital lease expired, those Hansen's disease residents were relocated to a nursing home facility; therefore, this system of records is no longer required.

Dated: March 31, 2011.

Mary K. Wakefield,

Administrator.

[FR Doc. 2011–9112 Filed 4–13–11; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Prevention; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of the Web conference meeting of the Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Substance Abuse Prevention (CSAP) Drug Testing Advisory Board (DTAB) on May 3 and 4, 2011.

A portion of the meeting from 10 a.m. to 5 p.m. EDT on May 3 will be open to the public and will include the Federal drug testing updates from the Department of Transportation, the Department of Defense, the Nuclear Regulatory Commission, and the Federal Drug-Free Workplace Programs; updates on the electronic custody and control form and the medical review officer certification under the Mandatory Guidelines for Federal Workplace Drug Testing Programs; and updates on oral fluid as a potential alternative specimen for Federal Workplace Drug Testing Programs.

The public is invited to attend the open session in person or to listen via teleconference. Due to the limited seating space and call-in capacity, registration is requested. Public comments are welcome. To register,

make arrangements to attend, obtain the teleconference call-in numbers and access codes, submit written or brief oral comments, or to request special accommodations for persons with disabilities, please register at the SAMHSA Committees' Web site at *http://nac.samhsa.gov/Registration/meetingsRegistration.aspx* or by contacting the CSAP DTAB Designated Federal Official, Dr. Janine Denis Cook (see contact information below).

The Board will also meet to discuss proposed revisions to the Mandatory Guidelines for Federal Workplace Drug Testing Programs on May 4 between 10 a.m.–5 p.m. EDT. This portion of the meeting will be conducted in a closed session as determined by the Administrator, SAMHSA, in accordance with 5 U.S.C. 552b(c)(9)(B) and 5 U.S.C. App. 2, Section 10(d).

Substantive program information, a summary of the meeting, and a roster of DTAB members may be obtained as soon as possible after the meeting, either by accessing the SAMHSA Committee Web site, *http://www.nac.samhsa.gov/DTAB/meetings.aspx,* or by contacting Dr. Cook. The transcript for the open meeting will also be available on the SAMHSA Committee Web site within three weeks after the meeting.

Committee Name: Substance Abuse and Mental Health Services Administration's Center for Substance Abuse Prevention Drug Testing Advisory Board.

Date/Time/Type: May 3, 2011 from 10 a.m. to 5 p.m. EDT: OPEN. May 4, 2011 from 10 a.m. to 5 p.m. EDT: CLOSED.

Place: SAMHSA Office Building, Sugarloaf and Seneca Conference Rooms, 1 Choke Cherry Road, Rockville, Maryland 20857.

Contact: Janine Denis Cook, PhD, Designated Federal Official, SAMHSA Drug Testing Advisory Board, 1 Choke Cherry Road, Room 2–1045, Rockville, Maryland 20857.

Telephone: 240–276–2600.

Fax: 240–276–2610.

E-mail: janine.cook@samhsa.hhs.gov.

Dated: April 8, 2011.

Toian Vaughn,

Committee Management Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. 2011–9082 Filed 4–13–11; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2011–0028]

Critical Infrastructure Partnership Advisory Council (CIPAC)

AGENCY: National Protection and Programs Directorate, DHS.

ACTION: Quarterly CIPAC membership update.

SUMMARY: The Department of Homeland Security (DHS) announced the establishment of the Critical Infrastructure Partnership Advisory Council (CIPAC) by notice published in the **Federal Register** Notice (71FR 14930–14933) dated March 24, 2006. That notice identified the purpose of CIPAC as well as its membership. This notice provides: (i) The quarterly CIPAC membership update; (ii) instructions on how the public can obtain the CIPAC membership roster and other information on the Council; and (iii) information on recently completed CIPAC meetings.

FOR FURTHER INFORMATION CONTACT: Nancy J. Wong, Director, Partnership Programs and Information Sharing Office, Partnership and Outreach Division, Office of Infrastructure Protection, National Protection and Programs Directorate, U.S. Department of Homeland Security, 245 Murray Lane, Mail Stop 0607, Arlington, VA 20598–0607; by telephone (703) 235–3999 or via e-mail at *CIPAC@dhs.gov.*

Responsible DHS Official: Nancy J. Wong, Director, Partnership Programs and Information Sharing Office, Partnership and Outreach Division, Office of Infrastructure Protection, National Protection and Programs Directorate, U.S. Department of Homeland Security, 245 Murray Lane, Mail Stop 0607, Arlington, VA 20598–0607; by telephone (703) 235–3999 or via e-mail at *CIPAC@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Purpose and Activity: CIPAC facilitates interaction between government officials and representatives of the community of owners and/or operators for each of the critical infrastructure sectors defined by Homeland Security Presidential Directive 7 (HSPD–7) and identified in the National Infrastructure Protection Plan (NIPP). The scope of activities covered by CIPAC includes planning; coordinating among government and critical infrastructure owner/operator security partners; implementing security program initiatives; conducting operational activities related to critical infrastructure protection security measures, incident response, recovery, infrastructure resilience, reconstituting critical infrastructure assets and systems for both manmade and naturally occurring events; and sharing threat, vulnerability, risk mitigation, and infrastructure continuity information.

Organizational Structure: CIPAC members are organized into eighteen (18) critical infrastructure sectors. Within all of the sectors containing critical infrastructure owners/operators, there generally exists a Sector Coordinating Council (SCC) that includes critical infrastructure owners and/or operators or their representative trade associations. Each of the sectors also has a Government Coordinating Council (GCC), whose membership includes a lead Federal agency that is defined as the Sector Specific Agency (SSA) and all relevant Federal, State, local, tribal, and/or territorial government agencies (or their representative bodies) whose mission interests also involve the scope of the CIPAC activities for that particular sector.

CIPAC Membership: CIPAC Membership may include:

(i) Critical infrastructure owner and/or operator members of an SCC;

(ii) Trade association members who are members of an SCC representing the interests of critical infrastructure owners and/or operators;

(iii) Each sector's Government Coordinating Council (GCC) members; and

(iv) State, local, tribal, and territorial governmental officials comprising the DHS State, Local, Tribal, Territorial GCC.

CIPAC Membership Roster and Council Information: The current roster of CIPAC membership is published on the CIPAC Web site (*http://www.dhs.gov/cipac)* and is updated as the CIPAC membership changes. Members of the public may visit the CIPAC Web site at any time to obtain current CIPAC membership, as well as the current and historic list of CIPAC meetings and agendas.

Dated: April 5, 2011.

Nancy Wong,

Designated Federal Officer for the CIPAC.

[FR Doc. 2011–9100 Filed 4–13–11; 8:45 am]

BILLING CODE 9110–09–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Immigration and Customs Enforcement

Agency Information Collection Activities: Extension of an Existing Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection for Review; Form I–901, Fee Remittance for Certain F, J and M Non-immigrants; OMB Control No. 1653–0034.

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE), will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until June 13, 2011.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Office of the Chief Financial Officer/OAA/Records Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., STOP 5705, Washington, DC 20536–5705.

Comments are encouraged and will be accepted for sixty days until June 13, 2011. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of currently approved information collection.

(2) *Title of the Form/Collection:* Fee Remittance for Certain F, J and M Non-immigrants.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–901, U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individual or Households. Public Law 104–208, Subtitle D, Section 641 directs the Attorney General, in consultation with the Secretary of State and the Secretary of Education, to develop and conduct a program to collect information on nonimmigrant foreign students and exchange visitors from approved institutions of higher education, as defined in section 101(a) of the Higher Education Act of 1965, as amended or in a program of study at any other DHS approved academic or language-training institution, to include approved private elementary and secondary schools and public secondary schools, and from approved exchange visitor program sponsors designated by the Department of State (DOS). It also authorized a fee, not to exceed $100, to be collected from these students and exchange visitors to support this information collection program. DHS has implemented the Student and Exchange Visitor Information System (SEVIS) to carry out this statutory requirement.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 600,000 responses at 19 minutes (.32 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 192,000 annual burden hours.

Comments and/or questions; requests for a copy of the proposed information collection instrument, with instructions; or inquiries for additional information should be directed to: Office of the Chief Financial Officer/OAA/Records Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., STOP 5705, Washington, DC 20536–5705.

Dated: April 8, 2011.

John Ramsay,

Forms Program Manager, Office of Asset Administration, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. 2011–9010 Filed 4–13–11; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Immigration and Customs Enforcement

Agency Information Collection Activities: Extension of an Existing Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection for Review; Form I–333, Obligor Change of Address.

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE), will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until June 13, 2011.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Office of the Chief Financial Officer/OAA/Records Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., STOP 5705, Washington, DC 20536–5705.

Comments are encouraged and will be accepted for sixty days until June 13, 2011. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who

are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Obligor Change of Address.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–333, U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individual or Households, Business or other non-profit. The information collected on the Form I–333 is necessary for U.S. Immigration and Customs Enforcement (ICE) to provide immigration bond obligors a standardized method to notify ICE of address updates. Upon receipt of the formatted information records will then be updated to ensure accurate service of correspondence between ICE and the obligor.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 12,000 responses at 15 minutes (.25 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 3,000 annual burden hours

Comments and/or questions; requests for a copy of the proposed information collection instrument, with instructions; or inquiries for additional information should be directed to: Office of the Chief Financial Officer/OAA/Records Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., STOP 5705, Washington, DC 20536–5705.

Dated: April 8, 2011.

John Ramsay,

Forms Program Manager, Office of Asset Administration, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. 2011–9008 Filed 4–13–11; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

United States Immigration and Customs Enforcement

Agency Information Collection Activities: New Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection for Review; Suspicious/ Criminal Activity Tip Reporting; OMB Control No. 1653–NEW.

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE), will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until June 13, 2011.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Office of the Chief Financial Officer/ OAA/Records Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., STOP 5705, Washington, DC 20536–5705.

Comments are encouraged and will be accepted for sixty days until June 13, 2011. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency' estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* New information collection.

(2) *Title of the Form/Collection:* Suspicious/Criminal Activity Tip Reporting.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. DHS/ICE is implementing multiple tools for tip reporting to allow the public and law enforcement partners to report tip information regarding crimes within the jurisdiction of DHS.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

No. of respondents	Form name/form number	Avg. burden per response (in hours)
66,000	Homeland Security Investigations Tip Form	0.16
20	Bulk Cash Smuggling Center Contact Form	0.16
118,000	Suspicious Activity Tip Line	0.10

(6) *An estimate of the total public burden (in hours) associated with the collection:* 22,363 annual burden hours.

Comments and/or questions; requests for a copy of the proposed information collection instrument, with instructions; or inquiries for additional information should be directed to: Office of the Chief Financial Officer/OAA/Records Branch, U.S. Immigration and Customs Enforcement, 500 12th Street SW., STOP 5705, Washington, DC 20536–5705.

Dated: April 8, 2011.

John Ramsay,

Forms Program Manager, Office of Asset Administration, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. 2011–9015 Filed 4–13–11; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

U. S. Immigration and Customs Enforcement

Agency Information Collection Activities: Extension of an Existing Information Collection; Comment Request.

ACTION: 60–Day Notice of Information Collection for Review; Form G–146, Nonimmigrant Checkout Letter; OMB Control No. 1653–0020

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE), will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until June 13, 2011.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Office of the Chief Financial Officer/OAA/Records Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., STOP 5705 Washington, DC 20536–5705.

Comments are encouraged and will be accepted for sixty days until June 13, 2011. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Nonimmigrant Checkout Letter.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form G–146, U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individual or Households. When an alien (other than one that is required to depart under safeguards) is granted the privilege of voluntary departure without an issuance of an Order to Show Cause, a control card is prepared. If after a certain period of time, a verification of departure is not received, actions are taken to locate the alien or ascertain his or her whereabouts. The ICE form G–146 is used to inquire of persons in the U.S. or abroad regarding the whereabouts of the alien.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 20,000 responses at 10 minutes (.166 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 3,320 annual burden hours

Comments and/or questions; requests for a copy of the proposed information collection instrument, with instructions; or inquiries for additional information should be directed to: Office of the Chief Financial Officer/OAA/Records Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., STOP 5705, Washington, DC 20536–5705.

Dated: April 8, 2011.

John Ramsay,

Forms Program Manager, Office of Asset Administration, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. 2011–9012 Filed 4–13–11; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5452–N–02]

Additional Allocations and Waivers Granted to and Alternative Requirements for 2010 Community Development Block Grant (CDBG) Disaster Recovery Grantees

AGENCY: Office of the Assistant Secretary for Community Planning and Development.

ACTION: Notice of allocations, waivers, and alternative requirements.

SUMMARY: This Notice advises the public of the second allocation of grant funds for CDBG disaster recovery grants for the purpose of assisting the recovery in areas covered by a declaration of major disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*). As described in this Notice, HUD is authorized by statute and regulations to waive statutory and regulatory requirements and specify alternative requirements for this purpose upon the request of the grantees. This Notice describes applicable waivers and alternative requirements, as well as the application process, eligibility requirements, and relevant statutory and regulatory provisions for grants provided under this Notice.

DATES: *Effective Date:* April 19, 2011.

FOR FURTHER INFORMATION CONTACT: Scott Davis, Director, Disaster Recovery and Special Issues Division, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 7th Street, SW., Room 7286, Washington, DC 20410, telephone number 202–708–3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339. Facsimile inquiries may be sent to Mr. Davis at 202–401–2044. (Except for the "800" number, these telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:

Allocations

The Supplemental Appropriations Act, 2010 (Pub. L. 111–212, approved July 29, 2010) (hereinafter, "Supplemental Appropriations Act") appropriates $100 million, to remain available until expended, in CDBG funds for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure, housing, and economic revitalization in areas affected by severe storms and flooding from March 2010 through May 2010 for which the President declared a major disaster covering an entire State, or States with more than 20 counties declared major disasters, under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (42 U.S.C. 5121 *et seq.*). The Supplemental Appropriations Act further notes:

> That funds shall be awarded directly to the State or unit of general local government at the discretion of the Secretary * * * *Provided further*, that funds allocated under this heading shall not adversely affect the amount of any formula assistance received by a State or subdivision thereof under the Community Development Fund: *Provided further*, that a State or subdivision thereof may use up to 5 percent of its allocation for administrative costs * * *

In a **Federal Register** Notice published November 10, 2010 (75 FR 69097), the Department allocated $50 million to three states and five units of general local government. Today's Notice allocates the remaining $50 million to the State of Tennessee and three of its local governments:

TABLE 1—TOTAL ALLOCATIONS UNDER PUBLIC LAW 111–212

State	Grantee	Initial allocation	This allocation	Total allocation
Kentucky	State Government	$13,000,000	0	$13,000,000
Rhode Island	City of Cranston	1,277,067	0	1,277,067
Rhode Island	City of Warwick	2,787,697	0	2,787,697
Rhode Island	State Government	8,935,237	0	8,935,237
Tennessee	City of Memphis	2,031,645	4,232,594	6,264,239
Tennessee	Nashville-Davidson County	10,731,831	22,357,982	33,089,813
Tennessee	Shelby County	1,212,788	2,526,642	3,739,430
Tennessee	State Government	10,023,735	20,882,782	30,906,517
Total				100,000,000

HUD computed the allocations in Table 1 based on data that are generally available and that cover all of the eligible affected areas. Second round allocations were made only to the State of Tennessee and its local communities based on the State representing over 75 percent of the estimated unmet needs for all eligible areas. For a more detailed description of the allocation methodology, *please see* Appendix A.

Use of Funds

The Supplemental Appropriations Act requires funds to be used only for specific purposes. The statute directs that each grantee will describe, in an Action Plan for Disaster Recovery, criteria for eligibility and how the use of the grant funds will address long-term recovery, and restoration of infrastructure, housing, and economic revitalization. HUD monitors compliance with this directive and may disallow expenditures if it finds that funds duplicate other benefits or expenditures that do not meet a statutory purpose. HUD encourages grantees to contact their assigned HUD offices for guidance in complying with these requirements during development and implementation of their Action Plans for Disaster Recovery. HUD field offices are available at *http://www.hud.gov/offices/cpd/about/staff/fodirectors/*.

As provided for in the Supplemental Appropriations Act, funds may be used as a matching requirement, share, or contribution for any other Federal program. However, the funds may not be used for activities reimbursable by, or for which funds are made available by, the Federal Emergency Management Agency (FEMA) or the Army Corps of Engineers. In other words, the CDBG disaster recovery funds may not *supplant* funds provided by FEMA or the Army Corps of Engineers.

Prevention of Fraud, Abuse, and Duplication of Benefits

To prevent fraud, abuse of funds, and duplication of benefits, HUD's November 10, 2010 **Federal Register** Notice (75 FR 69097), includes specific reporting, written procedures, monitoring, and internal audit requirements applicable to each grantee. Please see the duplication of benefits note at paragraph 27 within the section "Applicable Rules, Statutes, Waivers, and Alternative Requirements; Pre-Grant Process" (75 FR 69108), and paragraph 5, sections C–D, within the same section (75 FR 69103).

In addition, the Department will: (1) Institute risk analysis and on-site monitoring of grantee management of the grants and of the specific uses of funds, (2) be extremely cautious in considering any waiver related to basic financial management requirements; the standard, time-tested CDBG financial requirements will continue to apply, and (3) collaborate with the HUD Office of Inspector General to plan and implement oversight of these funds.

Authority To Grant Waivers

The Supplemental Appropriations Act authorizes the Secretary to waive, or specify alternative requirements for any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary, or use by the recipient, of these funds and guarantees, except for requirements related to fair housing, nondiscrimination and equal opportunity, labor standards, and the environment (including requirements concerning lead-based paint), upon: (1) A request by the grantee explaining why such a waiver is required to facilitate the use of such funds or guarantees, and (2) a finding by the Secretary that such a waiver would not be inconsistent with the overall purpose of Title I of the Housing and Community Development Act of 1974 (HCD Act). Regulatory waiver authority is also provided by 24 CFR 5.110, 91.600, and 570.5.

The Secretary finds that the waivers, alternative requirements, and statutory changes previously described in the November 10, 2010 **Federal Register** Notice (75 FR 69097), will apply without exception, to the funds allocated under today's Notice as they are necessary to facilitate the use of these funds for the statutory purposes, and are not inconsistent with the overall purpose of Title I of the HCD Act or the

Cranston-Gonzalez National Affordable Housing Act, as amended. Under the requirements of the Supplemental Appropriations Act and the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act), regulatory waivers must be justified and published in the **Federal Register**. Note that the waivers, alternative requirements, and statutory changes will not apply to funds provided under the regular CDBG program.

Application Process, Eligibility, and Relevant Statutory and Regulatory Provisions

The waivers and alternative requirements described in the November 10, 2010 **Federal Register** Notice (75 FR 69097) described the application requirements and eligible uses of funds under the Supplemental Appropriations Act, including the required Action Plan for Disaster Recovery. Each grantee receiving an allocation under today's Notice, which has not submitted an Action Plan for Disaster Recovery by the date of this Notice, is required to submit a Plan to program its total allocation by June 13, 2011. Each grantee receiving an allocation under today's Notice, which has submitted an Action Plan for Disaster Recovery by the date of this Notice, is required to submit an Action Plan Amendment to program its additional allocation by June 13, 2011. If any grantee fails to meet these requirements, HUD, on the first business day after the deadline, will commence an action to recapture any funds not programmed. Grantees must prepare the Action Plan in accordance with the application process described in the November 10, 2010 **Federal Register** Notice (75 FR 69097).

Unless noted otherwise, the term "grantee" refers to any grantee—whether State, city, or county—receiving a direct award under this Notice.

Applicable Rules, Statutes, Waivers, and Alternative Requirements

Unless stated otherwise, the following waivers and alternative requirements apply to any State or unit of general local government receiving a direct award under this Notice.

1. *General note.* Except as described in this Notice, statutory and regulatory provisions governing the State CDBG program shall apply to any State receiving an allocation under this Notice, while statutory and regulatory provisions governing the CDBG entitlement program shall apply to any unit of general local government receiving a direct allocation in this Notice. Applicable statutory provisions can be found at 42 U.S.C. 5301 *et seq.* Applicable State and entitlement provisions can be found at 24 CFR part 570.

2. *Prerequisites to a grantee's receipt of CDBG disaster recovery funds under this Notice.* Prior to receiving funds under this Notice, each grantee that has not submitted an Action Plan for Disaster Recovery must: (1) Adopt a citizen participation plan, (2) publicize a proposed Action Plan, (3) provide public notice and allow for comment, and (4) submit to HUD an Action Plan for Disaster Recovery, including certifications, programming the grantee's entire allocation by June 13, 2011. Upon acceptance by HUD of the Action Plan, a grant agreement will be executed and the funds will be accessible.

Grantees that have already submitted an Action Plan for Disaster Recovery to HUD must: (1) Publicize a proposed Action Plan Amendment, (2) provide public notice and allow for comment, and (3) submit to HUD an Action Plan Amendment programming the grantee's additional allocation by June 13, 2011. Upon acceptance by HUD of the Action Plan Amendment, a revised grant agreement will be executed and the additional funds can be accessed.

If any grantee fails to meet the requirement to program its entire allocation within the relevant timelines, HUD, on the first business day after that deadline, will commence an action to recapture the funds.

3. *Incorporation of waivers, alternative requirements, and statutory changes previously described.* The waivers and alternative requirements provided in the November 10, 2010 **Federal Register** Notice (75 FR 69097) apply to each grantee receiving an allocation of funds under this Notice.

Duration of Funding

Availability of funds provisions in 31 U.S.C. 1551–1557, added by section 1405 of the National Defense Authorization Act for Fiscal Year 1991 (Pub. L. 101–510), limit the availability of certain appropriations for expenditure. This limitation may not be waived. However, the Supplemental Appropriations Act for these grants directs that these funds be available until expended unless, in accordance with 31 U.S.C. 1555, HUD determines that the purposes for which the appropriation has been made have been carried out and no disbursement has been made against the appropriation for two consecutive fiscal years. In such a case, HUD shall close out the grant prior to expenditure of all funds.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers for the disaster recovery grants under this Notice are as follows: 14.218; 14.228.

Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The FONSI is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, Room 10276, 451 7th Street, SW., Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Hearing or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

Appendix A—Allocation Methodology Detail

On November 10, 2010, HUD announced an allocation of $50 million to states and local governments in Tennessee, Kentucky, and Rhode Island to address unmet disaster recovery needs relating to the severe storms and flooding that occurred in the spring of 2010. In its press release, the Department stated the following:

> Today's announcement is meant to comply with Congress' directive that one-half of the $100 million appropriated in July for disaster recovery be obligated within 90 days. HUD will provide grantees with guidance on preparing plans and applying for their allocations. Further, HUD will continue to review long-term recovery needs to determine how to allocate the remaining $50 million in aid. The agency's review will include unmet housing, infrastructure and economic revitalization needs.

HUD's methodology for estimating unmet needs and making allocations is fully stated in Appendix A of the November 10, 2010 **Federal Register** Notice (75 FR 69097). But to briefly recap, Tennessee represents over 75 percent of the need among the four eligible states:

TABLE 1—PRELIMINARY ESTIMATES OF UNMET NEEDS

State	Housing	Infrastructure	Business	Total
Tennessee	$363,412,407	$64,907,061	$108,349,875	$536,669,343
Rhode Island	54,111,522	3,290,878	23,910,814	81,313,214
Kentucky	60,379,939	3,540,307	10,899,431	74,819,677
Nebraska	0	1,186,985	0	1,186,985
Total	477,903,868	72,925,231	143,160,120	693,989,220

The State of Nebraska did not receive an allocation because a proportional allocation provides less than one million in funding and needs did not extend beyond that which the State could address on its own.

As noted in the **SUPPLEMENTARY INFORMATION** section of this Notice, the initial allocation provided both Kentucky and Rhode Island with $13 million for each state and its respective communities. Thus, they have already received an allocation in proportion to their need. As such, the remaining funds are distributed to the State of Tennessee and its local governments.

Dated April 8, 2011.

Mercedes M. Márquez,

Assistant Secretary Community Planning and Development.

[FR Doc. 2011–9118 Filed 4–13–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5486–N–09]

Notice of Proposed Information Collection: Comment Request; Fellowship Recruitment for the Fellowship Placement Program

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* June 13, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street, SW., Washington. DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Kheng Mei Tan, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–3815 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Fellowship Recruitment for the Fellowship Placement Program.

OMB Control Number, if applicable: N/A.

Description of the need for the information and proposed use: The administrator of Fellowship Placement Program will be responsible for selecting and recruiting qualified federal fellows. Federal fellows will provide technical and capacity assistance to help local governments.

Agency form numbers, if applicable: N/A.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours to complete the application is 3 hours. The number of respondents is estimated to be 100 respondents. The total number of burden hours is 300 hours.

Status of the proposed information collection: This is a new collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: April 5, 2011.

Raphael W. Bostic,

Assistant Secretary for Policy Development and Research.

[FR Doc. 2011–8964 Filed 4–13–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–R–2011–N001; BAC–4311–K9–S3]

Presquile National Wildlife Refuge, Chesterfield County, VA; Comprehensive Conservation Plan and Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), intend to prepare a comprehensive conservation plan (CCP) and environmental assessment (EA) for Presquile National Wildlife Refuge (NWR) located in Chesterfield County, Virginia, approximately 20 miles south of Richmond on the James River. We provide this notice in compliance with our CCP policy to advise other Federal and State agencies, Tribes, and the public of our intentions, and to obtain suggestions and information on the scope of issues to consider in the planning process.

DATES: To ensure consideration, please send your written comments by May 16, 2011. We will announce opportunities for public input in local news media throughout the CCP process.

ADDRESSES: Send your comments or requests for more information by any of the following methods.

E-mail: northeastplanning@fws.gov. Include "Presquile NWR CCP" in the subject line of the message.

Fax: Attention: Nancy McGarigal, 413–253–8468.

U.S. Mail: U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, MA 01305.

In-Person Drop-off: You may drop off comments during regular business hours at 11110 Kimages Road, Charles City, VA 23030.

FOR FURTHER INFORMATION CONTACT: Eastern Virginia Rivers National Wildlife Refuge Complex; phone: 804–333–1470; fax: 804–333–3396.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we initiate our process for developing a CCP for Presquile NWR in Chesterfield County, VA. This notice complies with our CCP policy to: (1) Advise other Federal and State agencies, Tribes, and the public of our intention to conduct detailed planning on this refuge, and (2) obtain suggestions and information on the scope of issues to consider in the environmental document and during development of the CCP.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

Each unit of the NWRS was established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the NWRS mission, and to determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives that will ensure the best possible approach to wildlife, plant, and habitat conservation, while providing for wildlife-dependent recreation opportunities that are compatible with each refuge's establishing purposes and the mission of the NWRS.

Our CCP process provides participation opportunities for Tribal, State, and local governments, agencies, organizations, and the public. At this time we encourage input in the form of issues, concerns, ideas, and suggestions for the future management of Presquile NWR.

We will conduct the environmental review of this project and develop an EA in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C. 4321 *et seq.*); NEPA regulations (40 CFR parts 1500–1508); other appropriate Federal laws and regulations; and our policies and procedures for compliance with those laws and regulations.

Presquile National Wildlife Refuge

Presquile NWR is one of four refuges that comprise the Eastern Virginia Rivers NWR Complex. The refuge is a 1,329-acre island in the James River. The Service acquired the land in 1952. It was previously operated as a dairy farm. Established to protect habitat for wintering waterfowl and other migratory birds, Presquile NWR is an important anchor in the network of refuges on and around the Chesapeake Bay.

Refuge habitats include swamp, tidal marsh, open fields and brushland, forest riparian, and river escarpment. This landscape supports a wide diversity of wildlife species. Over 200 species of birds have been documented on the refuge, 90 of which occur in the summer breeding season. Other refuge wildlife includes 59 fish species, 22 mammal species, 4 amphibian species, and 18 different reptile species.

Scoping: Preliminary Issues, Concerns, and Opportunities

We have identified preliminary issues, concerns, and opportunities that we may address in the CCP. We have briefly summarized these issues below. During public scoping, we may identify additional issues.

(1) Ecoregional or ecosystem-wide issues, such as climate change, regional land conservation, and protection of water quality on the James River and throughout the Chesapeake Bay Watershed;

(2) Biological program issues, such as habitat and species management needs, protection, restoration, monitoring, inventories, and research;

(3) Public use program issues, such as the breadth and quality of programs, public access, user conflicts, and use impacts on natural resources;

(4) Community relations and outreach issues and opportunities, such as tourism, and local economic impacts; and

(5) Coordination and communication issues and opportunities with other environmental educators, and Federal, State, and Tribal Governments, and with non-governmental conservation partners.

Public Meetings

We will give the public an opportunity to provide input at a public meeting (or meetings). You can obtain the schedule from the planning team leader or project leader (see **ADDRESSES**). You may also send comments anytime during the planning process by mail, e-mail, or fax (see **ADDRESSES**). There will be additional opportunities to provide public input once we have prepared a draft CCP.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: March 11, 2011.

Wendi Weber,

Acting Regional Director, U.S. Fish and Wildlife Service.

[FR Doc. 2011–8812 Filed 4–13–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–300–1310–PP–OSHL]

Notice of Intent To Prepare a Programmatic Environmental Impact Statement (EIS) and Possible Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969 as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) intends to prepare a Programmatic EIS for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the BLM in Colorado, Utah, and Wyoming, and by this notice is announcing the beginning of the scoping process to solicit public comments and identify issues.

DATES: This notice initiates the public scoping process for the EIS and possible plan amendments. Comments on issues may be submitted in writing until May 16, 2011. The BLM invites comments on potential resource issues that should be discussed in the NEPA analysis, including input on issues pertaining to historic and cultural resources within the areas proposed for land use plan amendment. Such information will inform consultation activities the BLM will conduct in furtherance of the United States' government-to-government relationship with Indian Tribes. The BLM will hold public scoping meetings at the following locations: Salt Lake City, Utah; Price, Utah; Vernal, Utah; Rock Springs, Wyoming; Rifle, Colorado; Denver, Colorado; and Cheyenne, Wyoming. The BLM will announce exact times and locations for all public meetings at least 15 days in advance through local media, newsletters, and the project Web site at: *http://blm.gov/st5c.* The minutes and list of attendees for each scoping meeting will be available to the public and may be supplemented after the meeting should participants wish to clarify their views. We will provide additional opportunities for public participation upon publication of the Draft Programmatic EIS. The first public meeting will be held in Salt Lake City, Utah on April 26, 2011.

ADDRESSES: You may submit comments by the following methods:

- *Web site: http://blm.gov/st5c.*
- *Mail:* BLM Oil Shale and Tar Sands Resources Leasing Programmatic EIS Scoping, Argonne National Laboratory, EVS, 240, 9700 S. Cass Avenue, Argonne, Illinois 60439.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, contact Sherri Thompson, Project Manager, Bureau of Land Management, Colorado State Office, telephone: (303) 239–3758, address: 2850 Youngfield Street, Lakewood, Colorado 80215, or Dan Haas, (for cultural issues), Cultural Resources Lead, Bureau of Land Management, Colorado State Office, telephone (303) 239–3647, or visit the Oil Shale and Tar Sands Resources Programmatic EIS Web site at: *http://blm.gov/st5c.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: In 2008, the BLM amended eight land use plans in Colorado, Utah, and Wyoming to make public lands available for potential leasing and development of oil shale resources, and two other land use plans to expand the acreage available for potential tar sands leasing in Utah, where these resources are located. These 2008 amendments, supported by the preparation of a Programmatic EIS required under Section 369(d)(1) of the Energy Policy Act of 2005, made approximately 2,000,000 acres available for potential development of oil shale. The 2008 Programmatic EIS and Record of Decision (ROD) amending the land use plans are available at *http://ostseis.anl.gov,* and include maps and more specific information about the geographic area studied in 2008. Information specific to the individual RMPs amended in 2008 can be found at the individual BLM Field Office Web site, which can be accessed through *http://www.blm.gov.*

The BLM has decided to take a fresh look at the land use plan allocation decisions made in the 2008 ROD associated with the Programmatic EIS, in order to consider which lands should be open to future leasing of oil shale and tar sands resources. The planning area for the oil shale resource is the Piceance and Washakie Basins in Colorado, the Uintah Basin in Utah, and the Green River and Washakie Basins in Wyoming. For the tar sands resources, the planning area is certain sedimentary provinces in the Colorado Plateau in Utah. As there are no economically viable ways yet known to extract and process oil shale for commercial purposes, and Utah tar sands deposits are not at present a proven commercially-viable energy source, the BLM, through its planning process, intends to take a hard look at whether it is appropriate for approximately 2,000,000 acres to remain available for potential development of oil shale, and approximately 431,224 acres of public land to remain available for potential development of tar sands.

The Programmatic EIS will analyze amending the following Resource Management Plans (RMP): The White River RMP, the Grand Junction RMP, the Glenwood Springs RMP, the Vernal RMP, the Price RMP, the Richfield RMP, the Monticello RMP, the Kemmerer RMP, the Rawlins RMP, and the Green River RMP to identify areas that may be excluded from any future oil shale and tar sands resources leasing in these three states. The BLM will use the NEPA scoping process in part to meet the public participation requirements of Section 106 of the National Historic Preservation Act (NHPA), and information gathered about historic and cultural resources will assist the BLM in meeting the requirements of NHPA Section 106.

This new planning initiative will also provide the BLM an opportunity to consider what public lands might be best suited for this kind of development in light of information not available in 2008. For example, the U.S. Geological Survey (USGS) has recently completed an in-place assessment of the oil shale and nahcolite resources of the Green River Formation in the Piceance Basin of western Colorado (August 2010) and an assessment of in-place oil in oil shales of the Eocene Green River Formation of the Uinta Basin of eastern Utah and western Colorado (August 2010). The USGS also anticipates release of an assessment of the Green River Formation in Wyoming later this year. On March 23, 2010, the U.S. Fish and Wildlife Service published a Notice of Petition Findings Endangered Threatened Wildlife and Plants; 12-Month Findings to List the Greater Sage-Grouse as Threatened or Endangered in the **Federal Register** (75 FR 13910). Sage grouse (which occurs on some lands allocated as open to oil shale and tar sands leasing in the 2008 land use plan decisions) range-wide was warranted for listing under the applicable provisions of the Endangered Species Act, but that

such listing was precluded by higher priority listing actions.

The BLM has developed a preliminary purpose and need for the proposed planning action. It is presented here to inform the public scoping process and to facilitate collaboration with interested parties to identify the planning issues important to local, regional, and National needs and concerns that will assist the BLM in formulating alternatives analyzed in the Programmatic EIS. The preliminary purpose and need statement for this proposed planning action is to reassess the appropriate mix of allowable uses with respect to oil shale and tar sands leasing and potential development.

The BLM will decide whether any changes should be made to the existing land use allocation decisions, in light of the nascent character of technology for developing oil shale and tar sands resources, and any relevant new information. Specifically, the BLM will consider amending the applicable resource management plans to specify whether any areas in Colorado, Utah, and Wyoming currently open for future leasing and development of oil shale or tar sands should not be made available for such leasing and development.

The Programmatic EIS will analyze the no action alternative, which would leave the current allocation decisions from the 2008 ROD in place. It will also analyze an alternative that would remove all of the following kinds of areas from oil shale and tar sands leasing, and one or more alternatives that would remove some of the following kinds of areas from oil shale and tar sands leasing:

(1) All areas that the BLM has identified or may identify as a result of inventories conducted during this planning process, as lands containing wilderness characteristics (preliminary information may be found in chapters 2 and 3 of the 2008 Programmatic EIS, at *http://ostseis.anl.gov*);

(2) The whole of the Adobe Town "Very Rare or Uncommon" area, as designated by the Wyoming Environment Quality Council on April 10, 2008 (*http://deq.state.wy.us/eqc/orders/Rare%20or%20Closed%20Cases/UandI_Final_for_DEQ.pdf*);

(3) Core or priority sage grouse habitat, as defined by such guidance as the BLM or the Department of the Interior may issue;

(4) All areas of critical environmental concern (ACEC) located within the areas analyzed in the September 2008 Oil Shale and Tar Sands Resources Leasing Final EIS (2008 OSTS Programmatic EIS, chapter 2, with further discussion in chapters 3 and 4, at *http://ostseis.anl.gov*); and

(5) All areas identified as excluded from commercial oil shale and tar sands leasing in Alternative C of the September 2008 OSTS Programmatic EIS (see *http://ostseis.anl.gov*).

Lands that the BLM identifies as having wilderness characteristics will be considered during this planning initiative, as described above, and consistent with Secretarial Order No. 3310, dated Dec. 22, 2010, and BLM Manuals 6301 and 6302. Because this is a targeted plan amendment addressing only the management of oil shale and tar sands resources, this planning initiative will not consider designating Wild Lands. Future leasing of lands determined by the BLM to have wilderness characteristics, if compatible with the allocation decisions stemming from this initiative, will subsequently be assessed in accordance with BLM Manual 6303, as appropriate (i.e., where the BLM has not determined, consistent with BLM Manual 6302, whether the lands with wilderness characteristics at issue should be receive a wild lands designation, BLM Manual 6303 will apply).

This planning initiative addresses the allocation of BLM-administered lands as closed or open to the potential leasing and development of oil shale and tar sands resources, but, as in the oil shale and tar sands planning process completed in 2008, will not disturb other management decisions contained in the RMPs governing the areas to be included in the study area. Preliminary issues and management concerns have been identified by BLM personnel, other agencies, and in meetings with individuals and user groups. They represent the BLM's knowledge to date regarding the issues and concerns with current land management. The public is encouraged to help refine these issues during the scoping phase, as well as identify additional issues relevant to the management of oil shale and tar sands resources in these areas that should be considered in the alternatives referenced, or any other alternative(s) the BLM may develop for consideration in this planning process.

In addition, the BLM anticipates including the mitigation measures developed during the previous oil shale and tar sands planning initiative completed in 2008, and may develop additional mitigation measures. These measures may be applied, if appropriate, at the discretion of the decision maker, at the time these resources are leased and/or developed.

This Notice also serves as notification of the planning criteria that the BLM is preliminarily considering as part of this planning initiative. Planning criteria are the standards, rules, and other factors used in formulating judgments about data collection, analysis, and decision making associated with development of the planning process and preparation of the Programmatic EIS. These criteria establish parameters and help focus the planning process and preparation of the Programmatic EIS. We welcome public comment on the following preliminary planning criteria:

(1) The Programmatic EIS and plan amendments will be completed in compliance with the FLPMA and all other applicable laws;

(2) The BLM will work collaboratively with the States of Colorado, Utah, and Wyoming, Indian Tribal governments, county and municipal governments, Federal agencies, and all other interested groups, agencies and individuals. Public participation will be encouraged throughout the process;

(3) The proposed plan amendments analyzed in the Programmatic EIS would amend the appropriate individual land use plans specifically to address allocation of BLM-administered lands as open or closed to leasing and development of oil shale and tar sands resources;

(4) Preparation of the Programmatic EIS and plan amendments will involve coordination with Indian Tribal governments and will provide strategies for the protection of recognized traditional uses;

(5) The BLM will coordinate with local, State, and Federal agencies in the planning process and development of the Programmatic EIS to strive for consistency with their existing plans and policies, to the extent practicable; and

(6) Any decisions made on the basis of the planning process and development of the Programmatic EIS will take into account valid existing rights.

The BLM will use an interdisciplinary approach to develop the Programmatic EIS in order to consider the variety of resource issues and concerns identified. Specialists with expertise in the following disciplines will be involved in the planning process: Minerals and geology, wildlife and fisheries, air quality, outdoor recreation, archeology, paleontology, hydrology, soils, sociology, and economics.

As noted above, the BLM will use and coordinate public participation opportunities offered consistent with the NEPA and land use planning processes to assist the agency in satisfying any public involvement requirements under Section 106 of the

NHPA and 36 CFR 800.2(d)(3). Further, the BLM seeks information about historic and cultural resources within the area potentially affected by the proposed land use amendments to assist in analyzing the potential impacts in the context of both NEPA and Section 106 of the NHPA. In addition, consistent with 36 CFR 800.8, the BLM anticipates coordinating its compliance with NHPA with fulfilling its obligations under NEPA to the extent possible. The BLM also may develop a Programmatic Agreement that addresses how the agency will fulfill its obligations under Section 106 of the NHPA with respect to the development of oil shale and tar sands. To the extent possible, the BLM intends to publish a draft of such Programmatic Agreement, if developed, concurrently with publication of any Draft EIS.

Consistent with the Federal government's government-to-government relationship with Indian Tribes, BLM consultation with these Tribes will be conducted in accordance with Executive Order 13575, and Tribal concerns, including impacts on Indian trust assets, will be given due consideration. The BLM invites Federal, State, and local agencies, along with Tribes and other stakeholders that may be interested or affected by the BLM's decision on this project, to participate in the scoping process. These entities, if eligible, may request or be requested by the BLM to participate as a cooperating agency in the NEPA process or consulting party in the NHPA process.

You may submit comments on issues and planning criteria in writing to the BLM at any public scoping meeting, or by using one of the methods listed in the **ADDRESSES** section above. After BLM has gathered public input on issues the planning and NEPA process should address, we will categorize comments received as follows:

(1) Issues to be resolved in the plan;

(2) Issues to be resolved through policy, regulation, or administrative action; or

(3) Issues beyond the scope of this plan amendment process.

The BLM will provide an explanation in the Programmatic EIS as to why we placed an issue in category two or three.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1501.7, 43 CFR 1610.2.

Mike Nedd,

Assistant Director, Minerals, Realty, and Resource Protection.

[FR Doc. 2011–9120 Filed 4–13–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–0311–7056; 2280–665]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before March 26, 2011. Pursuant to section 60.13 of 36 CFR Part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service,1201 Eye St., NW., 8th Floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by April 29, 2011. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

ALABAMA

Baldwin County

Malbis Plantation, 10145 US 90, Daphne, 11000238

COLORADO

Denver County

Saint Philomena Catholic Parish School, 940 Fillmore St., Denver, 11000239

Weld County

Von Gohren—Thompson Homestead—Gerry Farm Rural Historic Landscape, (Historic Farms and Ranches of Weld County MPS) Address Restricted, Greeley, 11000240

FLORIDA

Sarasota County

Chidsey Library, 701 N. Tamiami Trail, Sarasota, 11000241

ILLINOIS

Adams County

Quincy National Cemetery, (Civil War Era National Cemeteries MPS) 36th & Main Sts., Quincy, 11000242

Cook County

Sutherland Hotel, 4659 S. Drexel Blvd., Chicago, 11000243

Kane County

Hubbard, Joel H., House, 304 N. 2nd Ave., St. Charles, 11000244

Madison County

Alton National Cemetery, (Civil War Era National Cemeteries MPS) 600 Pearl St., Alton, 11000245

Winnebago County

Ziock Building, 416 S. Main St., Rockford, 11000246

MASSACHUSETTS

Norfolk County

Oak Grove Farm, 410 Exchange St., Millis, 11000247

MISSOURI

Jackson County

Locust Street Apartments, (Working-Class and Middle-Income Apartment Buildings in Kansas City, Missouri MPS) 3421 & 3425 Locust St., Kansas City, 11000249

St. Louis Independent City Hamilton Hotel, 956 Hamilton Ave., St. Louis (Independent City), 11000248

NEVADA

Storey County

Piper, Henry, House, 58 N. B St., Virginia City, 11000254

Washoe County

Galena Creek Schoolhouse, (School Buildings in Nevada MPS) 16000 Callahan Rd., Reno, 11000255

NEW JERSEY

Atlantic County

Risley School, 134 Cape May Ave., Ester Manor City, 11000256

NEW YORK

Clinton County

Heyworth—Mason Industrial Building, Mason Hill Rd., Peru, 11000250

Essex County

Crandall Marine Railway, 11 Dry Dock Ln., Ticonderoga, 11000251

Fulton County

Hotel Broadalbin, 59 W. Main St., Broadalbin, 11000252

Rensselaer County

Dickinson Hill Fire Tower, Fire Tower Rd., Grafton, 11000253

NORTH CAROLINA

McDowell County

Old Fort Commercial Historic District, Roughly bounded by E. Main, Spring, Commerce & W. Main Sts., Old Fort, 11000257

VIRGINIA

Albemarle County

Greenwood—Afton Rural Historic District, Roughly 5 to 7 mi. N. & S. of I–64, Greenwood—Afton, 11000258

WASHINGTON

Clallam County

Port Angeles Civic Historic District, 205, 215, 217 & 319 S. Lincoln St., Port Angeles, 11000259

WEST VIRGINIA

Hampshire County

Hook's Tavern, Jct. of US 50 & Smokey Hollow Rd., Capon Bridge, 11000260

North River Mills Historic District, Jct. Cnty. Rds. 45/20 & 4/2, North River Mills, 11000261

[FR Doc. 2011–9038 Filed 4–13–11; 8:45 am]

BILLING CODE 4312–51–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–11–009]

Government in the Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

ORIGINAL DATE AND TIME: April 12, 2011 at 11 a.m.

NEW DATE AND TIME: April 14, 2011 at 1:30 p.m.

PLACE: 500 E Street, SW., Washington, DC 20436, *Telephone:* (202) 205–2000.

STATUS: Open to the public.

In accordance with 19 CFR 201.35(d)(1), the Commission has determined to reschedule the meeting of 11 a.m., April 12, 2011 to 1:30 p.m., April 14, 2010. Earlier announcement of this rescheduling was not possible.

By order of the Commission.

Issued: April 11, 2011.

James R. Holbein,

Acting Secretary to the Commission.

[FR Doc. 2011–9140 Filed 4–12–11; 11:15 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decrees Under the Comprehensive Environmental Response, Compensation and Liability Act

Under 28 CFR 50.7, notice is hereby given that on April 8, 2011, four proposed consent decrees signed by defendants Arch Coal, Inc., K&M Investors, Inc., Momentive Specialty Chemicals, Inc., and SWEPI LP were lodged in the civil action *United States* v. *Arch Coal, Inc., et al.,* Civil Action No. 1:11–cv–00055, in the United States District Court for the Eastern District of Missouri, Southeastern Division.

In this action the United States is seeking response costs pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9607, for costs incurred in response to releases of hazardous substances at the Missouri Electric Works Superfund Site ("the Site"), in Cape Girardieu, Missouri. The proposed consent decrees will resolve the United States' claims against the four defendants under Section 107 of CERCLA, 42 U.S.C. 9607, at the Site. Under the terms of the proposed consent decree, the defendants will make the following cash payments to the United States:

Arch Coal, $21,850.58; K&M Investors, $89,569.12; Momentive Specialty Chemicals, $2,441.70; and SWEPI, $31,167.05. In return, the United States will grant all four defendants covenants not to sue under CERCLA with respect to the Site. The Department of Justice will receive for a period of thirty (30) days after the date of this publication comments relating to the proposed consent decrees. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to the proposed consent decrees with defendants Arch Coal, K&M Investors, Momentive Specialty Chemicals, and SWEPI in *United States* v. *Arch Coal, Inc., et al.,* D.J. Ref. 90–11–2–614/3.

The proposed consent decrees may be examined at the office of the United States Attorney, 111 S. 10th Street, 20th Floor, St. Louis, Missouri 63102. During the public comment period, the Consent Decrees may be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html* and at the Consent Decree Library, P. O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing a request to Tonia Fleetwood, fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy please refer to the referenced case and enclose a check in the amount of $18.00 (25 cents per page reproduction costs), payable to the U.S. Treasury.

Public comments may be submitted by email to the following e-mail address: *pubcomment-ees.enrd@usdoj.gov.*

Robert E. Maher, Jr.,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–8967 Filed 4–13–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States and State of New York v. Stericycle, Inc., et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America and State of New York* v. *Stericycle, Inc., et al.,* Civil Action No. 1:11–cv–00689. On April 8, 2011, the United States and the attorney general for the State of New York filed a Complaint alleging that the proposed acquisition by Stericycle, Inc. of Healthcare Waste Solutions ("HWS") would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed the same time as the Complaint, requires Stericycle and HWS to divest HWS's Bronx, New York transfer station, which is used in the provision of infectious waste treatment services for customers in the New York City metropolitan area.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (*telephone:* 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of a copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530 (*telephone:* 202–307–0924).

Patricia A. Brink,

Director of Civil Enforcement.

United States District Court for the District of Columbia

United States of America, Department of Justice, Antitrust Division, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530, and *State of New York, Office of the Attorney General, Antitrust Bureau, 120 Broadway, New York, New York 10271,* Plaintiffs, v. *Stericycle, Inc., 28161 North Keith Drive, Lake Forest, Illinois 60045, SAMW Acquisition Corporation, 28161 North Keith Drive, Lake Forest, Illinois 60045,* and *Healthcare Waste Solutions, Inc., 4357 Ferguson Drive, Suite 100, Cincinnati, Ohio 45245,* Defendants.

Case No.: 1:11-cv-00689
Assigned To: Howell, Beryl A.
Assign. Date: 4/8/2011
Description: Antitrust

Complaint

Plaintiffs, the United States of America ("United States"), acting under the direction of the Attorney General of the United States, and the State of New York, acting under the direction of its Attorney General, bring this civil antitrust action against defendants, Stericycle, Inc., SAMW Acquisition Corporation, and Healthcare Waste Services, Inc. ("HWS"), to enjoin Stericycle's proposed acquisition of HWS and to obtain other equitable relief. Plaintiffs complain and allege as follows:

I. Nature of the Action

1. Pursuant to an agreement and plan of merger dated September 24, 2010, Stericycle intends to acquire all of HWS, except for an incinerator in Matthews, North Carolina, for $245 million. Defendants Stericycle and HWS currently compete in the treatment of infectious waste.

2. The United States and the State of New York bring this action to prevent the proposed acquisition because it would substantially lessen competition in the provision of infectious waste treatment services in the New York City Metropolitan Area, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

II. Jurisdiction and Venue

3. The United States brings this action under Section 15 of the Clayton Act, as amended, 15 U.S.C. 4 and 25, to prevent and restrain defendants from violating Section 7 of the Clayton Act, 15 U.S.C. 18. The State of New York brings this action under Section 16 of the Clayton Act, 15 U.S.C. 26, to prevent and restrain defendants from violating Section 7 of the Clayton Act, 15 U.S.C. 18. The State of New York, by and through its Attorney General, brings this action on behalf of the citizens, general welfare, and economy of the State of New York.

4. Defendants treat infectious waste in the flow of interstate commerce. Defendants' activities in treating infectious waste substantially affect interstate commerce. The Court has jurisdiction over this action and over the parties pursuant to 15 U.S.C. 22 and 28 U.S.C. 1331 and 1337.

5. Defendants have consented to venue and personal jurisdiction in this District. Venue is therefore proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22 and 28 U.S.C. 1391(c).

III. The Defendants

6. Defendant Stericycle, Inc. is a Delaware corporation with its principal place of business in Lake Forest, Illinois. Stericycle, a multi-national company, is the largest provider of infectious waste treatment services in the United States, with operations in all 50 states, including 54 treatment facilities. In 2009, Stericycle had U.S. revenues of $913 million. SAMW Acquisition Corporation is a corporation formed by Stericycle to facilitate its acquisition of HWS. Stericycle and SAMW hereinafter are collectively referred to as "Stericycle".

7. Defendant Healthcare Waste Solutions ("HWS") is a Delaware corporation with its principal place of business in Cincinnati, Ohio. HWS is the second-largest provider of infectious waste treatment services in the United States, with operations in 15 states that include six treatment facilities. In 2009, HWS had total revenue of about $31 million.

IV. Trade and Commerce

A. Background

8. Regulated medical waste is waste generated in the diagnosis, treatment, or immunization of human beings or animals. There are generally three types of regulated medical waste: (1) Infectious waste; (2) pathological waste; and (3) trace chemotherapy waste. Infectious waste is waste that has come into contact with bodily fluids and "sharps" waste, such as syringes and scalpels. Pathological waste is anatomical parts, and trace chemotherapy waste is small amounts of chemical compounds used to treat cancer patients and the equipment used to administer the compounds. Infectious waste comprises approximately 90 percent of the regulated medical waste generated in the United States.

9. State and federal governments heavily regulate the treatment of regulated medical waste. They prescribe how each type of regulated medical waste must be stored, collected, and treated. Providers of infectious waste treatment services are required to be licensed by various state and federal regulatory agencies before they can offer such services.

10. Regulated medical waste must be stored separately from other types of waste, and each type of regulated medical waste must be stored separately from the other types in specially marked and sealed containers.

11. State-approved treatment facilities must be used to render infectious waste non-infectious. Failure to use state-approved treatment facilities subjects both the generator of the infectious waste and the infectious waste treatment service provider to criminal prosecution, fines, damage actions, and potentially high clean-up costs.

12. Autoclave sterilization is the most common treatment for infectious waste. An autoclave uses steam sterilization combined with pressure to render infectious waste non-infectious. Autoclave sterilization is not approved for pathological or trace chemotherapy waste, which instead must be incinerated in a specially licensed medical waste incinerator.

13. Infectious waste is typically collected from generator sites (e.g., hospitals and physician offices) on daily route trucks and then transported to treatment facilities. Route trucks are vans and, more typically, 16- to 24-foot straight trucks. A daily route truck typically travels a route within a 75- to 100-mile radius of its garage.

14. Obtaining approval for an infectious waste treatment facility in and around large urban areas, such as New York City, is difficult. Only one such commercial facility operates in the New York City Metropolitan area. Transporting large volumes of infectious waste to distant treatment facilities using daily route trucks is not cost-effective. Therefore, service providers serve such areas by using local transfer stations.

15. Once the daily route truck has delivered the infectious waste to a local

transfer station, the collection function is completed. At a transfer station, containers of infectious waste are unloaded from the daily route trucks and loaded onto tractor trailers for efficient shipment to more distant treatment facilities.

16. The size of the market for the provision of infectious waste treatment services is largely influenced by transportation costs because such costs represent a large share of the total cost of providing treatment services.

17. Defendants Stericycle and HWS own and operate numerous autoclave facilities for the treatment of infectious waste. Stericycle's and HWS's closest facilities to New York City are located in Sheridan and Oneonta, New York; Woonsocket, Rhode Island; and Morgantown and Marcus Hook, Pennsylvania. The closest of these is about 180 miles from New York City. It is not cost-effective to transport large volumes of infectious waste to these distant facilities using daily route trucks.

18. Stericycle and HWS operate local transfer stations in and around New York City and compete to provide infectious waste treatment services by serving customers through these local transfer stations.

19. In and around New York City, Stericycle owns and operates local transfer stations in the Bronx, Staten Island, West Babylon, and Farmingdale, New York. Stericycle also owns local transfer stations in Piscataway and Bloomfield, New Jersey. HWS owns and operates a local transfer station in the Bronx, New York.

20. In the New York City Metropolitan Area, encompassing the City of New York, and the counties of Westchester, Rockland, Nassau, and Suffolk in New York, the counties of Hudson, Bergen, Passaic, Essex, Union, and Middlesex in New Jersey, and the county of Fairfield in Connecticut, apart from one small competitor, no other infectious waste treatment service provider has a local transfer station located within approximately 100 miles of Stericycle's or HWS's local transfer stations.

B. Relevant Market

21. The provision of infectious waste treatment services to customers in the New York City Metropolitan Area is a line of commerce and relevant price discrimination service market within the meaning of Section 7 of the Clayton Act.

22. Infectious waste treatment differs from treatment for other types of waste, including other types of regulated medical waste. There are no legal alternatives to treating infectious waste other than using an approved treatment technology, such as autoclave sterilization.

23. Defendants provide infectious waste treatment services to New York City Metropolitan Area customers using local transfer stations. Other infectious waste treatment service providers that operate treatment facilities more than 100 miles from the New York City Metropolitan Area cannot cost-effectively compete to provide infectious waste treatment services without a local transfer station located in the New York City Metropolitan Area.

24. A small but significant increase in the price of infectious waste treatment services would not cause New York City Metropolitan Area customers to move sufficient volumes of infectious waste to another type of treatment service or to switch to an infectious waste treatment service provider that does not operate a local transfer station in sufficient numbers so as to make such a price increase unprofitable. Therefore, the relevant market is the provision of infectious waste treatment services to customers in the New York Metropolitan Area.

C. Anticompetitive Effect of the Acquisition

25. In the New York City Metropolitan Area, the acquisition would remove a significant competitor in the treatment of infectious waste in an already highly concentrated market. The proposed acquisition would reduce from three to two the number of competitors with local transfer stations, and Stericycle and HWS would have approximately 90 percent of the infectious waste treatment market in the New York City Metropolitan Area. The third competitor is a small firm that opened an autoclave treatment facility in Mount Vernon, New York in 2010; it is unlikely to replace the competition lost as a result of the merger. The substantial increase in concentration and loss of competition likely will result in higher prices for infectious waste treatment services.

26. Vigorous price competition between Stericycle and HWS in the provision of infectious waste treatment services has benefited customers in the New York City Metropolitan Area.

27. The proposed acquisition will eliminate the competition between Stericycle and HWS; reduce the number of providers of infectious waste treatment services with local transfer stations from three to two; and enable Stericycle to raise prices and lower quality of service for customers in the New York City Metropolitan Area, in violation of Section 7 of the Clayton Act.

D. Entry Into the Treatment of Infectious Waste

28. Successful entry into the provision of infectious waste treatment services for customers in the New York City Metropolitan Area is unlikely without first obtaining a local transfer station from which waste can be transferred to more distant treatment facilities.

29. A prospective provider of infectious waste treatment services faces substantial barriers to site and build a transfer station. Obtaining the state and local permits and approvals necessary to site a medical waste transfer station would require a substantial investment in time and money, without any guarantee that the permits and approvals would ultimately be granted. In recent years, several infectious waste treatment service providers have attempted without success to obtain the necessary permits to site a local transfer station within New York City.

30. Entry into the provision of infectious waste treatment services to customers in the New York City Metropolitan Area would not be timely, likely, or sufficient to counter anticompetitive price increases or diminished quality of service that Stericycle could impose after the proposed acquisition.

V. Violation Alleged

31. Stericycle's proposed acquisition of HWS's infectious waste treatment assets in the New York City Metropolitan Area likely will substantially lessen competition and tend to create a monopoly in interstate trade and commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

32. Unless restrained, the transaction will have the following anticompetitive effects, among others:

A. Actual and potential competition between Stericycle and HWS in the provision of infectious waste treatment services in the New York City Metropolitan Area will be eliminated;

b. Competition generally in the provision of infectious waste treatment services in the New York City Metropolitan Area will be substantially lessened; and

c. Prices for infectious waste treatment services in the New York City Metropolitan Area likely will increase, and service likely will be reduced.

VI. Requested Relief

33. Plaintiffs request:

a. That Stericycle's proposed acquisition of HWS be adjudged and decreed to be unlawful and in violation of Section 7 of the Clayton Act, 15 U.S.C. 18;

b. That defendants and all persons acting on their behalf be permanently enjoined and restrained from consummating the proposed acquisition of HWS by Stericycle, or from entering into or carrying out any contract, agreement, plan, or understanding, the effect of which would be to merge the voting securities or assets of the defendants;

c. That plaintiffs receive such other and further relief as the case requires and the Court deems just and proper; and

d. That plaintiffs recover the costs of this action.

Dated: April 8, 2011.

Respectfully submitted,

For Plaintiff United States of America

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United States District Court for the District of Columbia

United States of America and State of New York, Plaintiffs, v. *Stericycle, Inc., SAMW Acquisition Corporation,* and *Healthcare Waste Solutions, Inc.,* Defendants.

Case No.: 1:11–cv–00689
Assigned To: Howell, Beryl A.
Assign. Date: 4/8/2011
Description: Antitrust

Competitive Impact Statement

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

Defendant Stericycle, Inc., through SAMW Acquisition Corporation, and defendant Healthcare Waste Solutions, Inc. ("HWS"), entered into a merger agreement dated September 24, 2010, pursuant to which Stericycle would acquire all of HWS, except for an incinerator in Matthews, North Carolina, for $245 million.

The United States and the State of New York filed a civil antitrust Complaint on April 8, 2011, seeking to enjoin the proposed acquisition, alleging that it likely would substantially lessen competition in the provision of infectious waste treatment services to customers in the New York City Metropolitan Area, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. The loss of competition from the acquisition likely would result in higher prices and reduced service for these customers of infectious waste treatment services.

At the same time the Complaint was filed, the United States and the State of New York also filed a Hold Separate Stipulation and Order and proposed Final Judgment, which are designed to eliminate the anticompetitive effects that would result from Stericycle's acquisition of HWS. Under the proposed Final Judgment, which is explained more fully below, Stericycle is required to divest HWS's transfer station located in the Bronx, New York. Under the terms of the Hold Separate Stipulation and Order, Stericycle and HWS must take certain steps to ensure that the assets being divested continue to be operated in a competitively independent and economically viable manner and that competition for infectious waste treatment services is maintained during the pendency of the ordered divestiture.

The United States, the State of New York, and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Defendants

Stericycle is a Delaware corporation with its principal place of business in Lake Forest, Illinois. Stericycle, a multi-national company, is the largest provider of infectious waste treatment services in the United States, with operations in all 50 states, including 54 treatment facilities. In 2009, Stericycle had U.S. revenues of $913 million. SAMW Acquisition Corporation is a corporation formed by Stericycle to facilitate its acquisition of HWS.

HWS is a Delaware corporation with its principal place of business in Cincinnati, Ohio. HWS is the second-largest provider of infectious waste treatment services in the United States, with operations in 15 states that include six treatment facilities. In 2009, HWS had total revenues of about $31 million.

B. The Competitive Effect of the Acquisition on Infectious Waste Treatment Services

1. Background

Regulated medical waste is waste generated in the diagnosis, treatment, or immunization of human beings or animals. There are generally three types of regulated medical waste: (1) Infectious waste; (2) pathological waste; and (3) trace chemotherapy waste. Infectious waste is waste that has come into contact with bodily fluids and "sharps" waste, such as syringes and scalpels. Pathological waste is anatomical parts, and trace chemotherapy waste is small amounts of chemical compounds used to treat cancer patients and the equipment used to administer the compounds. Infectious waste comprises approximately 90 percent of the regulated medical waste generated in the United States.

State and federal governments heavily regulate the treatment of regulated

medical waste. They prescribe how each type of regulated medical waste must be stored, collected, and treated. Providers of infectious waste treatment services are required to be licensed by various state and federal regulatory agencies before they can offer such services. Regulated medical waste must be stored separately from other types of waste, and each type of regulated medical waste must be stored separately from the other types in specially marked and sealed containers. State-approved treatment facilities must be used to render infectious waste non-infectious. Failure to use state-approved treatment facilities subjects both the generator of the infectious waste and the infectious waste treatment service provider to criminal prosecution, fines, damage actions, and potentially high clean-up costs.

Autoclave sterilization is the most common treatment for infectious waste. An autoclave uses steam sterilization combined with pressure to render infectious waste non-infectious. Autoclave sterilization is not approved for pathological or trace chemotherapy waste, which instead must be incinerated in a specially licensed medical waste incinerator.

Infectious waste is typically collected from generator sites (e.g., hospitals and physician offices) on daily route trucks and then transported to treatment facilities. Route trucks are vans and, more typically, 16- to 24-foot straight trucks. A daily route truck typically travels a route within a 75- to 100-mile radius of its garage.

Obtaining approval for an infectious waste treatment facility in and around large urban areas, such as New York City, is difficult. Only one such commercial facility operates in the New York City Metropolitan Area. Transporting large volumes of infectious waste to distant treatment facilities using daily route trucks is not cost-effective. Therefore, service providers serve such areas by using local transfer stations. Once the daily route truck has delivered the infectious waste to a local transfer station, the collection function is completed. At a transfer station, containers of infectious waste are unloaded from the daily route trucks and loaded onto tractor trailers for efficient shipment to more distant treatment facilities.

The size of the market for the provision of infectious waste treatment services is largely influenced by transportation costs because such costs represent a large share of the total cost of providing treatment services. Defendants Stericycle and HWS own and operate numerous autoclave facilities for the treatment of infectious waste. Stericycle's and HWS's closest facilities to New York City are located in Sheridan and Oneonta, New York; Woonsocket, Rhode Island; and Morgantown and Marcus Hook, Pennsylvania. The closest of these is about 180 miles from New York City. It is not cost-effective to transport large volumes of infectious waste to these distant facilities using daily route trucks.

Stericycle and HWS operate local transfer stations in and around New York City and compete to provide infectious waste treatment services by serving customers through these local transfer stations. In and around New York City, Stericycle owns and operates local transfer stations in the Bronx, Staten Island, West Babylon, and Farmingdale, New York. Stericycle also owns local transfer stations in Piscataway and Bloomfield, New Jersey. HWS owns and operates a local transfer station in the Bronx, New York.

In the New York City Metropolitan Area, encompassing the City of New York, and the counties of Westchester, Rockland, Nassau, and Suffolk in New York, the counties of Hudson, Bergen, Passaic, Essex, Union, and Middlesex in New Jersey, and the county of Fairfield in Connecticut, apart from one small competitor, no other infectious waste treatment service provider has a local transfer station located within approximately 100 miles of Stericycle's or HWS's local transfer stations.

2. Relevant Market

The provision of infectious waste treatment services to customers in the New York City Metropolitan Area is a line of commerce and relevant price discrimination service market within the meaning of Section 7 of the Clayton Act. Infectious waste treatment differs from treatment for other types of waste, including other types of regulated medical waste. There are no legal alternatives to treating infectious waste other than using an approved treatment technology, such as autoclave sterilization.

Defendants provide infectious waste treatment services to New York City Metropolitan Area customers using local transfer stations. Other infectious waste treatment service providers that operate treatment facilities more than 100 miles from the New York City Metropolitan Area cannot cost-effectively compete to provide infectious waste treatment services without a local transfer station located in the New York City Metropolitan Area. A small but significant increase in the price of infectious waste treatment services would not cause New York City Metropolitan Area customers to move sufficient volumes of infectious waste to another type of treatment service, or to switch to an infectious waste treatment service provider that does not operate a local transfer station, in sufficient numbers so as to make such a price increase unprofitable. The relevant market is the provision of infectious waste treatment services to customers in the New York City Metropolitan Area.

3. Anticompetitive Effects of the Transaction

In the New York City Metropolitan Area, the acquisition would remove a significant competitor in the treatment of infectious waste in an already highly concentrated market. The proposed acquisition would reduce from three to two the number of competitors with local transfer stations, and Stericycle and HWS would have approximately 90 percent of the infectious waste treatment market in the New York City Metropolitan Area. Vigorous price competition between Stericycle and HWS in the provision of infectious waste treatment services has benefited customers in the New York City Metropolitan Area. The third competitor is a small firm that opened an autoclave treatment facility in Mount Vernon, New York, in 2010; it is unlikely to replace the competition lost as a result of the merger.

The proposed acquisition will eliminate the competition between Stericycle and HWS and enable Stericycle to raise prices and lower quality of service for customers in the New York City Metropolitan Area, in violation of Section 7 of the Clayton Act.

4. Entry Into the Treatment of Infectious Waste

Successful entry into the provision of infectious waste treatment services for customers in the New York City Metropolitan Area is unlikely without first obtaining a local transfer station from which waste can be transferred to more distant treatment facilities.

A prospective provider of infectious waste treatment services faces substantial barriers to site and build a transfer station. Obtaining the state and local permits and approvals necessary to site an infectious waste transfer station would require a substantial investment in time and money, without any guarantee that the permits and approvals would ultimately be granted. In recent years, several infectious waste treatment service providers have attempted without success to obtain the

necessary permits to site a local transfer station within New York City.

Entry into the provision of infectious waste treatment services to customers in the New York City Metropolitan Area would not be timely, likely, or sufficient to counter anticompetitive price increases or diminished quality of service that Stericycle could impose after the proposed acquisition.

III. Explanation of the Proposed Final Judgment

The terms of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition alleged in the Complaint. Section IV of the proposed Final Judgment requires defendants, within forty-five (45) days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest HWS's transfer station in the Bronx, New York, which is used in the provision of infectious waste treatment services to customers in the New York City Metropolitan Area. The acquirer of the transfer station, along with associated tangible and intangible assets, must be acceptable to the United States, in its sole discretion after consultation with the State of New York. The divestiture of these assets according to the terms of the proposed Final Judgment will establish a new, independent, and economically viable competitor, thereby preserving competition in the provision of infectious waste treatment services to customers in the New York City Metropolitan Area.

In the event that defendants do not accomplish the divestiture within the time prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestitures. If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court, United States, and the State of New York as appropriate, setting forth his or her efforts to accomplish the divestitures. At the end of six months, if the divestitures have not been accomplished, the trustee, the United States, and the State of New York, will make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

The Final Judgment also requires, in Section VIII, that defendants provide advance notification of certain future proposed acquisitions not otherwise subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a. That provision requires 30 days' advance written notice to the United States and the State of New York before defendants acquire, directly or indirectly, (1) Interest in any business engaged in the treatment of infectious waste that serves the New York City Metropolitan Area; (2) other than in the ordinary course of business, assets of a person engaged in the treatment of infectious waste generated in the New York City Metropolitan Area; or (3) capital stock or voting securities of any person that, at any time during the twelve (12) months immediately preceding such acquisition, was engaged in the treatment of infectious waste generated in the New York City Metropolitan Area, where that person's annual revenues in this area from the treatment of infectious waste were in excess of $500,000. With this provision, the United States and the State of New York will have knowledge in advance of acquisitions that may impact competition in the provision of infectious waste treatment services in the New York City Metropolitan Area.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act (15 U.S.C. 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. 16(a)), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against the defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States, the State of New York, and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to The Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants. The United States could have commenced litigation and sought a judicial order enjoining the acquisition of HWS by Stericycle. The United States is satisfied that the divestiture and other relief described in the proposed Final Judgment will preserve competition in the provision of infectious waste treatment services for customers in the New York City Metropolitan Area. The relief contained in the proposed Final Judgment would achieve all or substantially all of the relief that the United States would have obtained through litigation, while avoiding the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by

the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1461 (DC Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.DC 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.*, 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3, (D.DC Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

As the United States Court of Appeals for the District of Columbia has held, under the APPA, a court considers, among other things, the relationship between the remedy secured and the allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[1] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States* v. *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.DC 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case); *United States* v. *Republic Serv., Inc.*, 2010–2 Trade Cas. (CCH) ¶ 77,097, 2010 U.S. Dist. LEXIS 70895, No. 08–2076 (RWR), at *160 (D.D.C. July 15, 2010) (finding that "[i]n light of the deferential review to which the government's proposed remedy is accorded, [amicus curiae's] argument that an alternative remedy may be comparably superior, even if true, is not a sufficient basis for finding that the proposed final judgment is not in the public interest.").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States* v. *Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), aff'd sub nom. *Maryland* v. *United States*, 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). Therefore, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *Republic Serv.*, 2010 U.S. Dist. LEXIS 70895, at *158 (entering final judgment "[b]ecause there is an adequate factual foundation upon which to conclude that the government's proposed divestitures will remedy the antitrust violations alleged in the complaint.").

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[2] Congress made clear its

[1] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

[2] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the

intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: April 8, 2011.

Respectfully submitted,

/s/ _____

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list of factors to focus on competitive considerations and addresses potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[3] *See United States* v. *Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.DC 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States* v. *Mid-Am. Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

United States District Court for the District of Columbia

United States of America and State of New York, Plaintiffs, v. *Stericycle, Inc., SAMW Acquisition Corp., and Healthcare Waste Solutions, Inc.*, Defendants.

Case No.:
Judge:
Deck Type: Antitrust
Date Stamp:

Proposed Final Judgment

Whereas, plaintiffs, the United States of America and the State of New York, filed their Complaint on April ___, 2011; plaintiffs and defendants, Stericycle, Inc. and SAMW Acquisition Corp., and Healthcare Waste Solutions, Inc., by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law; and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of law or fact;

And whereas, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is the prompt and certain divestiture of the Divestiture Asset to assure that competition is not substantially lessened;

And Whereas, plaintiffs require defendants to make a divestiture for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, defendants have represented to plaintiffs that the divestiture required below can and will be made, and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now, therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is hereby *ordered, adjudged, and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against the defendants under Section 7 of the Clayton Act, 15 U.S.C. 18, as amended.

II. Definitions

As used in this Final Judgment:

A. "Acquirer" means the entity to which defendants shall divest the Divestiture Asset.

B. "Stericycle" means defendant Stericycle, Inc., a Delaware corporation with its principal place of business in Lake Forest, Illinois, and SAMW Acquisition Corp. (a corporation formed to facilitate the acquisition), and their successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and all of their directors, officers, managers, agents, and employees.

C. "HWS" means defendant Healthcare Waste Solutions, Inc., a Delaware corporation with its principal place of business in Cincinnati, Ohio, and its successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and all of their directors, officers, managers, agents, and employees.

D. "Infectious Waste" means regulated medical waste that is generated in the diagnosis, treatment, or immunization of human beings or animals and that has come into contact with bodily fluids, and "sharps" waste, such as syringes and scalpels.

E. "Treatment" means the sterilization of infectious waste at a state-approved treatment facility, including the use of transfer stations to facilitate the shipment of infectious waste to other treatment sites.

F. "Divestiture Asset" means HWS's Bronx, New York transfer station, located at 1281 Viele Avenue, Bronx, New York 10474, including:

1. Tangible assets at the HWS facility identified in this Paragraph II(F), including all research and development activities, equipment, and fixed assets, real property (leased or owned), equipment, personal property, inventory, office furniture, materials, supplies, on- or off-site warehouses or storage facilities; all licenses, permits, and authorizations issued by any governmental organization relating to the facilities; and all facility records, but excluding assets used exclusively in the HWS collection business; and

2. All intangible assets associated with the HWS facility identified in this Paragraph II(F), including, but not limited to, all contractual rights, patents, licenses and sublicenses, intellectual property, technical information, computer software (including waste monitoring software and management information systems) and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information provided to employees, customers, suppliers, agents or licensees, but excluding assets used exclusively in the HWS collection business.

G. "New York City Metropolitan Area" means the area encompassing the City of New York, and the counties of Westchester, Rockland, Nassau, and

Suffolk in New York, the counties of Hudson, Bergen, Passaic, Essex, Union, and Middlesex in New Jersey, and the county of Fairfield in Connecticut.

III. Applicability

A. This Final Judgment applies to Stericycle and HWS, as defined above, and all other persons in active concert or participation with either of them, who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Sections IV and V of this Final Judgment, defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Asset, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer of the assets divested pursuant to this Final Judgment.

IV. Divestiture

A. Defendants are ordered and directed, within forty-five (45) calendar days after the filing of the Complaint in this matter, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Asset in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States in its sole discretion, after consultation with the State of New York. The United States, in its sole discretion, after consultation with the State of New York, may agree to one or more extensions of this time period not to exceed thirty (30) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Divestiture Asset as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Asset. Defendants shall inform any person making an inquiry regarding a possible purchase of the Divestiture Asset that it is being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Asset customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendants shall provide the Acquirer and the United States information relating to the personnel involved in the operation and management of the Divestiture Asset to enable the Acquirer to make offers of employment. Defendants shall not interfere with any negotiations by the Acquirer to employ or contract with any defendant employee whose primary responsibility is the operation or management of the Divestiture Asset.

D. Defendants shall permit prospective Acquirers of the Divestiture Asset to have reasonable access to personnel and to make inspections of the physical facility of the Divestiture Asset; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational or other documents and information customarily provided as part of a due diligence process.

E. Defendants shall warrant to the Acquirer that the Divestiture Asset will be operational on the date of sale.

F. Defendants shall not take any action that will impede in any way the permitting, operation or divestiture of the Divestiture Asset.

G. Defendants shall warrant to the Acquirer that there are no material defects in the environmental, zoning or other permits pertaining to the operation of the Divestiture Asset, and that following the sale of the Divestiture Asset, defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Asset.

H. Unless the United States, after consultation with the State of New York, otherwise consents in writing, the divestiture pursuant to Section IV, or by trustee appointed pursuant to Section V, of this Final Judgment, shall be accomplished in such a way as to satisfy the United States, in its sole discretion, after consultation with the State of New York, that the divestiture will achieve the purposes of this Final Judgment and that the Divestiture Asset can and will be used by the Acquirer as part of a viable, ongoing business providing infectious waste treatment services. The divestiture, whether pursuant to Section IV or Section V of this Final Judgment:

1. Shall be made to the Acquirer that, in the United States's sole judgment, after consultation with the State of New York, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the business of providing infectious waste treatment services; and

2. Shall be accomplished so as to satisfy the United States, in its sole discretion, after consultation with the State of New York, that none of the terms of any agreement between the Acquirer and defendants gives defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

V. Appointment of Trustee

A. If defendants have not divested the Divestiture Asset within the time period specified in Section IV, defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the sale of the Divestiture Asset.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Asset. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States, after consultation with the State of New York, at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V, Paragraph D, of this Final Judgment, the trustee may hire at the defendants' cost and expense any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

D. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the Divestiture Asset and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Asset and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and

the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facility of the Divestiture Asset, and defendants shall develop financial and other information relevant to the Divestiture Asset as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States and the State of New York, and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Asset, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Asset.

G. If the trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth: (1) The trustee's efforts to accomplish the required divestiture; (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished; and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, defendants or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the plaintiffs of any proposed divestiture required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Asset, together with full details of the same.

B. Within ten (10) calendar days of receipt of such notice by the plaintiffs, the United States may request from defendants, the proposed Acquirer, any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within ten (10) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within fifteen (15) calendar days after receipt of the notice or within fifteen (15) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States, after consultation with the State of New York, provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under paragraph V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by defendants under paragraph V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Notice to Customers

No later than five (5) calendar days following the sale of the Divestiture Asset, Defendants shall send a Notice, in a form approved by the United States, in its sole discretion, after consultation with the State of New York, to all customers located in the New York City Metropolitan Area that are under contract with HWS and served by the Divestiture Asset, informing such customers that they have the right to terminate such contracts for a period of ninety (90) days from the date of the Notice. Defendants shall certify to the United States that the Notice was timely sent.

VIII. Notice of Future Acquisitions

A. Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the "HSR Act"), Stericycle, without providing advance notification to the plaintiffs, shall not directly or indirectly acquire, any (1) Interest in any business engaged in the treatment of infectious waste that serves the New York City Metropolitan Area; (2) other than in the ordinary course of business assets of a person engaged in the treatment of infectious waste generated in the New York City Metropolitan Area; or (3) capital stock or voting securities of any person that, at any time during the twelve (12) months immediately preceding such acquisition, was engaged in the treatment of infectious waste generated in the New York City Metropolitan Area, where that person's annual revenues in this area from the treatment of infectious waste were in excess of $500,000.

B. Such notification shall be provided to the plaintiffs in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 9 of the instructions must be provided only about the treatment of infectious waste. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the United States make a written request for

additional information, Stericycle shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

IX. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

X. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

XI. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, defendants shall deliver to plaintiffs an affidavit as to the fact and manner of their compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Asset, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for the Divestiture Asset, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States, after consultation with the State of New York, to information provided by defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to plaintiffs an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section IX of this Final Judgment. Defendants shall deliver to the plaintiffs an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Asset until one year after such divestiture has been completed.

XII. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice Antitrust Division, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

1. Access during defendants' office hours to inspect and copy, or at the option of the United States, to require defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

2. To interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States or the New York Attorney General, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XIII. No Reacquisition

During the term of this Final Judgment, defendants may not reacquire any part of the Divestiture Asset, nor may any defendant participate in any other transaction that would result in a combination, merger, or other joining together of any part of the Divestiture Asset with assets of the divesting company.

XIV. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XVI. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

United States District Judge.

[FR Doc. 2011–9106 Filed 4–13–11; 8:45 am]

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Google Inc. and ITA Software Inc., Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Google Inc. and ITA Software Inc.*, Civil Case No. 1:11–cv–00688. On April 8, 2011, the United States filed a Complaint alleging that Google's proposed acquisition of ITA Software Inc. would substantially reduce competition in the online travel planning industry, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment would require Google to continue licensing ITA Software's products for a period of five years following the merger.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.justice.gov/atr*, and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to James J. Tierney, Chief, Networks and Technology Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, NW., Suite 7100, Washington, DC 20530 (telephone: 202–307–6200).

Patricia A. Brink,

Director of Civil Enforcement.

In the United States District Court for the District of Columbia

United States of America, United States Department of Justice, Antitrust Division, 450 Fifth Street, NW., Suite 7100, Washington, DC 20530, Plaintiff, v. *Google Inc., 1600 Amphitheatre Parkway, Mountain View, CA 94043, and ITA Software, Inc., 141 Portland Street, Cambridge, MA 02139,* Defendants.

Civil Action No. 1:11–cv–00688.

Filed: 4/8/2011.

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action against Google Inc. ("Google") and ITA Software, Inc. ("ITA") pursuant to the antitrust laws of the United States to enjoin Google's proposed acquisition of ITA, and to obtain such other equitable relief as the Court deems appropriate. The United States alleges as follows:

I. Nature of Action

1. On July 1, 2010, Google, a significant provider of general Internet search and search advertising in the United States, entered into a merger agreement to acquire ITA, the provider of the leading independent airfare pricing and shopping system ("P&S system"), for $700 million. P&S systems provide flight pricing, schedule and seat availability information to Internet travel sites.

2. Online travel represents a significant share of e-commerce in the United States. Consumers rely on the Internet to make their travel plans, and often begin by shopping for airfare. Online travel intermediaries ("OTIs") such as Orbitz, Kayak and Expedia allow consumers to compare flight prices, schedules, and seat availability on multiple airlines simultaneously. OTIs, and the flight search services they offer, have become very popular with consumers who want to ensure they are getting the best deal. Indeed, most U.S. consumers compare flight options on an OTI Web site before purchasing a ticket online.

3. ITA's P&S system, QPX, powers a significant share of the domestic comparative flight searches conducted by U.S. consumers. ITA licenses QPX to many of the most popular and innovative OTI's providing comparative flight search services, including Orbitz, Kayak, and Microsoft's Bing Travel. QPX is a critical flight search tool for many of its licensees, as other P&S systems cannot match its speed and flexibility, and are not poised to do so in the near future. Thus, these OTIs currently have no adequate alternatives to QPX and will not have any following the merger.

4. Google has the most widely used general Internet search engine in the United States and is the leading seller of Internet search advertising. Google seeks to expand its search services by launching an Internet travel site to offer comparative flight search services.

5. The proposed merger will give Google the means and incentive to use its ownership of QPX to foreclose or disadvantage its prospective flight search rivals by degrading their access to QPX, or denying them access to QPX altogether. As a result, the proposed merger is likely to result in reduced quality, variety, and innovation for consumers of comparative flight search services.

II. Jurisdiction, Venue and Commerce

6. The United States brings this action under Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain Google and ITA from violating Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

7. Google is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located in Mountain View, CA. In 2009, Google earned more than $23 billion in revenues in the United States. Google is engaged in interstate commerce and in activities substantially affecting interstate commerce. It sells online search advertising throughout the United States. Its sales of online search advertising in the United States represent a regular, continuous and substantial flow of interstate commerce, and have had a substantial effect upon interstate commerce.

8. ITA is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located in Cambridge, MA. ITA is engaged in interstate commerce and in activities substantially affecting interstate commerce. It makes sales throughout the United States. Its sales in the United States represent a regular, continuous and substantial flow of interstate commerce, and have had a substantial effect upon interstate commerce.

9. The Court has subject-matter jurisdiction over this action and these defendants pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

10. Venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(b)(1) and

(c). Defendants Google and ITA transact business and are found within the District of Columbia. Google and ITA have submitted to personal jurisdiction in this District.

III. The Merger Is Likely To Lessen Competition Substantially in the Market for Comparative Flight Search Services in the United States

A. Overview of Comparative Flight Search Services and P&S Systems

11. Major airlines developed the first flight search systems in the 1950s and 1960s for their own internal use. In the 1970s, the airlines started releasing specialized versions of these systems for use by professional "brick and mortar" travel agents. These systems provided both flight search and booking functionality. They were known first as "computer reservation systems" ("CRSs"), and later as "global distribution systems" ("GDSs") as airlines divested their ownership interests and the companies expanded their presence outside of the United States. The GDS firms function as intermediaries between the airlines looking to sell tickets and travel agents with customers looking to buy tickets.

12. The early flight search systems were relatively limited in their search capabilities. They generated a limited set of results per query, and did not present the list of flight options in a user-friendly format. Travel agents received special training in order to use the systems, and brought their training and experience to bear both in performing flight queries and interpreting the results for consumers. Consumers made travel decisions based on information extracted from these systems by professional travel agents.

13. With the advent of the Internet, two different types of OTIs emerged that allow U.S. consumers to search for domestic flight prices, schedules, and seat availability on multiple airlines simultaneously: Online travel agencies ("OTAs") such as Expedia, Travelocity and Priceline, and travel meta-search engines ("Metas") such as Kayak, TripAdvisor and Bing Travel. Like the "brick and mortar" travel agencies, OTAs provide both flight search and booking services. Also like the "brick and mortar" travel agencies, OTAs split booking fees with the GDSs. They supplement this revenue by selling advertising on their Web sites to airlines, hotels and other companies offering travel-related products and services.

14. Metas enable consumers to search for flights but do not offer booking services. When a consumer on a Meta travel site enters a flight query, the Meta provides a set of flight options, and for each option, a set of links to various airline and OTA Web sites. To purchase a ticket, the consumer must click a link to an airline or OTA Web site. In contrast to OTAs, which generate revenue primarily through booking fees and secondarily through advertising sales, Metas generate revenue through advertising sales and referral fees collected from the airlines and OTAs.

15. To attract traffic, Metas generally offer innovative flight search features that capture the consumer's attention, and provide an array of attractive flight options in response to each query. Metas also prioritize quick response times because consumers on their sites are often at an earlier stage of the travel planning process, and are less likely to endure a prolonged wait for search results. Although Metas are the newcomers, they are driving competition in comparative flight search services through innovation, and are progressively gaining ground.

16. To perform a flight search on an OTA or a Meta, a consumer typically enters an origin and destination city and desired travel dates and times. The travel site then provides a number of options on different airlines with varying routes and pricing. Some travel sites—particularly the Metas—also offer more sophisticated and innovative flight search features, for example, a fare predictor that allows consumers to identify the best time to buy a ticket for a particular trip, or an "anywhere" feature that allows them to explore different destinations by specifying a price range, desired activity (*e.g.*, beach, golf, skiing) and desired temperature (*e.g.*, average high of 80).

17. To provide flight search functionality, OTAs and Metas rely on P&S systems such as ITA's QPX. A system includes not only the P&S engine software, but also on-going access to seat and fare class availability data. When a consumer on a Meta or OTA Web site submits a flight query (*e.g.*, Boston to San Francisco, March 1, 2011, returning March 14, 2011), the Web site sends the query to the P&S system. The P&S system accesses the fare, schedule, and seat availability information of multiple airlines, and uses a sophisticated algorithm to analyze the flight possibilities and convert the query into a list of available flight options. It sends these options back to the OTA or Meta, which presents the available flight options to the consumer in a format that facilitates comparison (*e.g.*, organized by price, departure or arrival time, or number and length of connections). P&S systems differ in their speed; flexibility; ability to find the lowest price itinerary; ability to obtain accurate seat availability information; and breadth of results presented.

18. Although the flight queries submitted on OTA and Meta Web sites are often simple, the computing challenges involved in providing the underlying flight search functionality are quite significant. Airfare pricing and seat availability change from moment to moment, and are governed by a complex system of fare rules that vary by airline. There are thousands of possible flight paths that can be used to travel between any two cities on a given day; when different airlines, departure and arrival times, and fare codes are taken into account, the number of possible flight combinations can number in the billions. In order to present consumers with flight options that are actually available for purchase, the billions of possible combinations must be checked against seat availability data and fare rules.

B. Relevant Product Market

1. Comparative Flight Search Services

19. One of the markets affected by this transaction is comparative flight search services. Comparative flight search service providers enable consumers to search online for flight prices, schedules, and seat availability on multiple airlines simultaneously. Comparative flight search services is a relevant antitrust product market because no other flight search service is as useful and convenient to consumers.

20. Current competitors in this market include Metas (*e.g.*, Kayak and Bing Travel), and OTAs (*e.g.*, Expedia, Orbitz and Travelocity) whose comparative flight search services can be consumed separately from their flight booking and other travel services.

21. Airline Web sites and reservation lines are not reasonable substitutes for comparative flight search services because they do not allow consumers to compare prices and schedules across multiple airlines simultaneously. It is significantly more cumbersome for a consumer to compare flight prices and schedules by going to many different airlines' Web sites separately, and even then the consumer might not find the best fare.

22. Using a "brick and mortar" travel agent is also not a reasonable substitute for comparative flight search services online because travel agents do not provide the same sort of user control, instantaneous response, and flight search flexibility as OTAs and Metas.

23. There are no reasonable substitutes for comparative flight search services, and thus, a small but significant degradation in the quality of comparative flight search services or increase in price to consumers of these services would not cause a significant number of users to switch to other services, such as airline Web sites or "brick and mortar" travel agents. Accordingly, comparative flight search services is a relevant product market for purposes of Section 7 of the Clayton Act.

2. P&S Systems

24. This transaction also impacts the P&S systems market. P&S systems have two main components: a continuously-updated database of airline pricing, schedule and seat availability information, and a software algorithm used to search the database for flight options that best match consumers' search criteria. The significant competitors in this market include ITA, Travelport, Sabre, Amadeus, and Expedia.

25. P&S systems is a relevant antitrust product market because no other comparative flight search technology is as fast or as reliable. The closest alternative to P&S systems is screen-scraping software which pulls or "scrapes" airline pricing and scheduling information from airline Web sites and other OTIs instead of accessing a centralized database of flight pricing, schedule, and seat availability information. Screen-scraping technology is not a reasonable substitute for P&S systems because it is significantly slower and less reliable.

26. A small but significant increase in the licensing fees charged to OTIs for use of P&S systems would not cause a sufficient number of these sites to substitute to screen scraping technology to make such price increases unprofitable. Accordingly, P&S systems is a relevant product market for purposes of Section 7 of the Clayton Act.

C. Relevant Geographic Market

1. Comparative Flight Search Services

27. The relevant geographic market for comparative flight search services is the United States. All the major OTIs that allow consumers to compare domestic flight prices and schedules are optimized for use by U.S. consumers. While some of the Web sites have foreign versions (*e.g., http://www.expedia.co.uk*), the foreign versions are not adequate substitutes for most U.S. consumers because they list flight prices in their local currency, and sell tickets in that currency, requiring a currency conversion fee.

2. P&S Systems

28. The relevant geographic market for P&S systems is the United States. In order for a P&S system to serve U.S. consumers, it must have access to comprehensive and reliable seat and fare class availability data on routes with at least one U.S. endpoint, and software which provides fare, tax, and fee calculations denominated in U.S. dollars. Accordingly, OTIs serving U.S. consumers cannot reasonably substitute software that is optimized for a different geographic market (*e.g.*, Europe) and not the United States.

D. Anticompetitive Effects

29. The acquisition of ITA by Google is likely to lessen competition substantially in the market for comparative flight search services in the United States. After acquiring ITA, Google intends to use QPX as the back-end technology for its forthcoming comparative flight search services. Google's travel service will compete with OTIs. As Google has recognized, QPX is a unique P&S system because it has superior features that cannot be quickly replaced or replicated. After acquiring QPX, Google will have the ability and incentive to foreclose competing OTIs' access to QPX and thereby weaken the ability of its rivals to compete.

1. ITA's QPX Is Dominant in P&S Systems and Serves as the Leading Platform for Web Sites Offering the Most Innovative Flight Search Services

30. Since its entry into the P&S systems market in 2001, ITA has dramatically expanded its portfolio of customers. ITA has won virtually every competition for business in the United States in which the customer did not already have a P&S system provider or product. At the same time, ITA has lost very few customers. Today, QPX powers all major Metas and three major OTAs and handles more domestic flight comparison queries than any other P&S system. QPX is widely recognized as the best P&S system in the U.S. market due to its superior speed and flexibility.

31. QPX has a significant speed advantage because it can more quickly determine seat availability using its proprietary Dynamic Availability Calculating System ("DACS"). ITA's DACS is a unique system which can quickly estimate seat availability without polling the airlines' systems (which slows the process) or relying on data from prior queries (which is sometimes stale and inaccurate). Speed is important because the longer it takes to respond to a query, the greater the likelihood that the consumer will abandon the search and switch to another flight search site.

32. QPX is also highly configurable. QPX has more than a thousand different parameters that can be adjusted or "tuned" to meet the needs of individual travel site customers. QPX's flexibility also allows it to more efficiently handle the complex queries demanded by more innovative flight search features such as Bing Travel's Fare Predictor, which predicts whether prices for a particular route are trending up or down.

33. ITA also leads in P&S system innovation. For example, ITA is developing a new product called InstaSearch which relies on cutting-edge computing techniques to significantly reduce query response times. ITA expects InstaSearch to be particularly useful in reducing the response times for more innovative flight search features such as "calendar" features which allow consumers to search for the lowest fares for a particular route over a period of weeks or months; and "anywhere" features which enable consumers to explore different destinations by specifying a price range, desired activity (*e.g.*, beach, golf, skiing) and desired temperature.

34. QPX's flexible design makes it the tool of choice for Metas. Indeed, ITA is the only P&S system currently capable of supporting many of the innovative comparative flight search services that are the core attraction for these travel sites.

2. Currently Available P&S System Alternatives Are Not Adequate Substitutes for QPX

35. The three GDSs—Sabre, Travelport and Amadeus—license P&S systems to third-parties (generally OTAs), but usually as part of a broader software package that includes booking and ticketing functionality. In addition, one of the OTAs, Expedia, has a proprietary P&S system to support its own travel Web site, which is based on a GDS product, but it has never licensed its system to third parties.

36. QPX's significant qualitative advantages have prompted some OTIs with ready access to a GDS or proprietary P&S system to license QPX. For example, Hotwire, an OTA, and TripAdvisor, a Meta, license QPX even though their corporate affiliate, Expedia, owns and operates its own proprietary P&S system. Similarly, Orbitz and Cheaptickets are part-owned (48%) by Travelport, one of the GDS firms, but have opted to license ITA's QPX

because it provides superior flight search functionality.

37. ITA has a superior flight search tool and is driving innovation in P&S system technology. Although the GDS firms and Expedia have responded by improving their P&S systems, they continue to be followers rather than leaders. As competition both in P&S systems and comparative flight search services is driven increasingly by innovation, the GDS firms have been unable to close the gap allowing ITA to progressively grow its share.

3. Google Will Have the Incentive To Foreclose Rivals' Access to QPX

38. The proposed merger will eliminate ITA as an independent and unique source of P&S system technology for competing OTIs, potentially stripping these sites of the technology needed to support their existing comparative flight search services, and delaying or deterring their efforts to develop new flight search features. After the merger, Google would have the ability to use its ownership of QPX to foreclose or disadvantage rivals of Google's travel service. For example, Google could refuse to renew existing QPX contracts, refuse to enter into new QPX contracts, enter into contracts on less favorable terms than ITA would have, or degrade the speed or quality of QPX offered to licensees. Unlike ITA, Google plans to develop a travel Web site. Therefore, Google will have the incentive to weaken competing OTIs by denying or degrading their access to QPX because increased profits from driving customers to its new travel service from rival OTIs will likely outweigh any lost profits from reduced licensing revenues from QPX.

39. The elimination of an independent ITA will also reduce travel site innovation. ITA partners with many different travel sites, and consumers have benefitted from the variety of flight search features that these collaborations have produced. Thus, consumers are likely to be harmed through reduced innovation and diminished consumer choice in the comparative flight search services market.

40. Finally, the proposed merger will provide Google access to competitively sensitive information from competing OTIs relating to their use of QPX, including tuning parameters and plans to offer new or improved services. Disclosure of such competitively sensitive information from competitors to Google will likely harm competition in the market for comparative flight services.

E. Difficulty of Entry in the Comparative Flight Search Services Market

41. The proposed merger would raise entry barriers into the comparative flight search market by placing QPX into Google's hands and beyond the reach of potential entrants. P&S systems are a critical input to the provision of comparative flight search services. No other firm offers a P&S system that is comparable to QPX.

42. The entry barriers associated with developing a new P&S system are extremely high. Indeed, two firms, Vayant and Everbread, have been developing P&S systems for several years, but have yet to garner any significant U.S.-based OTIs as customers. In addition, Google looked at developing its own P&S system as an alternative to acquiring ITA but concluded it would take several years and require numerous engineers due to the complexity of the algorithms.

VI. Violation Alleged

43. The United States incorporates the allegations of paragraphs 1 through 41 above.

44. The proposed transaction between Google and ITA would likely substantially lessen competition in interstate trade and commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, in the market for comparative flight search services in the United States.

VII. Relief Requested

45. The United States request that:

a. The proposed merger of Google and ITA be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. 18;

b. Google and ITA be enjoined from carrying out the proposed merger or carrying out any other agreement, understanding, or plan by which Google and ITA would acquire, be acquired by, or merge with each other;

c. The United States be awarded their costs of this action; and

d. The United States receive such other and further relief as the case requires and the Court deems just and proper.

Dated: April 8, 2011.

Respectfully submitted,

For Plaintiff United States:

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Joseph F. Wayland,
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Certificate of Service

I, Aaron D. Hoag, hereby certify that on April 8, 2011, I caused a copy of the Complaint to be served on defendants Google Inc. and ITA Software, Inc. by mailing the document via e-mail to the duly authorized legal representatives of the defendants, as follows:

For Google:

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United States District Court for the District of Columbia

United States of America, Plaintiff, v. *Google Inc., and ITA Software, Inc.,* Defendants.

Civil Action No. 1:11-cv-00688.
Filed: 4/8/2011.

Competitive Impact Statement

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment

submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of This Proceeding

On July 1, 2010, Google Inc. ("Google") entered into a merger agreement to acquire ITA Software Inc. ("ITA") for $700 million. ITA develops and licenses a software product called "QPX." QPX is used by many airlines, online travel agents and online travel search sites to provide extremely complex and customized flight search functionality to consumers. QPX has unique capabilities and acts as a type of mini-search engine for travel sites. When a customer wants to know the availability and cost of flights from Boston to San Francisco, for example, QPX is the tool that provides the answer.

Google intends to offer an online travel search product that will compete with existing travel search sites that provide the ability to search for airfares across a range of airlines, many of whom use QPX; these Web sites are referred to as Online Travel Intermediaries ("OTIs"). In essence, Google is acquiring a critical input not previously owned by a company that is a horizontal competitor to users of ITA. This transaction therefore posed a significant risk that Google could use the acquisition to foreclose rivals or unfairly raise their costs. Accordingly, the United States brought this lawsuit against Google and ITA on April 8, 2011, seeking to enjoin the proposed transaction. Following a thorough investigation, the United States believes that, unless enjoined, the likely effect of the transaction as proposed by the parties would be to lessen competition substantially for comparative flight search services in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. This loss of competition likely would result in reduced innovation and reduced consumer choice in the comparative flight search market.

Simultaneous with the filing of the Complaint, the United States also filed a proposed Final Judgment designed to remedy the Section 7 violation. The Final Judgment does not settle any claims which may arise under any other provisions of the laws, including Section 2 of the Sherman Act.

Under the proposed Final Judgment, which is explained more fully below, Defendants are subject to a variety of affirmative obligations, all of which are designed to ensure ongoing access to QPX for current ITA licensees and to enable new entrants or new licensees to obtain the QPX software on fair, reasonable, and non-discriminatory terms. The licensing provisions require Google to honor existing QPX licenses for OTIs, renew existing licenses under similar terms and conditions, and offer licenses to any OTIs not under contract on fair, reasonable, and non-discriminatory terms, judged in reference to similarly situated entities. Google must continue with the development of ordinary course upgrades and enhancements to QPX, and must devote substantially as many resources to research and development for QPX as ITA did prior to the acquisition. Google must license InstaSearch, an add-on to QPX which enables consumers to enter more flexible and creative queries in searching for flights. Google must observe strict firewall commitments to ensure the confidentiality of licensee information. In addition, Google must report certain complaints that it has directly or indirectly treated OTIs unfairly. This obligation will enable OTIs who believe that Google has acted in an unfair manner with respect to flight search advertising [1] to make complaints and have written complaints brought directly to the attention of the Department of Justice.

Google's affirmative obligations ensure that OTIs will have continued access to QPX after the merger, while preserving Google's ability to use QPX and ITA's engineering talent as a platform for developing new and innovative flight search services for consumers. The proposed Final Judgment therefore strikes an appropriate balance between competing interests by preserving the potential significant efficiencies from the combination of Google's and ITA's complementary expertise while redressing the potential for anticompetitive foreclosure that could result from the acquisition.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

[1] Google has the largest online search engine and generates revenue through the sale of online advertising.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Comparative Flight Search Industry

Over the past decade, consumer access to direct search and booking of air travel has been revolutionized. The Internet has provided consumers with tools that enable them directly to search for customized itineraries. Innovation in flight search tools has provided consumers with quick and convenient access to the most responsive and useful itineraries and prices. Two different types of Web sites enable U.S. consumers to conduct Internet searches for domestic flight prices, schedules, and seat availability on multiple airlines simultaneously: Online travel agencies ("OTAs") and travel meta-search engines ("Metas"). In many respects, OTAs function like the online equivalent of brick and mortar travel agents, assisting users in identifying travel options and then in booking the consumer's choice. Examples of OTAs are Expedia, Travelocity, and Priceline. By contrast, the so-called Metas, such as Kayak, TripAdvisor, and Bing Travel, provide highly differentiated products with broad search capabilities—functioning almost like mini-search engines to enable consumers to search for flights. The Metas, however, do not offer direct booking services (*i.e.*, to purchase a ticket, consumers must click a link to an airline's Web site or to an OTA). The largest Metas are all powered by QPX. In addition to providing comparative flight search services, both Metas and OTAs often enable consumers to search for other travel products and services such as hotel rooms, rental cars, and vacation packages. When described together, OTAs and Metas constitute OTIs.

To perform a flight search on any OTI, a consumer typically enters an origin and destination city and desired travel dates. The OTI then provides a number of options on different airlines with varying routes and pricing. Some travel sites—particularly the Metas powered by QPX, which has some unique capabilities and advantages—also offer more sophisticated and innovative flight search features, such as a fare predictor that allows consumers to identify the best time to buy a ticket for a particular trip, or an "anywhere" feature that allows them to explore different destinations by specifying a desired price range, activity, and/or temperature at the destination.

To provide flight search functionality, OTIs rely on pricing and shopping ("P&S") systems. ITA's QPX is a sophisticated P&S system that is

differentiated in several respects from its competitors. P&S systems include not only the engine that performs the search, but also on-going access to seat and fare class availability data. When a consumer on a OTI Web site submits a flight query (*e.g.*, Boston to San Francisco, departing March 1, 2011, returning March 14, 2011), the Web site sends the query to the P&S system. The P&S system accesses the fare, schedule, and seat availability information of multiple airlines, and uses a sophisticated algorithm to analyze the flight possibilities and convert the query into a list of available flight options. It sends these options back to the OTI, which presents the available flight options to the consumer in a format that facilitates comparison (*e.g.*, organized by price, departure or arrival time, or number and length of connections). QPX is a highly accurate and well developed P&S system.

B. The Defendants and the Proposed Transaction

Google's principal business is an online search engine. Measured by the number of search queries or advertising revenue, Google is the largest search engine by far. *See Author's Guild* v. *Google*, No. 05 Civ. 8136 (DC), 2011 WL 986049, at *12 (S.D.N.Y. Mar. 22, 2011) (recognizing "Google's market power in the online search market"). In 2009, Google earned more than $23 billion in revenues in the United States. Google derives nearly all of its revenue from online search advertising, or the ads accompanying search engine results.

Google's only significant online search engine competitor is Bing, which has a much smaller share of both queries and advertising revenue. In addition to providing general purpose search engines, Google and Bing also provide specialized search sites, known as "vertical" sites. Bing, for example, offers a travel site that utilizes QPX to provide comparative flight search services. In conjunction with its acquisition of QPX, Google has announced its intention to launch new travel search functionality on its Web sites.

ITA is the leading producer of P&S systems in the United States. ITA's software is widely used by airlines and OTIs to search for, price, and display results for airline travel queries.

On July 1, 2010, Google and ITA entered into a merger agreement. Unremedied, this transaction would provide Google with the incentive and ability to foreclose rivals (actually or effectively) from the comparative flight search market. This could be accomplished by preventing licensees and potential licensees access to the leading comparative flight search product, QPX, or by hobbling them by failing to continue development at levels commensurate with the pre-merger environment. This would diminish competition in this market and effectively diminish consumer choice. The transaction would substantially lessen competition in the comparative flight search market and is the subject of the Complaint and proposed Final Judgment filed by the United States in this matter.

C. Relevant Markets

Antitrust law, including Section 7 of the Clayton Act, protects consumers from anticompetitive conduct, such as firms' acquisition of the ability to raise prices or reduce choice. Market definition assists antitrust analysis by focusing attention on those markets where competitive effects are likely to be felt. Well-defined markets encompass the economic actors including both sellers and buyers whose conduct most strongly influences the nature and magnitude of competitive effects. To ensure that antitrust analysis takes account of a broad enough set of products to evaluate whether a transaction is likely to lead to a substantial lessening of competition, defining relevant markets in merger cases frequently begins by identifying a collection of products or set of services over which a hypothetical monopolist profitably could impose a small but significant and non-transitory increase in price.

Here, the United States's investigation revealed that all OTIs rely on a P&S system, such as ITA's QPX, to drive the comparative airfare search offerings such Web sites offer their users. Should one company control all P&S systems, OTIs would have no alternative products to which they could turn to defeat a price increase. As such, the market for P&S systems is a relevant product market.

The comparative flight search market is an additional relevant market implicated by this merger. The market participants are OTIs that offer the ability for users to compare flights and prices across different airlines. Comparative flight search is a relevant market because there are no reasonable substitutes consumers could turn to if a company controlling all comparative flight search Web sites reduced the quality of its service. Airline Web sites and reservation lines are not reasonable substitutes because they do not offer the comparative aspect of OTIs. Brick and mortar travel agents are also not reasonable substitutes because travel agents do not provide the same sort of user control, instantaneous response, and flight search flexibility as OTIs. Accordingly, comparative flight search services is a relevant product market.

Antitrust analysis must also consider the geographic dimensions of competition. Here, the relevant markets exist within the United States and are not affected by competition outside the United States. The competitive dynamics for both markets is distinctly different outside the United States.

D. Competitive Effects

Since its introduction to the market in 2001, ITA has been the leader in P&S systems. ITA has won nearly every competition for business in the United States in which the customer did not already have a P&S system in place. ITA has also lost very few customers due to its ability to provide highly and uniquely customized P&S functionality. ITA's customers include two of the five largest OTAs in the United States, and all five of the largest Metas. ITA's P&S system, QPX, has an advantageous position against its competitors in terms of speed, configurability, and accuracy. QPX consistently leads the industry in innovation. In short, ITA has a leading position in P&S systems. From a competition perspective, ITA's corporate independence from any particular OTI ensures that all of its customers receive the benefits of ITA's cutting edge innovation—*i.e.*, there is currently no vertically integrated OTI owned by ITA that receives favorable treatment relative to ITA's other customers.

This will not be the case once Google purchases ITA. Google intends to launch a new service after completing the transaction that will compete directly with other OTIs by providing flight search results. Because so many OTIs rely on ITA as an input to their services, Google will have the ability and incentive to either shut off access to ITA to those competitors, or degrade the quality of QPX that is available to those competitors. Such actions in the upstream pricing and shopping market would substantially reduce competition in the downstream comparative flight search market.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment sets forth: (1) Requirements regarding the parties' continued licensing and improvement of QPX; (2) requirements regarding the parties' licensing of InstaSearch, a new flight search technology under development by ITA; (3) procedures for resolving disputes

between OTIs and the parties regarding licensing of QPX or InstaSearch; (4) requirements for the creation of a firewall at the parties' business regarding use of competitively sensitive information gained through provision of QPX or InstaSearch services; and (5) oversight procedures the United States may use to ensure compliance with the proposed Final Judgment. Section IX of the proposed Final Judgment states that these provisions will expire five years after entry of the proposed Final Judgment.

As discussed earlier, the United States' concerns regarding the proposed transaction revolve around Google's ability and incentive to weaken its competitors in the comparative flight search market by denying or degrading their access to QPX. Denying or degrading rivals' access to QPX would potentially diminish competition in the comparative flight search market. Therefore, as discussed in more detail below, the key remedies embodied within the proposed Final Judgment include guarantees that the key products on which OTIs rely will continue to be available in a robust fashion for at least five years after the entry of the Final Judgment. Five years will provide those OTIs that do not wish to be dependent on Defendants' P&S system a sufficient period of time to switch to an alternative system.

A. Licensing and Improving of QPX

Section IV.A–G of the proposed Final Judgment preserves competition for OTIs by creating a legally enforceable commitment that Defendants will continue to license and improve QPX. Sections IV.A–C require Defendants to honor the terms of all QPX agreements in effect as of the entry of the Final Judgment, negotiate extensions to existing QPX agreements with any OTI on the terms set forth in the OTI's existing contract for up to five years from the entry of the Final Judgment, and negotiate new QPX agreements with any OTI who is not party to an existing QPX agreement on terms that are fair, reasonable, and non-discriminatory.

Section IV.D prohibits Defendants from entering into any new QPX agreement that would prevent an OTI from using alternative products to QPX. Defendants and an OTI, however, are free to enter into an exclusive QPX agreement if Defendants offer a non-exclusive agreement on fair, reasonable, and non-discriminatory terms.

Section IV.E requires Defendants to make available to OTIs ordinary course upgrades to QPX at the same price those upgrades are made available to other customers. Section IV.F requires Defendants to devote substantially the same resources to the research and development and maintenance of QPX for the use of customers as ITA did in the average of the two years prior to the filing of the Complaint. This requirement eases concerns that post-merger Defendants will let the QPX product languish without committing resources to improve it over time.

Finally, Google intends to introduce a new travel search service that will include airfare pricing and shopping functionality. Section IV.G provides that Defendants are not required to offer OTIs any product, service or functionality that Google develops exclusively for its new travel search service.

B. Licensing of InstaSearch

Prior to the proposed transaction, ITA was developing a product, called InstaSearch, for license to customers that promised to be the next generation in pricing and shopping services. InstaSearch was being developed to use a cache of results to provide instantaneous or near-instantaneous results to airfare search queries. One concern of the proposed transaction is that Google will prevent this innovative product from being made available to its OTI competitors. As such, the decree aims to ensure InstaSearch is available for license.

Sections IV.H–J of the proposed Final Judgment preserves competition for OTIs by requiring Defendants to negotiate InstaSearch agreements for terms up to five years from the entry of the Final Judgment. While ITA developed InstaSearch for future sale, it has not sold a commercial version of the product to any customers. ITA, however, has entered into a contract with one customer to deliver a "proof of concept" implementation of InstaSearch. The proposed Final Judgment requires Defendants to offer OTIs at least the same functionality as contained in the proof of concept attached to the proposed Final Judgment, and requires Defendants to make commercially reasonable efforts to ensure that the InstaSearch implementation conforms to the proposed technical specifications. Should Defendants provide an InstaSearch implementation to any of their customers that is superior to the version envisioned by the proof of concept, the proposed Final Judgment requires Defendants to make that improved product available to all OTIs. Finally, the proposed Final Judgment allows Defendants to charge fair, reasonable and non-discriminatory fees for InstaSearch.

C. Arbitration Provisions

The proposed Final Judgment requires that the Defendants negotiate in good faith with any OTI, but also sets forth certain procedures by which Defendants and OTIs can resolve disputes over the fees charged for any type of service should Defendants and an OTI not reach agreement over fees. As described in Sections IV.K–M, Defendants shall submit to binding arbitration over the disputed fees once certain conditions have been met. The Defendants and the OTI must, prior to submitting a matter to arbitration, designate a person at each company with the authorization to resolve the dispute in a final and binding fashion, and those individuals must meet in an attempt to resolve a dispute. Additionally, prior to Defendants' being obligated to enter into binding arbitration with an OTI, that OTI must certify to the United States that it negotiated in good faith with Defendants, and further receive consent of the United States to initiate arbitration. Upon receiving consent of the United States to initiate arbitration, the OTI may commence arbitration through the American Arbitration Association. The parties may agree to suspend the arbitration proceedings to attempt to resolve the dispute.

These procedures ensure that Defendants negotiate in good faith with all OTIs, and that if an agreement cannot be reached between the OTI and Defendants on a price term, that a resolution can be had quickly by an impartial third party using clear benchmarks from existing contracts. For non-price terms, the traditional decree enforcement provisions will provide the mechanism for resolving disputes.

D. Additional Provisions

Section V of the proposed Final Judgment prohibits Google from taking certain actions that could undermine the purpose of the proposed Final Judgment. Access to airline seat and booking class information is a critical input to a P&S system. To ensure that Defendants do not restrict access to this crucial information, Section V.A prohibits Defendants from entering into agreements with an airline that restricts the airline's right to share seat and booking class information with Defendants' competitors, unless one or more airlines enter into exclusive agreements with a competitor. Subject to certain limitations, Sections V.B–C require Google to make available to OTIs any seat and booking class information Defendants obtain for use in Google's new flight search service. Finally, Section V.D prohibits Defendants from

conditioning the provision of QPX or InstaSearch on whether or how much an OTI spends on other products or services sold by Google.

E. Firewall Requirements

As alleged in the Complaint, Defendants could use information and data gained through contracts with OTIs to then compete with those OTIs. Section VI of the proposed Final Judgment requires Defendants to establish a firewall at the company to prevent the misappropriation of competitively sensitive information and data. That section requires that Defendants only use an OTI's confidential information for the provision of any product or service to that specific OTI, for routine administrative or financial purposes, or for the continued development and improvement of QPX or InstaSearch. Google may use more limited query information, which does not include data regarding how OTIs configure the QPX product, for the improvement of Defendants' airfare pricing and shopping engines. Section VI.A prohibits, subject to a small list of exclusions, employees working on Google's travel search product from accessing confidential OTI information. Section VI.D requires Defendants to implement procedures to prevent confidential information from being used or accessed by employees other than those having a legitimate need for such information. Finally, Section VI.E requires the Defendants to submit its proposed procedures to the United States for its approval or rejection of those procedures.

F. Compliance

To facilitate monitoring of Defendants' compliance with the proposed Final Judgment, Section VII grants the United States access, upon reasonable notice, to Defendants' records and documents relating to matters contained in the proposed Final Judgment. Defendants must also make their employees available for interviews or depositions about such matters. Moreover, upon request, Defendants must answer interrogatories and prepare written reports relating to matters contained in the proposed Final Judgment.

In addition, Sections IV.N–O requires Google to create a Web site where OTIs can access a copy of the proposed Final Judgment and submit complaints that Google is violating the terms of the proposed Final Judgment or is acting, directly or indirectly, in an unfair manner in connection with flight search advertising in the United States. Google must provide copies of these complaints to the United States for a period of time from the earlier of five years from entry of the proposed Final Judgment, or two years from the date Google launches its new travel flight search service.

IV. Remedies Applicable to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in Federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Defendants.

V. Procedures Applicable for Approval or Modification of the Proposed Final Judgment

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: James J. Tierney, Chief, Networks & Technology Enforcement Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 7100, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, seeking preliminary and permanent injunctions against Defendants' transaction and proceeding to a full trial on the merits. The United States is satisfied, however, that the relief in the proposed Final Judgment will preserve competition in the comparative flight search market. Thus, the proposed Final Judgment would protect competition as effectively as would any remedy available through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

VII. Standard of Review Under the APPA for Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the United States is entitled to "broad discretion to settle with the Defendant within the reaches of the public interest." *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1461 (DC Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1

(D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.*, 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").[1]

Under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is *'within the reaches of the public interest.'* More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States* v. *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

In addition, "a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States* v. *Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged."). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d. at 1459–60. Courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F..Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 *Cong. Rec.* 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the Court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that the United States considered in formulating the proposed Final Judgment.

Dated: April 8, 2011.

Respectfully submitted.

For Plaintiff United States of America,

Aaron D. Hoag, *Attorney, U.S. Department of Justice, Antitrust Division, 450 Fifth Street, NW., 7th Floor, Washington, DC 20530, Tel: (202) 307–6153, Fax: (202) 616–8544, E-mail: aaron.hoag@usdoj.gov.*

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[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[2] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'").

[3] *See United States* v. *Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States* v. *Mid-Am. Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

Certificate of Service

I, Aaron D. Hoag, hereby certify that on April 8, 2011, I caused a copy of the Competitive Impact Statement to be served on defendants Google Inc. and ITA Software, Inc. by mailing the document via e-mail to the duly authorized legal representatives of the defendants, as follows:

For Google:

John D. Harkrider,
Axinn, Veltrop & Harkrider LLP, 114 West 47th Street, New York, NY 10036, E-mail: jdh@avhlaw.com.

For ITA:

Michele Sasse Harrington, *Hogan Lovells U.S. LLP, 555 Thirteenth Street, NW., Washington, DC 20004. E-mail: michele.harrington@hoganlovells.com.*

For Plaintiff United States of America

Aaron D. Hoag, *Attorney, U.S. Department of Justice, Antitrust Division, 450 Fifth Street, NW., 7th Floor, Washington, DC 20530, Tel: (202) 307–6153, Fax: (202) 616–8544, E-mail: aaron.hoag@usdoj.gov.*

United States District Court for the District of Columbia

United States of America, Plaintiff v. *Google Inc.* and *ITA Software, Inc.* Defendants.

[Proposed] Final Judgment

Whereas, Plaintiff United States of America ("United States") filed its Complaint on April 8, 2011, the United States and Defendants Google Inc. and ITA Software, Inc., by their respective attorneys, have consented to entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And whereas, Defendants agree to be bound by the provisions of the Final Judgment pending its approval by the Court;

And whereas, the United States requires that Defendants agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, Defendants have represented to the United States that the actions and conduct restrictions can and will be undertaken and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of Defendants, it is *ordered, adjudged and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

A. "AAA" means the American Arbitration Association.

B. "Affiliate" means, with respect to any entity, another entity that controls, is controlled by or is under common control of the first entity.

C. "Airline Customer" means a Customer that operates an airline or is an Affiliate of an airline.

D. "Availability Information" means information about the availability of a seat at a specific booking class on a specific flight obtained by ITA as an input to QPX, including information in ITA's Dynamic Availability Calculating System and its system for processing other types of availability data, including Availability Status ("AVS") and Numeric Availability Status ("NAVS"), but excluding fully computed pricing and shopping results.

E. "Covered Employee" means an employee of a Defendant having as a job responsibility the day-to-day development of, or day-to-day strategic decision-making with respect to, the Google Consumer Flight Search Service, other than an Excepted Employee.

F. "Customer" means a company that has entered into a QPX Agreement or an agreement for InstaSearch with Defendants. Customer does not include Google or ITA.

G. "Customized Software" means any version of QPX or the InstaSearch Service that is modified specifically for a Customer in response to a request made by a Customer for particular features or functionality not included in the commercially available version of QPX or the InstaSearch Service. If the modified version is made available to other Customers (other than Affiliates of the requesting Customer), it no longer qualifies as "Customized Software" (provided that Customized Software that is provided in response to good faith requests from two or more Customers may be substantially similar).

H. "Database Query," with respect to any OTI, has the definition set forth in the QPX Agreement in effect between ITA and such OTI (or a definition given therein for "observation query").

I. "Defendants" means Google and ITA, as defined below, and any successor or assign to all or substantially all of the business or assets of Google and ITA involved in the provision of QPX, the InstaSearch Service, or the Google Consumer Flight Search Service.

J. "Embedded Software" means any version of QPX or the InstaSearch Service that is modified from the commercially available version for the purpose of integrating it into software that provides significantly greater functionality than QPX or the InstaSearch Service, such as a passenger reservation system or Internet booking engine. The software into which such version of QPX is integrated shall also be deemed "Excluded Software."

K. "EU" means an execution unit (a measure of the independent processing cores in a server). For example, a single core such as an Intel Pentium 4 has one EU, whereas a dual core chip such as the Intel Pentium D has two EUs. A dual Intel Pentium D server, in turn, would have four EUs.

L. "Excepted Employee" means an individual employed by ITA at the time of the complaint in this matter who has been designated in writing by Defendants and approved by the United States. With the consent of the United States, which shall not be unreasonably withheld, Defendants shall be entitled to designate a replacement for any Excepted Employee who is no longer employed by Defendants or ceases to have day-to-day job responsibilities involving QPX or InstaSearch.

M. "Excluded Information" means:

(1) Information available to the public or obtained by a Defendant from a third-party not under an obligation of confidentiality to the OTI licensee of QPX who disclosed such information to a Defendant;

(2) Information obtained by Google as part of its Web search business;

(3) Information provided to a Defendant in connection with a product or service other than QPX or the InstaSearch Service; and

(4) Schedule, fare, flight or availability information of any airline.

N. Nothing in any QPX Agreement shall be read as modifying the definition of Excluded Information so as to require Defendants to treat any Excluded Information as OTI Confidential Information pursuant to this Final Judgment.

O. "Excluded Software" means (i) Customized Software; (ii) Embedded Software; and (iii) Experimental Software.

P. "Experimental Software" means a beta or test version of QPX or the InstaSearch Service that is made available to a limited number of customers, for a limited period of time,

specifically for the purpose of testing new or modified features prior to the commercial release of those new or modified features as part of QPX or the InstaSearch Service. While Defendants remain free to determine whether a new or modified feature is ever ultimately incorporated into the commercially available version of QPX or the InstaSearch Service that must be licensed pursuant to this Final Judgment, Defendants may not use the exclusion of Experimental Software to circumvent the licensing obligation set forth in Section IV.E.

Q. "Final Offer" means the proposed pricing terms for a QPX Agreement and/or InstaSearch Agreement, pursuant to which Defendants will provide QPX and/or InstaSearch to the OTI.

R. "Google" means Defendant Google Inc., a Delaware corporation headquartered in Mountain View, California, any successor to all or substantially all of its business or assets, and its subsidiaries (whether partially or wholly owned), divisions, groups, Affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees (but excluding in all cases ITA, as defined below).

S. "Google Consumer Flight Search Service" means a publicly available Web site, product or service owned or operated by a Defendant that provides airfare price, schedule or Availability Information to consumers based on results returned from an airfare pricing and shopping engine, as well as any syndicated versions thereof.

T. "Google Services" means Web sites, products or services owned or operated by a Defendant, including but not limited to the Google Consumer Flight Search Service.

U. "InstaSearch" means a technology under development by ITA prior to the date of the Complaint herein in which specified pricing and shopping queries are pre-computed using QPX, stored in a cache and made available to one or more Customers from the cache.

V. "InstaSearch Agreement" means an agreement between a Defendant and an OTI, negotiated pursuant to the terms of this Final Judgment, providing such OTI the right to submit queries to the InstaSearch Service, subject to the terms and conditions set forth in Section IV.H of this Final Judgment.

W. "InstaSearch Proof of Concept" means a specific implementation of InstaSearch, incorporating a QPX cache and associated interfaces, that ITA, prior to the date of the Complaint herein, agreed to deliver as a proof-of-concept to a Customer, as more fully defined in a Solution Document/Interface Definition Document (the "InstaSearch POC Solution Document"), attached to this Final Judgment as Exhibit 1.

X. "InstaSearch Service" means the service to be offered by Defendants to OTIs as required by this Final Judgment having the same InstaSearch functionality as the InstaSearch Proof of Concept but permitting an OTI to vary the number of covered markets and the targeted refresh rate.

Y. "ITA" means Defendant ITA Software, Inc., a Delaware corporation headquartered in Cambridge, Massachusetts, and its subsidiaries (whether partially or wholly owned), divisions, groups, Affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees (but excluding in all cases Google, as defined above.)

Z. "Level 1 Query" means a specific type of pricing and shopping query, with the definition and input and output data definitions specified in the InstaSearch POC Solution Document, which, when submitted to the InstaSearch Service, returns certain cached results. As explained in detail in the InstaSearch POC Solution Document, a Level 1 Query will return data that enables the OTI to populate a map showing to the user the best price to a range of destinations from a particular origin over a particular range of dates.

AA. "Level 2 Query" means a specific type of pricing and shopping query, with the definition and input and output data definitions specified in the InstaSearch POC Solution Document, which, when submitted to the InstaSearch Service, is passed through to QPX and is not intended to return cached results. As explained in detail in the InstaSearch POC Solution Document, a Level 2 Query narrows the result set to the particular destination selected during the user's Level 1 Query, and returns the cheapest solution for a range of departure days and stay lengths.

BB. "Level 3 Query" means a query submitted to the InstaSearch Service other than a "Level 1 Query" or "Level 2 Query."

CC. "Live Query," with respect to any OTI, has the definition set forth in the QPX Agreement in effect between ITA and such OTI (or a definition given therein for "user query").

DD. "OTI," or online travel intermediary, means a Web site offering (or proposing to offer) airfare search functionality to consumers in the United States, other than a Web site owned or operated by an airline. Provided, however, that in the case of an OTI that is a line of business, business unit, subsidiary, or Affiliate of a company that also has non-OTI lines of business, business units, subsidiaries or Affiliates, the provisions in this Final Judgment that apply to OTIs will only apply to that line of business, business unit, subsidiary or Affiliate that offers airfare search services to consumers, and not to lines of business, business units, subsidiaries or Affiliates that do not offer airfare search services to consumers.

EE. "OTI Confidential Information" means confidential and proprietary inventions, products, designs and ideas (including computer software), functionality, concepts, processes, internal structure, external elements, user interfaces, technology, and documentation belonging to an OTI, OTI Configuration Information, as well as confidential and proprietary information relating to the OTI's operations, plans, opportunities, finances, research, technology, developments, know-how, and personnel, that is disclosed to a Defendant by an OTI pursuant to a QPX Agreement or an InstaSearch Agreement to which such OTI is a party, except to the extent that such information is Excluded Information.

FF. "OTI Configuration Information" means information related to an OTI's configuration or tuning of QPX or the InstaSearch Service or the parameters used by the OTI for particular types of queries.

GG. "OTI Plan Information" means confidential information related to an OTI's current or future product or marketing plans that is disclosed by such OTI to a Defendant pursuant to a QPX Agreement or InstaSearch Agreement to which such OTI is a party, except to the extent that such information is necessary to implement a feature or features for the OTI or represents Excluded Information.

HH. "QA Information" means Query Information or other information related to the performance, quality or accuracy of any software or service provided by a Defendant in connection with a QPX Agreement or InstaSearch Agreement, or one or more results generated by any such software or service, including:

(1) Reports of bugs or defects;

(2) Information related to the success or failure of an attempt to book or otherwise use a pricing and shopping solution provided by Defendants;

(3) Information related to the existence of solutions which potentially should have been, but were not, included in the results provided by Defendants; and

(4) Information related to instances in which other sources of information or

methods of calculation lead to a different fare than that calculated by Defendants' products or services for a particular pricing and shopping solution (without regard to the merits of the different calculations).

(5) QA Information may include OTI Configuration Information to the extent that it is associated with a particular query, result, report or request, provided that Defendants may not access the information in order to separate OTI Configuration Information from the QA Information as a whole, or to use the OTI Configuration Information for a purpose prohibited by Section VI.

II. "QPX" means the airfare pricing and shopping engine and Related Software deployed in production by ITA for Customers as of the date of the Complaint herein (provided that nothing in this Final Judgment shall confer any rights to use the Related Software other than to the extent that such Related Software is used by QPX), together with any enhancements, upgrades, updates, or bug fixes thereto that Defendants must develop or license pursuant to Sections IV.E and IV.F of this Final Judgment, whether or not licensed under the name QPX, provided that in no event shall QPX include:

(1) Fare management capabilities that are part of ITA's Rule and Fare Display System;

(2) Refund/reissue capability using Airline Tariff Publishing Company ("ATPCO") Category 31 and Category 33;

(3) Award travel or frequent flyer related functionality;

(4) InstaSearch in any form (including but not limited to that comprised in the InstaSearch Proof of Concept or required to be licensed pursuant to this Final Judgment), or any other technology having substantially greater or different hardware requirements than QPX as deployed in production by ITA for Customers (other than any Excluded Software) as of the date of the Complaint herein that is not otherwise required to be licensed pursuant to existing QPX Agreements or the terms of this Final Judgment;

(5) Middleware or other applications that may be related to, but are separate from, the base airfare pricing and shopping engine;

(6) Any Web site or consumer-facing interface, application or technology, whether or not syndicated to multiple Web sites, including but not limited to the Google Services;

(7) Any product, service, application, technology, feature, or functionality not made available to Customers, whether or not derived from or based upon QPX, including, but not limited to, any product, service, application, technology, feature, or functionality that is exclusively used in or by one or more Google Services; or

(8) Excluded Software.

JJ. "QPX Agreement" means an agreement, other than an InstaSearch Agreement, between a Defendant and a Customer permitting the Customer to submit queries to or otherwise use QPX, whether denominated as a License Agreement, Services Agreement, or otherwise.

KK. "Qualifying Complaint" means a written complaint from an OTI that (i) identifies the OTI on behalf of whom the complaint is submitted; and (ii) alleges that Google is violating this Final Judgment or acting, directly or indirectly, in an unfair manner in connection with flight search advertising in the United States.

LL. "Query Information" means information related to the execution and results of a particular query, including the query submitted to such service, the results returned in response to such query, operational data related to the execution of the query (*e.g.* the particular server(s) on which it was executed, the time it was received, the length of time needed to execute it, *etc.*), any intermediate results or errors generated during the execution of the query, and any information that is known or received regarding the success or failure of the query for the Customer (*e.g.* bookability or pricing errors in the results).

MM. "Related Software" means availability management and other software operated by ITA in connection with the provision of pricing and shopping results to Customers as of the date of the Complaint herein.

NN. "Reporting Period" means the period beginning upon the entry of this Final Judgment and expiring at the earlier of (i) five years from the entry of the Final Judgment; or (ii) two years from the date that Google launches a Google Consumer Flight Search Service.

OO. "Similarly Situated OTIs" means, with respect to any particular OTI seeking to enter into a QPX Agreement or InstaSearch Agreement, other OTIs having actual, reasonably expected (in terms of the OTI's own projections of its expected volume), and/or minimum QPX or InstaSearch query volumes (in the aggregate and as to specific types of queries) and, for QPX Agreements, fee metrics (*e.g.* per-query, per-ticket or per-Passenger Name Record ("PNR")), that are similar to those of such OTI (but excluding the OTI itself and its Affiliates). This provision shall be interpreted broadly so as to avoid, where reasonably possible, the situation where an OTI has no or few Similarly Situated OTIs.

III. Applicability

This Final Judgment applies to Defendants, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV. Required Conduct

Licensing of QPX

A. Defendants shall honor the terms of all QPX Agreements in effect as of the entry of this Final Judgment (including terms related to customization and query tuning services for QPX), except and unless the terms of this Final Judgment provide additional rights to, or eliminate restrictions on, OTIs, in which case Defendants may not enforce such terms against the OTI.

B. At the request of any OTI who is a party to a QPX Agreement as of the entry of this Final Judgment, Defendants shall negotiate an extension of such OTI's QPX Agreement for a term set at the reasonable discretion of the OTI (but that shall be no less than one year and that need not extend beyond five years from the entry of this Final Judgment, provided that if such extension would commence more than four years from the entry of this Final Judgment, its term shall expire five years from the entry of this Final Judgment), on:

(1) Commercial terms (*e.g.* price, functionality, minimum query volumes and permitted uses of QPX, as well as customization and query tuning services for QPX) that are substantially similar to those governing such OTI's use of QPX as of the entry of the Final Judgment, and

(2) Other terms (*e.g.* audit rights, choice of law and indemnification) that are fair, reasonable, and non-discriminatory.

(3) Notwithstanding anything in this paragraph, Defendants shall not require an OTI to include in an extension any provision that Defendants would be prohibited from requiring in a new QPX Agreement pursuant to section IV.D of this Final Judgment, provided that, if an OTI elects to remove such a provision from the extension, or requests an extension with a different term than its QPX Agreement in effect as of the entry of the Final Judgment, the commercial terms of such extension shall be modified in a corresponding manner that is fair, reasonable and non-discriminatory in light of the commercial terms of QPX Agreements in effect between Defendants and

Similarly Situated OTIs as of or subsequent to the date of this Final Judgment.

C. At the request of any OTI who is not party to a QPX Agreement, or whose QPX Agreement will expire within one year of such request, Defendants shall negotiate a QPX Agreement with such OTI for a term set at the reasonable discretion of the OTI (but that shall be no less than one year and that need not extend beyond the date that is five years from the entry of this Final Judgment, provided that if such QPX Agreement would commence more than four years from the entry of this Final Judgment, its term shall expire five years from the entry of this Final Judgment), on:

(1) Commercial terms (*e.g.* price, functionality, minimum query volumes and permitted uses of QPX, as well as customization and query tuning services for QPX) that are fair, reasonable and non-discriminatory judged exclusively in relation to the OTI's chosen contract term, desired fee metrics (*e.g.* per-query, per-ticket, or per-PNR), reasonably expected query volume, the minimum query volume to be included in such QPX Agreement, and the commercial terms of QPX Agreements in effect between Defendants and Similarly Situated OTIs as of or subsequent to the date of this Final Judgment, and

(2) Other terms (*e.g.* audit rights, choice of law, and indemnification) that are fair, reasonable, and non-discriminatory.

D. Defendants may not require that a QPX Agreement entered into pursuant to Section IV.B or Section IV.C of this Final Judgment prevent the OTI from using alternative products to QPX sold by companies other than Defendants. Defendants and the OTI may, however, enter an exclusive QPX Agreement if Defendants offer the OTI a non-exclusive agreement on fair, reasonable, and non-discriminatory terms.

E. All QPX Agreements with OTIs shall include the right to use ordinary course upgrades to QPX that Defendants make available to Customers without additional charge during the term of such QPX Agreement. If Defendants make an ordinary course upgrade to QPX available to Customers, but require the payment of an additional charge, Defendants may condition the use of such upgrade pursuant to this paragraph upon the payment of an equivalent charge, provided that such charge is fair, reasonable, and non-discriminatory. Defendants shall make available to OTIs the same version of QPX as they make available to Customers, including but not limited to any version made available to Airline Customers. This paragraph does not require Defendants to make available to OTIs InstaSearch or any other product, feature or technology excluded from the definition of QPX above, including the Excluded Software.

F. Defendants shall, on an annual basis, devote substantially as many (or more) engineering resources (in terms of budget and full-time-equivalent employees) to the research and development and maintenance of QPX and the InstaSearch Service (other than resources devoted to the development of the InstaSearch Proof of Concept as required by agreements entered into by ITA prior to the date of the Complaint herein) for the use of Customers as ITA did in the average of the two years prior to the filing of the Complaint herein (excluding resources devoted by ITA to any aspect of its passenger service system, reservations system, inventory system or Internet booking engine, including but not limited to the integration of QPX into such system, and resources devoted to the development of products or services that are excluded from the definition of QPX in this Final Judgment, including but not limited to ITA's InstaSearch). Defendants shall make commercially reasonable efforts to respond to Customers' requests for development of QPX, consistent with ITA's past practice prior to the date of the Complaint herein. Provided, however, that:

(1) If the amount of revenue derived by Defendants from third-party licensing of QPX materially decreases during the term of the Final Judgment, Defendants shall be permitted to make a corresponding reduction in the amount of resources committed pursuant to this paragraph, provided that Defendants shall obtain the consent of the United States prior to making such reduction, which consent shall not be unreasonably withheld or delayed; and

(2) The degree to which particular efforts benefit Defendants or Google Services shall not be considered in evaluating whether such efforts qualify as "research and development and maintenance of QPX for the use of Customers," so long as those efforts are legitimately beneficial to Customers and not solely beneficial to Defendants or Google Services.

G. Nothing in this Final Judgment shall require Defendants to provide to any third party any product, service, or technology (or feature thereof) that Defendants develop exclusively for use in the Google Services, nor shall any such product, service, or technology, or the relative functionality of one or more Google Services (including, but not limited to, the Google Consumer Flight Search Service) when compared to third-party Web sites using QPX, be considered in determining Defendants' compliance with any provision of this Final Judgment.

(1) Licensing of InstaSearch

H. At the request of any OTI, Defendants shall negotiate an InstaSearch Agreement with such OTI for a term set at the reasonable discretion of the OTI (but that shall be no less than one year and that need not extend beyond five years from the entry of this Final Judgment, provided that if such InstaSearch Agreement would commence more than four years from the entry of this Final Judgment, its term shall expire five years from the entry of this Final Judgment). Such InstaSearch Agreement shall:

(1) Offer the OTI the same functionality as the InstaSearch Proof of Concept, except that Defendants shall permit the OTI to increase the number of markets covered and contemplated cache refresh rate beyond that of the InstaSearch Proof of Concept, subject to the payment of appropriate fees as set forth below (and such InstaSearch Agreement shall expressly provide that Defendants shall have no obligation to implement any other functionality);

(2) At Defendants' option, disclaim any representations, warrantees, guarantees, or service level agreements as to the performance of the InstaSearch Service, or its fitness for any use, notwithstanding any statements to the contrary made by ITA in connection with the InstaSearch Proof of Concept, including but not limited to in the InstaSearch POC Solution Document, provided that if, during the term of such QPX Agreement, Defendants make any representations, warrantees, guarantees or service level agreements to any Customers as to the performance of the InstaSearch Service, Defendants shall offer the same representations, warrantees, guarantees or service level agreements to OTIs with equivalent projected usage of the InstaSearch Service (including the number and types of markets to be covered, refresh rate, provisioned hardware and total expected volume), subject to such OTI agreeing to pay a fair, reasonable and non-discriminatory fee for the receipt of such representation, warrantee, guarantee or service level agreement, which may differ from the pricing structure and limits set forth in Section IV.H.4 below.

(3) Provide that Defendants shall have no obligation to improve the InstaSearch Service, except that:

(a) If during the term of such InstaSearch Agreement, Defendants provide their Customers, including

solely Airline Customers, an implementation of InstaSearch with greater functionality than the InstaSearch Service described herein without requiring them to pay an additional charge (other than in Excluded Software), Defendants shall make reasonable commercial efforts to also make such improved version available to the OTI pursuant to its InstaSearch Agreement (recognizing that not all implementations will be suitable for all types of Customers even after the use of reasonable commercial efforts), under the same pricing terms provided for in such InstaSearch Agreement; and

(b) If Defendants require its Customers, including its Airline Customers, to pay an additional fee to obtain an upgrade which can be provided to OTIs with reasonable commercial efforts, Defendants shall offer the upgrade to OTIs with an InstaSearch Agreement, but may condition availability of the upgrade on payment of a fair, reasonable, and non-discriminatory charge (which may differ from the pricing structure and limits set forth in Section IV.H.4 below);

(4) Obligate the OTI to:

(a) Provision with Defendants a number of EUs for its InstaSearch Service that, in Defendants' discretion, which shall be applied in a fair, reasonable, and non-discriminatory manner, is reasonable given the OTI's intended covered markets and refresh rate, and to pay a monthly per-EU fee for each EU so provisioned (including any EUs used for computing, storing, managing or retrieving cached results) equal to the lesser of (i) for OTIs with a QPX Agreement in effect, the per-EU fee set forth in such QPX Agreement (giving effect to all volume discounts and aggregating EUs provisioned for InstaSearch with those provisioned for other purposes, including, but not limited to, QPX.); or (ii) a per-EU fee that is fair, reasonable, and non-discriminatory solely in light of the EU fees charged by Defendants to Similarly Situated OTIs in QPX Agreements then in effect.

(b) Pay a fair, reasonable and non-discriminatory per-query fee for each Level 1 and Level 2 Query it submits to the InstaSearch Service that shall be (i) greater than the effective per-query fee paid by such OTI for Database Queries (or, if no such rate exists, an amount that is fair, reasonable, and non-discriminatory in light of the effective per-query fees then charged by Defendants to Similarly Situated OTIs for Database Queries), and (ii) less than the effective per-query fee paid by such OTI for Live Queries (or, if no such rate exists, an amount that is fair, reasonable, and non-discriminatory in light of the effective per-query fees then charged by Defendants to Similarly Situated OTIs for Live Queries); and

(c) Pay a per-query fee for each Level 3 Query it submits equal to the effective per-query fee paid by such OTI for Live Queries (or, if no such rate exists, an amount that is fair, reasonable, and non-discriminatory in light of the effective per-query fees then charged by Defendants to Similarly Situated OTIs for Live Queries).

I. Defendants shall make commercially reasonable efforts to ensure that the InstaSearch Service conforms to the technical specifications set forth in the InstaSearch POC Solution Document, but it is specifically understood that, other than as set forth in any representations, warrantees, guarantees or service level agreements that Defendants are otherwise required to make pursuant to this Final Judgment, or that Defendants make in any particular InstaSearch Agreement, Defendants make no representation, either to the United States, the Court or to any Customer that the InstaSearch Service will prove commercially useful for any Customer.

J. Nothing in this Final Judgment shall be deemed to require Defendants to permit an OTI to host any portion of the InstaSearch Service, or the EUs used for such service, on the OTI's own hardware, notwithstanding any provisions of such OTI's QPX Agreement.

K. Arbitration

L. Defendants shall negotiate in good faith with any OTI seeking a QPX Agreement or an InstaSearch Agreement pursuant to this Final Judgment (including, but not limited to, existing licensees seeking to renew their agreements). If Defendants and the OTI are unable to reach agreement on the amount to be charged for any type of query pursuant to Sections IV.B.1, IV.C.1, or IV.H.4 of this Final Judgment, Defendants shall submit the matter to binding arbitration under the following conditions:

(1) Prior to submitting any matter to arbitration, Defendants and the OTI shall each designate a contact having the proper authorization to resolve the dispute in a final and binding fashion, who shall meet in person or by telephone for a period of 30 days (or such other period of time as Google and the OTI shall mutually agree) in an attempt to resolve the dispute. The contact for Defendants shall be Google's General Counsel or his or her designee.

(2) No arbitration shall be commenced unless the OTI (i) has certified to the United States that it negotiated in good faith, including participation in the resolution procedure described in the preceding paragraph; and (ii) has obtained the consent of the United States, in its sole discretion, to initiate arbitration.

(3) Arbitration pursuant to this Final Judgment shall be conducted in accordance with the AAA's Commercial Arbitration Rules and Expedited Procedures, except where inconsistent with specific procedures prescribed by this Final Judgment. As described below in Section IV.J.12, the arbitrator shall select the Final Offer of either the OTI or the Defendants and may not alter, or request or demand alteration of, any terms of those Final Offers. The decision of the arbitrator shall be binding on the parties as to the matters properly submitted to arbitration pursuant to this Final Judgment, and Defendants shall abide by the arbitrator's decision by offering an executable QPX Agreement or InstaSearch Agreement (as appropriate) to the OTI incorporating the pricing terms selected by the arbitrator.

(4) Defendants and an OTI may, by agreement, modify any time periods specified in this Section IV.J.

(5) Upon obtaining the consent of the United States to initiate arbitration, the OTI may commence arbitration by filing with the AAA and furnishing to the AAA and the United States its Final Offer. Within five business days of the commencement of an arbitration, Defendants shall file with the AAA and furnish to the United States their Final Offer. After the AAA has received Final Offers from the OTI and Defendants, it will immediately furnish a copy of each Final Offer to the other party.

(6) Within five business days of the commencement of an arbitration, the OTI and the Defendants each shall furnish a legally binding writing to the other and to the United States committing to maintain the confidentiality of the arbitration and of any Final Offers and discovery materials exchanged during the arbitration, and to limit the use of any Final Offers and discovery materials to the arbitration. The writing shall expressly state that all records of the arbitration and any discovery materials may be disclosed to the United States.

(7) At any time after the commencement of arbitration, the OTI and Defendants may agree to suspend the arbitration, for periods not to exceed 14 days in the aggregate, to attempt to resolve their dispute through negotiation. The OTI and the Defendants shall effectuate such suspension through a joint writing filed

with the AAA and furnished to the United States. Either the OTI or the Defendants may terminate the suspension at any time by filing with the AAA and furnishing to the United States a writing calling for the arbitration to resume.

(8) The AAA, in consultation with the United States, shall assemble a list of potential arbitrators, to be furnished to the OTI and Defendants as soon as practicable after commencement of the arbitration. Such potential arbitrators shall, to the greatest extent possible, be individuals familiar with the travel industry as well as this Final Judgment. Within five business days after receipt of this list, the OTI and Defendants each may submit to the AAA the names of up to 20 percent of the persons on the list to be excluded from consideration, and shall rank the remaining arbitrators in their orders of preference. The AAA, in consultation with the United States, will appoint as arbitrator the candidate with the highest ranking who is not excluded by the OTI or Defendants.

(9) The OTI and the Defendants shall exchange written discovery requests within five business days of receiving the other party's Final Offer, and shall exercise reasonable diligence to respond within 14 days. Discovery shall be limited to the following items in the possession of the parties: (i) previous agreements between the OTI and the Defendants; (ii) current and prior QPX Agreements and agreements relating to InstaSearch between the Defendants and other OTIs; and (iii) records of past arbitrations pursuant to this Final Judgment.

(10) The scope of the arbitration shall be limited to the determination of a fair, reasonable and non-discriminatory fee to be charged for each type of query in dispute, judged exclusively in light of the following factors:

(a) The OTI's actual or reasonably expected query volume;

(b) The minimum query volume to be required in the QPX Agreement or InstaSearch Agreement for such query type;

(c) The amounts charged for such queries to Similarly Situated OTIs pursuant to QPX Agreements in effect between Defendants and such OTIs, as appropriately adjusted for the change in the Consumer Price Index, for all Urban Consumers, Subgroup "All Items", U.S. City Average, for (base Year 1982–84=100) subsequent to the date of such agreements; and

(d) if applicable, the nature and extent of any representations, warrantees, guarantees or service level agreements offered to such OTI.

(11) In reaching his or her decision, the arbitrator may consider only documents exchanged in discovery between the parties, testimony explaining the documents and the parties' Final Offers, and briefs submitted and arguments made by counsel.

(12) Arbitrations under this Final Judgment shall begin within 30 days of the AAA furnishing to the OTI and to the Defendants, pursuant to Section IV.J.5, each party's Final Offer. The arbitration hearing shall last no longer than ten business days, after which the arbitrator shall have five business days to inform the OTI and the Defendants which Final Offer best reflects fair, reasonable, and non-discriminatory terms under this Final Judgment.

(13) The Arbitrator shall have no authority to consider or determine Defendants' compliance with the terms of this Final Judgment or with any other agreement, or to determine the reasonableness of any provision of a proposed or negotiated QPX Agreement or InstaSearch Agreement other than those for which arbitration was specifically provided for above.

(14) Any Arbitrator's fees and any costs payable to the Arbitrator shall be shared equally by the parties to the arbitration. Each party to the arbitration shall bear its own legal fees and expenses.

M. Nothing in Section IV.K shall prevent Defendants from agreeing with an OTI (i) on fees or other terms that are more favorable to the OTI than those required by this Final Judgment, (ii) to withdraw a matter from arbitration prior to decision; or (iii) to supersede a previously arbitrated rate as a part of a freely negotiated contract or amendment.

N. Nothing in Section IV.K shall limit the ability of the United States to enforce this Final Judgment in Court, including as to matters covered by an existing or potential arbitration proceeding.

O. Required Disclosures

P. Google shall, throughout the Reporting Period, make available a Web page at *http://itaqualifyingcomplaint.com* which shall contain a Web form permitting OTIs to submit Qualifying Complaints, as well as a link to this Final Judgment, and shall, on a semiannual basis during the Reporting Period, furnish copies of any Qualifying Complaints received via such form to the Department of Justice.

Q. To the extent that, during the Reporting Period, an attorney employed by Google's Legal Department (or an outside attorney retained by Google and acting at the direction of Google's Legal Department) communicates with an OTI with respect to a written complaint that the Google attorney reasonably believes would, if submitted as set forth in the preceding paragraph, be a Qualifying Complaint, such attorney shall take reasonable steps to ensure that the OTI is informed of its right to submit a Qualifying Complaint and the Web address at which it can do so.

V. Additional Provisions

A. Defendants shall not enter into any agreement with an airline that restricts that airline's right to share any Availability Information with parties other than Defendants, provided that this paragraph shall cease to apply to any type of Availability Information (regardless of source) if one or more airlines enters into an agreement with one or more of Defendants' competitors (either in the provision of airfare pricing and shopping services or in the provision of OTI services) that restricts that airline's right to share such Availability Information with parties other than such competitor(s).

B. To the extent that Defendants obtain Availability Information from any airline for use as an input to an airfare pricing and shopping engine used by the Google Consumer Flight Search Service, Defendants shall also incorporate such Availability Information into QPX results generated for all OTIs who are party to a QPX Agreement, unless the airline explicitly and unilaterally restricts the use of such Availability Information by or for one or more OTIs. Defendants shall not provide any incentive to an airline to restrict the use of Availability Information by another OTI.

C. Notwithstanding the foregoing, nothing in this Final Judgment shall (i) restrict Defendants' right to enter into agreements by which they become an authoritative source of an airline's Availability Information for third parties (including, but not limited to, agreements to provide passenger service systems, reservations systems, availability hubs or similar systems); or (ii) be deemed to prohibit Defendants from obtaining access to or using Availability Information merely because the providing airline has not provided it to any party other than Defendants, so long as the airline retains the right to provide such Availability Information to another party at any time, in its unilateral discretion.

D. Defendants shall not condition the provision of QPX or the InstaSearch Service on whether or how much an OTI spends on other products or services sold by Google.

E. Nothing in this Final Judgment shall be deemed to alter, in any way, the terms of any agreement Defendants may have with any customer related to any product or service other than QPX or the InstaSearch Service.

VI. Firewall

A. No Covered Employee shall access any OTI Configuration Information or any OTI Plan Information, except to the extent such information constitutes or is included within QA Information, or with the written consent of the OTI concerned.

B. Defendants shall not use OTI Confidential Information for any purpose other than:

(1) In connection with the marketing, sale, or provision of any product or service to such OTI (or, with the consent of such OTI, its Affiliates);

(2) In connection with billing, invoicing, financial reporting, financial or capacity forecasting, compensation, audit, legal, compliance, or similar administrative or financial purposes;

(3) In connection with the development, maintenance and improvement of QPX and the InstaSearch Service, in accord with ITA's past practices prior to agreeing to be acquired by Google; or

(4) As permitted by such OTI in writing.

C. Notwithstanding anything in this Final Judgment, Defendants shall be permitted to access and use QA Information in connection with the development, maintenance and improvement of Defendants' airfare pricing and shopping engines (including those not made available to any Customers), provided that Defendants shall not extract any customer identifiable OTI Configuration Information or use any OTI Configuration Information for the purpose of changing, improving or comparing the Google Consumer Flight Search Service's use of any airfare pricing and shopping engine.

D. Defendants shall implement reasonable procedures to prevent OTI Confidential Information from being used or accessed by employees other than those having a legitimate need for such information in connection with the permitted uses of such information set forth in this Section VI. Nothing in this Final Judgment shall restrict Defendants' right to assign any employee to any job responsibility, or otherwise to restrict the ability of employees who have previously had access to or used OTI Confidential Information in the course of prior job responsibilities from subsequently assuming additional or different responsibilities for Defendants, provided that such employees shall not use OTI Confidential Information for any purpose other than as permitted by this Final Judgment. An employee shall not be deemed to have "used" OTI Confidential Information solely on account of his or her prior access to OTI Confidential Information, absent evidence of intentional reliance on information other than information that is retained in the unaided memory of such employee (provided that memory is "unaided" if the employee has not intentionally memorized the information for the purpose of retaining and subsequently using or disclosing it) or an affirmative intention to violate or evade the terms of this Final Judgment. Defendants shall, upon the reasonable request of the United States, provide the United States with a list of employees who have had access to or used OTI Confidential Information at any point after the filing of the complaint in this matter who also have job responsibilities in addition to those set forth in Section VI.B, above.

E. Defendants shall, within thirty (30) calendar days of the entry of the Stipulation and Order, submit to the Department of Justice a document setting forth in detail the procedures implemented to effect compliance with Sections VI.A, VI.B, and VI.C of this Final Judgment. The Department of Justice shall notify Defendants within ten (10) business days whether it approves of or rejects Defendants' compliance plan, in its sole discretion. In the event that Defendants' compliance plan is rejected, the reasons for the rejection shall be provided to Defendants and Defendants shall be given the opportunity to submit, within ten (10) business days of receiving the notice of rejection, a revised compliance plan. If the parties cannot agree on a compliance plan, the United States shall have the right to request that the Court rule on whether Defendants proposed compliance plan is reasonable.

F. Defendants may at any time submit to the United States evidence relating to the actual operation of the firewall in support of a request to modify the firewall set forth in Section VI. In determining whether it would be appropriate for the United States to consent to modify the firewall, the United States, in its sole discretion, shall consider the need to protect OTI Confidential Information and the impact the firewall has had on Defendants' ability to efficiently support OTIs and the Google Consumer Flight Search Service.

VII. Compliance Inspection

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the Department of Justice, including consultants and other persons retained by the Department of Justice, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted

(1) Access during the Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide to the United States hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record, the Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested. Written reports authorized under this paragraph may, at the sole discretion of the United States, require Defendants to conduct, at their cost, an independent audit or analysis relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by a Defendant to the United States, the Defendant represents and identifies in writing the material in any such information or documents to which a claim of

protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and the Defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give the Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding). The United States will provide such notice electronically to an individual designated by Google to receive such notices.

VIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

IX. Expiration of Final Judgment

Unless modified by this Court, this Final Judgment shall expire five years from the date of its entry.

X. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Court approval subject to procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

United States District Judge.

[FR Doc. 2011–9020 Filed 4–13–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–74,364]

International Business Machines (IBM), Sales and Distribution Business Unit, Global Sales Solution Department, Off-Site Teleworker in Centerport, New York; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated November 29, 2011, by a petitioner requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) applicable to workers and former workers of International Business Machines (IBM), Sales and Distribution Business Unit, Global Sales Solution Department, off-site teleworker, Centerport, New York (subject firm). The determination was issued on October 29, 2010. The Department's Notice of Determination was published in the **Federal Register** on November 17, 2010 (75 FR 70296). The workers supply computer software development and maintenance services for the Sales and Distribution Business Unit.

The negative determination was based on the findings that Criterion I has not been met because fewer than three workers were separated and further separations are not threatened.

With respect to Section 222(c) of the Act, the investigation revealed that Criterion (1) has not been met because fewer than three workers were separated and further separations are not threatened. The investigation also revealed that the group eligibility requirements under Section 222(f) of the Act, 19 U.S.C. 2272(f), have not been satisfied because the workers' firm has not been identified in an affirmative finding of injury by the International Trade Commission.

In the request for reconsideration, the petitioner alleged that the subject firm outsourced their job as well as 2,544 other IBM jobs to India.

The Department has carefully reviewed the request for reconsideration and the existing record, and has determined that there may have been a misinterpretation of the worker group. The Department will conduct further investigation to determine if the petitioning workers meet the eligibility requirements of the Trade Act of 1974, as amended.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, on this 6th day of April 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–8980 Filed 4–13–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–75,192, TA–W–75,192A]

Core Industries, Inc., DBA Star Trac, Including On-Site Leased Workers From Aerotek, Helpmates, Mattson, and Empire Staffing, Irvine, CA and Core Industries, Inc., DBA Star Trac, Including On-Site Leased Workers From Aerotek, Helpmates, Mattson, and Empire Staffing, Murrieta, CA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on February 15, 2011, applicable to workers of Core Industries, Inc., DBA Star Trac, Irvine, California. The notice was published in the **Federal Register** on March 10, 2011 (75 FR 13230).

At the request of the company, the Department reviewed the certification for workers of the subject firm. The workers produce commercial fitness equipment.

The Murrieta, California location operated in conjunction with the Irvine, California location. Both locations were part of the overall production operation and were affected by the firm's acquisition of commercial fitness equipment from a foreign country.

Accordingly, the Department is amending the certification to include workers of the Murrieta, California location of Core Industries, Inc., DBA Star Trac, Irvine, California.

The amended notice applicable to TA–W–75,192 is hereby issued as follows:

All workers of Core Industries, Inc., DBA Star Trac, including on-site leased workers from Aerotek, Helpmates, Mattson, and

Empire Staffing, Irvine, California (TA–W–75,192), and Core Industries, Inc., DBA Star Trac, including on-site leased workers from Aerotek, Helpmates, Mattson, and Empire Staffing, Murrieta, California (TA–W–75,192A), who became totally or partially separated from employment on or after February 8, 2010, through February 15, 2013, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 1st day of April 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–8974 Filed 4–13–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–72,575]

Dell Products LP, Winston-Salem (WS–1) Division, Including On-Site Leased Workers From Adecco, Spherion, Patriot Staffing, Manpower, TEKsystems, APN, ICONMA, Staffing Solutions, South East, Omni Resources And Recovery, Securamerica, LLC, Industrial Distribution Group (IDG), LLC, Arm Automation, Inc., Seaton Corporation, Foxconn/PCE Technology, Inc. and Select Staffing, Also Known As Real Time Staffing, Winston-Salem, NC; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on March 1, 2010, applicable to workers of Dell Products LP, Winston-Salem (WS–1) Division. including on-site leased workers from Adecco, Spherion, Patriot Staffing, Manpower, TEKsystems, APN and ICONMA, Winston-Salem, North Carolina. The workers are engaged in employment related to the production of desktop computers.

The notice was published in the **Federal Register** on April 23, 2010 (75 FR 21361). The notices were amended on March 30, 2010, August 31, 2010, November 18, 2010 and January 4, 2011 to include on-site leased workers from Staffing Solutions, South East, and Omi Resources and Recovery, SecurAmerica, LLC, Industrial Distribution Group (IDG), LLC, ARM Automation, Inc., and Seaton Corporation and Foxconn/PCE Technology, Inc. The notices were published in the **Federal Register** on April 19, 2010 (75 FR 20385), September 13, 2010 (75 FR 55614), December 7, 2010 (75 FR 76040), and January 14, 2011 (76 FR 2710) respectively.

At the request of the State agency, the Department reviewed the certification for workers of the subject firm.

New information shows that workers leased from Select Staffing, also known as Real Time Staffing were employed on-site at the Winston-Salem, North Carolina location of Dell Products LP, Winston-Salem (WS–1) Division. The Department has determined that on-site workers from Select Staffing, also known as Real Time Staffing were sufficiently under the control of the subject firm to be covered by this certification.

Based on these findings, the Department is amending this certification to include workers leased from Select Staffing, also known as Real Time Staffing working on-site at the Winston-Salem, North Carolina location of Dell Products LP, Winston-Salem (WS–1) Division.

The amended notice applicable to TA–W–72,575 is hereby issued as follows:

All workers of Dell Products LP, Winston-Salem (WS–1) Division, including on-site leased workers of Adecco, Spherion, Patriot Staffing, Manpower, TEKsystems, APN, ICONMA, and Staffing Solutions, South East, Omni Resources and Recovery, SecurAmerica, LLC, Industrial Distribution Group (IDG), LLC, ARM Automation, Inc., Seaton Corporation, Foxconn/PCE Technology, Inc., and Select Staffing, also known as Real Time Staffing, Winston-Salem, North Carolina, who became totally or partially separated from employment on or after October 13, 2008 through March 1, 2012, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 1st day of April 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–8976 Filed 4–13–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–75,172, TA–W–75,172A, TA–W–75,172B, et al.]

Dex One, et al.; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

TA–W–75,172
Dex One, Formerly Known as RH Donnelly and/or Dex Media LLC, East Division, Including On-Site Leased Workers of Advantage XPO, Fort Myers, Maitland, and Ocala, FL

TA–W–75,172A
Dex One, Formerly Known as RH Donnelly and/or Dex Media LLC, East Division, Including On-Site Leased Workers From Advantage XPO, Arlington Heights, Chicago, Lombard, Springfield, and Tinley Park, IL

TA–W–75,172B
Dex One, Formerly Known as RH Donnelly and/or Dex Media LLC, East Division, Including On-Site Leased Workers From Advantage XPO, Fayetteville and Morrisville, NC

TA–W–75,172C
Dex One, Formerly Known as RH Donnelly and/or Dex Media LLC, East Division, Including On-Site Leased Workers From Advantage XPO, Las Vegas, NV

TA–W–75,172D
Dex One, Formerly Known as RH Donnelly and/or Dex Media LLC, East Division, Including On-Site Leased Workers From Advantage XPO and Administrative Resource Options, Carlisle and Dunmore, PA

TA–W–75,172E
Dex One, Formerly Known as RH Donnelly and/or Dex Media LLC, East Division, Including On-Site Leased Workers From Advantage XPO, Bristol, TN

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on February 18, 2011, applicable to workers of Dex One, East Division, including on-site leased workers from Advantage XPO, in Fort Myers, Maitland, and Ocala, Florida (TA–W–75,172); Arlington Heights, Chicago, Lombard, Springfield, and Tinley Park, Illinois (TA–W–75,172A); Fayetteville and Morrisville, North Carolina (TA–W–75,172B); Las Vegas, Nevada (TA–W–75,172C); Carlisle and Dunmore, Pennsylvania (TA–W–

75,172D); and Bristol, Tennessee (TA–W–75,172E). The notice was published in the **Federal Register** on March 10, 2011 (76 FR 13228).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in activities related to graphic design services.

Dex One was formerly known as RH Donnelly and/or Dex Media, LLC. Some workers dislocated from employment at Dex One had their unemployment insurance (UI) wages reported under a separate account under the name RH Donnelly and/or Dex Media, LLC.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers who were adversely affected by the firm acquiring from a foreign country services like or directly competitive with the services supplied by the firm.

The amended notice applicable to TA–W–75,172 is hereby amended as follows:

All workers of Dex One, formerly known as RH Donnelly and/or Dex Media, LLC, East Division, including on-site leased workers from Advantage XPO, in the following locations: Fort Myers, Maitland, and Ocala, Florida (TA–W–75,172); Arlington Heights, Chicago, Lombard, Springfield, and Tinley Park, Illinois (TA–W–75,172A); Fayetteville and Morrisville, North Carolina (TA–W–75,172B); Las Vegas, Nevada (TA–W–75,172C); Carlisle and Dunmore, Pennsylvania, including on-site leased workers from Administrative Resource Options (TA–W–75,172D); and Bristol, Tennessee (TA–W–75,172E), who became totally or partially separated from employment on or after February 2, 2010, through two years from the date of certification, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 6th day of April 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–8982 Filed 4–13–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–74,081]

General Motors Vehicle Manufacturing, Formerly Known as General Motors Corporation, Shreveport Assembly Plant, Including On-Site Leased Workers From Aerotek, Kelly Services and Voith Industrial Services, Inc., Formerly Known as Premier Manufacturing Support Services, Shreveport, LA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 27, 2010, applicable to workers of General Motors Vehicle Manufacturing, formerly known as General Motors Corporation, Shreveport Assembly Plant, including on-site leased workers from Aerotek and Kelly Services, Shreveport, Louisiana. Workers are engaged in the production of vehicles. The Notice was published in the **Federal Register** on August 13, 2010 (75 FR 49530).

At the request of a petitioner, the Department reviewed the certification for workers of the subject firm. The company reports that workers leased from Voith Industrial Services, Inc., formerly known as Premier Manufacturing Support Services, were employed on-site at the Shreveport, Louisiana location of General Motors Vehicle Manufacturing, Shreveport Assembly Plant. The Department has determined that these workers were sufficiently under the control of General Motors Vehicle Manufacturing to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Voith Industrial Services, Inc., formerly known as Premier Manufacturing Support Services, working on-site at the Shreveport, Louisiana location of General Motors Vehicle Manufacturing.

The amended notice applicable to TA–W–74,081 is hereby issued as follows:

All workers of General Motors Vehicle Manufacturing, formerly known as General Motors Corporation, Shreveport Assembly Plant, including on-site leased workers from Aerotek, Kelly Services, and Voith Industrial Services, Inc., formerly known as Premier Manufacturing Support Services, Shreveport, Louisiana, who became totally or partially separated from employment on or after August 28, 2010, through July 27, 2012, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 4th day of April, 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–8979 Filed 4–13–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–72,735; TA–W–72,735A]

Colfor Manufacturing, Inc., an AAM Company, Minerva, OH; Colfor Manufacturing, Inc., an AAM Company, Salem, OH; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on March 17, 2010, applicable to workers of Colfor Manufacturing, Inc., Minerva, Ohio. The workers are engaged in activities related to the production of transmission and power train parts. The notice was published in the **Federal Register** on April 23, 2010 (75 FR 21354).

At the request of the company, the Department reviewed the certification for workers of the subject firm.

The Salem, Ohio location operated in conjunction with the Minerva, Ohio facility, both locations experienced declining sales, worker separations and were impacted by a loss of business at the Minerva, Ohio manufacturing facility of the subject firm. Information also shows that Colfor Manufacturing, Inc. is a wholly owned subsidiary of AAM Company.

Accordingly, the Department is amending this certification to include workers of the Salem, Ohio location of the subject firm and to show the correct name of the subject firm in its entirety should read Colfor Manufacturing, Inc., an AAM Company.

The amended notice applicable to TA–W–72,735 is hereby issued as follows:

All workers of Colfor Manufacturing, Inc., an AAM Company, Minerva, Ohio (TA–W–72,735), and Colfor Manufacturing, Inc., an

AAM Company, Inc., Salem, Ohio (TA–W–72,735A), who became totally or partially separated from employment on or after October 28, 2008, through March 17, 2012, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 4th day of April 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–8977 Filed 4–13–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Application of the Prevailing Wage Methodology in the H–2B Program

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Notice.

SUMMARY: On January 19, 2011, the Department of Labor (Department) published a final rule, Wage Methodology for the Temporary Non-agricultural Employment H–2B Program (Wage Final Rule),[1] promulgating a new prevailing wage methodology, as proposed in the Department's October 5, 2010 Notice of Proposed Rulemaking (NPRM). The prevailing wage methodology set forth in the Wage Final Rule applies to wages paid for work performed on or after January 1, 2012. Employers whose work commences in 2011 and continues into 2012 will have to pay a prevailing wage determined under the new prevailing wage methodology for the work performed in 2012. In order to ensure that employers accurately attest to their need to pay a different wage when the Wage Final Rule is effective, the Department has amended the ETA Form 9142, Application for Temporary Employment Certification, Appendix B.1, to reflect the employer's obligation to pay at least the highest of the most recent prevailing wage that the Department issues to the employer and is in effect at the time the work is performed.

DATES: This Notice is effective on April 14, 2011.

FOR FURTHER INFORMATION CONTACT: William L. Carlson, PhD, Administrator, Office of Foreign Labor Certification, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; telephone: (202) 693–3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

On August 30, 2010, the U.S. District Court in the Eastern District of Pennsylvania in *Comite' de Apoyo a los Trabajadores Agricolas (CATA)* v. *Solis*, Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), ordered the Department to "promulgate new rules concerning the calculation of the prevailing wage rate in the H–2B program that are in compliance with the Administrative Procedure Act no later than 120 days from the date of this order."[2] The Court ruled that the Department had violated the Administrative Procedure Act when it did not adequately explain its reasoning for using skill levels as part of the H–2B prevailing wage determinations, and when it failed to consider comments relating to the choice of appropriate data sets in deciding to rely on data from the Bureau of Labor Statistics' Occupational Employment Survey (OES) rather than wage rates established by the Davis-Bacon Act (DBA) and McNamara O'Hara Service Contract Act (SCA) in setting the prevailing wage rates.

In order to comply with the Court-mandated deadline, on October 5, 2010, the Department issued an NPRM, Wage Methodology for the Temporary Non-agricultural Employment H–2B Program, 75 FR 61578, Oct. 5, 2010. The NPRM proposed to revise the methodology by which prevailing wages are determined in the H–2B program. The Department issued a Final Rule on January 19, 2011. In the Wage Final Rule, the Department acknowledged that employers already may have made contractual arrangements based on the wage methodology in place before the issuance of the Wage Final Rule and, in order to provide employers with sufficient planning time and to minimize disruption, the Department delayed implementation "so that the prevailing wage methodology set forth in this Rule applies only to wages paid for work performed on or after January 1, 2012." 76 FR 3452, 3462, Jan. 19, 2011.

The Department will require all employers who apply for an H–2B labor certification (or on whose behalf an H–2B labor certification is filed) after the effective date of this Notice to agree, as a condition of receiving the H–2B labor certification, to pay the prevailing wage rate in effect for the period of work encompassed by their application. Since the wages resulting from the Wage Final Rule's methodology will be different from the wages under the current methodology, this may result in two wage rates being applicable to a single application. Because many employers will apply for H–2B workers for periods of up to 10 months, applications covering work to be performed both before and after January 1, 2012, could now begin to be filed.

Therefore, to ensure that an employer agrees to pay the prevailing wage rate in effect for the period of work encompassed by their application, the Department has received approval of a revised Appendix B.1 (Office of Management and Budget Control Number 1205–0466) of the *Application for Temporary Employment Certification*, which the employer must sign and submit with its filed Application signifying its agreement to the condition above. The revised form follows this Notice. As of the effective date of this Notice, the Department will require this amended Appendix B.1 to be submitted with an *Application for Temporary Employment Certification* in order to ensure the employer attests to these wage obligations. Where the employer fails to submit the signed correct Appendix B.1 and/or where necessary, the National Processing Center will send the employer a Request for Information requesting the submission of the revised Appendix.

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101(a)(15)(H)(ii)). Public reporting burden for this collection of information is estimated to average 2 hours 10 minutes per response for H–2A and 2 hours 45 minutes for H–2B, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification, U.S. Department of Labor,

[1] Wage Methodology for the Temporary Non-agricultural Employment H–2B Program, 76 FR 3452, Jan. 19, 2011.

[2] The Court later extended the deadline for the publication of the Wage Methodology for the Temporary Non-agricultural Employment H–2B Program Final Rule until January 18, 2011. *CATA* v. *Solis*, Civil No. 2:09–cv–240–LP, 2010 WL 3431761, Oct. 27, 2010.

Room C4312, 200 Constitution Avenue, NW., Washington, DC 20210. Do NOT send the completed application to this address. All of the forms that comprise this collection of information can be found at *http://www.foreignlaborcert.doleta.gov/form.cfm.*

Signed in Washington, DC, this 8th day of April 2010.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

BILLING CODE 4510–FP–P

OMB Control Number: 1205-0466
Expiration Date: 11/30/2011

Application for Temporary Employment Certification

ETA Form 9142 – APPENDIX B.1
U.S. Department of Labor

For Use in Filing Applications Under the H-2B Non-Agricultural Program ONLY

A. Attorney or Agent Declaration

I hereby certify that I am an employee of, or hired by, the employer listed in Section C of the ETA Form 9142, and that I have been designated by that employer to act on its behalf in connection with this application. I also certify that to the best of my knowledge the information contained herein is true and correct. *I understand that to knowingly furnish false information in the preparation of this form and any supplement hereto or to aid, abet, or counsel another to do so is a felony punishable by a $250,000 fine or 5 years in a Federal penitentiary or both (18 U.S.C. 1001).*

1. Attorney or Agent's last (family) name	2. First (given) name	3. Middle initial
4. Firm/Business name		
5. E-Mail address		
6. Signature		7. Date signed

B. Employer Declaration

By virtue of my signature below, ***I HEREBY CERTIFY*** *the following conditions of employment:*

1. The job opportunity is a bona fide, full-time temporary position, the qualifications for which are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.
2. The job opportunity is not vacant because the former occupant(s) is (are) on strike or locked out in the course of a labor dispute involving a work stoppage.
3. The job opportunity is open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship, and the employer has conducted the required recruitment, in accordance with regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which certification is sought. Any U.S. workers who applied or apply for the job were or will be rejected only for lawful, job-related reasons, and the employer must retain records of all rejections.
4. The offered terms and working conditions of the job opportunity are normal to workers similarly employed in the area(s) of intended employment and are not less favorable than those offered to the foreign worker(s) and are not less than the minimum terms and conditions required by Federal regulation at 20 CFR 655, Subpart A.
5. The offered wage equals or exceeds the highest of the most recent prevailing wage that is or will be issued by the Department to the employer for the time period the work is performed, or the applicable Federal, State, or local minimum wage, and the employer will pay the offered wage.
6. The offered wage is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage, or the legal Federal or State minimum wage, whichever is highest.
7. During the period of employment that is the subject of the labor certification application, the employer will comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety laws;
8. The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the Application for Temporary Employment Certification in the area of intended employment within the period beginning 120 days before the date of need, except where the employer also attests that it offered the job opportunity that is the subject of the application to those laid-off U.S. worker(s) and the U.S. worker(s) either refused the job opportunity or was rejected for the job opportunity for lawful, job-related reasons.

Case Number:_____ Case Status: _____ Period of Employment: _____ to _____

OMB Control Number: 1205-0466
Expiration Date: 11/30/2011

Application for Temporary Employment Certification

ETA Form 9142 – APPENDIX B.1
U.S. Department of Labor

9. The employer and its agents and/or attorneys have not sought or received payment of any kind from the employee for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.
10. Unless the H-2B worker is being sponsored by another subsequent employer, the employer will inform H-2B workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under § 655.35, and that if dismissed by the employer prior to the end of the period, the employer is liable for return transportation.
11. Upon the separation from employment of any foreign worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing or any other method specified of the separation from employment not later than forty-eight (48) hours after such separation is discovered by the employer.
12. The employer will not place any H-2B workers employed pursuant to this application outside the area of intended employment listed on the Application for Temporary Employment Certification unless the employer has obtained a new temporary labor certification from the Department.
13. The dates of temporary need, reason(s) for temporary need, and number of worker positions being requested for certification have been truly and accurately stated on the application.
14. If the application is being filed as a job contractor, the employer will not place any H-2B workers employed pursuant to the labor certification application with any other employer or at another employer's worksite unless:
    (i) The employer applicant first makes a bona fide inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the area of intended employment within the period beginning 120 days before and throughout the entire placement of the H-2B worker, the other employer provides written confirmation that it has not so displaced and does not intend to displace such U.S. workers; and
    (ii) All worksites are listed on the certified Application for Temporary Employment Certification

I hereby designate the agent or attorney identified in section D (if any) of the ETA Form 9142 to represent me for the purpose of labor certification and, by virtue of my signature in Block 3 below, **I take full responsibility** for the accuracy of any representations made by my agent or attorney.

I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained therein is true and accurate. *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a felony punishable by a $250,000 fine or 5 years in the Federal penitentiary or both (18 U.S.C. 1001).*

1. Last (family) name	2. First (given) name	3. Middle initial
4. Title		
5. Signature		6. Date signed

Case Number:_____ Case Status: _____ Period of Employment: _____ to _____

[FR Doc. 2011–8968 Filed 4–13–11; 8:45 am]
BILLING CODE 4510–FP–C

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221 (a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than April 25, 2011.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than April 25, 2011.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC this 6th day of April 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

APPENDIX

[27 TAA petitions instituted between 3/21/11 and 4/1/11]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
80057	Orchard Brands (Workers)	Athens, GA	03/21/11	03/17/11
80058	Alliance One International, Inc. (Workers)	Morrisville, NC	03/21/11	03/18/11
80059	Tyco Electronics (Company)	Fuquay-Varina, NC	03/22/11	03/21/11
80060	The Valspar Corporation (Workers)	High Point, NC	03/22/11	03/16/11
80061	Sara Lee (Workers)	Bensenville, IL	03/22/11	03/21/11
80062	Ericsson (State/One-Stop)	Kansas City, MO	03/22/11	03/21/11
80063	Stream International, Inc. (State/One-Stop)	Richardson, TX	03/23/11	03/22/11
80064	Wayne Trademark Printing and Packaging (Workers)	High Point, NC	03/23/11	03/22/11
80065	Genesis Furniture Industries (Workers)	Pontotoc, MS	03/23/11	03/22/11
80066	Ivex Packaging, LLC (Union)	Joliet, IL	03/23/11	03/18/11
80067	Lane Punch Corporation (Company)	Salisbury, NC	03/24/11	03/08/11
80068	New Enterprise Stone & Lime (Workers)	Erie, PA	03/24/11	03/16/11
80069	Hydro Aluminum North America (Company)	Ellenville, NY	03/25/11	03/24/11
80070	Reno Radiological Associates (State/One-Stop)	Reno, NV	03/25/11	03/24/11
80071	PCS Administration (USA), Inc. (Company)	Northbrook, IL	03/25/11	03/25/11
80072	Alcoa Rockdale Operations (State/One-Stop)	Rockdale, TX	03/25/11	03/24/11
80073	Ikano Communications (Workers)	Salt Lake City, UT	03/25/11	03/24/11
80074	AES Westover (Union)	Johnson City, NY	03/28/11	03/25/11
80075	Golden Technologies (Workers)	Old Forge, PA	03/29/11	03/29/11
80076	Nexergy, Inc. (Company)	Columbus, OH	03/29/11	03/28/11
80077	Federal Broach And Machine Company, LLC (Company)	Tempe, AZ	03/30/11	03/29/11
80078	First Boston Pharma (State/One-Stop)	Brockton, MA	03/30/11	03/28/11
80079	The Loomis Company (Workers)	Wyomissing, PA	03/30/11	03/29/11
80080	ViaTech Publishing Solutions (State/One-Stop)	Kalama, WA	03/30/11	03/28/11
80081	SuperMedia, LLC (State/One-Stop)	Dallas, TX	03/30/11	03/29/11
80082	United Furniture Industries (Workers)	Amory, MS	03/31/11	03/30/11
80083	The Genie Company (Union)	Shenandoah, VA	03/31/11	03/31/11

[FR Doc. 2011–8975 Filed 4–13–11; 8:45 am]
BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–75,135]

Flowserve Corporation, Albuquerque, NM; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated March 23, 2011, a State of New Mexico workforce official requested administrative reconsideration of the Department of Labor's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The Department's Notice was issued on February 28, 2011 and published in the **Federal Register** on March 17, 2010 (76 FR 14693).

The negative determination of the TAA petition filed on behalf of workers at the subject firm was based on the finding that Criterion (1) has not been met because no workers were totally or

partially separated, or threatened with such separation.

In the request for reconsideration, the petitioner claimed that worker separations had occurred during the relevant time period and provided documentation in support of this allegation.

The Department has carefully reviewed the request for reconsideration and the existing record, and has determined that the Department will conduct further investigation to determine if the petitioning workers meet the eligibility requirements of the Trade Act of 1974, as amended.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 6th day of April 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–8981 Filed 4–13–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Information about the DOL Notification Process for Worker Abandonment, or Termination for Cause for H–2A Temporary Agricultural Labor Certifications

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Notice.

SUMMARY: This Notice announces specific instructions employers must follow when notifying the Department of Labor's (Department) Office of Foreign Labor Certification (OFLC) that an H–2A worker certified on an *Application for Temporary Employment Certification* or a worker in corresponding employment has voluntarily abandoned employment, or was terminated for cause before the end of the work contract period.

DATES: This Notice is effective on April 14, 2011.

FOR FURTHER INFORMATION CONTACT: William L. Carlson, PhD, Administrator, Office of Foreign Labor Certification, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–3010 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

On February 12, 2010, the Department published a Final Rule on the Temporary Agricultural Employment of H–2A Aliens in the United States (U.S.), 75 FR 6884, Feb. 12, 2010 (2010 Final Rule). The H–2A nonimmigrant worker visa program enables U.S. agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services, when willing and qualified U.S. workers are unavailable and the employment of the H–2A workers will not adversely affect the wages and working conditions of similarly employed workers in the United States.

Occasionally, H–2A workers or workers in corresponding employment voluntarily leave their employment or are terminated for cause before the specified contract term expires. The 2010 Final Rule provides that an employer will not be responsible for transportation and subsistence expenses and/or the three-fourths guarantee related to such an H–2A worker or worker in corresponding employment, where the H–2A worker or worker in corresponding employment abandons employment or is terminated for cause before the end date of the contract period, as specified in the *Application for Temporary Employment Certification*, if the employer notifies OFLC's National Processing Center (NPC) (and the Department of Homeland Security (DHS) in the case of an H–2A worker) of such abandonment or termination.

As set out in 20 CFR 655.122(n), in such instances, the employer must notify the NPC (and DHS in the case of an H–2A worker) in writing, or by any other method specified by the Department or DHS in a manner specified in a notice published in the **Federal Register**, no later than 2 working days after the abandonment or termination occurs. An abandonment begins after an H–2A worker or worker in corresponding employment fails to report for work at the regularly scheduled time for 5 consecutive work days without consent of the employer.

II. Notification Process

Beginning on the effective date of this Notice, the written notification, as set forth in 20 CFR 655.122(n), must be provided by one of the following means:

1. By electronic mail (e-mail) to: *H2A.abandonment&termination.chicago@dol.gov*, or

2. Employers without internet access may instead send written notification by:

(a) Facsimile to: (312) 353–6666; or

(b) U.S. Mail to: U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center, 536 South Clark Street, 9th floor, Chicago, Illinois 60605–1509.

In order to ensure prompt and effective processing of the notification, the Department requests that the employer's notice include at a minimum the following information:

1. The reason(s) for notification or late notification, if applicable;

2. The date of abandonment or termination;

3. The number of H–2A worker(s) and/or other worker(s) in corresponding employment who abandoned or was/were terminated for cause, and the name of each such H–2A worker and/or worker in corresponding employment, each employee's last known address (other than employer-provided housing);

4. The Application/Certification number(s); and

5. The employer's name; address, telephone number, and Federal Employer Identification Number (FEIN).

The NPC will also accept a copy of the written notification of abandonment or termination for cause submitted by the employer to DHS as long as it contains all of the information listed above and is submitted to the NPC via one of the means enumerated in this Notice. Failure to provide notice or failure to provide timely notice may lead to a finding of noncompliance with the transportation and subsistence expenses and/or the three-fourths guarantee provisions as set forth in 20 CFR 655.122(n).

Signed in Washington, DC, this 8th day of April 2011.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2011–8969 Filed 4–13–11; 8:45 am]

BILLING CODE 4510–FP–P

DEPARTMENT OF LABOR

Employment and Training Administration

Request for Certification of Compliance—Rural Industrialization Loan and Grant Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration is issuing this

notice to announce the receipt of a "Certification of Non-Relocation and Market and Capacity Information Report" (Form 4279–2) for the following:

Applicant/Location: Elm City Food Cooperative, Inc./New Haven, *Connecticut.*

Principal Product/Purpose: The loan, guarantee, or grant application is to finance build-out, equipment and start-up costs of a cooperative based full-service retail grocery store that will carry mostly natural and organic foods. The co-op will source the food from approximately 150 local and regional farmers and 50 local and regional food processors. The grocery store is to be located in New Haven, Connecticut. The NAICS industry code for this enterprise is: 445110 (supermarket and other grocery (except convenience) stores).

DATES: All interested parties may submit comments in writing no later than April 28, 2011.

Copies of adverse comments received will be forwarded to the applicant noted above.

ADDRESSES: Address all comments concerning this notice to Anthony D. Dais, U.S. Department of Labor, Employment and Training Administration, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210; or e-mail *Dais.Anthony@dol.gov;* or transmit via fax (202) 693–3015 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Anthony D. Dais, at telephone number (202) 693–2784 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 188 of the Consolidated Farm and Rural Development Act of 1972, as established under 29 CFR part 75, authorizes the United States Department of Agriculture to make or guarantee loans or grants to finance industrial and business activities in rural areas. The Secretary of Labor must review the application for financial assistance for the purpose of certifying to the Secretary of Agriculture that the assistance is not calculated, or likely, to result in: (a) A transfer of any employment or business activity from one area to another by the loan applicant's business operation; or, (b) An increase in the production of goods, materials, services, or facilities in an area where there is not sufficient demand to employ the efficient capacity of existing competitive enterprises unless the financial assistance will not have an adverse impact on existing competitive enterprises in the area. The Employment and Training Administration within the Department of Labor is responsible for the review and certification process. Comments should address the two bases for certification and, if possible, provide data to assist in the analysis of these issues.

Signed: at Washington, DC, this 8th of April, 2011.

Jane Oates,

Assistant Secretary for Employment and Training.

[FR Doc. 2011–8990 Filed 4–13–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Request for Certification of Compliance—Rural Industrialization Loan and Grant Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration is issuing this notice to announce the receipt of a "Certification of Non-Relocation and Market and Capacity Information Report" (Form 4279–2) for the following:

Applicant/Location: Sun Life Family Health Center, Inc./Queen Creek, Arizona.

Principal Product/Purpose: The loan, guarantee, or grant application is to provide long-term financing of the headquarters facility and long-term working capital for the new expansion in the Casa Grande, Eloy, and Queen Creek facilities. The company's headquarters are located in Queen Creek, Arizona. The NAICS industry code for this enterprise is: 621498 (community health centers and clinics, outpatient).

DATES: All interested parties may submit comments in writing no later than April 28, 2011.

Copies of adverse comments received will be forwarded to the applicant noted above.

ADDRESSES: Address all comments concerning this notice to Anthony D. Dais, U.S. Department of Labor, Employment and Training Administration, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210; or e-mail *Dais.Anthony@dol.gov;* or transmit via fax (202)693–3015 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Anthony D. Dais, at telephone number (202)693–2784 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 188 of the Consolidated Farm and Rural Development Act of 1972, as established under 29 CFR part 75, authorizes the United States Department of Agriculture to make or guarantee loans or grants to finance industrial and business activities in rural areas. The Secretary of Labor must review the application for financial assistance for the purpose of certifying to the Secretary of Agriculture that the assistance is not calculated, or likely, to result in: (a) A transfer of any employment or business activity from one area to another by the loan applicant's business operation; or, (b) An increase in the production of goods, materials, services, or facilities in an area where there is not sufficient demand to employ the efficient capacity of existing competitive enterprises unless the financial assistance will not have an adverse impact on existing competitive enterprises in the area. The Employment and Training Administration within the Department of Labor is responsible for the review and certification process. Comments should address the two bases for certification and, if possible, provide data to assist in the analysis of these issues.

Signed at Washington, DC this 8th day of April, 2011.

Jane Oates,

Assistant Secretary for Employment and Training.

[FR Doc. 2011–8991 Filed 4–13–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–73,156]

American Spring Wire Corporation, Kankakee, IL; Notice of Revised Determination on Reconsideration

On October 7, 2010, the Department issued a Notice of Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of American Spring Wire Corporation, Kankakee, Illinois (subject firm) to apply for Trade Adjustment Assistance (TAA). The Department's Notice was published in the **Federal Register** on October 25, 2010 (75 FR 65516). The subject workers are engaged in employment related to the production of spring wire. The worker group does not include leased workers.

New information obtained during the reconsideration investigation revealed that workers and former workers of

American Spring Wire Corporation, Kankakee, Illinois meet the criteria as Suppliers for secondary worker certification.

Criterion I has been met because a significant number or proportion of workers in the workers' firm were totally or partially separated, or were threatened with separation.

Criterion II has been met because workers of subject firm produced and sold spring wire for a firm that employed a worker group eligible to apply for TAA and the spring wire was related to the article that was the basis for the TAA certification.

Criterion III has been met because the loss of business by subject firm with the aforementioned firm, with respect to spring wire, contributed importantly to worker separations, or threat of separations, at the Kankakee, Illinois facility.

Conclusion

After careful review of the additional facts obtained on reconsideration, I determine that workers and former workers of subject firm, who are engaged in employment related to the supply of spring wire, meet the worker group certification criteria under Section 222(c) of the Act, 19 U.S.C. 2272(c). In accordance with Section 223 of the Act, 19 U.S.C. 2273, I make the following certification:

All workers of American Spring Wire Corporation, Kankakee, Illinois, who became totally or partially separated from employment on or after December 17, 2008, through two years from the date of this revised certification, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 6th day of April, 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–8978 Filed 4–13–11; 8:45 am]

BILLING CODE 4510–FN–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2011–3]

Notice of Public Meeting: Technical Aspects of Mandatory Deposit of Published Electronic Works Available Only Online

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of public meeting.

SUMMARY: The U.S. Copyright Office of the Library of Congress will host a public meeting on May 24, 2011, with members of the publishing community to discuss lessons learned from the Office's receipt of electronic deposits in fulfillment of the mandatory deposit requirements of the copyright law. The objective is to identify file submission, packaging, and formatting standards that can effectively and efficiently be adapted to the workflow requirements for both the publishing community and the Library of Congress.

DATES: The public meeting will take place on Tuesday, May 24, 2011, from 9 a.m. to 4 p.m. Responses by parties interested in participating are due by 5 p.m. May 11, 2011.

ADDRESSES: The public meeting will take place in the Copyright Hearing Room of the Madison Building of the Library of Congress, LM–408, 101 Independence Ave., SE., 20059. With respect to the notices of participation, the Copyright Office strongly prefers that responses be submitted electronically. Notices of participation with the required information should be sent to *cad@loc.gov*.

FOR FURTHER INFORMATION CONTACT: Jewel Player, Chief, Copyright Acquisitions Division. Telephone (202) 707–7125; Telefax (202) 707–4435.

SUPPLEMENTARY INFORMATION: On January 25, 2010, the Copyright Office adopted an interim regulation governing the mandatory deposit of published electronic works available only on-line. 75 FR 3863 (January 25, 2010). This regulation permits the Copyright Office to acquire, on behalf of the Library of Congress, electronic works published only online and available exclusively in electronic formats. Prior to this regulation, all online-only works were exempt from the mandatory deposit provisions of the copyright law.

Under the interim regulation, certain works available only online, i.e., electronic serials, are now subject to the mandatory deposit requirement but only to the extent the Copyright Office issues a demand notice for the works. Once the Copyright Office and the Library of Congress have gained experience with ingesting digital works, additional categories of electronic works published only online will be added to the list.

On September 1, 2010, the Copyright Office, on behalf of the Library of Congress, issued its first mandatory deposit notice for works published only online. To date, 30 publishers have received demand notices for a total of 85 online-only titles. These 30 publishers represent a cross section of the community, including large commercial publishers, small commercial publishers, academic institutions, and open access as well as subscription based titles.

The online-only deposit amendment was issued as an "interim" regulation because the Copyright Office foresaw that "the experience of issuing and responding to demands for online–only works will raise additional issues that should be considered before the regulation becomes final, *e.g.*, the technical details of how an online–only work should be transmitted to the Copyright Office." 75 FR 3864 (January 25, 2010). The experience of the Copyright Office thus far is that every submission has been unique. Although suggested submission instructions were provided, no two publishers have transmitted, packaged or formatted their files in the same manner. Needless to say this has created tremendous technical challenges not only for the Library of Congress but also for the publishers responding to the demand notices.

In response to these multiple transmission, packaging, and formatting issues, the Copyright Office will be hosting a public working session to discuss the packaging and submission processes to fulfill a mandatory deposit demand for an electronic work. The goal is to identify a maximum of five possible packaging standards, transmission protocols, and file structures that will work for the publishing community as well as for the Office and the Library. The participants should represent all segments of the serial publishing community, such as publishers, aggregators, abstract and indexing services, journal hosting services, software developers, file conversion services, file archiving services, and organizations focusing on library and electronic information standards. We encourage these groups to send representatives to the meeting to foster a well-informed discussion of the issues.

Limits on participation: Due to space constraints, we regret that we cannot accommodate more than two representatives per organization. We ask that one of these representatives be well-versed in your organization's technical and workflow requirements related to content production, file formats, file naming conventions, metadata, file transmission, and file packaging guidelines.

Notice of participation: A notice to participate in the meeting must be filed no later than 5 p.m. on May 11, 2011. Each notice should be submitted by e-

mail to *cad@loc.gov* and include the following information for each participant: name, organization, title, postal mailing address, telephone, telefax, and an e-mail address. To avoid spam blocks, all participants should add *cad@loc.gov* to their address books. This will assure that you receive additional information related to the meeting. Persons who are unable to send requests via the preferred approach should contact Jewel Player, Chief, Copyright Acquisitions Division, at (202) 707–7125.

Dated: April 8, 2011.

Maria A. Pallante,

Acting Register of Copyrights.

[FR Doc. 2011–9013 Filed 4–13–11; 8:45 am]

BILLING CODE 1410–30–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 11–04]

Notice of Entering Into a Compact With the Republic of Malawi

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: In accordance with Section 610(b)(2) of the Millennium Challenge Act of 2003 (Pub. L. 108–199, Division D), the Millennium Challenge Corporation (MCC) is publishing a summary and the complete text of the Millennium Challenge Compact between the United States of America, acting through the Millennium Challenge Corporation, and the Republic of Malawi. Representatives of the United States Government and the Republic of Malawi executed the Compact documents on April 7, 2011.

Dated: April 8, 2011.

Henry Pitney,

Deputy General Counsel, Millennium Challenge Corporation.

Summary of Millennium Challenge Compact With the Republic of Malawi

The five-year Millennium Challenge Compact with the Republic of Malawi will provide up to $350.7 million to reduce poverty through economic growth (the "Compact"). The Compact focuses on revitalization of the Malawi power sector, and is intended to: (i) Increase investment and employment income by raising the profitability and productivity of enterprises; (ii) expand access to electricity for the Malawian people and businesses; and (iii) improve delivery of social services.

1. Project Overview and Activity Descriptions

To advance the Compact goal of reducing poverty through economic growth, the Compact will fund a Power Sector Revitalization Project (the "Project") that aims to improve the availability, reliability, and quality of the power supply by: (i) Increasing the throughput capacity and stability of the national electricity grid; (ii) increase efficiency of hydropower generation; and (iii) create an enabling environment for future expansion by strengthening sector institutions and enhancing regulation and governance of the sector. The Project consists of two activities (i) the Infrastructure Development Activity and (ii) the Power Sector Reform Activity (the "Activities").

A. Infrastructure Development Activity *($283 Million)*

The Infrastructure Development Activity focuses on the rehabilitation, upgrade and modernization of those generation, transmission and distribution assets of the Electricity Supply Corporation of Malawi ("ESCOM") in most urgent need of repair, in order to improve the capability of the transmission system and increase the efficiency and sustainability of hydropower generation. Because maintaining the current generation assets and expanding generation capacity are necessary to ensure realization of the full benefits of the Infrastructure Development Activity, the Government of Malawi ("GOM") is committing to maintain current generation assets, and to invest in new generation by completing the construction of the 64 MW Kapichira II hydropower plant during the term of the Compact. By the end of the Compact term, MCC expects that the Infrastructure Development Activity will result in increases in generation capacity (from 286 MW to 356 MW), network throughput (from 260 MW to 410 MW) and distribution capability (from 868 megavolt amperes (MVA) to 1,118 MVA), as well as a reduction of technical losses of the power system (from 20–25% to 18%).

The Infrastructure Development Activity consists of the following four sub-activities:

(a) *Nkula A Rehabilitation Sub-Activity.* This sub-activity will provide funding to rehabilitate and modernize Malawi's oldest major hydropower plant Nkula A—at the Nkula Falls Hydroelectric plant. The objective of this proposed investment is to improve the availability of power in Malawi by reducing outages caused by the condition of assets, and maximizing the power output of generators. The rehabilitation is necessary to assist ESCOM avoid the good probability that at least a portion, if not all, of the plant could fail by the end of the Compact without MCC's investment. Such a loss in generation output would have a significant adverse affect on the Malawi economy, and severely compromise the potential utilization and returns on MCC's investment in the transmission and distribution upgrade and rehabilitation.

(b) *Transmission Network Upgrade Sub-Activity.* This sub-activity will upgrade the backbone of the transmission network in order to: (i) Improve the quality and reliability of supply in the northern, central and southern regions of the country; (ii) increase the capacity to move power from the south, where 98 percent of Malawi's power is generated, to the central and northern regions; (iii) reduce technical losses on transmission lines; and (iv) provide a secure transmission link between the southern and central regions.

(c) *Transmission and Distribution Upgrade, Expansion, and Rehabilitation Sub-Activity.* This sub-activity includes investments in the southern, central, and northern power systems of the Malawi power network in order to: (i) Upgrade existing network connections (33-kilovolt (kV), 11kV); (ii) extend existing substations; (iii) upgrade transformers in existing substations; (iv) develop new substations; (v) install and/or repair improved protection systems; (vi) provide new network extensions and connections; and (vii) install a new system control and data acquisition system.

(d) *Environment and Natural Resource Management (ENRM) Sub-Activity.* The objective of the ENRM sub-activity is to help the GOM and other relevant stakeholders address the growing problems of aquatic weed infestation and excessive sedimentation in the Shire River, which cause costly disruptions to downstream power plant operations. The ENRM sub-activity intends to address these issues by: (i) Mitigating the impact of the weeds and sedimentation by providing dredgers and weed-harvesting equipment for use at existing hydropower plants and the Liwonde Barrage, and expanding use of upstream biological control measures; and (ii) developing and implementing an Environmental and Natural Resource Management Action Plan (ENRMAP) that sets the course for an improved understanding and action on environmental, social (including

gender), and economic factors that cause or contribute to weed infestation and sedimentation in the Shire River.

B. Power Sector Reform Activity *($25.7 million)*

The Power Sector Reform Activity complements the Infrastructure Development Activity by providing support for the GOM's policy reform agenda, and aims to build capacity in pivotal sector institutions: ESCOM, the Malawi Energy Regulatory Authority (MERA), and the Ministry of Natural Resources Energy and Environment (MNREE). Currently, ESCOM suffers from significant financial, governance and operational challenges. In addition, inadequate GOM policies and sector governance continue to hinder development of the power sector. To address these challenges, MCC and the GOM have developed two sub-activities under the Power Sector Reform Activity: the ESCOM Turnaround sub-activity and the Regulatory Strengthening sub-activity.

(a) *ESCOM Turnaround Sub-Activity.* The objectives of this sub-activity are to restore ESCOM's financial health and rebuild ESCOM into a strong, well-managed company. MCC funding will support three main areas of the turnaround: finances, corporate governance and operations.

(i) *Finances:* MCC funding will support the provision of technical assistance and equipment to ESCOM, including: (1) Development of a detailed financial plan for 2011–2016; (2) deployment of a "financial turnaround team"; (3) development of a loss reduction study; (4) assistance in rapid billings and collections improvements; (5) strengthening of internal controls; (6) rebuilding of the customer database; (7) pursuit of debt collection; (8) development of a new automated financial management system; and (9) assistance with tariff applications.

(ii) *Operations:* MCC funding will support change management efforts, designing human resources strategies, strengthen ESCOM's procurement division, and other operational assistance.

(iii) *Corporate Governance:* MCC funding will seek to improve corporate governance and support ESCOM's turnaround, including: (1) Recruitment services; (2) twinning/mentoring arrangements or management contract support; (3) a performance management system; and (4) board strategic planning. MCC funding will provide technical assistance on corporate performance standards, including a study on best practices and benchmarks for corporate governance of electric utilities with regional, continental and international benchmarks and recommendations for ESCOM by the end of the second year of the Compact term.

(b) *Regulatory Strengthening Sub-Activity.* The objective of this sub-activity is to provide support for the GOM's policy reform agenda by building capacity in pivotal sector institutions such as MERA and MNREE, and to develop a regulatory environment, consistent with best practices in independent power utility regulation, which will promote potential private sector investment in generation and grid capacity at an affordable cost.

(i) *Tariff Reform:* MCC funding will support a cost of service study to determine appropriate tariff levels and schedules to achieve full cost recovery, more efficient utilization of electricity, and achievement of social objectives. Based on the results of this study, the GOM commits to a phased implementation of full-cost recovery tariffs and schedules to be completed by the end of year three of the Compact.

(ii) *MERA Capacity Building:* MCC funding will support capacity building at MERA to improve its regulatory oversight activities and operations including training and mentoring and development of peer relationships with other regulatory bodies.

Enabling Environment for Public and Private Sector Investment: MCC funding will support the GOM's efforts to implement a suitable market model which will include efforts to: (a) Study and design a single buyer model to be implemented during the Compact; and (b) develop the building blocks of a bilateral power trade market.

2. Administration

The Compact also includes program administration costs estimated at $33 million over a five-year timeframe, including the costs of administration, management, auditing, and fiscal and procurement services. In addition, the cost of monitoring and evaluation of the Compact and integration of MCC's gender policy is budgeted at approximately $9 million.

3. Economic and Beneficiary Analysis

By reducing power outages and technical losses, enhancing the sustainability and efficiency of hydropower generation, and increasing the potential kilowatt hours ("*kWh*") of throughput to electricity consumers, the Program will reduce energy costs to enterprises and households, improve productivity in agriculture, manufacturing, and service sectors, and support the preservation and creation of employment opportunities in the economy. MCC and the GOM expect the Program to result in the following benefits and distribution thereof:

- An estimated 5 million individuals will benefit by year 20 after the Compact term through reduced domestic and enterprise energy costs, increased employment income, and profits;
- An estimated US$2.4 billion of income benefits to Malawi at the present discounted rate of 10 percent;
- An estimated 40 percent of beneficiaries are currently extremely poor, and 60 percent are poor [1]; and
- Extremely poor individuals will gain approximately US$221 of benefits in PPP terms, and poor individuals will gain an average of US$291 (estimates based on recent employment and electricity connection patterns, and incorporate effects of a modest rise in tariffs, to partly finance expanded access).

Millennium Challenge Compact Between the United States of America Acting Through the Millennium Challenge Corporation and the Republic of Malawi

Millennium Challenge Compact

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[1] "Extremely poor" is defined as living on the equivalent amount in 2010 of less than US$1.25 per day 2005 PPP adjusted dollars, and "poor" is defined as living on less than US$2.00 per day 2005 PPP adjusted dollars.

Millennium Challenge Compact

Preamble

This Millennium Challenge Compact (this "*Compact*") is between the United States of America, acting through the Millennium Challenge Corporation, a United States Government corporation ("*MCC*"), and the Republic of Malawi ("*Malawi*"), acting through its government (the "*Government*") (individually a "*Party*" and collectively, the "*Parties*"). Capitalized terms used in this Compact will have the meanings provided in Annex V.

Recognizing that the Parties are committed to the shared goals of promoting economic growth and the elimination of extreme poverty in Malawi and that MCC assistance under this Compact supports Malawi's demonstrated commitment to strengthening good governance, economic freedom and investments in people;

Recalling that the Government consulted with the private sector and civil society of Malawi to determine the priorities for the use of Millennium Challenge Corporation assistance and developed and submitted to MCC a proposal for such assistance to achieve lasting economic growth and poverty reduction;

Understanding that MCC wishes to help Malawi implement the program described herein (as such description may be amended from time to time in accordance with the terms hereof, the "*Program*") to counter a key binding constraint to sustained growth and diversification in the Malawi economy; and

Acknowledging that to implement the Program, MCC wishes to make available to the Government an amount not to exceed Three Hundred and Fifty Million Seven Hundred Thousand United States Dollars (US$350,700,000), subject to the terms and conditions of this Compact;

The Parties hereby agree as follows:

Article 1. Goal and Objectives

Section 1.1 Compact Goal

The goal of this Compact is to reduce poverty through economic growth in Malawi (the "*Compact Goal*").

Section 1.2 Program Objective

The collective objective of the Program (the "*Program Objective*") is to (i) increase investment and employment income by raising the profitability and productivity of enterprises, (ii) expand access to electricity for the Malawian people and businesses, and (iii) improve delivery of social services.

Section 1.3 Project Objective

To achieve the Program Objective, the Government will implement the Power Sector Revitalization Project described in Annex I (the "*Project*") with the assistance of MCC. The objective of the Project is to improve the availability, reliability, and quality of the power supply by increasing the throughput capacity and stability of the national electricity grid, increase efficiency of hydropower generation, and create an enabling environment for future expansion by strengthening sector institutions and enhancing regulation and governance of the sector (the "*Project Objective*").

Article 2. Funding and Resources

Section 2.1 Program Funding

Upon entry into force of this Compact in accordance with Section 7.3, MCC will grant to the Government, under the terms of this Compact, an amount not to exceed Three Hundred and Forty One Million Five Hundred and Eighty Thousand United States Dollars (US$341,580,000) ("*Program Funding*") for use by the Government to implement the Program. The allocation of Program Funding is generally described in Annex II.

Section 2.2 Compact Implementation Funding

(a) Upon signing of this Compact, MCC will grant to the Government, under the terms of this Compact and in addition to the Program Funding described in Section 2.1, an amount not to exceed Nine Million One Hundred and Twenty Thousand United States Dollars (US$9,120,000) ("*Compact Implementation Funding*") under Section 609(g) of the Millennium Challenge Act of 2003, as amended (the "*MCA Act*"), for use by the Government to facilitate implementation of the Compact, including for the following purposes:

(i) financial management and procurement activities;

(ii) administrative activities (including start-up costs such as staff salaries) and administrative support expenses such as rent, computers and other information technology or capital equipment;

(iii) monitoring and evaluation activities;

(iv) feasibility and any remaining project preparatory studies; and

(v) other activities to facilitate Compact implementation as approved by MCC.

The allocation of Compact Implementation Funding is generally described in Annex II.

(b) Each Disbursement (as defined below) of Compact Implementation Funding is subject to satisfaction of the conditions precedent to such Disbursement as set forth in Annex IV.

(c) If MCC determines that the full amount of Compact Implementation Funding available under Section 2.2(a) exceeds the amount that reasonably can be utilized for the purposes set forth in Section 2.2(a), MCC, by written notice to the Government, may withdraw the excess amount, thereby reducing the amount of the Compact Implementation Funding available under Section 2.2(a) (such excess, the "*Excess CIF Amount*"). In such event, the amount of Compact Implementation Funding granted to the Government under Section 2.2(a) will be reduced by the Excess CIF Amount, and MCC will have no further obligations with respect to such Excess CIF Amount.

(d) Upon the written request of the Government, MCC may grant to the Government an amount equal to all or a portion of such Excess CIF Amount as an increase in the Program Funding. Such grant of additional Program Funding will be in writing and subject to the terms and conditions of this Compact applicable to Program Funding.

Section 2.3 MCC Funding

Program Funding and Compact Implementation Funding are collectively referred to in this Compact as "*MCC Funding*", and includes any refunds or reimbursements of Program Funding or Compact Implementation

Funding paid by the Government in accordance with this Compact.

Section 2.4 Disbursement

In accordance with this Compact and the Program Implementation Agreement, MCC will disburse MCC Funding for expenditures incurred in furtherance of the Program (each instance, a "*Disbursement*"). Subject to the satisfaction of all applicable conditions precedent, the proceeds of Disbursements will be made available to the Government, at MCC's sole election, by (a) deposit to one or more bank accounts established by the Government and acceptable to MCC (each, a "*Permitted Account*") or (b) direct payment to the relevant provider of goods, works or services for the implementation of the Program. MCC Funding may be expended only for Program expenditures.

Section 2.5 Interest

Unless MCC agrees otherwise in writing, the Government will pay or transfer to MCC, in accordance with the Program Implementation Agreement, any interest or other earnings that accrue on MCC Funding prior to such funding being used for a Program purpose.

Section 2.6 Government Resources; Budget

(a) The Government will provide all funds and other resources, and will take all actions, that are necessary to carry out the Government's responsibilities under this Compact.

(b) The Government will use its best efforts to ensure that all MCC Funding it receives or is projected to receive in each of its fiscal years is fully accounted for in its annual budget on a multi-year basis.

(c) The Government will not reduce the normal and expected resources that it would otherwise receive or budget from sources other than MCC for the activities contemplated under this Compact and the Program.

(d) Unless the Government discloses otherwise to MCC in writing, MCC Funding will be in addition to the resources that the Government would otherwise receive or budget for the activities contemplated under this Compact and the Program.

Section 2.7 Limitations on the Use of MCC Funding

The Government will ensure that MCC Funding is not used for any purpose that would violate United States law or policy, as specified in this Compact or as further notified to the Government in writing or by posting from time to time on the MCC Web site at *http://www.mcc.gov* (the "*MCC Web site*"), including but not limited to the following purposes:

(a) For assistance to, or training of, the military, police, militia, national guard or other quasi-military organization or unit;

(b) For any activity that is likely to cause a substantial loss of United States jobs or a substantial displacement of United States production;

(c) To undertake, fund or otherwise support any activity that is likely to cause a significant environmental, health, or safety hazard, as further described in MCC's environmental and social assessment guidelines and any guidance documents issued in connection with the guidelines posted from time to time on the MCC Web site or otherwise made available to the Government (collectively, the "*MCC Environmental Guidelines*"); or

(d) To pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions, to pay for the performance of involuntary sterilizations as a method of family planning or to coerce or provide any financial incentive to any person to undergo sterilizations or to pay for any biomedical research which relates, in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning.

Section 2.8 Taxes

(a) Unless the Parties specifically agree otherwise in writing, the Government will ensure that all MCC Funding is free from the payment or imposition of any existing or future taxes, duties, levies, contributions or other similar charges (but not fees or charges for services that are generally applicable in Malawi, reasonable in amount and imposed on a non-discriminatory basis) ("*Taxes*") of or in Malawi (including any such Taxes imposed by a national, regional, local or other governmental or taxing authority of or in Malawi). Specifically, and without limiting the generality of the foregoing, MCC Funding will be free from the payment of (i) any tariffs, customs duties, import taxes, export taxes, and other similar charges on any goods, works or services introduced into Malawi in connection with the Program, (ii) sales tax, value added tax, excise tax, property transfer tax or stamp duty tax, and other similar charges on any transactions involving goods, works or services in connection with the Program, (iii) taxes and other similar charges on ownership, possession or use of any property in connection with the Program, and (iv) taxes and other similar charges on income, profits or gross receipts attributable to work performed in connection with the Program and related social security taxes and other similar charges on all natural or legal persons performing work in connection with the Program except (1) natural persons who are citizens or residents of Malawi and (2) legal persons formed under the laws of Malawi (but excluding MCA–Malawi and any other entity formed for the purpose of implementing the Government's obligations hereunder).

(b) The mechanisms that the Government will use to implement the tax exemption required by Section 2.8(a) will be set forth in the Program Implementation Agreement (the "*Tax Schedules*"). Such mechanisms may include exemptions from the payment of Taxes that have been granted in accordance with applicable law, refund or reimbursement of Taxes by the Government to MCC, MCA–Malawi or to the taxpayer, or payment by the Government to MCA–Malawi or MCC, for the benefit of the Program, of an agreed amount representing any collectible Taxes on the items described in Section 2.8(a).

(c) If a Tax has been paid contrary to the requirements of Section 2.8(a) or the Tax Schedules, the Government will refund promptly to MCA–Malawi (or to another party as designated by MCC) the amount of such Tax in Malawi Kwacha and MCA–Malawi will refund that amount in U.S. Dollars to MCC, unless otherwise provided by MCC, within sixty (60) days (or such other period as may be agreed in writing by the Parties) after the Government is notified in writing (whether by MCC or MCA–Malawi) that such Tax has been paid. If the amount of such Tax is converted to U.S. Dollars from Malawi Kwacha, the rate of exchange applicable to such conversion shall be the U.S. Dollar–Malawi Kwacha rate of exchange as published by the Reserve Bank of Malawi on the date of transfer.

(d) In the event the Government fails to make a payment, including any refund, reimbursement, or other payment that falls hereunder in full when due (including VAT or other refund or reimbursement), interest shall be paid on such past due amount at a rate of the then current U.S. Treasury Prompt Pay Interest Rate, calculated on a daily basis and a 360-day year from the due date of such payment until such amount is paid.

(e) No MCC Funding, proceeds thereof or Program Assets may be applied by

the Government in satisfaction of its obligations under Section 2.8(c).

Article 3. Implementation

Section 3.1 Program Implementation Agreement

The Parties will enter into an agreement providing further detail on the implementation arrangements, fiscal accountability and disbursement and use of MCC Funding, among other matters (the "*Program Implementation Agreement*" or "*PIA*"); and the Government will implement the Program in accordance with this Compact, the PIA, any other Supplemental Agreement and any Implementation Letter.

Section 3.2 Government Responsibilities

(a) The Government has principal responsibility for overseeing and managing the implementation of the Program.

(b) The Government will create and designate MCA–Malawi, a public trust to be created under the laws of Malawi, as the accountable entity to implement the Program and to exercise and perform the Government's right and obligation to oversee, manage and implement the Program, including without limitation, managing the implementation of the Project and its Activities, allocating resources and managing procurements. MCA–Malawi will have the authority to bind the Government with regard to all Program activities. The designation contemplated by this Section 3.2(b) will not relieve the Government of any obligations or responsibilities hereunder or under any related agreement, for which the Government remains fully responsible. MCC hereby acknowledges and consents to the designation in this Section 3.2(b).

(c) The Government will ensure that any Program Assets or services funded in whole or in part (directly or indirectly) by MCC Funding are used solely in furtherance of this Compact and the Program unless MCC agrees otherwise in writing.

(d) The Government will take all necessary or appropriate steps to achieve the Program Objective and the Project Objective during the Compact Term (including, without limiting Section 2.6(a), funding all costs that exceed MCC Funding and are required to carry out the terms hereof and achieve such objectives, unless MCC agrees otherwise in writing).

(e) The Government will fully comply with the Program Guidelines, as applicable, in its implementation of the Program.

Section 3.3 Policy Performance

In addition to undertaking the specific policy, legal and regulatory reform commitments identified in Annex I, the Government will seek to maintain and to improve its level of performance under the policy criteria identified in Section 607 of the MCA Act, and the selection criteria and methodology used by MCC.

Section 3.4 Accuracy of Information

The Government assures MCC that, as of the date this Compact is signed by the Government, the information provided to MCC by or on behalf of the Government in the course of reaching agreement with MCC on this Compact is true, correct and complete in all material respects.

Section 3.5 Implementation Letters

From time to time, MCC may provide guidance to the Government in writing on any matters relating to this Compact, MCC Funding or implementation of the Program (each, an "*Implementation Letter*"). The Government will apply such guidance in implementing the Program. The Parties may also issue jointly agreed-upon Implementation Letters to confirm and record their mutual understanding on aspects related to the implementation of this Compact, the PIA or other related agreements.

Section 3.6 Procurement

The Government will ensure that the procurement of all goods, works and services by the Government or any Provider to implement the Program will be consistent with the "MCC Program Procurement Guidelines" posted from time to time on the MCC Web site (the "*MCC Program Procurement Guidelines*"). The MCC Program Procurement Guidelines include the following requirements, among others:

(a) Open, fair, and competitive procedures must be used in a transparent manner to solicit, award and administer contracts and to procure goods, works and services;

(b) Solicitations for goods, works, and services must be based upon a clear and accurate description of the goods, works and services to be acquired;

(c) Contracts must be awarded only to qualified contractors that have the capability and willingness to perform the contracts in accordance with their terms on a cost effective and timely basis; and

(d) No more than a commercially reasonable price, as determined, for example, by a comparison of price quotations and market prices, will be paid to procure goods, works and services.

Section 3.7 Records; Accounting; Covered Providers; Access

(a) Government Books and Records. The Government will maintain, and will use its best efforts to ensure that all Covered Providers maintain, accounting books, records, documents and other evidence relating to the Program adequate to show, to MCC's satisfaction, the use of all MCC Funding and the implementation and results of the Program ("*Compact Records*"). In addition, the Government will furnish or cause to be furnished to MCC, upon its request, originals or copies of such Compact Records.

(b) Accounting. The Government will maintain and will use its best efforts to ensure that all Covered Providers maintain Compact Records in accordance with generally accepted accounting principles prevailing in the United States, or at the Government's option and with MCC's prior written approval, other accounting principles, such as those (i) prescribed by the International Accounting Standards Board, or (ii) then prevailing in Malawi. Compact Records must be maintained for at least five (5) years after the end of the Compact Term or for such longer period, if any, required to resolve any litigation, claims or audit findings or any applicable legal requirements.

(c) Providers and Covered Providers. Unless the Parties agree otherwise in writing, a "*Provider*" is (i) any entity of the Government that receives or uses MCC Funding or any other Program Asset in carrying out activities in furtherance of this Compact or (ii) any third party that receives at least U.S.$50,000 in the aggregate of MCC Funding (other than as salary or compensation as an employee of an entity of the Government) during the Compact Term. A "*Covered Provider*" is (i) a non-United States Provider that receives (other than pursuant to a direct contract or agreement with MCC) U.S.$300,000 or more of MCC Funding in any Government fiscal year or any other non-United States person or entity that receives, directly or indirectly, U.S.$300,000 or more of MCC Funding from any Provider in such fiscal year, or (ii) any United States Provider that receives (other than pursuant to a direct contract or agreement with MCC) U.S.$500,000 or more of MCC Funding in any Government fiscal year or any other United States person or entity that receives, directly or indirectly, U.S.$500,000 or more of MCC Funding from any Provider in such fiscal year.

(d) Access. Upon MCC's request, the Government, at all reasonable times, will permit, or cause to be permitted, authorized representatives of MCC, an authorized Inspector General of MCC ("*Inspector General*"), the United States Government Accountability Office, any auditor responsible for an audit contemplated herein or otherwise conducted in furtherance of this Compact, and any agents or representatives engaged by MCC or the Government to conduct any assessment, review or evaluation of the Program, the opportunity to audit, review, evaluate or inspect facilities, assets and activities funded in whole or in part by MCC Funding.

Section 3.8 Audits; Reviews

(a) Government Audits. Except as the Parties may agree otherwise in writing, the Government will, on at least a semi-annual basis, conduct, or cause to be conducted, financial audits of all disbursements of MCC Funding covering the period from signing of this Compact until the earlier of the following December 31 or June 30 and covering each six-month period thereafter ending December 31 and June 30, through the end of the Compact Term. In addition, upon MCC's request, the Government will ensure that such audits are conducted by an independent auditor approved by MCC and named on the list of local auditors approved by the Inspector General or a United States–based certified public accounting firm selected in accordance with the "Guidelines for Financial Audits Contracted by MCA" (the "*Audit Guidelines*") issued and revised from time to time by the Inspector General, which are posted on the MCC Web site. Audits will be performed in accordance with the Audit Guidelines and be subject to quality assurance oversight by the Inspector General. Each audit must be completed and the audit report delivered to MCC no later than 90 days after the first period to be audited and no later than 90 days after each June 30 and December 31 thereafter, or such other period as the Parties may otherwise agree in writing.

(b) Audits of Other Entities. The Government will ensure that MCC financed agreements between the Government or any Provider, on the one hand, and (i) a United States nonprofit organization, on the other hand, state that the United States nonprofit organization is subject to the applicable audit requirements contained in OMB Circular A–133, "Audits of States, Local Governments, and Non-Profit Organizations," issued by the United States Office of Management and Budget; (ii) a United States for-profit Covered Provider, on the other hand, state that the United States for-profit organization is subject to audit by the applicable United States Government agency, unless the Government and MCC agree otherwise in writing; and (iii) a non-U.S. Covered Provider, on the other hand, state that the non-U.S. Covered Provider is subject to audit in accordance with the Audit Guidelines.

(c) Corrective Actions. The Government will use its best efforts to ensure that each Covered Provider (i) takes, where necessary, appropriate and timely corrective actions in response to audits, (ii) considers whether the results of the Covered Provider's audit necessitates adjustment of the Government's records, and (iii) permits independent auditors to have access to its records and financial statements as necessary.

(d) Audit by MCC. MCC will have the right to arrange for audits of the Government's use of MCC Funding.

(e) Cost of Audits, Reviews or Evaluations. MCC Funding may be used to fund the costs of any audits, reviews or evaluations required under this Compact.

Article 4. Communications

Section 4.1 Communications

Any document or communication required or submitted by either Party to the other under this Compact must be in writing and in English. For this purpose, the address of each Party is set forth below.

To MCC

Millennium Challenge Corporation, Attention: Vice President, Compact Operations, (with a copy to the Vice President and General Counsel), 875 Fifteenth Street, NW., Washington, DC 20005, United States of America, Facsimile: (202) 521–3700, Telephone: (202) 521–3600, E-mail: *VPOperations@mcc.gov* (Vice President, Compact Operations), *VPGeneralCounsel@mcc.gov* (Vice President and General Counsel)

To the Government

Ministry of Finance, Attention: Minister of Finance, (with copies to the (a) Secretary to the Treasury and (b) Chief Secretary to the Government), Capital Hill, Lilongwe, Malawi, Tel: +265–1788030, Fax: +265–1788384. E-mail: *secmof@finance.gov.mw*.

To MCA–Malaw:

Upon establishment of MCA–Malawi, MCA–Malawi will notify the Parties of its contact details.

Section 4.2 Representatives

For all purposes of this Compact, the Government will be represented by the individual holding the position of, or acting as, Minister of Finance of the Republic of Malawi, and MCC will be represented by the individual holding the position of, or acting as, Vice President, Compact Operations (each of the foregoing, a "*Principal Representative*"). Each Party, by written notice to the other Party, may designate one or more additional representatives (each, an "*Additional Representative*"). A Party may change its Principal Representative to a new representative that holds a position of equal or higher authority upon written notice to the other Party.

Section 4.3 Signatures

Signatures to this Compact and to any amendment to this Compact will be original signatures appearing on the same page or in an exchange of letters or diplomatic notes. With respect to all documents arising out of this Compact (other than the Program Implementation Agreement) and amendments thereto, signatures may, as appropriate, be delivered by facsimile or electronic mail and in counterparts and will be binding on the Party delivering such signature to the same extent as an original signature would be.

Article 5. Termination; Suspension; Expiration

Section 5.1 Termination; Suspension

(a) Either Party may terminate this Compact in its entirety by giving the other Party thirty (30) days' prior written notice.

(b) MCC may, immediately, upon written notice to the Government, suspend or terminate this Compact or MCC Funding, in whole or in part, and any obligation related thereto, if MCC determines that any circumstance identified by MCC, as a basis for suspension or termination (whether in writing to the Government or by posting on the MCC Web site) has occurred, which circumstances include but are not limited to the following:

(i) The Government fails to comply with its obligations under this Compact or any other agreement or arrangement entered into by the Government in connection with this Compact or the Program;

(ii) An event or series of events has occurred that makes it probable that the Program Objective or the Project Objective will not be achieved during the Compact Term or that the Government will not be able to perform its obligations under this Compact;

(iii) A use of MCC Funding or continued implementation of this Compact or the Program violates applicable law or United States Government policy, whether now or hereafter in effect;

(iv) The Government or any other person or entity receiving MCC Funding or using Program Assets is engaged in activities that are contrary to the national security interests of the United States;

(v) An act has been committed or an omission or an event has occurred that would render Malawi ineligible to receive United States economic assistance under Part I of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151 *et seq.*), by reason of the application of any provision of such act or any other provision of law;

(vi) The Government has engaged in a pattern of actions inconsistent with the criteria used to determine the eligibility of Malawi for assistance under the MCA Act; and

(vii) The Government or another person or entity receiving MCC Funding or using Program Assets is found to have been convicted of a narcotics offense or to have been engaged in drug trafficking.

Section 5.2 Consequences of Termination, Suspension or Expiration

(a) Upon the suspension or termination, in whole or in part, of this Compact or any MCC Funding, or upon the expiration of this Compact, the provisions of Section 4.2 of the Program Implementation Agreement will govern the post-suspension, post-termination or post-expiration treatment of MCC Funding, any related Disbursements and Program Assets. Any portion of this Compact, MCC Funding, the Program Implementation Agreement or any other Supplemental Agreement that is not suspended or terminated will remain in full force and effect.

(b) MCC may reinstate any suspended or terminated MCC Funding under this Compact if MCC determines that the Government or other relevant person or entity has committed to correct each condition for which MCC Funding was suspended or terminated.

Section 5.3 Refunds; Violation

(a) If any MCC Funding, any interest or earnings thereon, or any Program Asset is used for any purpose in violation of the terms of this Compact, then MCC may require the Government to repay to MCC in United States Dollars the value of the misused MCC Funding, interest, earnings, or asset, plus interest within thirty (30) days after the Government's receipt of MCC's request for repayment. Interest will accrue from the date of the violation and will be calculated at the 10-year U.S. Treasury Note rate prevailing as of the close of business in Washington, DC as of the date of MCC's request for payment. The Government will not use MCC Funding, proceeds thereof or Program Assets to make such payment.

(b) Notwithstanding any other provision in this Compact or any other existing agreement to the contrary, MCC's right under Section 5.3(a) for a refund will continue during the Compact Term and for a period of (i) five (5) years thereafter or (ii) one (1) year after MCC receives actual knowledge of such violation, whichever is later.

Section 5.4 Survival

This Section 5.4 and the Government's responsibilities under Sections 2.7, 3.7, 3.8, 5.2, 5.3, and 6.4 will survive the expiration, suspension or termination of this Compact.

Article 6. Compact Annexes; Amendments; Governing Law

Section 6.1 Annexes

Each annex to this Compact constitutes an integral part hereof, and references to "Annex" mean an annex to this Compact unless otherwise expressly stated.

Section 6.2 Amendments

(a) The Parties may amend this Compact only by a written agreement signed by the Principal Representatives (or such other government official designated by the relevant Principal Representative).

(b) Notwithstanding Section 6.2(a), the Parties may agree in writing, signed by the Principal Representatives (or such other government official designated by the relevant Principal Representative) or any Additional Representative, to modify any Annex to (i) Suspend, terminate or modify any Project or Activity, or to create a new project, (ii) change the allocations of funds as set forth in Annex II as of the date hereof (including to allocate funds to a new project), (iii) modify the Implementation Framework described in Annex I, or (iv) add, delete or waive any condition precedent described in Annex IV; provided that, in each case, any such modification (1) is consistent in all material respects with the Program Objective and Project Objective, (2) does not cause the amount of Program Funding to exceed the aggregate amount specified in Section 2.1 (as may be modified by operation of Section 2.2(d)), (3) does not cause the amount of Compact Implementation Funding to exceed the aggregate amount specified in Section 2.2(a), and (4) does not extend the Compact Term.

Section 6.3 Inconsistencies

In the event of any conflict or inconsistency between:

(a) any Annex and any of Articles 1 through 7, such Articles 1 through 7, as applicable, will prevail; or

(b) this Compact and any other agreement between the Parties regarding the Program, this Compact will prevail.

Section 6.4 Governing Law

This Compact is an international agreement and will be governed by the principles of international law.

Section 6.5 Additional Instruments

Any reference to activities, obligations or rights undertaken or existing under or in furtherance of this Compact or similar language will include activities, obligations and rights undertaken by, or existing under or in furtherance of any agreement, document or instrument related to this Compact and the Program.

Section 6.6 References to MCC Web Site

Any reference in this Compact, the PIA or any other agreement entered into in connection with this Compact, to a document or information available on, or notified by posting on the MCC Web site will be deemed a reference to such document or information as updated or substituted on the MCC Web site from time to time.

Section 6.7 References to Laws, Regulations, Policies and Guidelines

Each reference in this Compact, the PIA or any other agreement entered into in connection with this Compact, to a law, regulation, policy, guideline or similar document will be construed as a reference to such law, regulation, policy, guideline or similar document as it may, from time to time, be amended, revised, replaced, or extended and will include any law, regulation, policy, guideline or similar document issued under or otherwise applicable or related to such law, regulation, policy, guideline or similar document.

Section 6.8 MCC Status

MCC is a United States government corporation acting on behalf of the United States Government in the implementation of this Compact. MCC and the United States Government assume no liability for any claims or loss arising out of activities or omissions under this Compact. The Government

waives any and all claims against MCC or the United States Government or any current or former officer or employee of MCC or the United States Government for all loss, damage, injury, or death arising out of activities or omissions under this Compact, and agrees that it will not bring any claim or legal proceeding of any kind against any of the above entities or persons for any such loss, damage, injury, or death. The Government agrees that MCC and the United States Government or any current or former officer or employee of MCC or the United States Government will be immune from the jurisdiction of all courts and tribunals of Malawi for any claim or loss arising out of activities or omissions under this Compact.

Article 7. Entry Into Force

Section 7.1 International Agreement

Before this Compact enters into force, the Government will proceed in a timely manner to complete all of its domestic requirements for each of the Compact and the Program Implementation Agreement to enter into force as an international agreement.

Section 7.2 Conditions Precedent to Entry Into Force

Before this Compact enters into force:

(a) The Program Implementation Agreement must have been signed by the parties thereto;

(b) The Government must have delivered to MCC:

(i) A letter signed and dated by the Principal Representative of the Government, or such other duly authorized representative of the Government acceptable to MCC, confirming that the Government has completed its domestic requirements for this Compact to enter into force and that the other conditions precedent to entry into force in this Section 7.2 have been met.

(ii) A signed legal opinion from the Attorney General of Malawi (or such other legal representative of the Government acceptable to MCC), in form and substance satisfactory to MCC; and

(iii) Complete, certified copies of all decrees, legislation, regulations or other governmental documents relating to the Government's domestic requirements for this Compact to enter into force and the satisfaction of Section 7.1, if any, which MCC may post on its Web site or otherwise make publicly available;

(c) MCC shall not have determined that after signature of this Compact, the Government has engaged in a pattern of actions inconsistent with the eligibility criteria for MCC Funding;

(d) The Government has delivered to MCC evidence, satisfactory to MCC, that it has fully funded a turnaround facility for Electricity Supply Corporation of Malawi ("*ESCOM*") to meet ESCOM's working capital and investment capital needs for the Government's Fiscal Year 2012, as further described in Annex I to this Compact (the "*Turnaround Facility*");

(e) The Government will ensure that ESCOM has employed a professionally qualified Chief Executive Officer for ESCOM; and

(f) The Government will have delivered a schedule for the construction of the Kapichira II hydropower plant that is acceptable to MCC.

Section 7.3 Date of Entry Into Force

This Compact will enter into force on the date of the letter from MCC to the Government in an exchange of letters confirming that MCC has completed its domestic requirements for entry into force of this Compact and that the conditions precedent to entry into force in Section 7.2 have been met.

Section 7.4 Compact Term

This Compact will remain in force for five (5) years after its entry into force, unless terminated earlier under Section 5.1 (the "*Compact Term*").

Section 7.5 Provisional Application

Upon signature of this Compact, and until this Compact has entered into force in accordance with Section 7.3, the Parties will provisionally apply the terms of this Compact; provided that, no MCC Funding, other than Compact Implementation Funding, will be made available or disbursed before this Compact enters into force.

In Witness Whereof, the undersigned, duly authorized by their respective governments, have signed this Compact.

Done at Lilongwe, Malawi, this 7th day of April, 2011, in the English language only.

The United States of America, acting through the Millennium Challenge Corporation, Name: Patrick Fine, Title: Vice President, Department of Compact Operations.

The Republic of Malawi, acting through the Ministry of Finance, Name: Kenny Edward Kandodo, Title: Minister of Finance.

Annex I Program Description

This Annex I describes the Program that MCC Funding will support in Malawi during the Compact Term.

A. Program Overview

1. Background and Consultative Process

(a) Background

Malawi is a landlocked country in southeast Africa that gained independence in 1964 and has a population of approximately 13.8 million people. Although Malawi has seen economic growth average seven percent over the last six years, an estimated 51 percent of the population lives on less than US$1.25 a day, and gross national income per capita stands at approximately US$880 (purchasing power parity ("*PPP*") adjusted). The economy remains heavily dependent on rain-fed agriculture and primary commodity exports, and sustained economic growth and development require increasing productivity of industry, agriculture, and services, as well as diversification of the economy.

Malawi's economy faces numerous challenges, including a power sector that is one of the most severely constrained in sub-Saharan Africa. The economic costs of an unreliable and inadequate power supply, as well as the costs of inappropriate pricing and high technical and non-technical losses, are estimated at seven to nine percent of GDP. In order to improve the prospects for sustained growth, poverty reduction, and improved delivery of health and education services, the power sector must be stabilized and expanded. Building on its current efforts to reform the power sector, the Government seeks to invest in infrastructure, turn around its electricity utility—Electricity Supply Corporation of Malawi ("*ESCOM*")—and develop an enabling legal and regulatory environment for investment in the sector. The Program is designed to support these efforts and assist Malawi with the sector's transformation.

(b) Consultative Process

Malawi was deemed eligible for Compact assistance in 2007. To coordinate the Compact development process, the Government formed a core team (the "*MCA–Malawi Core Team*") in March 2008 to work with MCC to develop the Program. In May 2008, the MCA–Malawi Core Team initiated an analysis of constraints to economic growth in Malawi, in collaboration with the World Bank, the U.K. Department for International Development and the African Development Bank. Pursuant to this analysis and an extensive consultative process with key stakeholders, the power sector was identified as a key constraint to economic growth in Malawi.

2. Goal and Objectives

The Compact Goal is to reduce poverty through economic growth. The Program Objective is to increase investment and employment income by raising the profitability and productivity of enterprises, expand access to electricity for the Malawian people and businesses, and improve delivery of social services. The Project Objective is to improve the availability, reliability, and quality of the power supply by increasing the throughput capacity and stability of the national electricity grid, increase efficiency of hydropower generation, and create an enabling environment for future expansion by strengthening sector institutions and enhancing regulation and governance of the sector.

3. Beneficiaries

By reducing power outages and technical losses, enhancing the sustainability and efficiency of hydropower generation, and increasing the potential kilowatt hours ("*kWh*") of throughput to electricity consumers, the Program will reduce energy costs to enterprises and households, improve productivity in agriculture, manufacturing, and service sectors, and support the preservation and creation of employment opportunities in the economy. The Parties expect the Program to result in the following benefits and distribution thereof:

- An estimated 5 million individuals will benefit by year 20 after the Compact Term through reduced domestic and enterprise energy costs, increased employment income, and profits;
- An estimated US$2.4 billion of income benefits to Malawi at the present discounted rate of 10 percent;
- An estimated 40 percent of beneficiaries are currently extremely poor, and 60 percent are poor [2]; and
- Extremely poor individuals will gain approximately US$221 of benefits in PPP terms, and poor individuals will gain an average of US$291 (estimates based on recent employment and electricity connection patterns, and incorporate effects of a modest rise in tariffs, to partly finance expanded access).

These estimated income benefits do not include the full value of improvements to the delivery of health and education services of improved power supply, but these are likely to be important both economically and socially. All projected results depend upon complementary investments in generation capacity, as well as the successful implementation of the infrastructure investments, the sustained turnaround of ESCOM, and the realization of power sector reforms.

B. Power Sector Revitalization Project

To advance the Program Objective, the Parties have designed a project to achieve a better-performing power sector with improved availability, reliability and quality of the power supply, increased efficiency of hydropower generation, and strengthened sector capacity and governance (the "*Power Sector Revitalization Project*"). Set forth below is a description of the Power Sector Revitalization Project that the Government will implement, or cause to be implemented, with support from MCC Funding.

The Power Sector Revitalization Project consists of the following activities (each an "Activity"):

- Investing in infrastructure development, including investment by the Government in new generation, and MCC Funding for generation and increased transmission and distribution capacity ("Infrastructure Development Activity"); and
- Rebuilding ESCOM into a financially strong, well-managed utility and developing a regulatory environment that supports public and private investment in new generation capacity and expanded access ("Power Sector Reform Activity").

1. Infrastructure Development Activity

The Infrastructure Development Activity will rehabilitate, upgrade and modernize ESCOM's generation, transmission and distribution assets in most urgent need of repair, in order to preserve existing generation, improve the capability of the transmission system, and increase the efficiency and sustainability of hydropower generation. To facilitate the development and implementation of the Program, MCC is providing support for the Government's ability to identify and prioritize investments in the sector by developing an integrated resource plan. MCC Funding will support significant investments in the power system infrastructure to preserve generation and stabilize and modernize the transmission and distribution network.

The Infrastructure Development Activity is only viable, technically and economically, if the Government and ESCOM maintain current generation assets and expand the generation capacity of the power system. Under the Infrastructure Development Activity, the Government will invest in new generation by completing the construction of the Kapichira II hydropower plant. Additionally, the Government will continue to seek to attract sustainable investment from the private sector and other donors to add significant amounts of new generation to the system.

The Parties expect that by the end of the Compact Term, the Infrastructure Development Activity, together with the Government's commitment to complete construction of Kapichira II, will result in increases in generation capacity (from 286 MW to approximately 356 MW), network throughput capacity (from 260 MW to approximately 410 MW) and distribution capacity (from 868 MVA to approximately 1,078 MVA), and a reduction of total system losses from 20–25 percent to 18 percent.

(a) Integrated Resource Plan

To facilitate the development and implementation of the Program, MCC is supporting the development of the Malawi 2020 Integrated Resource Plan ("*IRP*") to enhance the Government's efforts to add generation. The objective of the IRP is to identify a prioritized list of generation resources that can help the Government and ESCOM meet the increasing demands for power in a manner that balances the objective of least or low cost power to users and diversification of energy sources, and to increase the impact of the Project. The expected outcome of the IRP is an executed plan to target and secure increased investments in the power system.

(b) Nkula A Refurbishment Sub-Activity

MCC Funding will support the refurbishment of the Nkula A hydropower plant, with the objective to improve the availability of power in Malawi by reducing outages caused by the condition of the assets, and maximizing power output from Nkula A. The refurbishment will improve the reliability of the plant, extend its useful life, and thereby avoid a partial or total failure of the plant.

(c) Transmission Network Upgrade Sub-Activity

This sub-activity is designed to upgrade the backbone of the transmission network to: (1) improve the quality and reliability of supply in the northern, central, and southern regions of the country; (2) increase the capacity to move power from the south where 98 percent of Malawi's power is generated to the central and northern regions; (3) reduce technical losses on

[2] "Extremely poor" is defined as living on the equivalent amount in 2010 of less than US$1.25 per day 2005 PPP adjusted dollars, and "poor" is defined as living on less than US$2.00 per day 2005 PPP adjusted dollars.

transmission lines; and (4) provide a secure transmission link between the southern and central regions.

MCC Funding will support the following investments:

(i) 220kV high voltage power line (the transmission "backbone" of the Malawi power system as currently configured) from the Nkula B hydropower plant to Lilongwe, which covers the southern and central regions of Malawi; the section of the backbone from Bawi or Golomoti, as the case may be, to Lilongwe—subject to completion and results of a full feasibility study and environmental and social impact assessments; and

(ii) 132kV line parallel to existing 66kV and 33kV lines from Chintheche to Luwinga and from Luwinga to Bwengu in the northern region.

(d) Transmission and Distribution Upgrade, Expansion, and Rehabilitation Sub-Activity.

This sub-activity includes investments in the southern, central, and northern power systems of the Malawi power network. MCC Funding will support the following measures:

(i) Upgrading (up-rating) of existing network connections (33kV, 11kV);

(ii) Extension of existing substations (including 66kV);

(iii) Up-rating of transformers in existing substations;

(iv) Development of new substations;

(v) Installation of improved protection systems;

(vi) Provision of new network extensions and connections; and

(vii) Installation of new controls and communication systems (SCADA).

(e) Environment and Natural Resource Management ("*ENRM*") Sub-Activity

The objective of the ENRM sub-activity is to help the Government and other relevant stakeholders address the growing problems of aquatic weed infestation and excessive sedimentation in the Shire River which cause costly disruptions to downstream power plant operations. MCC Funding will support the following measures:

(i) Mitigation of the impact of the weeds and sedimentation through mechanical and biological measures (in accordance with international best practices), including the purchase and use of dredgers and weed-harvesting equipment at existing hydropower plants and the Liwonde Barrage, and expanded use of upstream biological control measures; and

(ii) Development and implementation of an Environmental and Natural Resource Management Action Plan ("*ENRMAP*"), acceptable to MCC, that enables an improved understanding of the environmental, social (including gender), and economic factors that cause or contribute to weed infestation and sedimentation in the Shire River, and establishes a set of prioritized interventions based on economic, institutional, policy, legal, environmental and social criteria to increase capacity to address these factors, in collaboration with other donors and stakeholders.

The Parties expect that the ENRM sub-activity will decrease outages and increase electricity output at the Nkula, Tedzani, and Kapichira hydropower plants that are currently affected by invasive weeds and excessive sedimentation. The ENRM sub-activity is also expected to improve land use and watershed management practices in the Shire River basin to help resolve underlying environmental and social issues that affect hydropower, communities, and other users dependent on ecosystem services.

(f) Public Sector Power Sector Preservation and New Generation Investments

An essential part of the Infrastructure Development Activity is the addition of new generation for the utilization of the new and upgraded transmission and distribution assets. The economic viability of MCC-funded investments is contingent on maintaining at least the current generation capacity of the power system (286 MW) during the Compact Term and then expanding it by at least 64 MW no later than the end of the Compact Term. In addition to this new generation, the Government expects to add significant generation to the system in the coming years, and MCC Funding will support planning and technical assistance through the IRP.

To achieve the preservation and new generation required under the Compact, the Government commits to meet milestones. Under the preservation milestones, the Government commits to taking all steps necessary to maintain current generation capacity in accordance with a plan developed by ESCOM in line with industry best practices, as acceptable to MCC. If the system's generation capacity falls below 286 MW, unless caused by the temporary shutdown of plants for maintenance or rehabilitation or force majeure, the Government will use commercially reasonable efforts to obtain interim replacement output. Under the new generation milestones, the Government commits to providing a construction schedule for the 64 MW Kapichira II hydropower plant ("*Kapichira II*") prior to entry into force and completing construction by the end of the Compact Term. The Government will provide quarterly updates to MCC on the satisfaction of milestones of the Kapichira II construction schedule.

2. Power Sector Reform Activity

The Power Sector Reform Activity complements the Infrastructure Development Activity by providing support for the Government's policy reform agenda and building capacity in pivotal sector institutions: ESCOM, the Malawi Energy Regulatory Authority or its successor ("*MERA*"), and the Ministry of Natural Resources Energy and Environment ("*MNREE*"). The Power Sector Reform Activity consists of two sub-activities: the ESCOM Turnaround sub-activity and the Regulatory Strengthening sub-activity.

(a) ESCOM Turnaround Sub-Activity

The objectives of this sub-activity are to restore ESCOM's financial health and rebuild ESCOM into a financially strong, well-managed company. MCC Funding will support three main areas of the turnaround: finances, corporate governance and operations.

(i) Finances

MCC Funding will support the provision of technical assistance and equipment to ESCOM, including: (1) Development of a detailed financial plan for 2011–2016; (2) deployment of a financial turnaround team; (3) development of a non-technical loss reduction study; (4) assistance in rapid billings and collections improvements; (5) strengthening of internal controls; (6) rebuilding of the customer database; (7) pursuit of debt collection; (8) development of a new automated financial management system; (9) assistance with tariff applications to the regulator; and (10) assistance with fixed asset mapping.

The Government agrees that a detailed financial plan for ESCOM is at the core of understanding and resolving the current financial challenges of the company. With MCC assistance, the Government will develop a detailed financial plan (the "*Financial Plan*") designed to restore ESCOM to financial and operational sustainability. The Financial Plan will project the working and investment capital needs of ESCOM for the 2011–2016 fiscal years, as agreed to with MCC. The Financial Plan will be based upon key financial inputs, such as projected accounts receivables and payables, future maintenance and capital investment needs, tariff increase projections, planned operational efficiencies, annual results of operations pursuant to audited financial statements, and other inputs relevant to

obtain sound projections of the budget support that the Government will provide, if required, through the Turnaround Facility. The Financial Plan will be updated on a quarterly basis with current ESCOM financial information, and will be approved by ESCOM's Board of Directors and the Government, as shareholder.

The Government will create and fund the ESCOM Turnaround Facility to support ESCOM's working capital and investment needs, as identified in the Financial Plan, during the Compact Term. The Government and MCC will identify specific milestones in the Malawi budget process and review progress leading up to the appropriation of funds for the Turnaround Facility. The Government will transfer to the Turnaround Facility, by the start of each ESCOM fiscal year (July–June) the required funding for that fiscal year to cover the maximum projected shortfall for ESCOM in working and investment capital under the Financial Plan. The Government will apportion this funding through the Government budget prior to the start of each fiscal year, beginning FY2011–2012. The ESCOM Board will control the use of funds disbursed from the Turnaround Facility. The funding and expenditure, if needed, of the Turnaround Facility in accordance with the Financial Plan will be a condition to Disbursement of continued MCC Funding.

The Government has converted a substantial portion of the debt owed to it by ESCOM into equity. Any remaining debt owed to the Government by ESCOM will be cleared from ESCOM's balance sheet no later than entry into force of the Compact. In addition, the Government will ensure that ESCOM restructures its third-party debt obligations in a manner that affords ESCOM a reasonable debt-service burden, consistent with the Financial Plan.

(ii) Corporate Governance

To improve corporate governance and support the turnaround, MCC Funding will support: (1) Recruitment services for key personnel; (2) twinning/mentoring arrangements or management contract support; (3) a performance management system; and (4) strategic planning by the board of directors of ESCOM ("*ESCOM Board*"). MCC funding will provide technical assistance on corporate performance standards, including a study on best practices and benchmarks for corporate governance of electric utilities with regional, continental and international benchmarks and recommendations for ESCOM no later than the end of the second year of the Compact Term (the "*Corporate Governance Benchmarking Study*").

The Government will ensure that ESCOM employs a Chief Executive Officer (CEO) prior to entry into force of this Compact. The individual selected for CEO will have at least ten years of public utility management experience, preferably at the CEO level, and a professional qualification in engineering, business, or finance.

The Government recognizes that good corporate governance of ESCOM is essential for long-term performance of the company and commits to improve ESCOM's corporate governance framework and practices. The Government will ensure that the ESCOM Board adheres to clear benchmarks for good corporate governance, including: (A) compliance with the requirements under Malawi's Companies Act, Public Financial Management Act, Public Audit Act, and the Energy Laws; (B) adherence to Malawi Code II, including duties of care and loyalty to the corporation and restrictions on conflicts of interest and related party transactions; (C) following the Sector Guidelines for Parastatal Organizations (the most recent of the draft or final form); and (D) staggering of ESCOM Board terms.

The Government warrants that ESCOM has restructured its existing ESCOM Board committees to have the following three committees: (i) Finance and Audit Committee; (ii) Technical Committee; and (iii) Appointments and Remuneration Committee. The Government will ensure that future nominations and appointments to the ESCOM Board will be done in accordance with a framework established pursuant to Malawi's Parastatals Reform Programme.

The Government will ensure that ESCOM submits and publishes its annual audited financial statements and annual reports to the relevant authorities, and will publish reports similar to those applicable to listed companies under Malawi's Companies Act, all of which will be posted on ESCOM's Web site. Quarterly reports will be made available to key stakeholders, including MCA-Malawi and MCC.

MCC Funding will support an annual performance audit of ESCOM operations. Prior to each audit, MCC and the Government will agree to the terms of reference based on standards for companies in Malawi, including Malawi Code II and the Companies Act. The Government will ensure that ESCOM takes appropriate corrective action to address any material weaknesses or recommendations identified through the audit.

To improve ESCOM's coordination with the Government, the Government will designate and coordinate all interaction with ESCOM through its Department of Statutory Corporations or a replacement or successor Government ministry or agency ("*DSC*"). The Government will ensure that all Government interaction with and shareholder oversight of ESCOM will be coordinated through DSC.

(iii) Operations

MCC Funding will support change management efforts, including developing organizational design, conducting performance management reviews, and designing human resources strategies. MCC Funding will support the procurement division by strengthening the internal control environment and developing policies and procedures to implement best practices in procurement. MCC Funding will support other operational assistance, including live wire repairs, asset management, occupational health and safety, safety and diagnostic equipment, and critical spare parts.

MCC Funding will also support the development of ESCOM's annual maintenance plan. The Government will ensure that ESCOM budgets and expends the amount set forth in the maintenance plan (based on a percentage of undepreciated asset value) for preventive maintenance of generation, transmission and distribution assets.

The GOM affirms that ESCOM will adhere to the Public Procurement Act of Malawi and the policies and procedures of the Government's Office of the Director of Public Procurement ("*ODPP*"). ESCOM will also take the following steps: (1) Strengthen the Internal Procurement Committee as an effective manager and overseer of procurement; (2) develop procurement benchmarks and milestones; (3) restructure its procurement and stores management staff to streamline operations; (4) minimize redundancies and fill skill gaps; (5) conduct public outreach through an information campaign; (6) design and agree on a new procurement organization structure merging procurement and supply; (7) secure guidance from ODPP; (8) develop a formal process to draft annual procurement plans; and (9) review and restructure the stores function and conduct regular stock checks.

(b) Regulatory Strengthening Sub-Activity

The Regulatory Strengthening sub-activity complements the Infrastructure Development Activity and the ESCOM Turnaround sub-activity by providing support for the Government's policy reform agenda and building capacity in pivotal sector institutions, MERA and MNREE. The objectives of the Regulatory Strengthening Sub-Activity are to develop a regulatory environment, consistent with best practices in independent power utility regulation, that support investment in generation and grid capacity at an affordable cost, with the potential participation of the private sector.

(i) Tariff Reform

The Government understands that appropriate tariff levels are critical to ESCOM's financial recovery and the growth of the power sector. MCC Funding will support a cost of service study to determine appropriate tariff levels and schedules to achieve full cost recovery, more efficient utilization of electricity, and achievement of social objectives. Based on the results of this study, the Government agrees to a phased implementation of full-cost recovery tariffs and schedules according to a timeline to be determined by entry into force of the Compact. Without reducing current tariff levels, the phased implementation will ensure an incremental increase in the scope of tariff levels and schedules, that will begin with a tariff that permits recovery of operating costs, thereafter recovery of operating costs plus capital replacement charges, and by the end of the Compact Term recovery of capital replacement costs, capital replacement charges and capital expansion charges. This full-cost recovery tariff should include recovery of operating expenses, financing costs actually incurred by ESCOM, capital replacement charges and capital expansion charges so that tariffs reflect ESCOM's long-run marginal costs. The Government will also seek to ensure adequate protection of poor and vulnerable groups through a lifeline tariff or other mechanism in a manner which is consistent with average total cost recovery and efficient utilization of electricity.

The Government will adopt the policy, legal and regulatory changes necessary to implement tariff reform, including: (1) rationalizing the five percent inflation fluctuation trigger and the four-year interval for review of base tariffs and tariff adjustment formula, so that tariffs may be adjusted on a basis that supports the viability of licensees; and (2) improving the components and definitions for the tariff adjustment components (collectively, the "*Tariff Indexation Framework*").

(ii) MERA Capacity Building

MCC Funding will support capacity building at MERA to improve its regulatory oversight activities and operations. This work will include the development and implementation of training and mentoring of MERA staff, and complementary activities designed to develop MERA. MCC Funding will also assist MERA to develop peer relationships with other regulatory bodies or related organizations.

MCC Funding will be used to complete a study to support the Government's commitment to further develop independent and capable governance of MERA. This study will be completed by the end of the second year of the Compact Term. The study will focus on best practices and benchmarks for corporate governance for electricity regulators, including regional, continental and international benchmarks and recommendations for the future governance of MERA (the "*Sector Benchmarking Study*").

The Government will ensure that MERA develops new technical codes for transmission, distribution and metering to account for captive, cogeneration and other forms of generation. MERA will also develop new "use of system" charging mechanisms, implement the design for a bilateral market, and develop codes to implement existing legal provisions on third-party access to the transmission network. MCC Funding will support these activities through technical assistance.

The Government will consider changing the composition of the board of directors of MERA ("*MERA Board*"), to make the MERA Board and its governance procedures consistent with best practices for independent regulatory authorities in the region and internationally. Specifically, the Government will review the continued membership of ex officio directors and the appropriateness of cross-representation on power sector boards and potential conflicts of interest that may arise between the regulator and regulated entities through board membership, such as the presence of the Principal Secretary for Energy Affairs and the Director of Energy Affairs on the MERA Board. To the extent that Government ex officio members continue on the ESCOM and MERA Boards, the Government affirms its commitment to ensuring that the ESCOM and MERA Boards meet standards applicable to Malawi parastatals with respect to conflicts of interest and independent decision-making, that the ex officio directors on the MERA Board will continue to be non-voting members, and that regulatory rulings are transparent.

The Government will ensure that the scope of MERA's power sector responsibilities is limited to regulation and policy implementation, and not for policy development or the solicitation of new generation.

In recognition of another key indicator of their progress developing a model regulatory institution, the Government and MERA confirm that levies and other charges applicable under the Energy Laws are, and have been, sufficient to cover MERA's operating expenses. The Government will ensure that MERA will publish an annual report including audited financial statements, as required under the Energy Regulation Act. MCC Funding will be used to support MERA in its development, including development of an annual report.

(iii) Enabling Environment for Public and Private Sector Investment

MCC Funding will support the Government's efforts to implement a suitable market model based on the studies performed in connection with the development of this Compact. MCC Funding will support MNREE's efforts to study and design (1) a single buyer model for the power sector ("*SBM Plan*"); and (2) the building blocks of a bilateral power trade market. MCC Funding will also assist with stakeholder education and outreach to support consumer organizations, industrial and commercial users, and other key players in advocating for improved service. In addition, MCC will seek to work with Parliament to strengthen its role in oversight of the power sector.

Based on the SBM Plan, the Government will create a single buyer, either ring-fenced within ESCOM, or a separate legal entity so that the single buyer's financial and system operation activities are autonomous from other ESCOM business units or government entities. Also, the Government will provide support to improve the credit worthiness of this single buyer. The Government will not unbundle ESCOM, except as otherwise provided herein, and shall not make effective the provisions in Section 4 and Parts IV and V of the Electricity Act that limit licensees to one license.

The Government will also clarify the Rural Electrification Act (the "*REA*") so that entities that pursue rural electrification activities without

receiving funding from the Rural Electrification Fund are not subject to the REA's internal rate of return and megawatt size restrictions. The Government will also revise its National Energy Policy to allow charging of differential tariffs for off-grid electrification.

(c) Power Sector Reform Agenda Semi-Annual Review

The Government and MCC will jointly supervise, through specific milestones, progress on the implementation of the Government's power sector reform agenda in the following areas: ESCOM finances; ESCOM operations; ESCOM corporate governance; tariff reform; MERA governance; and regulatory enabling environment for public and private sector participation (collectively, the "*Power Sector Reform Agenda*"). The Government and MCC have specified the milestones below, for which new capitalized terms are further defined in Annex III. Prior to entry into force of the Compact, the Parties will identify semi-annual benchmarks for each milestone. The parties will conduct a semi-annual review of progress on the Power Sector Reform Agenda. Corrective action, acceptable to MCC, as needed to ensure satisfactory progress, will be a condition of continued MCC Funding.

(i) ESCOM Finances

The financial health of ESCOM will be tracked by setting and maintaining the following financial ratios and covenants:
(1) Cost Recovery Ratio;
(2) Current Ratio supported by cash flow statements;
(3) Bad Debt Ratio;
(4) Average Cost of Electricity Billed; and
(5) ESCOM Billing and Collection Efficiency.

(ii) ESCOM Operations

Improvements in the operations of ESCOM will be measured by the following areas:
(1) Quantity of Electricity Metered;
(2) Quantity of Electricity Billed;
(3) Reduction in Losses;
(4) Voltage Quality;
(5) Maintenance Expenditures;
(6) Reduced Outages; and
(7) Annual Procurement Audit.

(iii) ESCOM Corporate Governance

ESCOM corporate governance will be measured by ESCOM's performance on:
(1) Corporate Governance Benchmarking Study;
(2) Annual performance audit reports; and
(3) Public annual report and audited financial statements.

(iv) Tariff Reform

Progress on tariff reform will be phased and measured by:
(1) Cost of service study;
(2) Tariff levels and schedules;
(3) Tariff Indexation Framework; and
(4) Tariff design efficiency, including, a lifeline tariff.

(v) MERA Governance

Improvements in MERA's governance and capacity will be tracked by:
(1) Sector Benchmarking Study;
(2) Peer review; and
(3) Public annual report and audited financial statements.

(vi) Improved Market Structure for Private Investment

Key milestones in the establishment of an enabling environment will be:
(1) Single-buyer model formed; and
(2) Legal framework for strengthened electricity market.

3. Environmental and Social Safeguards

The Project will be implemented in compliance with the MCC Environmental Guidelines and the MCC Gender Policy, and any resettlement will be carried out in accordance with the World Bank's Operational Policy on Involuntary Resettlement in effect as of July 2007 ("*OP 4.12*") in a manner acceptable to MCC. The Government also will ensure that the Project complies with all national environmental laws and regulations, licenses and permits, and applicable international conventions and treaties, except to the extent such compliance would be inconsistent with this Compact. Specifically, the Government will: (a) Cooperate with or complete, as the case may be, any ongoing environmental assessments, or if necessary undertake and complete any additional environmental assessments, social assessments, environmental management plans, environmental and social audits, resettlement policy frameworks, and resettlement action plans required under the laws of Malawi, the MCC Environmental Guidelines, this Compact, the Program Implementation Agreement, or any Supplemental Agreement, or as otherwise required by MCC, each in form and substance satisfactory to MCC; (b) ensure that Project-specific environmental and social management plans are developed and all relevant measures contained in such plans are integrated into project design, the applicable procurement documents and associated finalized contracts, in each case, in form and substance satisfactory to MCC; and (c) implement to MCC's satisfaction appropriate environmental and social mitigation measures identified in such assessments or plans. Unless MCC agrees otherwise in writing, the Government will fund all necessary costs of environmental and social mitigation measures (including, without limitation, costs of resettlement) not specifically provided for or that exceed the MCC Funding specifically allocated for such costs in the Detailed Financial Plan for the Project.

To maximize the positive social impacts of the Project, address cross-cutting social and gender issues such as human trafficking, child and forced labor, and HIV/AIDS, and ensure compliance with the MCC Gender Policy, and to the extent that such does not conflict with MCC's Gender Policy, the Malawi National Gender Policy as ultimately adopted by the Government, the Government will: (i) Develop a comprehensive social and gender integration plan which, at a minimum, performs a gender, institutional and policy review relevant to the Compact Project, identifies approaches for regular, meaningful and inclusive consultations with women and other vulnerable/underrepresented groups, consolidates the findings and recommendations of Project-specific social and gender analyses and conducts additional gender analysis as needed, and sets forth strategies for incorporating findings of the social and gender analyses into final Project designs and additional targeted activities as appropriate ("*Social and Gender Integration Plan*"); (ii) ensure, through monitoring and coordination during implementation, that final Activity designs, construction tender documents and implementation plans are consistent with and incorporate the outcomes of the social and gender analyses and Social and Gender Integration Plan; and (iii) on an annual basis, review and update the Social and Gender Integration Plan as needed to reflect lessons learned and project-specific analysis.

During the development of the Compact, MCC and the Government assessed and identified the potential environmental and social impacts and risks of the Activities. Under the definitions articulated in MCC's Environmental Guidelines, (1) the Infrastructure Development Activity is classified as a Category A project; (2) the Power Sector Reform Activity is a Category C project; and (3) the ENRM sub-activity is categorized as a Category B project. In addition to environmental risks, MCC has also identified certain social and gender-related and resettlement risks from the Activities.

Several measures have been taken to mitigate the risks associated with these Activities. Environmental and Social Impact Assessments ("*ESIAs*") have been developed for the Infrastructure Development Activity, and additional environmental and social (including gender) analysis and mitigation planning will be carried out for certain activities of the Infrastructure Development Activity and the ENRM sub-activity. MCC will require appropriate storage and disposal, possibly outside of Malawi, of oil-contaminated soils, PCB-contaminated oils, soils and equipment, and other hazardous waste associated with implementation of the Infrastructure Development Activity. MCC Funding will be used to design and implement a hazardous waste management plan under the Infrastructure Development Activity. MCC will also require, and MCC Funding will support, measures to ensure appropriate disposal of weeds and sediment extracted from dredging and weed harvesting operations at the hydropower plants. The Government has identified potential sites for the disposal of weeds and sediment associated with implementation of the ENRM sub-activity and will require appropriate development and management of such sites.

To address resettlement risks, a Resettlement Policy Framework has been prepared to specify how resettlement planning and implementation will proceed in connection with the Compact Activities. This resettlement framework will attempt to minimize loss of land and immovable assets, and avoid physical displacement of residential and other structures. In the event an Activity triggers involuntary resettlement, MCC Funding will support the development of a resettlement action plan by MCA-Malawi in consultation with relevant Government entities, and such resettlement action plan will be submitted for approval to MCC.

The Compact will fund additional analysis of social and gender-related implications of the Activities. This analysis will build upon preliminary work conducted during Compact design to ensure that the Activities are implemented so as to address and integrate the needs of vulnerable groups, in adherence with MCC's Gender Policy.

4. Donor Coordination

MCC and the MCA-Malawi Core Team have sought development partners with complementary expertise on energy issues and whose further involvement could help ensure sustainability of the Compact. During Compact development, MCC's review of feasible investments identified approximately $200 million more in beneficial projects than currently feasible under the Compact. Given MCC's inability to finance these otherwise important investments, MCC has discussed with the World Bank and the African Development Bank—the other key donors supporting the power sector in Malawi—the possibility of partnering to support a comprehensive power sector reform program. This reform program could also include sector institutional strengthening activities such as capacity building and technical assistance for the MNREE's Department of Energy.

MCC has also been in discussions with the International Finance Corporation (IFC) regarding creating an appropriate enabling environment for private sector and IFC investment. IFC recently funded a study that identified barriers to private sector investment in energy efficiency and renewable energy opportunities and scoped potential IFC investments. IFC's report identifies a critical need for technical assistance for the Government to establish an enabling environment in order to facilitate these energy efficiency and renewable energy opportunities. As of November 2010, MCC is considering incorporating the IFC's recommendations in the policy, regulatory and legal framework strengthening activity currently supported under the Compact.

5. USAID

While USAID does not currently play an active role in implementing this Compact, MCC is seeking USAID involvement to provide technical assistance for the power sector. MCC is investigating whether USAID's Africa Infrastructure Program (AIP) could potentially provide technical assistance to the Government of Malawi to assist them with structuring agreements with independent power producers and capacity building for MERA. In addition, MCC will coordinate its outreach initiatives with the Malawi parliament, media and civil society under the Regulatory Strengthening sub-activity with USAID's complementary governance and accountability initiatives under its Malawi Legislative Strengthening program.

6. Sustainability

The Compact includes several measures to ensure sustainability of MCC's investment. As designed, both the Power Sector Reform Activity and the ENRM sub-activity are targeted to ensure sustainability of the Infrastructure Development Activity. In addition, the Infrastructure Development Activity includes certain sustainability safeguards such as requiring a certain percentage of asset value to be set aside for preventative maintenance.

Substantial progress on the Power Sector Reform Activity is essential to the magnitude and sustainability of the Compact investments in physical infrastructure, and to the sustained economic growth of Malawi. The Power Sector Reform Activity also addresses key structural issues in the power sector including tariff reform, creating an environment capable of attracting private sector investment, and ensuring the creation of a strong and independent energy sector regulator. These reform activities are structured both as covenants in the Compact and conditions to entry into force of the Compact, or will become conditions to disbursement in the Program Implementation Agreement. Due to the weed and sedimentation problems plaguing Malawi's almost entirely hydropower-based generation facilities, the ENRM sub-activity will also provide necessary steps to ensure sustainability of the Compact.

In addition to the sustainability benefits inherent in the project design of the Power Sector Reform Activity and the ENRMAP, the sustainability of the Infrastructure Development Activity will also heavily depend on a robust maintenance regime for generation, transmission and distribution assets. As part of the Infrastructure Development Activity, MCC will require a certain percentage of its asset value be set aside for preventative maintenance of its MCC funded as well as other assets.

C. Implementation Framework

1. Overview

The implementation framework and the plan for ensuring adequate governance, oversight, management, monitoring and evaluation, and fiscal accountability for the use of MCC Funding are summarized below. MCC and the Government will enter into the Program Implementation Agreement, and any other agreements in furtherance of this Compact, all of which, together with this Compact, set out certain rights, responsibilities, duties and other terms relating to the implementation of the Program.

2. MCC

MCC will take all appropriate actions to carry out its responsibilities in connection with this Compact and the Program Implementation Agreement, including the exercise of its approval

rights in connection with the implementation of the Program.

3. MCA-Malawi

In accordance with Section 3.2(b) of this Compact, MCA-Malawi will act on the Government's behalf to implement the Program and to exercise and perform the Government's rights and responsibilities with respect to the oversight, management, monitoring and evaluation, and implementation of the Program, including, without limitation, managing the implementation of Projects and their Activities, allocating resources, and managing procurements. The Government will ensure that MCA-Malawi takes all appropriate actions to implement the Program, including the exercise and performance of the rights and responsibilities designated to it by the Government pursuant to this Compact and the Program Implementation Agreement. Without limiting the foregoing, the Government will also ensure that MCA-Malawi has full decision-making autonomy, including, inter alia, the ability, without consultation with, or the consent or approval of, any other party, to: (1) Enter into contracts in its own name; (2) sue and be sued; (3) establish Permitted Accounts in a financial institution in the name of MCA-Malawi and hold MCC Funding in such accounts; (4) expend MCC Funding; (5) engage a fiscal agent who will act on behalf of MCA-Malawi on terms acceptable to MCC; (6) engage one or more procurement agents who will act on behalf of MCA-Malawi, on terms acceptable to MCC, to manage the acquisition of the goods, works, and services required by MCA-Malawi to implement this Compact; and (7) competitively engage one or more auditors to conduct audits of its accounts. The Government will take the necessary actions to establish and maintain MCA-Malawi, in accordance with the terms hereof including the applicable conditions precedent to the Disbursement of Compact Implementation Funding set forth in Annex IV to this Compact. MCA-Malawi will be administered and managed by a Board of Trustees and a Management Unit. In addition, MCA-Malawi will have a Stakeholders' Committee to continue the consultative process during implementation of the Program. MCA-Malawi will be incorporated through a trust deed under Malawi's Trustees Incorporation Act, which trust deed will be included in the Program Implementation Agreement (hereinafter referred to as the "*MCA-Malawi Trust Deed*"), which will, collectively, set forth the responsibilities of the Board of Trustees, the Stakeholders' Committee and the Management Unit. The MCA-Malawi Trust Deed will be developed and adopted in accordance with MCC's Guidelines for Accountable Entities and Implementation Structures, published on the MCC Web site (the "*Governance Guidelines*"), and will be in form and substance satisfactory to MCC. MCA-Malawi on behalf of the Government will administer the MCC Funding.

(a) Board of Trustees

(i) Composition. MCA-Malawi will be governed by a board of trustees (the "*Board of Trustees*"), which will consist of voting members representing the Government, private sector, and civil society groups, as well as a non-voting representative of MCC as an observer. The appointment of the trustees will be articulated in the MCA-Malawi Trust Deed and will adhere to MCC's Governance Guidelines. Subject to further discussion, members representing the Government will include the Secretary of the Treasury, the Principal Secretary for Natural Resources Energy and Environment, and the Principal Secretary for Development Planning and Cooperation. Non-government members will be nominated by key private sector and civil society groups rather than by the Government, and may include but shall not be limited to the Council for Non-Governmental Organizations in Malawi (CONGOMA), the Economics Associations of Malawi (ECAMA), and the Malawi Confederated Chambers of Commerce and Industry (MCCCI). There will be a minimum of seven trustees, and a maximum of nine trustees. The composition of the Board of Trustees will comply with the Governance Guidelines, to MCC's satisfaction.

(ii) Roles and Responsibilities. The Board of Trustees will be responsible for overseeing the implementation of the Program and will have final decision-making authority and responsibility over the implementation of the Program. The Board of Trustees will meet regularly; the frequency of meetings will be set forth in the MCA-Malawi Trust Deed and will be in accordance with the Governance Guidelines. The specific roles of the voting members and non-voting observers will be set forth in the MCA-Malawi Trust Deed. The chairperson of the Board of Trustees will be selected by a majority vote of the Trustees. On at least an annual basis or as otherwise required by the Government, the Board of Trustees will report to the Government on the status and progress of the Compact regarding implementation, financial matters, procurements, and other matters identified by the Government.

(b) Stakeholders' Committee

(i) Composition. A Stakeholders' Committee will be selected according to a process in accordance with the MCC's Governance Guidelines and the MCA-Malawi Trust Deed, as approved by MCC. Without limiting the foregoing, as required in MCC's Governance Guidelines, the Stakeholders' Committee will be composed of inter alia, representatives from non-governmental organizations, civil society, private sector, and local and regional government Program beneficiaries.

(ii) Roles and Responsibilities. Consistent with the Governance Guidelines, the Stakeholders' Committee will be responsible for continuing the consultative process throughout implementation of the Program. While the Stakeholders' Committee will not have any decision-making authority, it will be responsible for, inter alia, reviewing, at the request of the Board of Trustees or the Management Unit, certain reports, agreements, and documents related to the implementation of the Program in order to provide advice and input to MCA-Malawi regarding the implementation of the Program.

(c) Management Unit

(i) Composition. The management unit, which will be led by a competitively selected Chief Executive Officer, will be composed of competitively selected staff with expertise in the key components of the Program, including, without limitation, a Deputy Chief Executive Officer, Legal Advisor, Human Resources Officer, Power Director, Communications and Outreach Director, Finance and Administration Director, ESA Director, Deputy Director for Social and Gender Issues, Procurement Director, Policy Specialist, M&E and Economics Director, and MIS Specialist (the "*Management Unit*"). The Management Unit will also include such other personnel as provided for in the MCA-Malawi Trust Deed. The directors will be supported by appropriate additional staff to enable the Management Unit to execute its roles and responsibilities.

(ii) Roles and Responsibilities. The Management Unit will be based in Lilongwe, Malawi, and will be responsible for day-to-day implementation of the Compact, with oversight from the Board of Trustees. The Management Unit will serve as the principal link between MCC and the Government, and will be accountable

for the successful implementation of the Program, the Project, and each Activity. As a recipient of MCC Funding, MCA-Malawi will be subject to MCC audit requirements.

4. Implementation Arrangements

Subject to the terms and conditions of this Compact and any related agreements entered into in connection with this Compact, MCC and the Government have identified certain institutions, including ESCOM, MERA and MNREE, that may receive technical assistance or other support under this Compact, and that, together with MCA-Malawi, will have key roles in the implementation of the Project and the Activities (each, a "*Project Partner*"). The Government will ensure that the roles and responsibilities of each Project Partner will be clearly articulated in an agreement between MCA-Malawi and the Project Partner, which agreement must be in form and substance satisfactory to MCC (each a "*Project Cooperation Agreement*").

The Government will ensure that ESCOM, as a Project Partner, will do the following in support of the Project: (a) Provide access to its facilities and cooperate with MCA-Malawi, and its consultants (including the PMC as defined below); (b) dedicate key staff to the Project, including engineers, environmental, social and gender specialists, and monitoring and evaluation personnel; (c) bear any transportation costs and per diems and incidental expenses for any of its personnel who travel in connection with the Project; and (d) provide administrative and technical support and use of appropriate office space and facilities.

MCA-Malawi will contract a project management consultant ("*PMC*") to manage and supervise the implementation of the infrastructure portions of the Infrastructure Development Activity and will assist MCA-Malawi with technical evaluations and contract negotiations. The Project Cooperation Agreement between MCA-Malawi and ESCOM will set forth the roles and responsibilities of each entity and any coordinating mechanisms to ensure that the PMC is able to successfully carry out its mandate. The PMC will also provide technical assistance to ESCOM with respect to project management.

5. Fiscal Agent

Unless MCC otherwise agrees in writing, the Government, directly or through MCA-Malawi, will engage one or more fiscal agents (each a "*Fiscal Agent*"), who will be responsible for assisting the Government with fiscal management and ensuring appropriate fiscal accountability of MCC Funding. Duties of the Fiscal Agent will be set forth in the Program Implementation Agreement and in such agreement as the Government, directly or indirectly through MCA-Malawi, enters into with each Fiscal Agent, which agreement shall be in form and substance satisfactory to MCC.

6. Procurement Agent

Unless MCC otherwise agrees in writing, the Government, directly or through MCA-Malawi, will engage one or more procurement agents (each as "*Procurement Agent*") to conduct and certify specified procurement activities in furtherance of the Compact. The roles and responsibilities of the Procurement Agent will be clearly articulated in the Program Implementation Agreement and in such agreement as the Government, directly or indirectly through MCA-Malawi, enters into with each Procurement Agent, which agreement shall be in form and substance satisfactory to MCC. Each Procurement Agent will adhere to the standards set forth in the MCC Program Procurement Guidelines and ensure that procurements are consistent with the procurement plan adopted by MCA-Malawi pursuant to the Program Implementation Agreement, unless MCC otherwise agrees in writing.

Annex II Multi-Year Financial Plan Summary

This Annex II summarizes the Multi-Year Financial Plan for the Program.

1. General

A multi-year financial plan summary ("*Multi-Year Financial Plan Summary*") is attached hereto as Exhibit A. By such time as specified in the PIA, the Government will adopt, subject to MCC approval, a multi-year financial plan that includes, in addition to the multi-year summary of estimated MCC Funding and the Government's contribution of funds and resources, the annual and quarterly funding requirements for the Program (including administrative costs) and for the Project, projected both on a commitment and cash requirement basis.

EXHIBIT A—MULTI-YEAR FINANCIAL PLAN SUMMARY

Component	CIF	Year 1	Year 2	Year 3	Year 4	Year 5	Total
1. POWER SECTOR REVITALIZATION PROJECT							
(a) Infrastructure Development Activity	2,978,000	12,134,000	80,191,000	80,715,000	64,344,000	42,638,000	283,000,000
(i) Nkula A Refurbishment Sub-Activity	.....	.....	4,436,000	7,762,000	7,762,000	2,218,000	22,178,000
(ii) Transmission Network Upgrade Sub-Activity	1,712,000	6,843,000	48,862,000	45,151,000	35,280,000	25,531,000	163,379,000
(iii) T&D Upgrade, Expansion, and Rehabilitation Sub-Activity	740,000	2,590,000	19,090,000	19,675,000	15,377,000	11,086,000	68,558,000
(iv) Environment and Natural Resource Management Sub-Activity	526,000	1,588,000	6,133,000	7,910,000	5,925,000	3,803,000	25,885,000
(v) Resettlement: Action Plan Development and Implementation	.....	1,113,000	1,670,000	217,000	.....	.....	3,000,000
(b) Power Sector Reform Activity	3,352,000	4,470,000	4,469,000	4,470,000	4,469,000	4,470,000	25,700,000
SUBTOTAL	6,330,000	16,604,000	84,660,000	85,185,000	68,813,000	47,108,000	308,700,000
2. CROSS-CUTTING SUPPORT							
(a) Gender Integration	260,000	348,000	348,000	348,000	348,000	348,000	2,000,000
(b) Monitoring and Evaluation	387,000	2,259,000	1,073,000	1,073,000	858,000	1,350,000	7,000,000
SUBTOTAL	647,000	2,607,000	1,421,000	1,421,000	1,206,000	1,698,000	9,000,000

EXHIBIT A—MULTI-YEAR FINANCIAL PLAN SUMMARY—Continued

Component	CIF	Year 1	Year 2	Year 3	Year 4	Year 5	Total
3. PROGRAM ADMINISTRATION							
(a) MCA–Malawi Administration	2,143,000	3,607,000	3,602,000	3,899,000	3,940,000	4,076,000	21,267,000
(b) Financial Management and Procurement Controls		2,060,000	2,122,000	2,185,000	2,251,000	2,319,000	10,937,000
(c) Financial Audits		150,000	155,000	159,000	164,000	168,000	796,000
SUBTOTAL	2,143,000	5,817,000	5,879,000	6,243,000	6,355,000	6,563,000	33,000,000
TOTAL COMPACT BUDGET	9,120,000	25,028,000	91,960,000	92,849,000	76,374,000	55,369,000	350,700,000

Annex III Description of Monitoring and Evaluation Plan

This Annex III (this "*M&E Annex*") generally describes the components of the Monitoring and Evaluation Plan ("*M&E Plan*") for the Program. The actual content and form of the M&E Plan will be agreed to by MCC and the Government in accordance with MCC's Policy for Monitoring and Evaluation of Compacts and Threshold Programs as posted from time to time on the MCC Web site (the "*MCC Policy for Monitoring and Evaluation of Compacts and Threshold Programs*"). The M&E Plan may be modified as outlined in MCC's Policy for Monitoring and Evaluation of Compacts and Threshold Programs with MCC approval without requiring an amendment to this Annex III.

1. Overview

MCC and the Government will formulate and agree to, and the Government will implement or cause to be implemented, an M&E Plan that specifies: (a) How progress toward the Compact Goal, Program Objective and Project Objective will be monitored ("*Monitoring Component*"); (b) a process and timeline for the monitoring of planned, ongoing, or completed Activities to determine their efficiency and effectiveness; and (c) a methodology for assessment and rigorous evaluation of the outcomes and impact of the Program ("*Evaluation Component*"). Information regarding the Program's performance, including the M&E Plan, and any amendments or modifications thereto, as well as progress and other reports, will be made publicly available on the Web site of MCC, MCA-Malawi and elsewhere.

2. Program Logic

The M&E Plan will be built on a logic model which illustrates how the Program, Project and Activities contribute to the Compact Goal, the Program Objective and the Project Objective.

The goal of the Compact is to reduce poverty through economic growth. The Program Objective is to: (a) Increase investment and employment income by raising the profitability and productivity of enterprises; (b) expand access to electricity for the Malawian people and businesses; and (c) improve delivery of social services. The outcomes of the Project Activities, otherwise referred to in the Compact as the Project Objective, are to improve the availability, reliability, and quality of the power supply by increasing the throughput capacity and stability of the national electricity grid, increase efficiency of hydropower generation, and create an enabling environment for future expansion by strengthening sector institutions and enhancing regulation and governance of the sector. These results are expected to contribute to Malawi's own poverty-reduction and economic growth goals as defined in the Malawi Growth and Development Strategy ("*MGDS*").

3. Monitoring Component

To monitor progress toward the achievement of the impact and outcomes of the Compact, the Monitoring Component of the M&E Plan will identify: (1) The Indicators (as defined below), (2) the definitions of the Indicators, (3) the sources and methods for data collection, (4) the frequency for data collection, (5) the party or parties responsible for collecting and analyzing relevant data, and (6) the timeline for reporting on each Indicator to MCC.

Further, the Monitoring Component will track changes in the selected Indicators for measuring progress towards the achievement of the Program Objective and Project Objective during the Compact Term. MCC also intends to continue monitoring and evaluating the long-term impacts of the Compact even after Compact expiration. The M&E Plan will establish baselines which measure the situation prior to a development intervention, against which progress can be assessed or comparisons made (each a, "*Baseline*"). The Government will collect Baselines on the selected Indicators or verify already collected Baselines where applicable and as set forth in the M&E Plan.

(a) Indicators

The M&E Plan will measure the results of the Program using quantitative, objective and reliable data ("*Indicators*"). Each Indicator will have benchmarks that specify the expected value and the expected time by which that result will be achieved ("*Target*"). All Indicators will be disaggregated by gender, income level and age, and beneficiary types to the extent practicable. Subject to prior written approval from MCC, the Government or MCA-Malawi may add Indicators or refine the definitions and Targets of existing Indicators.

(i) Compact Indicators

(1) Goal. The M&E Plan will contain the following Indicators related to the Compact Goal. The Target of these Indicators is to contribute to the national goals specified in the MGDS. Although the Program contributes to these goals, satisfaction of these goals is not intended to be solely attributable to the Project:

(A) Absolute poverty rate [3] nationwide: 35–40 percent living on less than US$1.00 a day in 2010 to 33.3 percent by 2016; and

(B) Absolute rural poverty rate nationwide: 40 percent living on less than US$1.00 a day in 2010 to 36 percent by 2016.

(2) Other Indicators. The M&E Plan will contain the Indicators listed in the following tables.

MCA-Malawi will update Baselines for key Indicators after new data becomes available, including the Malawi Integrated Household Survey III, after a new billing system is installed at ESCOM, and after a Cost of Service study and Integrated Resource Plan are

[3] Poverty rates cited above are based on MCA-Malawi Core Team projections using poverty line of US$1.00 a day. *Annex I* defines poverty line as US$1.25 a day.

completed. Indicators on outages and load shedding will be refined prior to entry into force of the Compact and during the first year of the Compact. Financial Targets and performance will be reviewed and updated regularly, as defined in Annex I of the Compact.

Table 1: Compact-Wide Results

The following are Indicators and Targets for the monitoring of the Program Objective as further described in paragraph 2 of Part A of Annex I. The Project is expected to contribute to the achievement of these Indicators and Targets, but is not solely responsible for the results.

TABLE 1—COMPACT-WIDE RESULTS

Result	Indicator	Definition	Unit	Baseline	Year 5 Target
Objective Level Indicators					
Increased Profitability and Productivity of Doing Business in Malawi.	Business sales losses due to power interruptions and quality, disaggregated by firm size [4].	Average value of sales losses due to electricity outages.	%	16.97	TBD
	Electricity as a major obstacle to doing business [5].	Average ranking by firms of electricity as a major obstacle to doing business. 10 is most severe, 1 is not a constraint.	Rank	9.8	5
	Back-up diesel generation for firms [6].	Average annual kWh of diesel generation consumed by registered firms as a percentage of total electricity consumed.	%	6.55	TBD
	Energy sales to industrial customers.	(Annual electricity sales (MWh) for industrial customers (Power LV & MV))/Total Electricity Sales (MWh) [7].	%	Est. 46	55–65
Improved Electricity Access for Households and Key Social Services.	Percentage of population electrified disaggregated by national, urban and rural.	Percentage of households in Malawi using electricity for lighting to total population of Malawi.	%	9	9.5–11
		Percentage of households in rural areas using electricity for lighting to total population.	%	3.0	3.2
		Percentage of rural households using electricity for lighting to total rural population.	%	11.5	TBD
		Percentage of urban households using electricity for lighting to total urban population.	%	43.6	TBD
	Electric Power Consumption per Capita.	(Total kWh billed in all regions)/Total population.	kWh per capita	103	111–115
	Social service electricity connections, disaggregated by schools and health centers.	Percentage of total schools and total health centers connected.	%	TBD	TBD
Expansion of Sector to Better Meet Demand for Power.	Investment in energy sector, disaggregated by private and public sectors, and generation and other assets [8].	Total US$ million committed by financial close, disaggregated by private and public sectors, and generation and other.	US$ million	0	TBD

[4] Indicator is sourced from World Bank Enterprise Survey, 2009. Baseline data reflects manufacturing sector data only. MCA-Malawi will explore developing a tool to capture information for smaller, informal firms.

[5] Indicator sourced from Malawi Chamber of Commerce (MCCCI) survey, 2009.

[6] Indicator sourced from World Bank Enterprise Survey, 2009.

[7] "LV" is defined as low voltage; "MV" is defined as medium voltage.

[8] Data and targets will be sourced from Malawi's Electricity Investment Plan and Integrated Resource Plan.

TABLE 1—COMPACT-WIDE RESULTS—Continued

Result	Indicator	Definition	Unit	Baseline	Year 5 Target
		MW of investment, disaggregated by private and public sectors, and generation and other.	MW	0	TBD
	System Maximum Demand Met.	Total demand met by the system.	MW	260 (2009)	320 [9]

Table 2: Infrastructure Development Activity.

The following are Indicators and Targets for the monitoring of the Infrastructure Development Activity as further described in paragraph 1 of Part B of Annex I.

TABLE 2—INFRASTRUCTURE DEVELOPMENT ACTIVITY

Result	Indicator	Definition	Unit	Baseline	Year 5 Target
Outcome Level Indicators					
Increased Availability of Electricity.	Quantity of Electricity Billed.	Total MWh billed in all regions.	MWh	1,421,958 [10]	1,800,000
Reduction in Losses	Total System Losses (Technical and Non-Technical).	[(Total kWh generated − Total kWh billed)/ Total kWh generated during same billing period].	%	20.13 [11]	17.5
	Transmission System Technical Losses.	[(Total kWh received by transmission from generation − Total kWh sent from transmission to distribution)/Total kWh received by transmission from generation].	%	8.54 [12]	6.5
	Distribution System Technical & Non-Technical Losses.	[(Total kWh received from transmission to Distribution − Total kWh billed)/Total kWh received from transmission to distribution].	%	11.58 [13]	8
Reduced Outages	System Average Interruption Frequency Index ("SAIFI").	[No. of customer interruptions > 3 mins/ Total customers].	Customer Interruptions/customer.	NA	TBD
	System Average Interruption Duration Index ("SAIDI").	[(No. of customer interruptions > 3 mins * Duration of outage)/ Total customers].	Duration of Customer Interruptions/customer.	NA	TBD
	Total System Load Shed [14].	Average MW load shed per occurrence in a year.	MW	2.5	TBD
		Cumulative duration of load shed in a year.	Hours	27,500	5,800
		Maximum MW load shed during peak hours.	MW	Est. 30–40	TBD

[9] Target will be calculated using total installed capacity minus 10 percent reserve margin for largest plant.

[10] Baseline data are sourced from MCA Compact Development Indicator Traking Template Pilot Exercise FY2010.

[11] Baseline data are sourced from MCA Compact Development Indicator Traking Template Pilot Exercise FY2010, and reflect the average for the fiscal year.

[12] Baseline data are derived from MCA Compact Development Indicator Traking Template Pilot Exercise FY2010, and reflect the average for the fiscal year.

[13] Baseline data are derived from MCA Compact Development Indicator Traking Template Pilot Exercise FY2010, and reflect the average for the fiscal year.

[14] Load shedding Indicators and their definitions will be refined prior to entry into force of the Compact and in the full M&E Plan.

TABLE 2—INFRASTRUCTURE DEVELOPMENT ACTIVITY—Continued

Result	Indicator	Definition	Unit	Baseline	Year 5 Target
Improved quality of power at primary substations [15].	Voltage Quality, disaggregated by transmission and distribution.	Percentage of time within (±10% transmission and ±6% distribution) voltage range South.	%	83	90
		Percentage of time within (±10% transmission and ±6% distribution) voltage range Centre.	%	83	90
		Percentage of time within (±10% transmission and ±6% distribution) voltage range North.	%	83	90
Increased Connections [16].	Number of residential customers connected to electricity, disaggregated by region.	Southern electricity supply total domestic connected.	Customer	67,316	3,139 additional
		Central electricity supply total domestic connected.	Customer	59,375	1,540 additional
		Northern electricity supply total domestic connected.	Customer	22,612	1,255 additional
	Number of commercial customers connected to electricity, disaggregated by region.	Southern electricity supply general customers connected.	Customer	11,751	343 additional
		Central electricity supply general customers connected.	Customer	9,189	301 additional
		Northern electricity supply general customers connected.	Customer	4,158	258 additional
	Number of industrial customers connected to electricity, disaggregated by region.	Southern electricity supply [Power LV + Power MV connected].	Customer	4,204	8 additional
		Central electricity supply [Power LV + Power MV connected].	Customer	2,510	9 additional
		Northern electricity Supply [Power LV + Power MV connected].	Customer	812	10 additional
Nkula A Sub-Activity					
Output Level Indicators					
Nkula A refurbished and operational.	Total MWh at Nkula A hydroelectric plant.	Total energy produced (MWh) annually at Nkula A.	MWh	168,900	207,441
Transmission Network Upgrade Sub-Activity					
Output Level Indicators					
Transmission Lines Upgraded, Rehabilitated and Extended.	New 132-kV lines	Kms of new 132-kV lines built by Activity.	Kms	0	153
	New 66-kV lines built	Kms of new 66-kV lines built by Activity.	Kms	0	79
	New 220-kV lines built	Kms of new 220-kV lines built by Activity.	Kms	0	190–205

TABLE 2—INFRASTRUCTURE DEVELOPMENT ACTIVITY—Continued

Result	Indicator	Definition	Unit	Baseline	Year 5 Target
T&D Upgrade, Expansion and Rehabilitation Sub-Activity					
Output Level Indicators					
Total New Transmission Transformer Capacity.	Transmission substation capacity.	Sum of transmission transformer capacity.	MVA	991.5	790 additional through Activity
Increased Network	SCADA Coverage Transmission.	Percentage of master station availability.	%	TBD	98–100
Control and Improved Data Acquisition.	SCADA Coverage Distribution.	Percentage of communication links available in installed sites.	%	TBD	90–95
Distribution Network Upgraded, Extended and/or Operational.	Kms of New Distribution lines upgraded or built.	Kms of new 33-kV lines upgraded or built by Activity.	Kms	0	113.3
	Kms of New Distribution Cables.	Kms of new 11-kV cables built by Activity.	Kms	0	5.44
	Distribution substation capacity.	Sum of distribution transformer capacity.	MVA	868	210 additional through Activity

Table 3: Environment and Natural Resource Management (ENRM) Sub-Activity

Due to the distinct nature of the data collection and outcomes of the ENRM sub-activity, it has been broken out into a separate table below. The following table describes the key Indicators and Targets for the monitoring the ENRM sub-activity and its relevant components, as further described in paragraph 1(e) of Part B of Annex I.

TABLE 3—ENVIRONMENT AND NATURAL RESOURCE MANAGEMENT (ENRM) SUB-ACTIVITY

Result	Indicator	Definition	Unit	Baseline	Year 5 target
Outcome Level Indicators					
Improved availability of hydroelectric power plants (HEP) in generation.	Energy not served due to weeds and sedimentation, disaggregated by HEP.	Sum MWh by HEP unavailable due to weed and sedimentation faults.	MWh	TBD	57,218 less than Baseline
	Percent utilization or operating ratio of HEP, disaggregated by HEP [17].	Actual energy generated by HEP MWh/ Theoretical maximum energy of installed capacity MWh.	%	73 (Nkula A) 69 (Nkula B) 82 (Tedzani I&II) 70 (Tedzani III) 77 (Kapichira I)	85 (Nkula A) 75 (Nkula B) 90 (Tedzani I&II) 75 (Tedzani III) 85 (Kapichira I)
Reduced weed infestation and siltation in upper Shire River basin.	Distribution of invasive aquatic species.	Area (Km^2) of weeds in upper Shire River basin as observed in geographic information system maps and field observations.	Km^2	TBD	TBD
	Water turbidity	Total suspended solids using standard methodology.	TSS	TBD	TBD
ENRMAP component (Indicators and Targets to be defined prior to entry into force of the Compact and MCC approval of activities to be funded under the ENRMAP component)					
Output Level Indicators					
Harmonized, gender responsive and effective institutional and policy environment for sustainable environmental management and protection.	Harmonized and gender responsive legal and policy framework enacted.	Legal framework adhering to the findings and recommendations of the ENRMAP developed [18].	Legal framework adopted.		Legal framework adopted.

[15] Substations will be identified in the full M&E plan.

[16] Data for Baseline are sourced from June 2010, ESCOM sales statistics and does not include export customers. The Indicator is useful for monitoring trends and performance as a function of overall sector growth, and will be used for impact evaluations. Targets are based on the Project's technical benefits projections from ICF-CORE Feasibility Study and which were used in ERR analysis.

TABLE 3—ENVIRONMENT AND NATURAL RESOURCE MANAGEMENT (ENRM) SUB-ACTIVITY—Continued

Result	Indicator	Definition	Unit	Baseline	Year 5 target
	Operational payment for ecosystem services mechanism established.	Legal framework enabling ecosystem finance developed as per the findings of the ENRMAP established.	Legal framework adopted.	.....	Legal framework adopted.
Weed and Silt Management Component					
Output Level Indicators					
Improved Control of Aquatic Weeds.	ESCOM expenses on aquatic weed management[19].	Total MK expended by ESCOM per year on aquatic weed control, including staff, equipment and fuel.	Million MK	TBD	TBD
	Yearly amount of weed harvested at Liwonde barrage.	Average weight in metric tons ("MT") of weed harvested at Liwonde barrage per year.	Million MT	13.4	20.04[20]
	Average daily peak weight of weed harvested at Liwonde barrage.	Average peak weight in metric tons of weed harvested at Liwonde barrage.	MT	120	216[21]
	Biocontrol inoculations, disaggregated by key location.	Number of biocontrol inoculations conducted, disaggregated by key location.	Number	TBD	TBD
	Efficiency of biological control on water hyacinth.	Feeding scars on sampled water hyacinth based on standardized methodology[22].	TBD	TBD	TBD
Improved Control of Silt	ESCOM expenses on silt management[23].	Total MK expended by ESCOM per year on silt removal, including staff, equipment and fuel.	Million MK	TBD	TBD
	Percentage of head pond available.	Head pond volume for Nkula/Original head pond volume for Nkula.	%	30	75
		Head pond volume for Tedzani/Original head pond volume for Tedzani.	%	50	75
		Head pond volume for Kapichira/Original head pond volume for Kapichira.	%	50	75

[18] Legal framework may include environmental management bill (including establishment of the National Environmental Management Authority), water resource management bill, and development of a new soil conservation bill.

[19] Indicator is useful for monitoring trends and performance as a function of overall ecosystem conditions.

[20] Total harvested material will depend on the performance of harvesting measures and biological controls.

[21] Total harvested material will depend on the performance of harvesting measures and biological controls.

[22] Indicator will be refined after completion of key feasibility studies and design work for the ENRMAP.

[23] Indicator is useful for monitoring trends and performance as a function of overall ecosystem conditions.

Table 4: Power Sector Reform Activity

The following are Indicators and Targets for the monitoring of the Power Sector Reform Activity as further described in paragraph 2 of Part B of Annex I. Key Targets and Baselines for these Indicators will be defined prior to entry into force of the Compact. Targets on financial Indicators will be reviewed semi-annually as defined in paragraph 2(c) of Part B of Annex I, and updated on a yearly basis.

TABLE 4—POWER SECTOR REFORM ACTIVITY

Result	Indicator	Definition	Unit	Baseline	Year 5 target
Outcome Level Indicators					
Improved Financial Sustainability/Solvency of ESCOM[24].	Cost Recovery Ratio ...	Total Actual revenue/ Projected operating expenses[25].	%	TBD	Greater than 100%
		Total Actual Revenue/ Projected operating expenses plus capital replacement costs[26].	%	TBD	Greater than 100%
		Total Actual Revenue/ Projected operating expenses plus capital replacement plus capital expansion costs[27].	%	TBD	100%
	Debt Equity Ratio	Total Debt/Total Equity	Ratio	TBD	TBD[28]
	Acid or Quick Test	Current Assets/Current Liabilities, excluding receivables and stocks.	Ratio	TBD	TBD
	Current Ratio	Current Assets/Current Liabilities.	Ratio	TBD	TBD
Improved Internal and External Governance of ESCOM and the Power Sector.	Quality of ESCOM Corporate Governance.	Progress against milestones set as a result of independent expert assessment based on international and regional best practices and Malawi law as articulated in Corporate Governance Benchmarking Study..	TBD	TBD	TBD
	Regulatory Independence and Effectiveness[29].	Progress against milestones set as a result of independent expert assessment and/ or benchmarking study on issues such as quality of regulatory decisions based upon sound analysis, conformity with Laws of Malawi, independence, and transparency based on international/regional best practices and governing principles in conformance with Annex I.	TBD	TBD	TBD

[24] Financial targets will be set after financial modeling is completed, and will be updated annually. Data will be sourced from audited financial statements. Baseline for Cost Recovery Ratio is sourced from World Bank Benchmarking Study. Indicators are useful for monitoring trends and performance as a function of overall financial and investment conditions.

[25] Total revenue based on energy, demand and fixed charges revenue. Operating expenses include cost of generation, transmission and distribution operations, corporate expenses, and financing costs to be incurred.

[26] Capital replacement costs include depreciation.

[27] Capital expansion costs include cost of long-term system expansion projects.

[28] Targets to reflect results of financial analysis and/or MERA regulations.

[29] Indicator to be refined after assessment tool has been defined prior to EIF.

TABLE 4—POWER SECTOR REFORM ACTIVITY—Continued

Result	Indicator	Definition	Unit	Baseline	Year 5 target
		ESCOM Turnaround Sub-Activity			
		Output Level Indicators			
Improved Financial Management.	ESCOM Billing and Collection Efficiency [30].	[Total revenue from post-paid bills collected in current month/total post-paid billed in previous month] × 100 for SES.	%	TBD	85–90
		[Total revenue from post-paid bills collected in current month/total post-paid billed in previous month] × 100 for CES.	%	TBD	85–90
		[Total revenue from post-paid bills collected in current month/total post-paid billed in previous month] × 100 for NES.	%	TBD	85–90
	Electricity Metered	Indicator to be defined prior to entry into force and in the full M&E plan, in accordance to Annex I..	TBD	TBD	TBD
	Average Collection Period in days.	365/(Total post-paid sales/((Beginning accounts receivables + ending accounts receivable)/2)).	Days	180	50
	Bad Debt	(Percentage of accounts over 180 days)/(total accounts receivable).	Days	TBD	TBD
	Average Creditor Days	365/(Total credit purchases/((Beginning accounts payables + ending accounts payables)/2)).	Days	150	60
	Financial Plans updated.	ESCOM Financial Plan with agreed upon financial ratios and covenants as defined in Annex I under Compact updated.	Update to Plans		Update to plans
	Publication of Audited Financial Statements.	ESCOM audited financial statements made public as defined in Annex I under Compact.	Publication of statements.	0	Annual publication
	Working Capital Gap Financed [31].	Yearly Government financial contribution required.	MWK Millions	TBD	0
		Yearly Government financial contribution as fraction of amount indicated by MCC-approved Financial Plan.	Percentage	NA	100% if positive amount required
Improved Quality of Customer Service.	Average time to respond to forced outages.	Average time to restore power for high voltage forced outages.	Days	3.36	2.7
		Average time to restore power for MV/LV forced outages.	Days	5.60	3.5

TABLE 4—POWER SECTOR REFORM ACTIVITY—Continued

Result	Indicator	Definition	Unit	Baseline	Year 5 target
	Customer satisfaction and perceptions of ESCOM service, disaggregated by gender.	Percent improvement in key indicators of customers' satisfaction, disaggregated by gender.	%	TBD	TBD
Improved ESCOM Operational Management and Efficiency.	Average Cost of Electricity Billed (kWh).	[Total expenses for Gx, Tx and Dx (MK)/total electricity generated(kWh)*US$].	US$/kWh	TBD	TBD
	Maintenance Expenditures.	Actual maintenance expenditures/Planned maintenance budget as defined in Annex I[32].	%	TBD	100
		Adherence to ESCOM maintenance plans as defined in Annex I.	Plans	NA	Yearly update to plans
Improved management of procurements by ESCOM.	Procurement Audits	Number of procurement audits completed by Auditor General's Office receiving satisfactory assessments.	Audit		TBD
	Procurement threshold	Procurement threshold increased by ODPP as a result of improved ESCOM compliance to procurement procedures.	Million MK		Increase over Baseline
Regulatory Strengthening Sub-Activity (Indicators and Targets to be defined prior to entry into force and MCC approval of activities to be funded under the sub-activity. Additional Indicators will be defined as per the benchmarking study, peer review and/or independent expert assessment)					
		Output Level Indicators			
Strengthened Regulatory Environment.	Tariff application processing time.	Average time to respond to tariff rate cases.	Days	TBD	TBD
	Tariff Indexation Framework.	Refinement of legal basis for tariff indexation framework adopted and implemented, as defined in Annex I.	Framework	0	Framework approved and implemented
	Audited financial statements and annual report published by MERA.	Audited financial statements and annual report published.	Annual Report	0	Yearly publication of report
	MERA Resolutions	Percentage of ESCOM performance reports reviewed on time.	%		TBD
Improved Market Structure for Private Investment.	Power Market Structure	Creation of credit worthy single buyer.	Single buyer created.		Credit worthy buyer created
		Revised Energy Laws in conformity with agreement in Compact approved and enacted.	Laws passed		Amended laws passed

(b) Data Collection and Reporting. The M&E Plan will establish guidelines for data collection and reporting, and identify the responsible parties. A performance monitoring task force will be created at ESCOM, with participation by MERA and MCA-Malawi. Compliance with data collection and reporting timelines will be conditions

[30] Baselines will be set after a new billing system is installed.

[31] Financial targets will be set after financial modeling is completed, and will be updated annually. Data will be sourced from audited financial statements and other sources of financial information.

[32] Maintenance plan is based on a percentage of un-depreciated asset value for preventive maintenance of generation, transmission and distribution assets.

for Disbursements for the relevant Activities as set forth in the Program Implementation Agreement. The M&E Plan will specify the data collection methodologies, procedures, and analysis required for reporting on results at all levels. The M&E Plan will describe any interim MCC approvals for data collection, analysis, and reporting plans.

(c) Data Quality Reviews. As determined in the M&E Plan or as otherwise requested by MCC, the quality of the data gathered through the M&E Plan will be reviewed to ensure that data reported are as valid, reliable, and timely as resources will allow. The objective of any data quality review will be to verify the quality and the consistency of performance data across different implementation units and reporting institutions. Such data quality reviews also will serve to identify where those levels of quality are not possible, given the realities of data collection.

(d) Semi-annual Reviews. Semi-annual reviews of the Power Sector Reform Activity will be conducted as outlined in paragraph 2(c) of Part B of Annex I.

(e) Management Information System. The M&E Plan will describe the information system that will be used to collect data, store, process and deliver information to relevant stakeholders in such a way that the Program information collected and verified pursuant to the M&E Plan is at all times accessible and useful to those who wish to use it. The system development will take into consideration the requirement and data needs of the components of the Program, and will be aligned with existing MCC systems, other service providers, and ministries.

(f) Role of MCA-Malawi. The monitoring and evaluation of this Compact spans one discrete Project and two Activities, and will involve a variety of governmental, nongovernmental, and private sector institutions. In accordance with the designation contemplated by Section 3.2(b) of this Compact, MCA-Malawi is responsible for implementation of the M&E Plan. MCA-Malawi will oversee all Compact-related monitoring and evaluation activities conducted for each of the Activities, ensuring that data from all implementing entities are consistent, accurately reported and aggregated into regular performance reports as described in the M&E Plan.

4. Evaluation Component

The Evaluation Component of the M&E Plan will contain three types of evaluations: (1) Impact evaluations; (2) project performance evaluations; and (3) special studies. MCC also intends to continue monitoring and evaluating the long-term impacts of the Compact even after Compact expiration. The Evaluation Component of the M&E Plan will describe the purpose of the evaluation, methodology, timeline, required MCC approvals, and the process for collection and analysis of data for each evaluation. The results of all evaluations will be made publicly available in accordance with MCC's Policy for Monitoring and Evaluation of Compacts and Threshold Programs.

(a) Impact Evaluation. The M&E Plan will include a description of the methods to be used for impact evaluations and plans for integrating the evaluation method into Project design. Based on in-country consultation with stakeholders, the strategies outlined below were jointly determined as having the strongest potential for rigorous impact evaluation. The M&E Plan will further outline in detail these methodologies. Final impact evaluation strategies are to be included in the M&E Plan. The following is a summary of the potential impact evaluation methodologies.

(i) Infrastructure Development Activity. The evaluation will attempt to assess the effectiveness of individual transmission lines and distribution investments in reducing outages and improving power quality, particularly in northern Malawi using a combination of approaches, to include potentially an interrupted time series approach, exogenous spatial variation due to the project, combined if sufficiently informative with phased implementation of distribution projects. The incremental impacts of improved reliability, quality and access to power will be estimated by comparing key intermediate outcomes, including changes in business investments and productivity, between businesses with access to infrastructure improvements, those without access to improvements, and for those in areas or zones that experience greater or lesser improvements in electricity due to differential levels of infrastructure upgrading. Gender disaggregated information for female-headed businesses will be pursued to the extent possible.

(ii) Power Sector Reform Activity. The most rigorous evaluation possible will be conducted, possibly employing an interrupted time series approach. The evaluation will estimate the causal relationship between changes in sector governance with: (1) Changes in ESCOM financial and operational performance; and (2) increases in private investment, generation capacity and electricity coverage for different groups such as female-headed households and regions of the country. The evaluation will also assess: (A) the extent to which improvements in MERA independence and regulatory capacity result in improved quality of service and supply by ESCOM; and (B) the extent to which this Activity improves the efficiency (employees per customer, response time to outages, etc.) and reduces losses at ESCOM. Differentiated impacts on customer service and access to men, women, and vulnerable groups will be explored.

(iii) Environment and Natural Resource Management (ENRM) Sub-Activity. The evaluation will attempt to isolate the causal factors linking weed and siltation in the Shire river basin to outages downstream at generation sites, particularly the extent to which palliative weed and silt management measures reduce the frequency and duration of outages and improve plant availability at hydropower plants downstream of Liwonde barrage. Potentially using a difference-in-differences and/or matching design, the evaluation will also attempt to look at how increases in tariff and/or electrification affect consumer energy choices, such as the use of charcoal and fuel wood, and the impact of the latter has on the environment. To the extent appropriate, differentiated impacts on different income groups, males vs. females, formal and informal firms, and factors such as access or non-access to capital will be explored. In order to implement the most rigorous evaluations possible, the Government and ESCOM will cooperate in assembling the required time series and other data required to implement the chosen methodology.

(b) Project Performance Evaluation. The M&E Plan will make provision for evaluations of all relevant Project activities. The M&E Plan will also make provision for final Project level evaluations ("*Final Evaluations*"). With the prior written approval of MCC, the Government or MCA-Malawi will engage independent evaluators to conduct the Final Evaluations at the end of the Project. The Final Evaluations will review progress during Compact implementation and provide a qualitative context for interpreting monitoring data and impact evaluation findings. They must at a minimum: (i) Evaluate the efficiency and effectiveness of the Activities; (ii) determine if and analyze the reasons why the Compact Goal, Program Objective and Project Objective, outcome(s) and output(s) were or were not achieved; (iii) identify positive and negative unintended results of the Program; (iv) provide

lessons learned that may be applied to similar projects; and (v) assess the likelihood that results will be sustained over time.

(c) Special Studies. The M&E Plan will include a description of the methods to be used for special studies, as necessary, funded through this Compact or by MCC. Plans for conducting the special studies will be determined jointly between the Government or MCA-Malawi and MCC before the approval of the M&E Plan. MCC, the Government and MCA-Malawi have agreed to conduct the following study as part of the Power Sector Reform Activity:

(i) Prior to entry into force of the Compact, the Government and MCC will agree on a method by which to independently evaluate and assess Malawi's regulatory environment and the governance of ESCOM and the power sector in Malawi as a whole. MCA-Malawi and the Government will then conduct both the Corporate Governance Benchmarking Study and the Sector Benchmarking Study by Year 2 of the Compact.

The M&E Plan will identify and make provision for any other special studies, ad hoc evaluations, and research that may be needed as part of the monitoring and evaluating of this Compact. Either MCC, MCA-Malawi or the Government may request special studies or ad hoc evaluations of Activities, or the Project as a whole prior to the expiration of the Compact Term. When the Government engages an evaluator, the engagement will be subject to the prior written approval of MCC. Contract terms must ensure non-biased results and the publication of results.

(d) Request for Ad Hoc Evaluation or Special Study. If MCA-Malawi or the Government require an ad hoc independent evaluation or special study at the request of the Government for any reason, including for the purpose of contesting an MCC determination with respect to a Project or Activity or to seek funding from other donors, no MCC Funding resources may be applied to such evaluation or special study without MCC's prior written approval.

5. Other Components of the M&E Plan

In addition to the monitoring and evaluation components, the M&E Plan will include the following components for the Program, Project and Activities, including, where appropriate, roles and responsibilities of the relevant parties and providers:

(a) Costs. A detailed cost estimate for all components of the M&E Plan; and

(b) Assumptions and Risks. Any assumption or risk external to the Program that underlies the accomplishment of the Program Objective, Project Objective and Activity outcomes and outputs.

6. Approval and Implementation of the M&E Plan

The approval and implementation of the M&E Plan, as amended from time to time, will be in accordance with the Program Implementation Agreement, any other relevant Supplemental Agreement and the MCC Policy for Monitoring and Evaluation of Compacts and Threshold Programs.

Annex IV Conditions Precedent to Disbursement of Compact Implementation Funding

This Annex IV sets forth the conditions precedent applicable to Disbursements of Compact Implementation Funding (each a "*CIF Disbursement*"). Capitalized terms used in this Annex IV and not defined in this Compact will have the respective meanings assigned thereto in the Program Implementation Agreement. Upon execution of the Program Implementation Agreement, each CIF Disbursement will be subject to the terms of the Program Implementation Agreement.

1. Conditions Precedent to Initial CIF Disbursement

Each of the following must have occurred or been satisfied prior to the Initial CIF Disbursement:

(a) The Government (or MCA-Malawi) has delivered to MCC:

(i) An interim fiscal accountability plan acceptable to MCC; and

(ii) A CIF procurement plan acceptable to MCC.

2. Conditions Precedent to Each CIF Disbursement

Each of the following must have occurred or been satisfied prior to each CIF Disbursement:

(a) The Government (or MCA-Malawi) has delivered to MCC the following documents, in form and substance satisfactory to MCC:

(i) A completed Disbursement Request, together with the applicable Periodic Reports, for the applicable Disbursement Period, all in accordance with the Reporting Guidelines;

(ii) A certificate of the Government (or MCA-Malawi), dated as of the date of the CIF Disbursement Request, in such form as provided by MCC; and

(iii) If this Compact has entered into force in accordance with Article 7, (1) a Fiscal Agent Disbursement Certificate and (2) a Procurement Agent Disbursement Certificate.

(b) If any proceeds of the CIF Disbursement are to be deposited in a bank account, MCC has received satisfactory evidence that (i) the Bank Agreement has been executed and (ii) the Permitted Accounts have been established;

(c) Appointment of an entity or individual to provide fiscal agent services, as approved by MCC, until such time as the Government provides to MCC a true and complete copy of a Fiscal Agent Agreement, duly executed and in full force and effect, and the fiscal agent engaged thereby is mobilized;

(d) Appointment of an entity or individual to provide procurement agent services, as approved by MCC, until such time as the Government provides to MCC a true and complete copy of the Procurement Agent Agreement, duly executed and in full force and effect, and the procurement agent engaged thereby is mobilized; and

(e) MCC is satisfied, in its sole discretion, that:

(i) The activities being funded with such CIF Disbursement are necessary, advisable or otherwise consistent with the goal of facilitating the implementation of the Compact and will not violate any applicable law or regulation;

(ii) No material default or breach of any covenant, obligation or responsibility by the Government, MCA-Malawi or any Government entity has occurred and is continuing under this Compact or any Supplemental Agreement;

(iii) There has been no violation of, and the use of requested funds for the purposes requested will not violate, the limitations on use or treatment of MCC Funding set forth in Section 2.7 of this Compact or in any applicable law or regulation;

(iv) Any Taxes paid with MCC Funding through the date ninety (90) days prior to the start of the applicable Disbursement Period have been reimbursed by the Government in full in accordance with Section 2.8(c) of this Compact; and

(v) The Government has satisfied all of its payment obligations, including any insurance, indemnification, tax payments or other obligations, and contributed all resources required from it, under this Compact and any Supplemental Agreement.

3. For Any CIF Disbursement Occurring After This Compact Has Entered Into Force in Accordance With Article 7

MCC is satisfied, in its sole discretion, that:

(a) MCC has received copies of any reports due from any technical consultants (including environmental auditors engaged by MCA-Malawi) for any Activity since the previous Disbursement Request, and all such reports are in form and substance satisfactory to MCC;

(b) The Implementation Plan Documents and Fiscal Accountability Plan are current and updated and are in form and substance satisfactory to MCC, and there has been progress satisfactory to MCC on the components of the Implementation Plan for the Projects or any relevant Activities related to such CIF Disbursement;

(c) There has been progress satisfactory to MCC on the M&E Plan and Social and Gender Integration Plan for the Program or Project or relevant Activity and substantial compliance with the requirements of the M&E Plan and Social and Gender Integration Plan (including the targets set forth therein and any applicable reporting requirements set forth therein for the relevant Disbursement Period);

(d) There has been no material negative finding in any financial audit report delivered in accordance with this Compact and the Audit Plan, for the prior two quarters (or such other period as the Audit Plan may require);

(e) MCC does not have grounds for concluding that any matter certified to it in the related MCA Disbursement Certificate, the Fiscal Agent Disbursement Certificate or the Procurement Agent Disbursement Certificate is not as certified;

(f) If any of the officers or key staff of MCA-Malawi have been removed or resigned and the position remains vacant, MCA-Malawi is actively engaged in recruiting a replacement; and

(g) MCC has not determined, in its sole discretion, that an act, omission, condition, or event has occurred that would be the basis for MCC to suspend or terminate, in whole or in part, the Compact or MCC Funding in accordance with Section 5.1 of this Compact.

Annex V Definitions

Activity has the meaning provided in Part B of Annex I.

Additional Representative has the meaning provided in Section 4.2.

Audit Guidelines has the meaning provided in Section 3.8(a).

Baseline has the meaning provided in paragraph 3 of Annex III.

Board of Trustees has the meaning provided in paragraph 3(a)(i) of Part C of Annex I.

CIF Disbursement has the meaning provided in Annex IV.

Compact has the meaning provided in the Preamble.

Compact Goal has the meaning provided in Section 1.1.

Compact Implementation Funding has the meaning provided in Section 2.2(a).

Compact Records has the meaning provided in Section 3.7(a).

Compact Term has the meaning provided in Section 7.4.

Corporate Governance Benchmarking Study has the meaning provided in paragraph 2(a)(ii) of Part B of Annex I.

Covered Provider has the meaning provided in Section 3.7(c).

Disbursement has the meaning provided in Section 2.4.

DSC has the meaning provided in paragraph 2(a)(ii) of Part B of Annex I.

ESCOM has the meaning provided in Section 7.2(d).

ESCOM Board has the meaning provided in paragraph 2(a)(ii) of Part B of Annex I.

ENRM has the meaning provided in paragraph 1(e) of Part B of Annex I.

ERNMAP has the meaning provided in paragraph 1(e)(ii) of Part B of Annex I.

ESIAs has the meaning provided in paragraph 3 of Part B of Annex I.

Evaluation Component has the meaning provided in paragraph 1 of Annex III.

Excess CIF Amount has the meaning provided in Section 2.2(c).

Final Evaluations has the meaning provided in paragraph 4(b) of Annex III.

Financial Plan has the meaning provided in paragraph 2(a)(i) of Part B of Annex I.

Fiscal Agent has the meaning provided in paragraph 5 of Part C of Annex I.

Governance Guidelines means MCC's Guidelines for Accountable Entities and Implementation Structures, as such may be posted on MCC's Web site from time to time.

Government has the meaning provided in the Preamble.

Implementation Letter has the meaning provided in Section 3.5.

Indicators has the meaning provided in paragraph 3(a) of Annex III.

Infrastructure Development Activity has the meaning provided in Part B of Annex I.

Inspector General has the meaning provided in Section 3.7(d).

Intellectual Property means all registered and unregistered trademarks, service marks, logos, names, trade names and all other trademark rights; all registered and unregistered copyrights; all patents, inventions, shop rights, know how, trade secrets, designs, drawings, art work, plans, prints, manuals, computer files, computer software, hard copy files, catalogues, specifications, and other proprietary technology and similar information; and all registrations for, and applications for registration of, any of the foregoing, that are financed, in whole or in part, using MCC Funding.

IRP has the meaning provided in paragraph 1(a) of Part B of Annex I.

Kapichira II has the meaning provided in paragraph 1(f) of Part B of Annex I.

kWh has the meaning provided in paragraph 3 of Part A of Annex I.

M&E Annex has the meaning provided in Annex III.

M&E Plan has the meaning provided in Annex III.

Malawi has the meaning provided in the Preamble.

Management Unit has the meaning provided in paragraph 3 (c)(i) of Part C of Annex I.

MCA Act has the meaning provided in Section 2.2(a).

MCA-Malawi Core Team has the meaning provided in paragraph 1(b) of Part A of Annex I.

MCA-Malawi Trust Deed has the meaning provided in paragraph 3 of Part C of Annex I.

MCC has the meaning provided in the Preamble.

MCC Environmental Guidelines has the meaning provided in Section 2.7(c).

MCC Funding has the meaning provided in Section 2.3.

MCC Gender Policy means the MCC "Gender Policy"(including any guidance documents issued in connection with the guidelines) posted from time to time on the MCC Web site or otherwise made available to the Government.

MCC Policy for Monitoring and Evaluation of Compacts and Threshold Programs has the meaning provided in Annex III.

MCC Program Procurement Guidelines has the meaning provided in Section 3.6.

MCC Web site has the meaning provided in Section 2.7.

MGDs has the meaning provided in paragraph 2 of Annex III.

MERA has the meaning provided in paragraph 2 of Part B of Annex I.

MERA Board has the meaning provided in paragraph 2(b)(ii) of Part B of Annex I.

MNREE has the meaning provided in paragraph 2 of Part B of Annex I.

Monitoring Component has the meaning provided in paragraph 1 of Annex III.

Multi-Year Financial Plan Summary has the meaning provided in paragraph 1 of Annex II.

ODPP has the meaning provided in paragraph 2(a)(iii) of Part B of Annex I.

OP 4.12 has the meaning provided in paragraph 3 of Part B of Annex I.

Party and *Parties* have the meaning provided in the Preamble.

Permitted Account has the meaning provided in Section 2.4.

PMC has the meaning provided in paragraph 4 of Part C of Annex I.

Power Sector Reform Activity has the meaning provided in Part B of Annex I.

Power Sector Reform Agenda has the meaning provided in paragraph 2(c) of Part B of Annex I.

Power Sector Revitalization Project has the meaning provided in Part B of Annex I.

PPP has the meaning provided in paragraph 1(a) of Part A of Annex I.

Principal Representative has the meaning provided in Section 4.2.

Procurement Agent has the meaning provided in paragraph 6 of Part C of Annex I.

Program has the meaning provided in the Recitals.

Program Assets means any assets, goods or property (real, tangible or intangible) purchased or financed in whole or in part (directly or indirectly) by MCC Funding.

Program Funding has the meaning provided in Section 2.1.

Program Guidelines means collectively the Audit Guidelines, the MCC Environmental Guidelines, the MCC Gender Policy, the Governance Guidelines, the MCC Program Procurement Guidelines, the Reporting Guidelines, the MCC Policy for Monitoring and Evaluation of Compacts and Threshold Programs, the MCC Cost Principles for Government Affiliates Involved in Compact Implementation (including any successor to any of the foregoing) and any other guidelines, policies or guidance papers relating to the administration of MCC-funded compact programs and as from time to time published on the MCC Web site.

Program Implementation Agreement and *PIA* have the meaning provided in Section 3.1.

Program Objective has the meaning provided in Section 1.2.

Project has the meaning provided in Section 1.3.

Project Cooperation Agreement has the meaning provided in paragraph 4 of Part C of Annex I.

Project Objective has the meaning provided in Section 1.3.

Project Partner has the meaning provided in paragraph 4 of Part C of Annex I.

Provider has the meaning provided in Section 3.7(c).

REA has the meaning provided in paragraph 2(b)(iii) of Part B of Annex I.

Reporting Guidelines means the MCC "Guidance on Quarterly MCA Disbursement Request and Reporting Package" posted by MCC on the MCC Web site or otherwise publicly made available.

SBM Plan has the meaning provided in paragraph 2(b)(iii) of Part B of Annex I.

Sector Benchmarking Study has the meaning provided in paragraph 2(b)(ii) of Part B of Annex I.

Social and Gender Integration Plan has the meaning provided in paragraph 3 of Part B of Annex I.

Supplemental Agreement means any agreement between (a) the Government (or any Government affiliate) and MCC (including, but not limited to, the PIA), or (b) MCC and/or the Government (or any Government affiliate), on the one hand, and any third party, on the other hand, including any of the Providers, in each case, setting forth the details of any funding, implementing or other arrangements in furtherance of this Compact.

Target has the meaning provided in paragraph 3(a) of Annex III.

Tariff Indexation Framework has the meaning provided in paragraph 2(b)(i) of Part B of Annex I.

Tax Schedules has the meaning provided in Section 2.8(b).

Taxes has the meaning provided in Section 2.8(a).

Turnaround Facility has the meaning provided in Section 7.2(d).

United States Dollars or *US$* means the lawful currency of the United States of America.

USAID is the United States Agency for International Development.

[FR Doc. 2011–8983 Filed 4–13–11; 8:45 am]

BILLING CODE 9211–03–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (11–038)]

NASA Advisory Council; Education and Public Outreach Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the Education and Public Outreach Committee of the NASA Advisory Council (NAC).

DATES: Friday, April 29, 2011, 8:30 a.m. to 5:30 p.m., Local Time.

ADDRESSES: From 8:30 to 9:45 a.m., the meeting will occur at the Edward Jones Dome located at 701 Convention Plaza in St. Louis, MO. From 10 a.m.–12 noon, the meeting will be conducted at the Renaissance St. Louis Grand & Suites, 800 Washington Avenue, in St. Louis, MO, in the Benton Room. From 2–5:30 p.m., the meeting will take place at the Edward Jones Dome, 701 Convention Plaza, in St. Louis, MO.

FOR FURTHER INFORMATION CONTACT: This meeting will also take place telephonically and via WebEx. Any interested person should contact Ms. Erika G. Vick, Executive Secretary for the Education and Public Outreach Committee, National Aeronautics and Space Administration, Washington, DC, at *Erika.vick-1@nasa.gov,* no later than 4 p.m., local time, April 27, 2011, to get further information about participating via teleconference and/or WebEx.

SUPPLEMENTARY INFORMATION: The agenda for the meeting includes the following topics:

FIRST Robotics Championship Opening Ceremony,

FIRST Robotics from the NASA HQ Perspective,

FIRST Robotics from the NASA Center Perspective,

Leadership Forum,

Tour the FIRST Robotics Teams.

The meeting will be open to the public up to the seating capacity of the room. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Dated: April 8, 2011.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2011–9036 Filed 4–13–11; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (11–039)]

NASA Advisory Council; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the NASA Advisory Council.

DATES: Thursday, May 5, 2011, 8 a.m.–5 p.m., Local Time

Friday, May 6, 2011, 8 a.m.–12 p.m., Local Time.

ADDRESSES: Ohio Aerospace Institute, The President's Room, 22800 Cedar Point Road, Cleveland, OH 44142.

FOR FURTHER INFORMATION CONTACT: Ms. Marla King, NAC Administrative Officer, National Aeronautics and Space Administration Headquarters, Washington, DC 20546, 202/358–1148.

SUPPLEMENTARY INFORMATION: The agenda for the meeting will include reports from the NAC Committees:

—Aeronautics
—Audit, Finance and Analysis
—Commercial Space
—Education and Public Outreach
—Exploration
—Information Technology Infrastructure
—Science
—Space Operations
—Technology and Innovation

The meeting will be open to the public up to the seating capacity of the room. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Dated: April 8, 2011.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2011–9035 Filed 4–13–11; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (11–040)]

NASA Advisory Council; Science Committee; Earth Science Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Earth Science Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

DATES: Wednesday, May 11, 8:30 a.m. to 4 p.m., and Thursday, May 12, 2010, 8:30 a.m. to 2 p.m., Local Time.

ADDRESSES: NASA Headquarters, 300 E Street, SW., Room 3H46, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. The agenda for the meeting includes the following topics:

—Earth Science Division Update.
—NASA's Earth Science Modeling Programs and Activities.

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Attendees will be requested to sign a register and to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. Foreign nationals attending this meeting will be required to provide a copy of their passport, visa, or green card in addition to providing the following information no less than 10 working days prior to the meeting: Full name; gender; date/place of birth; citizenship; visa/green card information (number, type, expiration date); passport information (number, country, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee. To expedite admittance, attendees with U.S. citizenship can provide identifying information 3 working days in advance by contacting Marian Norris via e-mail at *mnorris@nasa.gov* or by telephone at (202) 358–4452.

Dated: April 8, 2011.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2011–9037 Filed 4–13–11; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (11–037)]

NASA Advisory Council; Task Group of the Science Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Task Group of the NASA Advisory Council (NAC) Science Committee. This Task Group reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

DATES: Wednesday, May 4, 2011, 2 p.m. to 4 p.m., Local Time.

ADDRESSES: This meeting will take place telephonically and by WebEx. Any interested person may call the USA toll free conference call number 800–369–3194, pass code TAGAGMAY4, to participate in this meeting by telephone. The WebEx link is *https://nasa.webex.com/,* meeting number 394 692 974, and password tagag_May4.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*

SUPPLEMENTARY INFORMATION: The agenda for the meeting includes the following topic:

—Organizing Analysis Groups to Serve the Needs of More than One NASA Mission Directorate It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Dated: April 8, 2011.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2011–9039 Filed 4–13–11; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Seek Approval To Continue an Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and Request for Comments.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request renewal of this collection. In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we are providing an opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting that OMB approve clearance of this collection for no longer than 3 years.

DATES: Written comments on this notice must be received by June 13, 2011 to be

assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Written comments regarding the information collection and requests for copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Blvd., Rm. 295, Arlington, VA 22230, or by e-mail to *splimpto@nsf.gov*.

FOR FURTHER INFORMATION CONTACT: Contact Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230; telephone 703–292–7556; or send e-mail to *splimpto@nsf.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Title of Collection: National Science Foundation Science Honorary Awards.

OMB Approval Number: 3145–0035.

Expiration Date of Approval: June 30, 2011.

Type of Request: Intent to seek approval to revise an information collection for three years.

Abstract: The National Science Foundation (NSF) administers several honorary awards, among them the President's National Medal of Science, the Alan T. Waterman Award, the National Science Board (NSB) Vannevar Bush Award, the NSB Public Service Award, and the Presidential Awards for Excellence in Science, Mathematics and Engineering Mentoring (PAESMEM) program.

In 2003, to comply with E-government requirements, the nomination processes were converted to electronic submission through the National Science Foundation's (NSF) FastLane system. Individuals can now prepare nominations and references through *http://www.fastlane.nsf.gov/honawards/*. First-time users must register on the Fastlane Web site using the link found in the upper right-hand corner above the "Log In" box before accessing any of the honorary award categories.

Use of the Information: The Foundation has the following honorary award programs:

• President's National Medal of Science. Statutory authority for the President's National Medal of Science is contained in 42 U.S.C. 1881 (Pub. L. 86–209), which established the award and stated that "(t)he President shall * * * award the Medal on the recommendations received from the National Academy of Sciences or on the basis of such other information and evidence as * * * appropriate."

Subsequently, Executive Order 10961 specified procedures for the Award by establishing a National Medal of Science Committee which would "receive recommendations made by any other nationally representative scientific or engineering organization." On the basis of these recommendations, the Committee was directed to select its candidates and to forward its recommendations to the President.

In 1962, to comply with these directives, the Committee initiated a solicitation form letter to invite these nominations. In 1979, the Committee initiated a nomination form as an attachment to the solicitation letter. A slightly modified version of the nomination form was used in 1980.

The Committee established the following guidelines for selection of candidates:

1. Principal criterion: the total impact of an individual's work on the current state of physical, biological, mathematical, engineering or social and behavioral sciences.

2. Achievements of an unusually significant nature in relation to the potential effects on the development of scientific thought.

3. Unusually distinguished service in the general advancement of science and engineering, especially when accompanied by substantial contributions to the content of science. Recognition by peers within the scientific community.

4. Contributions to innovation and industry.

5. Influence on education through publications, teaching activities, outreach, mentoring, *etc.*

6. Must be a U.S. citizen or permanent resident who has applied for citizenship.

In 2003, the Committee changed the active period of eligibility to three years, including the year of nomination. After that time, candidates must be renominated with a new nomination package for them to be considered by the Committee.

Narratives are now restricted to two pages of text, as stipulated in the guidelines at *http://www.fastlane.nsf.gov/honawards/nms*.

• Alan T. Waterman Award. Congress established the Alan T. Waterman Award in August 1975 (42 U.S.C. 1881a (Pub. L. 94–86) and authorized NSF to "establish the Alan T. Waterman Award for research or advanced study in any of the sciences or engineering" to mark the 25th anniversary of the National Science Foundation and to honor its first Director. The annual award recognizes an outstanding young researcher in any field of science or engineering supported by NSF. In addition to a medal, the awardee receives a grant of $500,000 over a three-year period for scientific research or advanced study in the mathematical, physical, medical, biological, engineering, social, or other sciences at the institution of the recipient's choice.

The Alan T. Waterman Award Committee was established by NSF to comply with the directive contained in P.L. 94–86. The Committee solicits nominations from members of the National Academy of Sciences, National Academy of Engineering, scientific and technical organizations, and any other source, public or private, as appropriate.

In 1976, the Committee initiated a form letter to solicit these nominations. In 1980, a nomination form was used which standardized the nomination procedures, allowed for more effective Committee review, and permitted better staff work in a short period of time. On the basis of its review, the Committee forwards its recommendation to the Director, NSF, and the National Science Board (NSB).

Candidates must be U.S. citizens or permanent residents and must be 35 years of age or younger or not more than seven years beyond receipt of the Ph.D. degree by December 31 of the year in which they are nominated. Candidates should have demonstrated exceptional individual achievements in scientific or engineering research of sufficient quality to place them at the forefront of their peers. Criteria include originality, innovation, and significant impact on the field.

• Vannevar Bush Award. The NSB established the Vannevar Bush Award in 1980 to honor Dr. Bush's unique contributions to public service. The award recognizes an individual who, through public service activities in science and technology, has made an outstanding "contribution toward the welfare of mankind and the Nation."

The NSB *ad hoc* Vannevar Bush Award Committee annually solicits nominations from selected scientific engineering and educational societies. Candidates must be a senior stateperson who is an American citizen and meets two or more of the following criteria:

1. Distinguished himself/herself through public service activities in science and technology.

2. Pioneered the exploration, charting, and settlement of new frontiers in science, technology, education, and public service.

3. Demonstrated leadership and creativity that have inspired others to distinguished careers in science and technology.

4. Contributed to the welfare of the Nation and mankind through activities in science and technology.

5. Demonstrated leadership and creativity that have helped mold the history of advancements in the Nation's science, technology, and education.

Nominations must include a narrative description about the nominee, a curriculum vitae (without publications), and a brief citation summarizing the nominee's scientific or technological contributions to our national welfare in promotion of the progress of science. Nominations must also include two reference letters, submitted separate from the nomination through *http://www.fastlane.nsf.gov/honawards/* Nominations remain active for three years, including the year of nomination. After that time, candidates must be renominated with a new nomination for them to be considered by the selection committee.

• NSB Public Service Award. The NSB Public Service Award Committee was established in November 1996. This annual award recognizes people and organizations that have increased the public understanding of science or engineering. The award is given to an individual and to a group (company, corporation, or organization), but not to members of the U.S. Government.

Eligibility includes any individual or group (company, corporation, or organization) that has increased the public understanding of science or engineering. Members of the U.S. Government are not eligible for consideration.

Candidates for the individual and group (company, corporation, or organization) award must have made contributions to public service in areas other than research, and should meet one or more of the following criteria:

1. Increased the public's understanding of the processes of science and engineering through scientific discovery, innovation and its communication to the public.

2. Encouraged others to help raise the public understanding of science and technology.

3. Promoted the engagement of scientists and engineers in public outreach and scientific literacy.

4. Contributed to the development of broad science and engineering policy and its support.

5. Influenced and encouraged the next generation of scientist and engineers.

6. Achieved broad recognition outside the nominee's area of specialization.

7. Fostered awareness of science and technology among broad segments of the population.

Nominations must include a summary of the candidate's activities as they relate to the selection criteria; the nominator's name, address and telephone number; the name, address, and telephone number of the nominee; and the candidate's vita, if appropriate (no more than three pages).

The selection committee recommends the most outstanding candidate(s) for each category to the NSB, which approves the awardees.

Nominations remain active for a period of three years, including the year of nomination. After that time, candidates must be renominated with a new nomination for them to be considered by the selection committee.

• Presidential Awards for Excellence in Science, Mathematics and Engineering Mentoring (PAESMEM) program

In 1996, the White House, through the National Science and Technology Council (NSTC) and the Office of Science and Technology Policy (OSTP), established the Presidential Awards for Excellence in Science, Mathematics and Engineering Mentoring (PAESMEM) program. The program, administered on behalf of the White House by the National Science Foundation, seeks to identify outstanding mentoring efforts or programs designed to enhance the participation of groups (women, minorities and persons with disabilities) underrepresented in science, mathematics and engineering. The awardees will serve as exemplars to their colleagues and will be leaders in the national effort to more fully develop the Nation's human resources in science, mathematics and engineering.

An honorarium in the amount of $10,000 will accompany the award along with a commemorative Presidential certificate. The award will be made to: (1) An individual who has demonstrated outstanding and sustained mentoring and effective guidance to a significant number of students at the K–12, undergraduate, or graduate education level or (2) to an organization that, through its programming, has enabled a substantial number of students underrepresented in science, mathematics and engineering to successfully pursue and complete the relevant degree programs. It is anticipated that each award will be used to continue the recognized activity. The nominees must have served in such a mentoring role for at least five years.

Estimate of Burden: These are annual award programs with application deadlines varying according to the program. Public burden also may vary according to program; however, across all the programs, it is estimated that each submission will average 19 hours per respondent. If the nominator is thoroughly familiar with the scientific background of the nominee, time spent to complete the nomination may be considerably reduced.

Respondents: Individuals, businesses or other for-profit organizations, universities, non-profit institutions, and Federal and State governments.

Estimated Number of Responses per Award: 207 responses, broken down as follows: For the President's National Medal of Science, 55; for the Alan T. Waterman Award, 60; for the Vannevar Bush Award, 12; for the Public Service Award, 20; and for the PAESMEM, 60.

Estimated Total Annual Burden on Respondents: 3,980 hours, broken down by 1,100 hours for the President's National Medal of Science (20 hours per 55 respondents); 1,200 hours for the Alan T. Waterman Award (20 hours per 60 respondents); 180 hours for the Vannevar Bush Award (15 hours per 12 respondents); 300 hours for the Public Service Award (15 hours per 20 respondents); and 1,200 hours for the PAESMEM (20 hours per 60 respondents).

Frequency of Responses: Annually.

Comments: Comments are invited on (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; or (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: April 8, 2011.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2011–9032 Filed 4–13–11; 8:45 am]

BILLING CODE 7555–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64267; File No. SR–EDGA–2011–10]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGA Exchange, Inc. Fee Schedule

April 8, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 7, 2011, the EDGA Exchange, Inc. (the "Exchange" or the "EDGA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its fees and rebates applicable to Members[3] of the Exchange pursuant to EDGA Rule 15.1(a) and (c). All of the changes described herein are applicable to EDGA Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.directedge.com*.

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 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 Exchange proposes to increase the rebate on Flag P from $0.0025 per share to $0.0027 per share for adding liquidity on EDGX via an EDGA-originated ROUC routing strategy, as defined in Rule 11.9(b)(3)(a).

The Exchange proposes to reduce the rate on Flag T from $0.0020 per share to $0.0012 per share for routing using the ROUD/ROUE routing strategies, as defined in Rules 11.9(b)(3)(b) and (c)(i).

Currently, for orders routed during the Pre-Opening[4] and Post-Closing Sessions,[5] a charge of $0.0030 per share applies (yielding Flag "7"). The Exchange proposes to reduce the rate to $0.0027 per share for routing during these trading sessions.

Currently, when an order is routed using the ROUT routing strategy, (as defined in Rule 11.9(b)(3)(c)(ii), a flag "RT" is yielded and a fee of $0.0025 per share is assessed. However, when an order routes to EDGX using the ROUT routing strategy, a Flag "I" is yielded, and a fee of $0.0030 per share is assessed. The Exchange proposes that when an order is routed using the ROUT routing strategy to EDGX Exchange, a Flag "RX" is yielded and a fee of $0.0027 per share will be assessed. This proposed language is included in footnote 10 of the fee schedule. Thus, the Exchange notes that when an order is routed using the ROUT routing strategy, it can either yield either a Flag "RT" or "RX." The Exchange also notes that a Flag "RX" can also be yielded when an order is routed using the ROUX routing strategy, as defined in Rule 11.9(b)(3)(c)(iii).

As a result of the insert of new language in footnote 10, conforming changes have been made to re-number existing footnotes 10–12 as footnotes 11–13. New footnote 11 is also proposed to be clarified to insert "per share" after the fee of $0.0030 to conform it with other footnotes on the fee schedule.

EDGA Exchange proposes to implement these amendments to the Exchange fee schedule on April 7, 2011.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Exchange Act,[6] in general, and furthers the objectives of Section 6(b)(4),[7] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

The Exchange believes that the proposed increased rebate for Flag P from $0.0025 to $0.0027 per share is an equitable allocation of reasonable dues, fees, and other charges. The ROUC routing strategy, as defined in Rule 11.9(b)(3)(a), checks the System for available shares and then is sent sequentially to destinations on the System routing table, Nasdaq OMX BX, and NYSE. If shares remain unexecuted after routing, they are posted to EDGX Exchange, Inc. ("EDGX"). The increased rebate is designed to incentivize Members to route through EDGA to reach multiple sources of liquidity before routing to other low cost destinations, and thereby potentially increases volume on EDGA to the extent an order using the ROUC routing strategy executes on EDGA. The increased rebate allows Members to reach multiple sources of liquidity by routing order flow through EDGA rather than going directly to various venues. The increased rebate also provides Members with superior economics as the $0.0027 per share rebate represents a flat rate if the ROUC routing strategy posts to EDGX, and thus allows EDGA Members to share in potential volume tier savings realized by the Exchange.[8] If the Member had routed to EDGX directly and the order had added liquidity to EDGX, the Member could receive rebates ranging from $0.0023–$0.0033, depending on if a volume threshold were satisfied.[9] The $0.0027 per share rebate thus represents a rate in between these various tiered and non-tiered rebates provided for adding liquidity to EDGX. This type of rate is also similar to EDGA's rate for removing liquidity from LavaFlow (Flag M). The standard removal rate of $0.0029 per share is reduced to $0.0023 per share for orders routed to LavaFlow that achieve certain volume thresholds, as EDGA Members are able to share in potential volume tier savings realized by EDGA when routing to LavaFlow.[10] This type of rate is also similar to other rates that EDGA charges, such as "one-under" pricing for routing to Nasdaq using the INET order type and is consistent with the processing of similar routing strategies by EDGA's competitors.[11] In

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Member is any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange.

[4] As defined in EDGA Rule 1.5(q).

[5] As defined in EDGA Rule 1.5(p).

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

[8] *See* EDGX fee schedule, footnote 1.

[9] *Id.*

[10] *See* footnote 6 of the EDGA fee schedule.

[11] *See* footnote 7 of the EDGA fee schedule. *See also* BATS BZX fee schedule: Discounted Destination Specific Routing ("One Under") to

this rate, EDGA takes into account the rates that it is charged or rebated when routing to other low cost destinations, such as EDGX.

The Exchange believes that the rebate of $0.0027 is reasonable as it is consistent with how other exchanges pass through rebates for orders routed to a different exchange that add liquidity. For example, when Nasdaq routes to Nasdaq BX, Nasdaq passes back Nasdaq BX's standard rebate of $0.0014 per share. When NYSE Arca routes to NYSE, NYSE Arca passes back the standard NYSE rebate of $0.0015 per share. These rebates generally approximate what the originating exchange receives from the exchange that is routed to plus or minus a certain differential. EDGA's pricing is consistent with this premise.

The Exchange believes that the proposed rebate is non-discriminatory in that it applies uniformly to all Members.

The Exchange believes that the proposed reduced rate for Flag T (routing using ROUD/ROUE routing strategies) of $0.0012 per share is an equitable allocation of reasonable dues, fees, and other charges. Lower fees are directly correlated with a higher number of intermediate low cost destinations as the more intermediate low cost destinations that there are creates a greater potential for an execution at a lower cost destination before reaching a higher cost destination. For example, the ROUQ routing strategy, as defined in Rule 11.9(b)(3)(c)(iv),[12] routes to the lowest number of low cost destinations compared to the ROUD/ROUE [13] and ROUZ [14] routing strategies. As a result, the Exchange charges a higher fee for such strategy of $0.0020 per share (Flag Q). The ROUD/ROUE routing strategies route to a medium number of low cost destinations and the ROUZ routing strategy routes to the highest number of low costs destinations amongst these routing strategies. As a result, the Exchange will assess a proposed fee of $0.0012 per share for the ROUD/ROUE routing strategies and assesses the lowest fee for the ROUZ routing strategy of $0.0010 per share. The more low cost destinations that an order routes to allows the Exchange to pass on the savings it receives from such destinations to its members in lower fees. Therefore, it is equitable that ROUQ has the highest fee of $0.0020 per share, while ROUD/ROUE has an intermediate fee of $0.0012 per share, and ROUZ has the lowest fee of the three strategies of $0.0010 per share. The Exchange also notes that a difference between ROUQ and ROUZ routing strategies is that the additional routing destinations in the ROUZ routing strategy are intermediate between the routing destinations in ROUQ. This also accounts for the differences in fees. Therefore, for each additional intermediate low cost destination that an order routes to, the prices of the strategies mentioned above (ROUQ, ROUD/ROUE, ROUZ) decrease accordingly.

The Exchange believes that the rate is reasonable when compared to other market centers using similar routing strategies. The comparable routing strategy to the ROUD/ROUE routing strategies is Parallel D or Parallel 2D with the DRT (Dark routing technique) option on BZX. BZX charges $0.0020 per share for its DRT option. The Exchange believes that the proposed rebate is non-discriminatory in that it applies uniformly to all Members.

The Exchange believes that the proposed reduced rate for Flag 7 executions of $0.0027 per share is an equitable allocation of reasonable dues, fees, and other charges. The reduced rate is designed to incentivize Members to increase volume on EDGA during the Pre-Opening and Post-Closing Sessions, which have limited trading hours. In addition, it represents a blended flat-rate for customers which EDGA has derived by taking into account its costs of routing to various destinations on its fee schedule. The blended, flat-rate provides simplicity for customers, instead of passing through the actual rates that EDGA receives from various destinations on its schedule. This type of rate is similar to other rates that EDGA charges, such as "one-under" pricing for routing to Nasdaq using the INET order type and is consistent with the processing of similar routing strategies by EDGA's competitors.[15]

In addition, the Exchange notes that fewer Members generally trade during pre and post trading hours because of the limited time parameters associated with these trading sessions. The Exchange believes that the rate is equitable in that it is lower than comparable routing strategies that route during regular trading hours (i.e., Flag X, $0.0029 per share). The Exchange believes that the proposed rebate is non-discriminatory in that it applies uniformly to all Members.

Currently, when a Member uses the ROUT strategy, it is charged $0.0030 per share (Flag "I") when it routes to EDGX. The Exchange proposes to lower this fee to $0.0027 per share and yield Flag "RX" instead. The Exchange believes that the proposed decreased rate for orders that route to EDGX Exchange, Inc. using the ROUT routing strategy (as noted in footnote 10) represents an equitable allocation of reasonable dues, fees, and other charges since the decreased fee is designed to cap Member's routed fees at $0.0027 per share. The decreased fee is also designed to incentivize Members to sweep liquidity through EDGA before going to other destinations while allowing Members to reach multiple source of liquidity by routing order flow through EDGA rather than going directly to various venues.

The rate does not favor routing to EDGX as it is higher than the rate for routing to any other destination (i.e., Nasdaq) using the ROUT routing strategy, in which a fee of $0.0025 per share is assessed. For example, if a Member uses EDGA to route to Nasdaq using the ROUT routing strategy, the Member is charged $0.0025 per share (Flag RT). However, EDGA is charged Nasdaq's standard removal rate of $0.0030 per share. Analogously, when a member uses EDGA to route to EDGX using the ROUT routing strategy, the member is proposed to be charged $0.0027 per share. However, EDGA is charged EDGX's standard removal rate of $0.0030 per share. Therefore, a Member is more likely to use the ROUT routing strategy to route to Nasdaq rather than EDGX since the potential costs savings that is achieved by the Member is greater. ($0.0005 vs. $0.0003).

The comparable routing strategy to the ROUT strategy is either Parallel D or Parallel 2D with the DRT (Dark routing technique) option on BZX or SCAN/STGY on Nasdaq OMX Exchange ("Nasdaq.") BATS BZX Exchange charges $0.0028 per share for its Parallel D and Parallel 2D routing strategies and $0.0020 per share for its DRT option. Nasdaq charges $0.0030 per share for its SCAN and STGY routing strategies. The Exchange believes that the proposed rebate is non-discriminatory in that it

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NYSE, NYSE ARCA and NASDAQ. *See* Securities Exchange Act Release No. 62858, 75 FR 55838 (September 14, 2010) (SR–BATS–2010–023) (modifying the BATS fee schedule in order to amend the fees for its BATS + NYSE Arca destination specific routing option to continue to offer a "one under" pricing model).

[12] *See* SR–EDGA–2011–09 (April 1, 2011).

[13] The Exchange notes that ROUD/ROUE routing strategies route to the identical number of low cost destinations.

[14] *See* SR–EDGA–2011–09 (April 1, 2011). *See* Rule 11.9(b)(3)(c)(v).

[15] *See* footnote 7 of the EDGA fee schedule. *See also* BATS BZX fee schedule: Discounted Destination Specific Routing ("One Under") to NYSE, NYSE ARCA and NASDAQ. *See* Securities Exchange Act Release No. 62858, 75 FR 55838 (September 14, 2010) (SR–BATS–2010–023) (modifying the BATS fee schedule in order to amend the fees for its BATS + NYSE Arca destination specific routing option to continue to offer a "one under" pricing model).

applies uniformly to all Members. Based on these comparisons, the Exchange believes that the rate is reasonable as it is line with the fees assessed by BATS BZX Exchange.

The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange. The Exchange believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not 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

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

The foregoing rule change has become effective pursuant to Section 19(b)(3) of the Act [16] and Rule 19b–4(f)(2) [17] thereunder. 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 e-mail to *rule-comments@sec.gov*. Please include File Number SR–EDGA–2011–10 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–EDGA–2011–10. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission,[18] all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of 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–EDGA–2011–10 and should be submitted on or before May 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–9045 Filed 4–13–11; 8:45 am]

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[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 19b–4(f)(2).

[18] The text of the proposed rule change is available on Exchange's Web site at *http://www.directedge.com*, on the Commission's Web site at *http://www.sec.gov*, at EDGA, and at the Commission's Public Reference Room.

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64286; File No. SR–Phlx–2011–50]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Singly Listed and Multiply Listed Indexes

April 8, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on April 8, 2011, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Fee Schedule to discontinue assessing an Options Surcharge Fee for RMN.[3]

The Exchange also proposes to remove specific symbol references to certain indexes in the title of Section II of the Exchange's Fee Schedule captioned, "Equity Options Fees (Includes options overlying equities, ETFs, ETNs, HOLDRS, BKX, RUT, RMN, MNX, NDX which are Multiply Listed)" and instead substitute the word "indexes." The Exchange proposes to make other conforming changes in the Fee Schedule.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] RMN represents options on the one-tenth value Russell 2000® Index (the "Reduced Value Russell Index" or "RMN").

any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to discontinue assessing an Options Surcharge for RMN because that index is no longer Multiply Listed and the license fee costs would be absorbed in the fees assessed on Singly Listed products.[4] The Exchange currently assesses an Options Surcharge for RUT,[5] RMN, MNX[6] and NDX[7] of $.15 per contract for Specialists, ROTs, SQTs[8] and RSQTs,[9] Broker Dealers and Firms. The Exchange will continue to assess an Options Surcharge for RUT, MNX, NDX and BKX.

The purpose of this rule change is also to make the title of Section II of the Fee Schedule more general to address when a particular option switches from a Multiply Listed to a Singly Listed product. Specifically, the Exchange is amending Section II of the Fee Schedule, titled "Equity Options Fees (Includes options overlying equities, ETFs, ETNs, HOLDRS, BKX, RUT, RMN, MNX, NDX which are Multiply Listed)" to "Equity Options Fees (Includes options overlying equities, ETFs, ETNs, indexes and HOLDRS, which are Multiply Listed)." The Exchange is proposing to remove specific references to certain index symbols, namely BKX,[10] RUT, RMN, MNX and NDX, in the heading and instead use the broader term "indexes" in order to account for a circumstance where one of these named index options becomes Singly Listed.[11] The broader term "indexes" would clarify that only index options that are Multiply Listed would be assessed the fees in Section II. Index options that are Singly Listed options would continue to be assessed the fees in Section III, which applies to options overlying currencies, equities, ETFs, ETNs, indexes and HOLDRs not listed on another exchange.

The Exchange is proposing to make this change in the Preface Section of the Fee Schedule as well as references to Section II fees in Section IV, titled "PIXL Pricing."

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[12] in general, and furthers the objectives of Section 6(b)(4) of the Act[13] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities.

The Exchange believes that it is reasonable to not assess an Options Surcharge on RMN, a Singly Listed index option, because the license costs, which are recouped by the Options Surcharge Fee, are absorbed in the higher fees assessed to Singly Listed index options.

The Exchange believes that it is reasonable to remove the specific references to certain index symbols and instead insert the reference to "indexes" because the reference to the category of products is consistent with the remainder of the Fee Schedule[14] and more accurately describes the category of products applicable to Section II of the Fee Schedule.

The Exchange believes that the proposals to not assess an Options Surcharge on RMN and remove specific references to index symbols and insert the reference to "indexes" are equitable because these proposals would uniformly apply to members and member organizations trading Singly Listed and Multiply Listed products.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[15] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2011–50 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx-2011–50. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's

[4] RMN recently became a Singly Listed index option. The Exchange assesses higher fees for Singly Listed options as there are increased costs associated with those products.

[5] RUT represents the options on the Russell 2000® Index (the "Full Value Russell Index" or "RUT").

[6] MNX represents options on the one-tenth value of the Nasdaq 100 Index traded under the symbol MNX ("MNX").

[7] NDX represents options on the Nasdaq 100 Index traded under the symbol NDX ("NDX").

[8] An SQT is defined in Exchange Rule 1014(b)(ii)(A) as an ROT who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned.

[9] A RSQT is defined Exchange Rule in 1014(b)(ii)(B) as an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically in options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange.

[10] BKX represents the KBW Bank Index.

[11] RMN recently became a Singly Listed index option. This proposed amendment would remove RMN from Section II of the Fee Schedule as well as the other specifically named index symbols and instead refer to indexes generally.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4).

[14] *See* Section III of the Fee Schedule titled "Singly Listed Options (Includes options overlying currencies, equities, ETFs, ETNs, indexes and HOLDRS not listed on another exchange), where the broader term "indexes" is utilized.

[15] 15 U.S.C. 78s(b)(3)(A)(ii).

Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2011–50 and should be submitted on or before May 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Cathy Ahn,

Deputy Secretary.

[FR Doc. 2011–9073 Filed 4–13–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64265; File No. SR–Phlx–2011–43]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX LLC Relating to Permit Fees

April 8, 2011.

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 April 1, 2011, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Fee Schedule to waive Permit Fees for existing Exchange members or member organizations that cease to conduct an options business, but continue to conduct an equities business.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the waiver of Permit Fees to existing members or member organizations that cease to conduct an options business on Phlx XL II,[3] but continue to conduct business on NASDAQ OMX PSX ("PSX")[4] under a market participant identifier ("MPID")[5] registered to the member or member organization. The Exchange is proposing this waiver to incentivize existing members and member organizations to continue to transact an equities business at the Exchange.

The Exchange currently assesses members and member organizations who are transacting business on the Exchange a Permit Fee of $1,100 per month. The Exchange assesses members and member organizations who are not transacting business on the Exchange a Permit Fee of $7,500 per month. A member or member organization would not be assessed the $7,500 Permit Fee for not transacting business on the Exchange if that member is either: (i) Solely a PSX Participant or (ii) engaged in any options business at the Exchange in a particular month. If the Exchange member or member organization meets the exemption criteria related to the $7,500 Permit Fee, the member or member organization would be assessed the $1,100 Permit Fee. In addition, a member or member organization that sponsors an options participant[6] would pay an additional Permit Fee for each sponsored options participant.[7]

At the time PSX began operations in October 2010, the Exchange filed a rule change to waive the Application Fee, Initiation Fee, Permit Fee and Account Fee for applicants applying to participate in PSX ("October 2010 Rule Change").[8] The October 2010 Rule Change applied the waivers to *new* Exchange members applying solely to participate in PSX.[9] Also, the October 2010 Rule Change did not apply the waivers to an applicant seeking approval to participate solely in the options market, or to an applicant seeking to participate in both the equities and the options markets.[10] Finally, the October 2010 Rule Change did not apply the waivers to members or member organizations that ceased their options operations, but remained solely as PSX Participants.

This filing proposes to extend the October 2010 Rule Change waiver of the Permit Fee to those Exchange members and member organizations that cease an options business, but continue to conduct an equities business.[11]

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[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Phlx XL II is the Exchange's electronic options trading platform.

[4] PSX is the Exchange's cash equities market electronic trading platform.

[5] An MPID is a four-letter code used by a member to categorize its trading activity for a specific purpose.

[6] *See* Exchange Rule 1094 titled Sponsored Participants. A Sponsored Participant may obtain authorized access to the Exchange only if such access is authorized in advance by one or more Sponsoring Member Organizations. Sponsored Participants must enter into and maintain participant agreements with one or more Sponsoring Member Organizations establishing a proper relationship(s) and account(s) through which the Sponsored Participant may trade on the Exchange.

[7] *See* Securities Exchange Act Release No. 63569 (December 17, 2010), 75 FR 81323 (December 27, 2010) (SR–Phlx–2010–178).

[8] *See* Securities Exchange Act Release No. 63351 (November 19, 2010), 75 FR 73140 (November 29, 2010) (SR–Phlx–2010–54).

[9] *See* Securities Exchange Act Release No. 63351 (November 19, 2010), 75 FR 73140 (November 29, 2010) (SR–Phlx–2010–54).

[10] *See* Securities Exchange Act Release No. 63351 (November 19, 2010), 75 FR 73140 (November 29, 2010) (SR–Phlx–2010–54).

[11] These members and member organizations would not be assessed an Application Fee or Initiation Fee because they are already Exchange

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [12] in general, and furthers the objectives of Section 6(b)(4) of the Act [13] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities.

The Exchange believes that it is reasonable to lower fees as an incentive for existing Exchange members and member organizations to continue to transact business on PSX, even after closing their options operations.

The Exchange believes that the proposal is equitable because the waiver applies uniformly to any existing members and member organizations that cease options trading on the Exchange, but determine to remain active PSX Participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[14] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

members or member organizations and have previously paid those fees. In addition, the monthly Account Fee would not be applicable to PSX Participants as MPIDs are used to identify member firms' participation, not account numbers.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4).

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2011–43 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2011–43. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2011–43 and should be submitted on or before May 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8924 Filed 4–13–11: 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64284; File No. SR–Phlx–2011–48]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Update Provisions Regarding the Dress Code and Trade Verification

April 8, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on April 6, 2011, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to amend Phlx Rule 1054 (Verification of Contracts and Reconciliation of Uncompared Trades) and Regulation 6 (Dress) of Rule 60 (Order and Decorum Code) [3] to delete obsolete provisions and update and modernize these sections.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/,* at the principal office of the Exchange, and

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange's Order and Decorum regulations are part of the Exchange's Options Floor Procedure Advices ("OFPAs" or Advices"), which may correspond to Exchange rules, and contain the Exchange's minor rule plan ("MRP" or "Minor Rule Plan") in respect of options trading. The Minor Rule Plan consists of Advices with preset fines, pursuant to Rule 19d–1(c) under the Act. 17 CFR 240.19d–1(c). The Exchange is not, by this filing, amending the fine schedule for Regulation 6 in OFPA.

Similarly to OFPAs, the Exchange also has Equity Floor Procedure Advices ("EFPAs") in respect of equity trading, which are not amended by this filing.

at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Rule 1054 and Regulation 6 to delete obsolete provisions and update and modernize these sections.

The Exchange's Order and Decorum regulations pursuant to Rule 60 of the Option Floor Procedure Advices,[4] with corresponding fine schedules, were originally codified in 1989.[5] The dress code in Regulation 6 of Rule 60 in OFPA, which indicates dress norms for individuals on the options floor (the "Dress Code") was omitted inadvertently in the 1989 filing and was added the year thereafter.[6] The last proposal in 2007 to amend the Dress Code adopted a business casual code and indicated what business attire was deemed acceptable on the trading floor.[7]

The Exchange does not propose by this filing to eliminate its Regulation 6. Rather, in light of the Exchange options market combining on-floor auction trading with an extensive electronic market, the Exchange proposes to eliminate the specifics of the Dress Code from Regulation 6 and set forth a procedure whereby the Exchange will communicate the specifics of the Dress Code to members[8] and post them on the options floor. The Exchange believes that in this way it would be able to address obsolete or unused Dress Code requirements[9] and most efficiently address any needed changes and updates, subject to notification of Exchange members regarding such requirements.

Specifically, the Exchange proposes to amend Regulation 6 to indicate that the Dress Code outlining acceptable and unacceptable dress for members and their staff, as well as any changes to the Dress Code, will be communicated to members by the Exchange in writing.[10] In addition, to further provide notification to on-floor traders, the Dress Code will be posted on the options trading floor of the Exchange. Moreover, to make sure that members have proper notification regarding changes, the Exchange proposes that changes to the Dress Code will only be effective three business days after such changes are communicated to Exchange members. By communicating guidelines as needed regarding acceptable apparel while on the trading floor, the Exchange intends to encourage the membership (and their associated persons) to comply with the Dress Code requirements.

Rule 1054 regarding the procedure for verification and reconciliation of options trades has been in existence for more than thirty years.[11] During that time the rule has seen little substantive (material) modification.[12] As such, the rule still has obsolete legacy language discussing the printing and distribution of carbon copy trade contracts. The Exchange therefore proposes to eliminate reference to obsolete or unused language in Rule 1054, particularly in light of having both on-floor and electronic markets, while preserving most of the rule.

Specifically, after eliminating reference to carbon copy trade contracts, the Exchange proposes to state that a member organization which is a clearing member of the Options Clearing Corporation shall be obligated to compare all trades made through or on behalf of such member as soon as possible after such trades are made or after receiving notification thereof. In addition, as currently required by the rule, such member would have to reconcile all uncompared trades and advisory trades and report all reconciliations, corrections and adjustments to the Exchange in accordance with such procedures as

[4] Order and Decorum regulations relate to administration of health, safety, welfare and general order and decorum on the Exchange.

[5] See Securities Exchange Act Release No. 27072 (August 8, 1989), 54 FR 32550 (SR–Phlx–89–41) (notice of filing and immediate effectiveness).

[6] See Securities Exchange Act Release No. 28499 (October 10, 1990), 55 FR 41290 (SR–Phlx–90–29) (approval order).

[7] See Securities Exchange Act Release No. 55492 (March 20, 2007), 72 FR 14321 (March 27, 2007) (SR–Phlx–2006–61) (notice of filing).

Regulation 6 currently states:

Acceptable Business Casual Dress (*Men*): • Casual slacks (*i.e.* khakis, dockers, corduroy fabric). • Ties are optional, but must be neat, clean, and properly tied. If a tie is torn or frayed, you will be asked to remove it.

• Traditional collared shirts, polo shirts, golf shirts (shirts may be long or short sleeved). Shirts must be neat and clean. All shirts must be tucked in. Shirts must be buttoned at least to the second button from the top. • Dress shoes, casual shoes, loafers, athletic shoes and boots (note: pant legs may not be tucked into boots). All shoes must be neat and clean. • Traditional business attire is always acceptable. Blazers may be worn in lieu of trading jackets. • Trading jackets or blazers must be worn at all times on the trading floor. Identification badges must be properly displayed at chest level. • Sweaters worn over a collared shirt, turtlenecks worn under a collared shirt. Acceptable Business Casual Dress (*Women*): • Dresses or casual slacks (*i.e.* khakis, dockers, corduroy fabric). • Shirts, sweaters, shells, turtlenecks, blouses, polo shirts, golf shirts (long or short sleeved). • Dress shoes, casual shoes, loafers, athletic shoes and boots (*note:* pant legs may not be tucked into boots). All shoes must be neat and clean. Inappropriate Casual Dress (*Men & Women*): • Denim clothing of any kind (*i.e.* pants, skirts, dresses, shirts, vests, blouses). • Sweat shirts, sweat pants, other sweat apparel of any kind and sport jerseys. • Shorts, gym shorts, skorts, culottes, beach wear, workout attire or miniskirts. • T-shirts of any kind. • Stirrup pants or other excessively tight or revealing clothing (*i.e.* bike shorts, leggings, sheer blouses, stretch pants). • Tank tops, halter tops, tube tops, tops with spaghetti straps, backless tops, crop tops (*note:* no bare midriffs). • Clothing with any inappropriate, or oversized logos (cartoon logos, oversized sports logos or inappropriately suggestive logos). • Slippers, sandals of any kind or open toed shoes. • Military fatigues, cargo pants, surgical scrubs, bib overalls. • Clothing which is torn, soiled or in need of repair. • Clothing and/or accessories which disrupt business operations or which draw excessive attention to an employee • Hats or headgear unless worn for religious purposes.

[8] This includes, per current use, members, member organizations, participants, and participant organizations. As such, the Exchange is deleting obsolete or unused references to Floor Manager, Post Supervisor, and Firm Representative from Regulation 6.

[9] As an example, the current Dress Code discusses items that are essentially out of use such as skorts and culottes.

[10] The Exchange intends to communicate the Dress Code to members within one week of the date of effectiveness of this proposal.

[11] Rule 1054 was formerly known as Rule 1074. *See* Securities Exchange Act Release No. 13591 (June 2, 1977) (SR–PBW–76–10) (approval order regarding, among things, renumbering Rule 1074 as 1054).

Rule 1054 states: At the time of execution, a carbon copy trade contract will be printed and distributed by the Exchange to the respective purchasing and selling members. Promptly upon receipt of such contract, a member organization which is a clearing member of the Options Clearing Corporation shall be obligated to verify the information shown on the contract, to reconcile all uncompared trades and advisory trades shown on the uncompared trade contract and to report all reconciliations, corrections and adjustments to the Exchange in accordance with such procedures as may be established by the Exchange from time to time. Such reconciliation report shall be filed with the Exchange prior to such cut-off hour as the Exchange may prescribe and shall be binding on the clearing member on whose behalf it is filed. The Exchange will consider all trades as executed and compared as of such cut-off hour.

[12] The last modification of the rule, as an example, was for the purpose of deleting Commentary .01 to Rule 1054 relating to use of certain technology for the trading of Dell options. *See* Securities Exchange Act Release No. 42143 (November 16, 1999), 64 FR 66224 (SR–Phlx–99–22) (November 24, 1999) (notice of filing and immediate effectiveness).

may be established by the Exchange from time to time. The current rule requirement that such reconciliation report shall be filed with the Exchange prior to such cut-off hour as the Exchange may prescribe and shall be binding on the clearing member on whose behalf it is filed is not changed.

The Exchange believes that the proposed Rule 1054 changes not only deletes obsolete provisions and updates the rule but also brings the rule into conformity with current options trading practices.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [13] in general, and furthers the objectives of Section 6(b)(5) of the Act [14] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, by deleting obsolete provisions and updating and modernizing its Regulation 6 regarding the Exchange's Dress Code and Rule 1054 regarding verification and reconciliation of options trades.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange believes that the foregoing proposed rule change may take effect upon filing with the Commission pursuant to Section 19(b)(3)(A) [15] of the Act and Rule 19b–4(f)(6)(iii) thereunder [16] because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2011–48 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2011–48. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2011–48 and should be submitted on or before May 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Cathy Ahn,

Deputy Secretary.

[FR Doc. 2011–9061 Filed 4–13–11; 8:45 am]

BILLING CODE 8011–01–P

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[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64276; File No. SR–Phlx–2011–13]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change Relating to Amendments to NASDAQ OMX PHLX LLC's Limited Liability Company Agreement, By-Laws, Rules, Advices and Regulations

April 8, 2011.

I. Introduction

On February 16, 2011, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") 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 amend the Exchange's Limited Liability Company Agreement, By-Laws, Rules, Advices and Regulations to alter its governance process and to make other non-substantive conforming changes. The proposed rule change was published for comment in the **Federal Register** on March 4, 2011.[3] The Commission received no comment letters regarding the proposal.

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[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 63981 (February 25, 2011), 76 FR 12180 (March 4, 2011) ("Notice").

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 April 18, 2011.

The Commission is hereby extending the 45-day period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change. In particular, the extension of time will ensure that the Commission has sufficient time to consider and take action on the Exchange's proposal.

Accordingly, pursuant to Section 19(b)(2)(A)(ii)(I) of the Act[5] and for the reasons stated above, the Commission designates June 2, 2011, 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 No. SR–Phlx–2011–13.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–9046 Filed 4–13–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64282; File No. SR–Phlx–2011–28]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Expand the Number of Components in the PHLX Oil Service Sector℠ Known as OSX℠, on Which Options Are Listed and Traded

April 8, 2011.

I. Introduction

On March 2, 2011, NASDAQ OMX PHLX LLC (the "Exchange" or "Phlx") 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 expand the number of components in the PHLX Oil Service Sector℠ (the "Index" or "OSX"℠) and to change the Index weighting methodology. The proposed rule change was published for comment in the **Federal Register** on March 17, 2011.[3] The Commission received no comments 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 May 1, 2011.

The Commission is hereby extending the 45-day period for Commission action on the proposed rule change. 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, which relates to the addition of components to the Index and a change to the Index weighting methodology.

Accordingly, pursuant to Section 19(b)(2)(A)(ii)(I) of the Act[5] and for the reason stated above, the Commission designates June 15, 2011, 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 No. SR–Phlx–2011–28.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–9047 Filed 4–13–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64283; File No. SR–FINRA–2011–012]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change Relating to TRACE Reporting of Asset-Backed Securities

April 8, 2011.

I. Introduction

On March 3, 2011, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change that would amend the FINRA Rule 6700 Series and FINRA Rule 7730 to prepare for the reporting of Asset-Backed Securities transactions to TRACE.[3] The proposed rule change was published for comment in the **Federal Register** on March 21, 2011.[4]

Section 19(b)(2) of the Act[5] 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 May 5, 2011.

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[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2)(A)(ii)(I).

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 64075 (March 11, 2011), 76 FR 14702 ("Notice").

[4] 15 U.S.C. 78s(b)(1).

[5] 15 U.S.C. 78s(b)(2)(A)(ii)(I).

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(2).

[2] 17 CFR 240.19b–4.

[3] On February 22, 2010, the Commission approved a proposed rule change that amends the FINRA Rule 6700 Series to define Asset-Backed Securities as TRACE-Eligible Securities and to require members to report transactions in such securities to TRACE, and, concomitantly, FINRA Rule 7730, to establish reporting fees for transactions in such securities. *See* Securities Exchange Act Release No. 61566 (February 22, 2010), 75 FR 9262 (March 1, 2010) (Order Approving File No. SR–FINRA–2009–065) ("TRACE ABS filing") and *Regulatory Notice* 10–23 (April 2010). The rule amendments in the TRACE ABS filing currently are anticipated to become effective on May 16, 2011. *See* Securities Exchange Act Release No. 63223 (November 1, 2010), 75 FR 68654 (November 8, 2010) (Notice of Filing and Immediate Effectiveness of SR–FINRA–2010–054 to Extend the Implementation Period for SR–FINRA–2009–065); *Regulatory Notice* 10–55 (October 2010) (establishing May 16, 2011 as the effective date).

[4] *See* Securities Exchange Act Release No. 64084 (March 16, 2011), 76 FR 15352 ("Notice").

[5] 15 U.S.C. 78s(b)(1).

The Commission is hereby extending the 45-day period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change. The extension of time will ensure that the Commission has sufficient time to consider and take action on the Exchange's proposal.

Accordingly, pursuant to Section 19(b)(2)(A)(ii)(I) of the Act[6] and for the reasons stated above, the Commission designates June 19, 2011, 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 No. SR–FINRA–2011–012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–9048 Filed 4–13–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64285; File No. SR–NASDAQ–2011–025]

Self-Regulatory Organizations; NASDAQ Stock Market, LLC; Order Approving Proposed Rule Change To Amend The NASDAQ OMX Group, Inc. By-Laws

April 8, 2011.

I. Introduction

On February 8, 2011, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the By-Laws of its parent corporation, The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). The proposed rule change was published for comment in the **Federal Register** on February 24, 2011.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

NASDAQ proposes amending the By-Laws of NASDAQ OMX to: (i) Amend the name of the Nominating Committee to the Nominating & Governance Committee; (ii) amend the NASDAQ OMX PHLX, Inc. reference to reflect a recent conversion to a limited liability company; and (iii) clarify By-Law Article IV, Section 4.4 that broker nonvotes are not counted as a vote cast either "for" or "against" a Director.

Currently, NASDAQ OMX By-Laws provide for a Nominating Committee that is appointed pursuant to the By-Laws. In addition to the responsibilities listed in By-Law Article IV, Section 4.13(h), NASDAQ states that the Nominating Committee also conducts certain governance functions such as consulting with the Board and the management to determine the characteristics, skills and experience desired for the Board as a whole and for its individual members, overseeing the annual director evaluation, and reviewing the overall effectiveness of the Board.

Accordingly, the Exchange proposes to rename and change all references to the "Nominating Committee" in the By-Laws, to the "Nominating & Governance Committee" so that the title of the committee accurately reflects all of its current functions, including those that are deemed governance functions. NASDAQ's proposal to rename the Nominating Committee would not change the function of the committee, but is intended to clarify the current functions and its governance role with respect to the Board selection process.

Additionally, NASDAQ proposes to amend Article 1, Section (o) of NASDAQ OMX's By-Laws to change the reference to "NASDAQ OMX PHLX, Inc." to "NASDAQ OMX PHLX LLC" to reflect a recently filed rule change to NASDAQ OMX PHLX, Inc. from a Delaware corporation to a Delaware limited liability company.[4]

Finally, NASDAQ proposes to add the words "and broker nonvotes" to NASDAQ OMX's By-Law Article IV, Section 4.4 to make clear that broker nonvotes will not be counted as a vote cast either "for" or "against" that director's election. In its filing, NASDAQ noted that NASDAQ OMX's past practice has been to not count a broker nonvote as a vote cast either for or against a director's election. Accordingly, this change would clarify this practice by codifying it into the By-Laws.

NASDAQ also stated that in 2010, NASDAQ OMX amended its By-Laws to state that in an uncontested election, a majority voting standard would apply to the election of its directors, requiring directors to be elected by the holders of a majority of the votes cast at any meeting for the election of directors at which a quorum is present in an uncontested election.[5] A plurality standard would still remain in a contested election. In its filing, NASDAQ noted that, the practice of not counting a broker nonvote as a vote cast either for or against a director's election will remain unchanged by the amendment to a majority vote standard. In support of this change, in its filing NASDAQ states that under Delaware case law, broker nonvotes are not considered as votes cast for or against a proposal or director nominee.[6]

III. Discussion and Commission's Findings

After carefully reviewing the proposed rule change, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[7] In particular, the Commission finds that the proposal is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(1)[9] of the Act, in particular, in that it is designed to enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act. In addition, the Commission finds that the proposal is consistent with Section 6(b)(5)[10] of the Act in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that the proposed amendments to NASDAQ OMX's By-Laws by changing the name of the Nominating Committee to the Nominating and Governance Committee, and amending references to

[6] 15 U.S.C. 78s(b)(2)(A)(ii)(I).

[7] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 63925 (February 17, 2011), 76 FR 10418 (February 24, 2011) ("Notice").

[4] *See* Securities Exchange Act Release No. 62783 (August 27, 2010), 75 FR 54204 (September 3, 2010) (SR–Phlx–2010–104).

[5] *See* Securities Exchange Act Release No. 61876 (April 8, 2010), 75 FR 19436 (April 14, 2010) (SR–NASDAQ–2010–025).

[6] *See Berlin* v. *Emerald Partners*, 552 A.2d 482 494 (Del Supr. 1988).

[7] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(1).

[10] 15 U.S.C. 78f(b)(5).

an exchange name to reflect a corporate change to a limited liability company, are both clarifying in nature. The Nominating Committee name change will ensure that the committee's title accurately reflects its functions, which, according to NASDAQ, includes governance through its general review of the overall effectiveness of the Board and other similar duties. Similarly, the change in NASDAQ OMX's By-Laws to reflect a previously approved change of NASDAQ OMX PHLX, Inc. to a Delaware limited liability company will ensure that the By-Laws are accurate and properly reflect an exchange entity name.

Finally, as to the part of the proposal that will specifically set forth in NASDAQ OMX's By-Laws that broker nonvotes will not be counted as a vote cast either for or against in director elections, the Commission believes that this change should help to provide transparency to the election of directors process, especially in light of NASDAQ OMX's recent change to a majority vote standard in the uncontested election of directors. While in its filing NASDAQ notes that it has always been NASDAQ OMX's practice to not count broker nonvotes for or against in director elections, the impact of the broker nonvotes and how such votes are counted will take on added significance under NASDAQ OMX's newly adopted majority vote standard for director elections. Accordingly, the Commission believes it is important that the NASDAQ OMX By-Laws provide clarity on this issue, even though, according to NASDAQ, Delaware case law would dictate the same result.

Based on the above, the Commission believes that the changes being proposed by NASDAQ to amend the By-Laws of its parent corporation, NASDAQ OMX, is consistent with investor protection and the public interest pursuant to Section 6(b)(5) of the Act since the changes will ensure the accuracy of the NASDAQ OMX By-Laws, as well as clarify for shareholders how broker nonvotes will be counted in director elections.[11]

IV. Conclusion

It is therefore ordered, that pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (SR–NASDAQ–2011–025), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–9049 Filed 4–13–11; 8:45 am]

BILLING CODE 8011–01–P

[11] As noted by NASDAQ in its filing, the other Boards of Directors of the regulatory subsidiaries of NASDAQ OMX have approved the changes to NASDAQ OMX's By-Laws. The Commission expects such regulatory subsidiaries to file these changes shortly pursuant to Section 19(b) of the Act.

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64287; File No. SR–NYSE–2011–15]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to NYSE Rule 1401 To Modify the Initial Trading Market Value for Debt Securities

April 8, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on April 1, 2011, the New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I 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 NYSE Rule 1401 to modify the initial trading market value requirements for Debt Securities from $10,000,000 to $5,000,000. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com*, and on the Commission's Web site at *http://www.sec.gov*.

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 NYSE proposes to amend NYSE Rule 1401 to modify the initial trading market value requirements for Debt Securities from $10,000,000 to $5,000,000.

NYSE Rule 1400 and 1401 set forth requirements for trading Debt Securities. The term "Debt Securities" includes any unlisted note, bond, debenture or evidence of indebtedness that is: (1) Statutorily exempt from the registration requirements of Section 12(b) of the Securities Exchange Act of 1934 (the "Act"), or (2) eligible to be traded under a Commission exemptive order.[3] Currently, NYSE Rule 1401 requires that Debt Securities traded on the NYSE must have an outstanding aggregate market value or principal amount of no less than $10,000,000 on the date that trading commences.

The Exchange proposes to reduce the required initial outstanding aggregate market value to $5,000,000. There are numerous corporate retail note programs offered by well-known issuers whose equity securities are listed on the Exchange, such as General Electric, DOW Chemical, Goldman Sachs and Caterpillar, that involve issuances of $5,000,000 or more but less than $10,000,000 in principal.[4] However, such issuances may not be traded on the NYSE under current NYSE Rule 1401. The Exchange believes that setting the minimum initial aggregate market value at $5,000,000 would expand the number of Debt Securities that could be traded on the Exchange's platform, thereby

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* NYSE Rule 1401 and Securities Exchange Act Release No. 54766 (November 16, 2006), 71 FR 67657 (November 22, 2006). Under the exemptive order, among other things, the issuer of the debt security must have at least one class of common or preferred equity security listed on the Exchange. Further, for purposes of NYSE Rule 1400(2), the term Debt Securities includes only securities that, if they were to be listed on the NYSE, would be listed under Sections 102.03 or 103.05 of the NYSE's Listed Company Manual, except that such securities do not include any security that is defined as an "equity security" under Section 3(a)(11) of the Act. The term Debt Securities also does not include a security that, if listed on the NYSE, would have been listed under Sections 703.19 or 703.21 of the NYSE's Listed Company Manual. *See* NYSE Rule 1400.

[4] Examples of debt securities issuances in the $5–10 million range include GE 4.85 8/15/14 CUSIP 36966RHE9, DOW 5.35 6/15/2013 CUSIP 26054LEG4; GS 5.50 5/15/2019 CUSIP 38141E6C8; CAT 5.85 2/15/2028 CUSIP 14912HJP6.

offering investors in such securities greater transparency and choice with respect to secondary market trading.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),[5] in general, and furthers the objectives of Section 6(b)(5) of the Act,[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes the proposed rule changes are consistent with these principles in that they seek to expand the number of Debt Securities that can be traded on the NYSE, thereby benefiting investors with increased transparency and choice with respect to secondary market trading.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2011–15 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2011–15. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NYSE–2011–15 and should be submitted on or before May 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–9050 Filed 4–13–11; 8:45 am]

BILLING CODE 8011–01–P

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64275; File No. SR–ISE–2011–24]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Enhancements to the Exchange's Electronic Trading Platform

April 8, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 7, 2011, the International Securities Exchange, LLC (the "Exchange" or the "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 Exchange has filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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 certain rules to facilitate enhancements to its electronic options trading system being implemented as part of the Optimise platform. The text of the proposed rule change is available on the Exchange's Web site *http://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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has developed an enhanced technology trading platform (the "Optimise platform"). To assure a smooth transition, the Exchange will migrate option classes from its current trading system to the Optimise platform over time (the "Transition Period").[5] The Optimise platform will offer members the same trading functionality as the current trading system with some minor enhancements, several of which were previously added to the ISE's rules.[6] Additionally, the Exchange previously adopted rule changes to identify certain functionality that it anticipated would be phased-in during the Transition Period.[7] However, since the adoption of these rule changes, the initial plan for the launch of the Optimise platform has changed, and the Optimise platform will now have most of the current functionality available during the Transition Period. The purpose of this rule filing is to remove language from the Exchange's rules indicating that certain functionality is not available on the Optimise platform and to identify additional minor enhancements that will be included on the Optimise platform.

Specifically, the Exchange proposes to delete Supplementary Material .10 to Rule 716 (Block Trades), Supplementary Material .03 to Rule 722 (Complex Orders), and Supplementary Material .09 to Rule 723 (Price Improvement Mechanism for Crossing Transactions), which indicate that the Block Order Mechanism, Facilitation Mechanism, Solicited Order Mechanism, Price Improvement Mechanism and complex order functionality will not be available for options traded on the Optimise platform.[8] The Optimise platform will now include all of this functionality during the Transition Period.

With the Optimise platform, the Exchange proposes to add the flexibility for the Exchange to determine, on a class basis, whether orders on the complex order book at the same price are executed in time priority, as they are currently, or among participants pursuant to ISE Rule 713(e) and Supplementary Material .01(a) to ISE Rule 713(e).[9] Under ISE Rule 713(e), priority customer orders are given priority over Professional Orders and market maker quotes at the same price, which will also be the case on the complex order book. However, because there is no obligation for primary market makers to enter quotes on the complex order book, primary market makers will not receive the enhanced participation rights to which they are entitled in the regular market.[10] The Exchange notes that this proposed rule change does not affect the provisions of paragraph (b)(2) of Rule 722 which limits the execution of complex orders when there are Priority Customer orders on the Exchange for the individual series of a complex order.

For options traded on the Optimise platform, the Exchange also proposes to modify the Price Improvement Mechanism so that Counter-Side Orders and Improvement Orders only execute against the Agency Order that is being exposed. Currently, when members respond to an order entered into the Price Improvement Mechanism, they may be executed against certain other, unrelated orders.[11] While the Exchange initially implemented this particular feature of the Price Improvement Mechanism to differentiate its service from those offered by other exchanges and to potentially attract additional unrelated order flow to the Exchange, this feature may discourage market participants from responding to Agency Orders. Accordingly, the Exchange believes that removing this feature could increase competition for orders entered into the Price Improvement Mechanism and thereby result in additional price improvement for agency orders.[12]

Finally, the Exchange notes that members initially will not be able to enter reserve orders, nor complex orders with an all-or-none or minimum quantity modifier in options classes that are traded on the Optimise platform. The Exchange will make these order types available on the Optimise platform as promptly as possible within the first month of the Transition Period, and assure that members are informed of the status of these order types.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b),[13] in general, and Section 6(b)(5)[14] in particular, that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the Exchange believes the Optimise platform will improve the efficiency and quality of options executions on the Exchange. The Exchange further believes that liquidity on the complex order book may be enhanced by executing all interest at the same price pro-rata based on size (with Priority Customer priority) as it does in its regular market. Having the ability to determine on a class basis whether orders on the complex order book at the same price will be executed in time priority or pro-rata based on size (with Priority Customer priority) will give the Exchange greater flexibility to respond to market needs and enhance its ability to compete more effectively. Finally, the Exchange believes that limiting the availability of Counter-Side Orders and Improvement Orders to execute only against the agency order being exposed in the Price Improvement Mechanism will encourage greater price competition with larger size, thereby increasing the opportunity for such agency order to receive additional price improvement.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not 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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The

[5] Options classes will be transferred from the current trading platform to the Optimise trading platform. The same options cannot trade on both systems at the same time. The Exchange has been working with its members to assure a smooth transition to the Optimise trading platform and will continue to do so up to the launch of the new technology and during the Transition Period.

[6] *See* Securities Exchange Act Release No. 63117 (October 15, 2010), 75 FR 65042 (October 21, 2010) (SR–ISE–2010–101).

[7] *Id.*

[8] The only functionality that will be phased-in is related to cabinet trades pursuant to ISE Rule 718.

[9] Exchanges have previously been given the ability to choose an allocation methodology on a class or series basis. *See, e.g.*, CBOE Rule 6.53C. The Exchange will notify Exchange members regarding allocation methodology for executions on the complex order book via circular.

[10] Supplementary Material to Rule 713, paragraphs .01(b) and (c) (enhanced participation rights for Primary Market Makers).

[11] Pursuant to ISE Rule 723(d)(6), when a market order or marketable limit order on the same side of the market as the Agency Order ends the exposure period, it will execute against any unexecuted interest in the Price Improvement Mechanism after the Agency Order is executed in full.

[12] The Price Improvement Period on the Boston Options Exchange ("BOX") currently contains this feature. *See* Chapter 5, Sec. 18(i) of the BOX Rules.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

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: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, 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 [15] and Rule 19b–4(f)(6) thereunder.[16]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. 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 requests that the Commission waive the 30 day period for this filing to become operative so that it may become effective and operative upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act and rule 19b–4(f)(6) thereunder. The Exchange believes that waiver of the operative delay period is consistent with the protection of investors and the public interest in that it will allow the Exchange to effect an orderly launch of the Optimise platform on April 11, 2011. Specifically, the Exchange previously adopted rule changes to identify certain existing functionality that it anticipated would be phase-in during the Transition Period.[17] However, virtually all of that functionality has been fully tested and is available for the launch. The Exchange believes that it will be less disruptive to members for this existing functionality to be available on the Optimise platform at the launch, as the trading environment will be more similar to the Exchange's existing market. In this respect, the Exchange notes that it has been conducting extensive testing with members and that it will initially trade only ten securities that have very limited trading volume on the Optimise platform. The Exchange will gradually transition additional securities to the Optimise platform to assure an orderly implementation of the new system.

The Commission notes that in October of 2010, the Exchange filed a proposed rule change relating to the functionalities that are the subject of the current proposal.[18] At that time, the Exchange identified certain functionalities, including the functionalities that are the subject of the current proposal, which will not be immediately available on the Optimise platform but would be phased in during the Transition Period. However, the Exchange now represents that the functionalities discussed in this filing are fully tested and available for launch on April 11. Allowing the functionalities to be available on the Optimise platform at the launch rather than after a delay should contribute to a more orderly launch and should facilitate implementation of Optimise under the Transition Period contemplated by the Exchange's rules. Further, as stated above, the Exchange has already noted its intent to later adopt these functionalities in a previous proposal. Therefore, Commission believes that waiving the 30-day operative delay is appropriate and consistent with the protection of investors and the public interest [19] and designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2011–24 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–2011–24. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange.[20] 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–2011–24 and should be submitted on or before May 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8973 Filed 4–13–11; 8:45 am]

BILLING CODE 8011–01–P

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its 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 fulfilled this requirement.

[17] *See* Securities Exchange Act Release No. 63117 (October 15, 2010), 75 FR 65042 (October 21, 2010) (SR–ISE–2010–101).

[18] *See id.*

[19] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[20] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov*.

[21] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12519 and #12520]

Florida Disaster #FL–00060

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Florida dated 04/07/2011.

Incident: Severe Storms, Flooding and Tornadoes.

Incident Period: 03/31/2011.

Effective Date: 04/07/2011.

Physical Loan Application Deadline Date: 06/06/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 01/09/2012.

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: Notice is hereby given that as a result of the Administrator's disaster declaration,. applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Hillsborough.

Contiguous Counties: Florida:

Hardee, Manatee, Pasco, Pinellas, Polk.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	5.125
Homeowners without Credit Available Elsewhere	2.563
Businesses with Credit Available Elsewhere	6.000
Businesses without Credit Available Elsewhere	4.000
Non-Profit Organizations with Credit Available Elsewhere	3.250
Non-Profit Organizations without Credit Available Elsewhere	3.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Non-Profit Organizations without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 12519 C and for economic injury is 12520 0.

The State which received an EIDL Declaration # is Florida.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: April 7, 2011.

Karen G. Mills,

Administrator.

[FR Doc. 2011–9104 Filed 4–13–11; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Interagency Task Force on Veterans Small Business Development

AGENCY: U.S. Small Business Administration.

ACTION: Notice of open Federal Interagency Task Force meeting.

SUMMARY: The SBA is issuing this notice to announce the location, date, time, and agenda for the fourth public meeting of the Interagency Task Force on Veterans Small Business Development. The meeting will be open to the public.

DATES: Friday, April 29, 2011, from 9 a.m. to 12 Noon in the Eisenhower Conference Room, Side A & B, located on the 2nd floor.

ADDRESSES: U.S. Small Business Administration, 409 3rd Street SW., Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), SBA announces the meeting of the Interagency Task Force on Veterans Small Business Development. The Task Force is established pursuant to Executive Order 13540 and focused on coordinating the efforts of Federal agencies to improve capital, business development opportunities and pre-established Federal contracting goals for small business concerns owned and controlled by veterans (VOB's) and service-disabled veterans (SDVOSB'S). Moreover, the Task Force shall coordinate administrative and regulatory activities and develop proposals relating to "six focus areas": (1) Access to capital (loans, surety bonding and franchising); (2) Ensure achievement of pre-established contracting goals, including mentor protégé and matching with contracting opportunities; (3) Increase the integrity of certifications of status as a small business; (4) Reducing paperwork and administrative burdens in accessing business development and entrepreneurship opportunities; (5) Increasing and improving training and counseling services; and (6) Making other improvements to support veteran's business development by the Federal government.

The Interagency Task Force on Veterans Small Business Development shall submit to the President, no later than one year after its first meeting, a report on the performance of its functions and any proposals developed pursuant to the "six focus areas" identified above. The purpose of the meeting is scheduled as a full Task Force meeting. The agenda will include a presentation and discussion from each Task Force Subcommittee regarding preliminary conclusions and recommendations to date for their respective "focus area" of the Task Force. In addition, the Task Force will allow time to obtain public comment from individuals and representatives of organizations regarding the areas of focus.

FOR FURTHER INFORMATION CONTACT: The meeting is open to the public; however, advance notice of attendance is requested. Anyone wishing to attend and/or make a presentation to the Task Force must contact Raymond B. Snyder, by April 25, 2011, by e-mail in order to be placed on the agenda. Comments for the Record should be applicable to the "six focus areas" of the Task Force and emailed prior to the meeting for inclusion in the public record, verbal presentations; however, will be limited to five minutes in the interest of time and to accommodate as many presenters as possible. Written comments should be e-mailed to Raymond B. Snyder, Deputy Associate Administrator, Office of Veterans Business Development, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, at the e-mail address for the Task Force, *vetstaskforce@sba.gov*.

Additionally, if you need accommodations because of a disability or require additional information, please contact Raymond B. Snyder, Designated Federal Official for the Task Force at (202) 205–6773; or by e-mail at: *raymond.snyder@sba.gov*, SBA, Office of Veterans Business Development, 409 3rd Street, SW., Washington, DC 20416.

For more information, please visit our Web site at *http://www.sba.gov/vets*.

Dated: April 11, 2011.

Dan Jones,

SBA Committee Management Officer.

[FR Doc. 2011–9101 Filed 4–13–11; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA 2011–0022]

Privacy Act of 1974, as Amended; Computer Matching Program (SSA/Centers for Medicare & Medicaid Services (CMS))—Match Number 1076

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a renewal of an existing computer matching program that will expire on April 17, 2011.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces a renewal of an existing computer matching program that we are currently conducting with CMS.

DATES: We will file a report of the subject matching program with the Committee on Homeland Security and Governmental Affairs of the Senate; the Committee on Oversight and Government Reform of the House of Representatives, and the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). The matching program will be effective as indicated below.

ADDRESSES: Interested parties may comment on this notice by either telefaxing to (410) 966–0869 or writing to the Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, 617 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401. All comments received will be available for public inspection at this address.

FOR FURTHER INFORMATION CONTACT: The Executive Director, Office of Privacy and Disclosure, Office of the General Counsel as shown above.

SUPPLEMENTARY INFORMATION:

A. General

The Computer Matching and Privacy Protection Act of 1988 (Public Law (Pub. L.) 100–503), amended the Privacy Act (5 U.S.C. 552a) by describing the conditions under which computer matching involving the Federal government could be performed and adding certain protections for persons applying for, and receiving, Federal benefits. Section 7201 of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508) further amended the Privacy Act regarding protections for such persons.

The Privacy Act, as amended, regulates the use of computer matching by Federal agencies when records in a system of records are matched with other Federal, State, or local government records. It requires Federal agencies involved in computer matching programs to:

(1) Negotiate written agreements with the other agency or agencies participating in the matching programs;

(2) Obtain the approval of the matching agreement by the Data Integrity Boards of the participating Federal agencies;

(3) Publish notice of the computer matching program in the **Federal Register**;

(4) Furnish detailed reports about matching programs to Congress and OMB;

(5) Notify applicants and beneficiaries that their records are subject to matching; and

(6) Verify match findings before reducing, suspending, terminating, or denying a person's benefits or payments.

B. SSA Computer Matches Subject to the Privacy Act

We have taken action to ensure that all of our computer matching programs comply with the requirements of the Privacy Act, as amended.

Daniel F. Callahan,

Acting Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

Notice of Computer Matching Program, SSA with the (Centers for Medicare & Medicaid Services (CMS))

A. Participating Agencies

SSA and CMS.

B. Purpose of the Matching Program

The purpose of this matching program is to provide us with health facility admission information. We will use this information to administer the Supplemental Security Income (SSI) efficiently to identify Special Veterans' Benefits (SVB) beneficiaries who are no longer residing outside of the United States.

C. Authority for Conducting the Matching Program

The legal authority for this agreement is executed pursuant to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, (Pub. L. 100–503, the Computer Matching and Privacy Protection Act (CMPPA) of 1988), the Office of Management and Budget (OMB) Circular A–130 entitled, Management of Federal Information Resources, at 61 FR 6428–6435 (February 20, 1996), and OMB guidelines pertaining to computer matching at 54 FR 25818 (June 19, 1989).

The legal authority for the SSI portion of the matching program is contained in sections 1611(e)(1)(A) and (B) and 1631(f) of the Social Security Act (Act) (42 U.S.C. 1382(e)(1)(A) and (B) and 1383(f)); see also 20 CFR 416.211. The legal authority for the SVB portion of the matching program is contained in sections 801 and 806(a) and (b) of the Act (42 U.S.C. 1001 and 1006(a) and (b)).

Section 1631(f) of the Act (42 U.S.C. 1383(f)) requires Federal agencies to provide SSA with such information as necessary to establish eligibility for SSI payments.

D. Categories of Records and Persons Covered by the Matching Program

SSA will provide CMS with a finder file on a monthly basis extracted from SSA's Supplemental Security Income Record and Special Veterans Benefits (SSR/SVB), SSA/ODSSIS 60–0103, with identifying information with respect to recipients of SSI benefits. CMS will match the SSA finder file against the system of records for individuals on the Long Term Care Minimum Data Set (LTC/MDS 09–70–0528) and submit its reply file to SSA no later than 21 days after receipt of the SSA finder file. The Title VIII benefit information is included in the SSI system of records and is paid using SSA's SSI automated system. The indicator identifying Title VIII claims resides on the SSR, SSA/ODSSIS 60–0103, though it is not an SSI payment.

Routine use number 19, effective January 11, 2006, allows disclosure to Federal, State, or local agencies for administering cash or non-cash income maintenance or health maintenance programs.

E. Inclusive Dates of the Matching Program

The effective date of this matching program is April 17, 2011 provided that the following notice periods have lapsed: 30 days after publication of this notice in the **Federal Register** and 40 days after notice of the matching program is sent to Congress and OMB. The matching program will continue for 18 months from the effective date and may be extended for an additional 12 months thereafter, if certain conditions are met.

[FR Doc. 2011–9094 Filed 4–13–11; 8:45 am]

BILLING CODE 4191–02–P

SUSQUEHANNA RIVER BASIN COMMISSION

Notice of Projects Approved or Rescinded for Consumptive Uses of Water

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice of Approved or Rescinded Projects.

SUMMARY: This notice lists the projects approved or rescinded by rule by the Susquehanna River Basin Commission during the period set forth in **DATES.**

DATES: November 1, 2010, through December 31, 2010.

ADDRESSES: Susquehanna River Basin Commission, 1721 North Front Street, Harrisburg, PA 17102–2391.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, telephone: (717) 238–0423, ext. 306; fax: (717) 238–2436; e-mail: *rcairo@srbc.net* or Stephanie L. Richardson, Secretary to the Commission, telephone: (717) 238–0423, ext. 304; fax: (717) 238–2436; e-mail: *srichardson@srbc.net*. Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists the projects, described below, receiving approval or rescission for the consumptive use of water pursuant to the Commission's approval by rule process set forth in 18 CFR 806.22(e) and 18 CFR 806.22(f) for the time period specified above:

Approvals by Rule Issued Under 18 CFR 806.22(e)

1. Empire Pipeline, Inc.—Tioga County Extension Project, ABR–201011050, Jackson Township, Tioga County, Pa.; Town of Canton and Town of Corning, Steuben County, N.Y.; Consumptive Use of up to 0.300 mgd; Approval Date: November 18, 2010.

2. SVC Manufacturing, Inc., Gatorade—Mountaintop Facility, ABR–201012042, Wright Township, Luzerne County, Pa.; Consumptive Use of up to 1.300 mgd; Approval Date: December 20, 2010.

Approvals by Rule Issued Under 18 CFR 806.22(f)

1. Novus Operating, LLC, Pad ID: Sylvester 4H Pad, ABR–201011001, Brookfield Township, Tioga County, Pa.; Consumptive Use of up to 2.000 mgd; Approval Date: November 1, 2010.

2. East Resources Management, LLC, Pad ID: Guillaume 715, ABR–201011002, Liberty Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 1, 2010.

3. Chesapeake Appalachia, LLC, Pad ID: Sparky, ABR–201011003, Sheshequin Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 1, 2010.

4. Chesapeake Appalachia, LLC, Pad ID: Gregory, ABR–201011004, Wysox Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 1, 2010.

5. Chief Oil & Gas LLC, Pad ID: Vollers Drilling Pad #1, ABR–201011005, Elkland Township, Sullivan County, Pa.; Consumptive Use of up to 2.000 mgd; Approval Date: November 1, 2010.

6. Enerplus Resources (USA) Corporation, Pad ID: Snow Shoe 1, ABR–201011006, Snow Shoe Township, Centre County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 1, 2010.

7. Enerplus Resources (USA) Corporation, Pad ID: Snow Shoe 2, ABR–201011007, Snow Shoe Township, Centre County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 1, 2010.

8. Chesapeake Appalachia, LLC, Pad ID: Norton, ABR–201011008, Elkland Township, Sullivan County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 2, 2010.

9. Chesapeake Appalachia, LLC, Pad ID: Crystal, ABR–201011009, North Towanda Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 2, 2010.

10. Chesapeake Appalachia, LLC, Pad ID: Weisbrod, ABR–201011010, Sheshequin Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 3, 2010.

11. Chesapeake Appalachia, LLC, Pad ID: Dland, ABR–201011011, Leroy Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 3, 2010.

12. Williams Production Appalachia LLC, Pad ID: Resource Recovery Well Pad 2, ABR–201011012, Snow Shoe Township, Centre County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 3, 2010.

13. Chesapeake Appalachia, LLC, Pad ID: M&M Estates, ABR–201011013, Fox Township, Sullivan County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 4, 2010.

14. Southwestern Energy Production Company, Pad ID: Wells Pad, ABR–201011014, Benton Township, Lackawanna County, Pa.; Consumptive Use of up to 4.990 mgd; Approval Date: November 5, 2010.

15. Southwestern Energy Production Company, Pad ID: Belcher Pad, ABR–201011015, Clifford Township, Susquehanna County, Pa.; Consumptive Use of up to 4.990 mgd; Approval Date: November 5, 2010.

16. EnCana Oil & Gas (USA) Inc., Pad ID: 4P, ABR–201011016, Lake Township, Luzerne County, Pa.; Consumptive Use of up to 1.200 mgd; Approval Date: November 8, 2010.

17. Anadarko E&P Company LP, Pad ID: David G Wascher Pad A, ABR–201011017, Lewis Township, Lycoming County, Pa.; Consumptive Use of up to 3.000 mgd; Approval Date: November 8, 2010.

18. XTO Energy Incorporated, Pad ID: Levan 8532H, ABR–201011018, Pine Township, Columbia County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 8, 2010.

19. XTO Energy Incorporated, Pad ID: Shaner8507H, ABR-201011019, Jordan Township, Lycoming County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 8, 2010.

20. XTO Energy Incorporated, Pad ID: Renn8506H, ABR–201011020, Jordan Township, Lycoming County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 8, 2010.

21. Williams Production Appalachia LLC, Pad ID: Webster—1, ABR–2009401.1, Franklin Township, Susquehanna County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 9, 2010.

22. Williams Production Appalachia LLC, Pad ID: Holbrook # 1, ABR–2009402.1, Bridgewater Township, Susquehanna County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 9, 2010.

23. Chesapeake Appalachia, LLC, Pad ID: Zaleski, ABR–201011021, Asylum Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 9, 2010.

24. Carrizo Marcellus, LLC, Pad ID: Shaskas South, ABR–201011022, Jessup Township, Susquehanna County, Pa.; Consumptive Use of up to 2.100 mgd; Approval Date: November 10, 2010.

25. Carrizo Marcellus, LLC, Pad ID: Bonnice 2, ABR–201011023, Jessup Township, Susquehanna County, Pa.; Consumptive Use of up to 2.100 mgd; Approval Date: November 10, 2010.

26. EOG Resources, Inc. Pad ID: SGL 90C Pad, ABR–2010011024, Lawrence Township, Clearfield County, Pa.; Consumptive Use of up to 4.999 mgd; Approval Date: November 10, 2010.

27. EOG Resources, Inc. Pad ID: SGL 90E Pad, ABR–2010011025, Lawrence Township, Clearfield County, Pa.; Consumptive Use of up to 4.999 mgd; Approval Date: November 10, 2010.

28. EOG Resources, Inc. Pad ID: SGL 90F Pad, ABR–2010011026, Lawrence

Township, Clearfield County, Pa.; Consumptive Use of up to 4.999 mgd; Approval Date: November 10, 2010.

29. Novus Operating, LLC, Pad ID: Red Tailed Hawk, ABR–201011027, Covington Township, Tioga County, Pa.; Consumptive Use of up to 2.000 mgd; Approval Date: November 12, 2010.

30. Chesapeake Appalachia, LLC, Pad ID: Lytwyn, ABR–201011028, Smithfield Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 12, 2010.

31. Talisman Energy USA Inc., Pad ID: 03 072 Szumski, ABR–201011029, Wells Township, Bradford County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: November 12, 2010.

32. Cabot Oil & Gas Corporation, Pad ID: StalterD P1, ABR–201011030, Lenox Township, Susquehanna County, Pa.; Consumptive Use of up to 3.575 mgd; Approval Date: November 12, 2010.

33. Talisman Energy USA Inc., Pad ID: 05 073 Harvey, ABR–201011031, Orwell Township, Bradford County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: November 12, 2010.

34. Talisman Energy USA Inc., Pad ID: 05 019 Cobb, ABR–201011032, Pike Township, Bradford County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: November 12, 2010.

35. Talisman Energy USA Inc., Pad ID: 05 028 Neville V, ABR–201011033, Warren Township, Bradford County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: November 15, 2010.

36. Chesapeake Appalachia, LLC, Pad ID: Taylor, ABR–201011034, Orwell Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 15, 2010.

37. Chesapeake Appalachia, LLC, Pad ID: Primrose, ABR–201011035, Standing Stone Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 15, 2010.

38. Chesapeake Appalachia, LLC, Pad ID: Pines, ABR–201011036, Cherry Township, Sullivan County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 15, 2010.

39. Chesapeake Appalachia, LLC, Pad ID: Roeber, ABR–201011037, Wyalusing Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 15, 2010.

40. EnCana Oil & Gas (USA) Inc., Pad ID: Kent North, ABR–201011038, Fairmount Township, Luzerne County, Pa.; Consumptive Use of up to 1.200 mgd; Approval Date: November 15, 2010.

41. EnCana Oil & Gas (USA) Inc., Pad ID: Kent South, ABR–201011039, Fairmount Township, Luzerne County, Pa.; Consumptive Use of up to 1.200 mgd; Approval Date: November 15, 2010.

42. East Resources Management, LLC, Pad ID: Nestor 551, ABR–201011040, Delmar Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 15, 2010.

43. Chesapeake Appalachia, LLC, Pad ID: Epler, ABR–201011041, Albany Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 16, 2010.

44. Enerplus Resources (USA) Corporation, Pad ID: Snow Shoe 4, ABR–201011042, Snow Shoe Township, Centre County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 16, 2010.

45. East Resources Management, LLC, Pad ID: Torpy & Van Order Inc 574, ABR–201011043, Covington Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 16, 2010.

46. Anadarko E&P Company LP, Pad ID: Harry W Stryker Pad A, ABR–201011044, Cogan House Township, Lycoming County, Pa.; Consumptive Use of up to 3.000 mgd; Approval Date: November 16, 2010.

47. Talisman Energy USA Inc., Pad ID: 05 014 Warner, ABR–201011045, Rush Township, Susquehanna County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: November 16, 2010.

48. Anadarko E&P Company LP, Pad ID: William S Kieser Pad A, ABR–201011046, Cogan House Township, Lycoming County, Pa.; Consumptive Use of up to 3.000 mgd; Approval Date: November 16, 2010.

49. Anadarko E&P Company LP, Pad ID: Ann C Good Pad B, ABR–201011047, Cogan House Township, Lycoming County, Pa.; Consumptive Use of up to 3.000 mgd; Approval Date: November 16, 2010.

50. Talisman Energy USA Inc., Pad ID: 03 052 Watkins, ABR–201011048, Columbia Township, Bradford County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: November 17, 2010.

51. Northeast Natural Energy, LLC, Pad ID: Curley, ABR–201011049, Graham Township, Clearfield County, Pa.; Consumptive Use of up to 0.020 mgd; Approval Date: November 17, 2010.

52. Talisman Energy USA Inc., Pad ID: 05 076 Brown, ABR–201011051, Orwell Township, Bradford County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: November 19, 2010.

53. Talisman Energy USA Inc., Pad ID: 05 082 Abell Living Trust, ABR–201011052, Warren Township, Bradford County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: November 19, 2010.

54. Chesapeake Appalachia, LLC, Pad ID: Comstock, ABR–201011053, Rome Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 19, 2010.

55. Range Resources—Appalachia, LLC, Pad ID: Goodwill Hunting Club Unit #4H–#9H Drilling Pad, ABR–201011054, Lewis Township, Lycoming County, Pa.; Consumptive Use of up to 5.000 mgd; Approval Date: November 19, 2010.

56. Cabot Oil & Gas Corporation, Pad ID: DerianchoF P1, ABR–201011055, Bridgewater Township, Susquehanna County, Pa.; Consumptive Use of up to 3.575 mgd; Approval Date: November 22, 2010.

57. Talisman Energy USA Inc., Pad ID: 05 180 Peck Hill Farm, ABR–201011056, Windham Township, Bradford County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: November 22, 2010.

58. EQT Production Co., Pad ID: Phoenix R, ABR–201011057, Duncan Township, Tioga County, Pa.; Consumptive Use of up to 3.000 mgd; Approval Date: November 22, 2010.

59. East Resources Management, LLC, Pad ID: Neal 815, ABR–201011058, Chatham Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 22, 2010.

60. East Resources Management, LLC, Pad ID: Signor 583, ABR–201011059, Covington Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 23, 2010.

61. Chesapeake Appalachia, LLC, Pad ID: Penecale, ABR–201011060, North Branch Township, Wyoming County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 23, 2010.

62. EQT Production Co., Pad ID: Longhorn C–1 (WDV1), ABR–201011061, Jay Township, Elk County, Pa.; Consumptive Use of up to 3.000 mgd; Approval Date: November 23, 2010.

63. J–W Operating Company, Pad ID: Pardee & Curtin Lumber Co. C–12H, ABR–201011062, Shippen Township, Cameron County, Pa.; Consumptive Use of up to 5.000 mgd; Approval Date: November 23, 2010.

64. Talisman Energy USA Inc., Pad ID: 05 058 Vough, ABR–201011063, Orwell Township, Bradford County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: November 23, 2010.

65. Talisman Energy USA Inc., Pad ID: 05 165 Hutchinson, ABR–201011064, Warren Township, Bradford County, Pa.; Consumptive Use of up to

6.000 mgd; Approval Date: November 23, 2010.

66. Talisman Energy USA Inc., Pad ID: 05 143 Bacon, ABR–201011065, Pike Township, Bradford County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: November 23, 2010.

67. Chesapeake Appalachia, LLC, Pad ID: Dunny, ABR–201011066, Windham Township, Wyoming County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: November 23, 2010.

68. Range Resources—Appalachia, LLC, Pad ID: Red Bend Hunting & Fishing Club Unit #3H–#5H Drilling Pad, ABR–201011067, Cogan House Township, Lycoming County, Pa.; Consumptive Use of up to 5.000 mgd; Approval Date: November 23, 2010.

69. Chief Oil & Gas LLC, Pad ID: PMG God Drilling Pad #1, ABR–201011068, Asylum Township, Bradford County, Pa.; Consumptive Use of up to 2.000 mgd; Approval Date: November 24, 2010.

70. Anadarko E&P Company LP, Pad ID: David O Vollman Pad A, ABR–201011069, Cogan House Township; Lycoming County, Pa.; Consumptive Use of up to 3.000 mgd; Approval Date: November 24, 2010.

71. East Resources Management, LLC, Pad ID: Shaw Trust 500, ABR–201011070, Sullivan Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 29, 2010.

72. East Resources Management, LLC, Pad ID: Sevem 474, ABR–201011071, Charleston Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 29, 2010.

73. Talisman Energy USA Inc., Pad ID: 05 223 Wheaton, ABR–201011072, Windham Township, Bradford County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: November 29, 2010.

74. Range Resources—Appalachia, LLC, Pad ID: Ogontz Fishing Club #18H–#23H Drilling Pad, ABR–201011073, Cummings Township, Lycoming County, Pa.; Consumptive Use of up to 5.000 mgd; Approval Date: November 30, 2010.

75. Range Resources—Appalachia, LLC, Pad ID: Paulhamus, Frederick Unit #5H & #6H Drilling Pad, ABR–201011074, Mifflin Township, Lycoming County, Pa.; Consumptive Use of up to 5.000 mgd; Approval Date: November 30, 2010.

76. Seneca Resources, Pad ID: Wolfinger Pad B, ABR–201011075, Shippen Township, Cameron County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 30, 2010, including a partial waiver of 18 CFR Section § 806.15.

77. EOG Resources, Inc. Pad ID: Sutherland Chevrolet 1H Pad, ABR–2010011076, Lawrence Township, Clearfield County, Pa.; Consumptive Use of up to 4.999 mgd; Approval Date: November 30, 2010.

78. Range Resources—Appalachia, LLC, Pad ID: Ogontz Fishing Club #24H–#29H Drilling Pad, ABR–201011077, Cummings Township, Lycoming County, Pa.; Consumptive Use of up to 5.000 mgd; Approval Date: November 30, 2010.

79. East Resources Management, LLC, Pad ID: Propheta 288, ABR–201011078, Charleston Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: November 30, 2010.

80. Chesapeake Appalachia, LLC, Pad ID: Broughton, ABR–201012001, Morris Township, Tioga County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: December 1, 2010.

81. Chesapeake Appalachia, LLC, Pad ID: Keir, ABR–201012002, Sheshequin Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: December 1, 2010.

82. EXCO Resources (PA), LLC, Pad ID: DCNR Tract 323 Pad-2, ABR–201012003, Pine Township, Clearfield County, Pa.; Consumptive Use of up to 8.000 mgd; Approval Date: December 1, 2010.

83. Range Resources—Appalachia, LLC, Pad ID: Fuller, Eugene Unit #1H—#3H Drilling Pad, ABR–201012004, Mifflin Township, Lycoming County, Pa.; Consumptive Use of up to 5.000 mgd; Approval Date: December 2, 2010.

84. Chesapeake Appalachia, LLC, Pad ID: Graham, ABR–201012005, Morris Township, Tioga County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: December 2, 2010.

85. Chesapeake Appalachia, LLC, Pad ID: Mobear, ABR–201012006, Wilmot Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: December 2, 2010.

86. Chesapeake Appalachia, LLC, Pad ID: Burkmont Farms, ABR–201012007, Wilmot Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: December 2, 2010.

87. Triana Energy, LLC, Pad ID: Triana-Young Pad B, ABR–201012008, Hector Township, Potter County, Pa.; Consumptive Use of up to 7.000 mgd; Approval Date: December 3, 2010.

88. EQT Production Company, Pad ID: Phoenix S, ABR–201012009, Duncan Township, Tioga County, Pa.; Consumptive Use of up to 3.000 mgd; Approval Date: December 6, 2010.

89. Williams Production Appalachia LLC, Pad ID: Campbell Well Pad, ABR–201012010, Benton Township, Columbia County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 6, 2010.

90. Chesapeake Appalachia, LLC, Pad ID: Franclaire, ABR–201012011, Braintrim Township, Wyoming County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: December 6, 2010.

91. Talisman Energy USA Inc., Pad ID: 02 015 DCNR 587, ABR–201012012, Ward Township, Tioga County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: December 8, 2010.

92. East Resources Management, LLC, Pad ID: Brewer 258, ABR–201012013, Jackson Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 9, 2010.

93. Chief Oil & Gas LLC, Pad ID: Houseknecht Drilling Pad #1, ABR–201012014, Davidson Township, Sullivan County, Pa.; Consumptive Use of up to 2.000 mgd; Approval Date: December 9, 2010.

94. Chesapeake Appalachia, LLC, Pad ID: SGL 289A, ABR–201012015, West Burlington Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: December 10, 2010.

95. East Resources Management, LLC, Pad ID: Crittenden 593, ABR–201012016, Richmond Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 13, 2010.

96. East Resources Management, LLC, Pad ID: Groff 720, ABR–201012017, Canton Township, Bradford County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 13, 2010.

97. East Resources Management, LLC, Pad ID: Swingle 591, ABR–201012018, Richmond Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 13, 2010.

98. Chesapeake Appalachia, LLC, Pad ID: Gary, ABR–201012019, Rush Township, Susquehanna County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: December 13, 2010.

99. Chesapeake Appalachia, LLC, Pad ID: Baltzley, ABR–201012020, Rush Township, Susquehanna County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: December 13, 2010.

100. Chesapeake Appalachia, LLC, Pad ID: Roland, ABR–201012021, Wilmot Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: December 13, 2010.

101. Chesapeake Appalachia, LLC, Pad ID: Potuck Farm, ABR–201012022, Cherry Township, Sullivan County, Pa.;

Consumptive Use of up to 7.500 mgd; Approval Date: December 13, 2010.

102. Chesapeake Appalachia, LLC, Pad ID: Norconk, ABR–201012023, Wilmot Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: December 13, 2010.

103. Range Resources—Appalachia, LLC, Pad ID: State Game Lands 75A #3H Drilling Pad, ABR–201012024, Cogan House Township, Lycoming County, Pa.; Consumptive Use of up to 5.000 mgd; Approval Date: December 13, 2010.

104. Chief Oil & Gas LLC, Pad ID: Niedzwiecki Drilling Pad #1, ABR–201012025, Sugarloaf Township, Columbia County, Pa.; Consumptive Use of up to 2.000 mgd; Approval Date: December 16, 2010.

105. Talisman Energy USA Inc., Pad ID: 05 128 Upham R, ABR–201012026, Pike Township, Bradford County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: December 16, 2010.

106. EXCO Resources (PA), LLC, Pad ID: Herring Pad—9, ABR–201012027, Graham Township, Clearfield County, Pa.; Consumptive Use of up to 8.000 mgd; Approval Date: December 16, 2010.

107. Pennsylvania General Energy, Pad ID: Reed Run Norwich Pad D, ABR–201012028, Norwich Township, McKean County, Pa.; Consumptive Use of up to 3.500 mgd; Approval Date: December 16, 2010.

108. Chief Oil & Gas LLC, Pad ID: Guinter Drilling Pad #1, ABR–201012029, Mifflin Township, Lycoming County, Pa.; Consumptive Use of up to 2.000 mgd; Approval Date: December 17, 2010.

109. Chesapeake Appalachia, LLC, Pad ID: Kinnarney, ABR–201012030, Albany Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: December 20, 2010.

110. Talisman Energy USA Inc., Pad ID: 05 202 Slovak M, ABR–201012031, Windham Township, Bradford County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: December 20, 2010.

111. East Resources Management, LLC, Pad ID: I G Coveney Revocable LVG Trust 282, ABR–201012032, Richmond Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 20, 2010.

112. Chief Oil & Gas LLC, Pad ID: Doebler Drilling Pad #1, ABR–201012033, Penn Township, Lycoming County, Pa.; Consumptive Use of up to 2.000 mgd; Approval Date: December 20, 2010.

113. Chief Oil & Gas LLC, Pad ID: Curtin Drilling Pad #1, ABR–201012034, Albany Township, Bradford County, Pa.; Consumptive Use of up to 2.000 mgd; Approval Date: December 20, 2010.

114. Chief Oil & Gas LLC, Pad ID: Remley Drilling Pad #1, ABR–201012035, Jackson Township, Columbia County, Pa.; Consumptive Use of up to 2.000 mgd; Approval Date: December 20, 2010.

115. Chief Oil & Gas LLC, Pad ID: Sterner Drilling Pad #1, ABR–201012036, Jackson Township, Columbia County, Pa.; Consumptive Use of up to 2.000 mgd; Approval Date: December 20, 2010.

116. Chief Oil & Gas LLC, Pad ID: Hess Drilling Pad #1, ABR–201012037, Jackson Township, Columbia County, Pa.; Consumptive Use of up to 2.000 mgd; Approval Date: December 20, 2010.

117. Chesapeake Appalachia, LLC, Pad ID: DGSM, ABR–201012038, Smithfield Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: December 20, 2010.

118. Chesapeake Appalachia, LLC, Pad ID: Hartz, ABR–201012039, Ulster Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Approval Date: December 20, 2010.

119. Carrizo Marcellus, LLC, Pad ID: Baker North, ABR–201012040, Forest Lake Township, Susquehanna County, Pa.; Consumptive Use of up to 2.100 mgd; Approval Date: December 20, 2010.

120. Carrizo Marcellus, LLC, Pad ID: Sterling Farms, ABR–201012041, Noxen Township and Monroe Township, Wyoming County, Pa.; Consumptive Use of up to 2.100 mgd; Approval Date: December 20, 2010.

121. Range Resources—Appalachia, LLC, Pad ID: Ogontz Fishing Club #30H—#35H, ABR–201012043, Cummings Township, Lycoming County, Pa.; Consumptive Use of up to 5.000 mgd; Approval Date: December 21, 2010.

122. East Resources Management, LLC, Pad ID: Vanvliet 614, ABR–201012044, Delmar Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 21, 2010.

123. Novus Operating, LLC, Pad ID: Merlin, ABR–201012045, Sullivan Township, Tioga County, Pa.; Consumptive Use of up to 2.000 mgd; Approval Date: December 22, 2010.

124. Talisman Energy USA Inc., Pad ID: 05 167 Hutchinson, ABR–201012046, Warren Township, Bradford County, Pa.; Consumptive Use of up to 6.000 mgd; Approval Date: December 23, 2010.

125. Range Resources—Appalachia, LLC, Pad ID: Rupert, Elton Unit #1H Drilling Pad, ABR–201012047, Penn Township, Lycoming County, Pa.; Consumptive Use of up to 5.000 mgd; Approval Date: December 23, 2010.

126. East Resources Management, LLC, Pad ID: Wilson 283, ABR–201012048, Charleston Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 23, 2010.

127. East Resources Management, LLC, Pad ID: Buckwalter 429, ABR–201012049, Delmar Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 23, 2010.

128. Range Resources—Appalachia, LLC, Pad ID: Winner Unit #2H—#5H Drilling Pad, ABR–201012050, Gallagher Township, Clinton County, Pa.; Consumptive Use of up to 5.000 mgd; Approval Date: December 27, 2010.

129. East Resources Management, LLC, Pad ID: Sherman 563, ABR–201012051, Shippen Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 27, 2010.

130. East Resources Management, LLC, Pad ID: Hitesman 580, ABR–201012052, Covington Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 27, 2010.

131. East Resources Management, LLC, Pad ID: Neal 375, ABR–201012053, Union Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 28, 2010.

132. East Resources Management, LLC, Pad ID: Parent 749, ABR–201012054, Canton Township, Bradford County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 28, 2010.

133. East Resources Management, LLC, Pad ID: McConnell 471, ABR–201012055, Charleston Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 28, 2010.

134. East Resources Management, LLC, Pad ID: Yourgalite 1119, ABR–201012056, Farmington Township, Tioga County, Pa.; Consumptive Use of up to 4.000 mgd; Approval Date: December 28, 2010.

135. East Resources Management, LLC, Pad ID: Marshall Brothers Inc 731, ABR–201012057, Jackson Township, Lycoming County, Pa.; Consumptive Use of up to 4.000 mgd, Approval Date: December 29, 2010.

Rescinded Approvals By Rule Issued Under 18 CFR 806.22(f)

1. Chesapeake Appalachia, LLC, Pad ID: Boyles, ABR–201008095, Elkland Township, Sullivan County, Pa.; Consumptive Use of up to 7.500 mgd; Rescinded Date: December 16, 2010.
2. Chesapeake Appalachia, LLC, Pad ID: Burkett, ABR–20100543, Smithfield Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Rescinded Date: December 16, 2010.
3. Chesapeake Appalachia, LLC, Pad ID: Lee, ABR–201008012, Asylum Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Rescinded Date: December 16, 2010.
4. Chesapeake Appalachia, LLC, Pad ID: McCarty, ABR–201007018, Fox Township, Sullivan County, Pa.; Consumptive Use of up to 7.500 mgd; Rescinded Date: December 16, 2010.
5. Chesapeake Appalachia, LLC, Pad ID: Oshea, ABR–20100660, Windham Township, Bradford County, Pa.; Consumptive Use of up to 7.500 mgd; Rescinded Date: December 16, 2010.
6. Chesapeake Appalachia, LLC, Pad ID: Schlick, ABR–201007077, Rush Township, Susquehanna County, Pa.; Consumptive Use of up to 7.500 mgd; Rescinded Date: December 16, 2010.
7. Chief Oil & Gas, LLC, Pad ID: M & L Beinlich North Drilling Pad #1, ABR–201007059, Overton Township, Bradford County, Pa.; Consumptive Use of up to 2.000 mgd; Rescinded Date: December 16, 2010.
8. Chief Oil & Gas, LLC, Pad ID: Baumunk Drilling Pad #1, ABR–20100675, Elkland Township, Sullivan County, Pa.; Consumptive Use of up to 2.000 mgd; Rescinded Date: December 16, 2010.
9. Citrus Energy, Pad ID: Martin #1V, ABR–20091202, Sugarloaf Township, Columbia County, Pa.; Consumptive Use of up 5.000 mgd; Rescinded Date: December 16, 2010.
10. Citrus Energy, Pad ID: Farver #1V, ABR–20091228, Benton Township, Columbia County, Pa.; Consumptive Use of up 5.000 mgd; Rescinded Date: December 16, 2010.
11. Epsilon Energy USA Inc., Pad ID: J. Bowen, ABR–20100356, Auburn Township, Susquehanna County, Pa.; Consumptive Use of up 5.000 mgd; Rescinded Date: December 16, 2010.
12. Epsilon Energy USA Inc., Pad ID: L Hardic, ABR–20100357, Auburn Township, Susquehanna County, Pa.; Consumptive Use of up 5.000 mgd; Rescinded Date: December 16, 2010.
13. Epsilon Energy USA Inc., Pad ID: B Poulsen, ABR–20100358, Auburn Township, Susquehanna County, Pa.; Consumptive Use of up 5.000 mgd; Rescinded Date: December 16, 2010.
14. Epsilon Energy USA Inc., Pad ID: La Rue, ABR–20100359, Rush Township, Susquehanna County, Pa.; Consumptive Use of up 5.000 mgd; Rescinded Date: December 16, 2010.
15. Epsilon Energy USA Inc., Pad ID: MJ Barlow, ABR–20100360, Rush Township, Susquehanna County, Pa.; Consumptive Use of up 5.000 mgd; Rescinded Date: December 16, 2010.
16. EnerVest Operating, LLC, Pad ID: Harris #1, ABR–20090709, Smithfield Township, Bradford County, Pa.; Consumptive Use of up 2.000 mgd; Rescinded Date: December 16, 2010.
17. EnerVest Operating, LLC, Pad ID: Wood #1, ABR–20090708, Athens Township, Bradford County, Pa.; Consumptive Use of up 2.000 mgd; Rescinded Date: December 16, 2010.
18. Penn Virginia Oil & Gas Corp., Pad ID: Kibbe #1, ABR–20100346, Harrison Township, Potter County, Pa.; Consumptive Use of up 4.000 mgd; Rescinded Date: December 16, 2010

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.*, 18 CFR parts 806, 807, and 808.

Dated: April 4, 2011.

Stephanie L. Richardson,

Secretary to the Commission.

[FR Doc. 2011–8961 Filed 4–13–11; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2010–0152]

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 of the Code of Federal Regulations (CFR), this document provides the public notice that by a document dated March 9, 2011, the National Railroad Passenger Corporation (Amtrak) has petitioned the Federal Railroad Administration (FRA) for a modification of the regulatory relief previously granted in Docket Number FRA–2010–0152. Specifically, by letter dated January 31, 2011, FRA granted Amtrak limited, conditional relief from the requirements of 49 CFR 240.117(e)(1)–(4), 240.305(a)(1)–(4), 240.305(a)(6), and 240.307 as applicable to a proposed Confidential Close Call Reporting System (C3RS) pilot project. As proposed by Amtrak in its initial waiver request and approved by FRA, the boundaries of the C3RS pilot project were defined to include certain portions of its facilities at the following nine locations: (1) South Hampton Street, Boston, MA; (2) New Haven Parcel G, New Haven, CT; (3) Sunnyside Yard, Long Island City, NY; (4) Penn Coach Yard and Race Street Engine House, Philadelphia, PA; (5) Washington, DC; (6) Miami, FL; (7) Los Angeles, CA, (8) Chicago, IL; and (9) Seattle, WA. For a more detailed description of the project's initial boundaries, see FRA's Notice of Petition for Waiver of Compliance published on November 2, 2010, 75 FR 67451. All relevant documents related to Amtrak's initial waiver request and FRA's decision letter responding to that request is available for review online at *http://www.regulations.gov* under the docket number referenced above.

With its petition dated March 9, 2011, Amtrak submitted to FRA "Amendment No. 1 to the Confidential Close Call Reporting System Implementing Memorandum of Understanding (C3RS/IMOU) dated May 11, 2010." That Amendment to the C3RS/IMOU seeks to expand the boundaries of the C3RS project to include Amtrak's Oakland, CA yard, including "all yard tracks and mechanical facilities within limits to include the West Oakland Amtrak lead to the South Magnolia Amtrak lead." A copy of the petition, as well as any written communications concerning the petition is available for review online at *http://www.regulations.gov* and in person at the Department of Transportation's Docket Operations Facility, 1200 New Jersey Ave., SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays. If you do not have access to the Internet, please contact FRA's Docket Clerk at 202–493–6030 who will provide necessary information concerning the contents of the petition.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

Web site: *http://www.regulations.gov.* Follow the online instructions for submitting comments.

- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.

• *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by May 16, 2011 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or online at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC on April 8, 2011.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory & Legislative Operations.

[FR Doc. 2011–8960 Filed 4–13–11; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Changes With Respect to Prizes and Awards and Employee Achievement Awards.

DATES: Written comments should be received on or before June 13, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of regulation should be directed to Joel Goldberger, (202) 927–9368, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Joel.P.Goldberger@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Changes With Respect to Prizes and Awards and Employee Achievement Awards.

OMB Number: 1545–1100.

Regulation Project Number: REG–209106–89.

Abstract: This regulation requires recipients of prizes and awards to maintain records to determine whether a qualifying designation has been made in accordance with section 74(b)(3) of the Internal Revenue Code. The affected public is prize and award recipients who seek to exclude the cost of a qualifying prize or award.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 5,100.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 1,275.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

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.

Request For Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on 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.

Approved: April 8, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–8997 Filed 4–13–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request For Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its effort to reduce paperwork and respondent burden, invites the general public and Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). The IRS is soliciting comments concerning Treatment of Gain From the Disposition of Interest in Certain Natural Resource Recapture Property by S Corporations and Their Shareholders.

DATES: Written comments should be received on or before June 13, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Joel Goldberger, at (202) 927–9368, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Joel.P.Goldberger@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Treatment of Gain From the Disposition of Interest in Certain Natural Resource Recapture Property by S Corporations and Their Shareholders.

OMB Number: 1545–1493.

Regulation Project Number: T.D. 8684.

Abstract: This regulation prescribes rules under Code section 1254 relating to the treatment by S corporations and their shareholders of gain from the disposition of natural resource recapture

property and from the sale or exchange of S corporation stock. Section 1.1254–4(c)(2) of the regulation provides that gain recognized on the sale or exchange of S corporation stock is not treated as ordinary income if the shareholder attaches a statement to his or her return containing information establishing that the gain is not attributable to section 1254 costs.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and individuals.

Estimated Number of Respondents: 1,000.

Estimated Time per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 1,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. 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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on 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.

Approved: April 8, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–9001 Filed 4–13–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Internal Revenue Service Advisory Council (IRSAC); Nominations

AGENCY: Internal Revenue Service, Department of the Treasury.

ACTION: Request for applications.

SUMMARY: The Internal Revenue Service (IRS) requests applications of individuals to be considered for selection as members of the Internal Revenue Service Advisory Council (IRSAC). Nominations should describe and document the proposed member's qualification for IRSAC membership, including the applicant's knowledge of Circular 230 regulations and the applicant's past or current affiliations and dealings with the particular tax segment or segments of the community that the applicant wishes to represent on the council. Applications will be accepted for current vacancies from qualified individuals and from professional and public interest groups that wish to have representatives on the IRSAC. The IRSAC is comprised of no more than thirty-five (35) appointed members; approximately twelve of these appointments will expire in December 2011. It is important that the IRSAC continue to represent a diverse taxpayer and stakeholder base. Accordingly, to maintain membership diversity, selection is based on the applicant's qualifications as well as areas of expertise, geographic diversity, major stakeholder representation and customer segments.

The Internal Revenue Service Advisory Council (IRSAC) provides an organized public forum for IRS officials and representatives of the public to discuss relevant tax administration issues. The council advises the IRS on issues that have a substantive effect on Federal tax administration. As an advisory body designed to focus on broad policy matters, the IRSAC reviews existing tax policy and/or recommends policies with respect to emerging tax administration issues. The IRSAC suggests operational improvements, offers constructive observations regarding current or proposed IRS policies, programs, and procedures, and advises the IRS with respect to issues having substantive effect on Federal tax administration.

DATES: Written applications will be accepted from May 2, 2011 through June 17, 2011.

ADDRESSES: Applications should be sent to National Public Liaison, CL:NPL:P, Room 7559 IR, 1111 Constitution Avenue, NW., Washington, DC 20224, Attn: Lorenza Wilds; or by e-mail: **public_liaison@irs.gov.* Applications may be submitted by mail to the address above or faxed to 202–927–4123. Application packages are available on the Tax Professional's Page, which is located on the IRS Internet Web site at *http://www.irs.gov/taxpros/index.html.*

FOR FURTHER INFORMATION CONTACT: Ms. Lorenza Wilds, 202–622–6440 (not a toll-free number).

SUPPLEMENTARY INFORMATION: IRSAC was authorized under the Federal Advisory Committee Act, Public Law 92–463. The first Advisory Group to the Commissioner of Internal Revenue—or the Commissioner's Advisory Group ("CAG")—was established in 1953 as a "national policy and/or issue advisory committee." Renamed in 1998, the Internal Revenue Service Advisory Council (IRSAC) reflects the agency-wide scope of its focus as an advisory body to the entire agency. The IRSAC's primary purpose is to provide an organized public forum for senior IRS executives and representatives of the public to discuss relevant tax administration issues.

Conveying the public's perception of IRS activities, the IRSAC is comprised of individuals who bring substantial, disparate experience and diverse backgrounds on the Council's activities. Membership is balanced to include representation from the taxpaying public, the tax professional community, small and large businesses, international, wage and investment taxpayers and the knowledge of Circular 230.

IRSAC members are nominated by the Commissioner of the Internal Revenue Service with the concurrence of the Secretary of the Treasury to serve a three year term. There are four subcommittees of IRSAC, the Small Business/Self Employed (SB/SE); Large Business and International (LB&I); Wage & Investment (W&I); and the Office of Professional Responsibility (OPR).

Members are not paid for their services. However, travel expenses for working sessions, public meetings and orientation sessions, such as airfare, per diem, and transportation to and from airports, train stations, *etc.*, are reimbursed within prescribed Federal travel limitations.

An acknowledgment of receipt will be sent to all applicants. In accordance with the Department of the Treasury Directive 21–03, a clearance process including annual tax checks and a practitioner check with the Office of Professional Responsibility will be conducted. In addition, all applicants

deemed "best qualified" will have to undergo a Federal Bureau of Investigation (FBI) fingerprint check. "Federally-registered lobbyists cannot be members of the IRSAC."

Equal opportunity practices will be followed for all appointments to the IRSAC in accordance with the Department of the Treasury and IRS policies. "The IRS has special interest in assuring that women and men, members of all races and national origins, and individuals with disabilities are adequately represented on advisory committees: and therefore, extends particular encouragement to nominations from such appropriately qualified candidates."

Dated: April 6, 2011.

Candice Cromling,

Director, National Public Liaison.

[FR Doc. 2011–8992 Filed 4–13–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Determinations Concerning Illnesses Discussed In National Academy of Sciences Reports on Gulf War and Health, Volumes 4 and 8

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: As required by law, the Department of Veterans Affairs (VA) hereby gives notice that the Secretary of Veterans Affairs, under the authority granted by the Persian Gulf War Veterans Act of 1998, has determined that there is no basis to establish any new presumptions of service connection at this time for any of the diseases, illnesses, or health effects discussed in the September 12, 2006, and April 9, 2010, reports of the Institute of Medicine of the National Academy of Sciences (NAS), respectively titled *Gulf War and Health, Volume 4: Health Effects of Serving in the Gulf War* (Volume 4) and *Gulf War and Health, Volume 8: Update of Health Effects of Serving in the Gulf War* (Volume 8).

FOR FURTHER INFORMATION CONTACT: Gerald Johnson, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 461–9727. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

I. Statutory Requirements

The Persian Gulf War Veterans Act of 1998, Public Law 105–277, title XVI, 112 Stat. 2681–742 through 2681–749 (set out as a note under 38 U.S.C. 1117 and codified in part at 38 U.S.C. 1118), and the Veterans Programs Enhancement Act of 1998, Public Law 105–368, 112 Stat. 3315, directed the Secretary to seek to enter into an agreement with the NAS to review and evaluate the available scientific evidence regarding associations between illnesses and exposure to toxic agents, environmental or wartime hazards, or preventive medicines or vaccines to which service members may have been exposed during service in the Southwest Asia theater of operations during the Persian Gulf War. Under this agreement, Congress directed NAS to identify agents, hazards, medicines, and vaccines to which service members may have been exposed during the Persian Gulf War. Congress required NAS, to the extent that available scientific data permits meaningful determinations, to determine for each substance or hazard identified: (1) Whether a statistical association exists between exposure to the substance or hazard and the occurrence of illnesses, (2) whether there is an increased risk of the illness among exposed human or animal populations, and (3) whether a plausible biological mechanism or other evidence of a causal relationship exists. Public Law 105–277, 112 Stat. 2681–747.

In addition, Congress authorized VA to compensate Gulf War Veterans for diagnosed or undiagnosed illnesses that are determined by VA to warrant a presumption of service connection based upon a positive association with exposure, as a result of Gulf War service, to a toxic agent, an environmental or wartime hazard, or a preventive medication or vaccine known or presumed to be associated with Gulf War service. 38 U.S.C. 1118. Thus, upon receipt of each NAS report, VA must determine whether a presumption of service connection is warranted for any disease or illness discussed in the report. A presumption of service connection is warranted if VA determines, based on sound medical and scientific evidence, that there is a positive association between the exposure of humans and animals to a biological, chemical, or other toxic agent, environmental or wartime hazard, or preventive medicine or vaccine known or presumed to be associated with service in the Southwest Asia theater of operations during the Gulf War and the occurrence of a diagnosed or undiagnosed disease or illness in humans and animals. 38 U.S.C. 1118(b). If the Secretary determines that a presumption of service connection is not warranted, the Secretary shall publish in the **Federal Register** a notice of the determination. 38 U.S.C. 1118(c)(3)(A). Accordingly, this notice announces VA's determination that no new presumptions of service connection are warranted for any disease or illness discussed in Volume 4 and Volume 8.

II. NAS Reports: Gulf War and Health Series

The NAS has issued eight numbered reports and two unnumbered "updates" in the Gulf War and Health series, which examine the health effects of exposure to specific chemical agents, environmental and wartime hazards, and preventive medicines and vaccines. **Federal Register** notices have been published on four of the eight numbered reports and two unnumbered updates announcing the Secretary's determination that the available evidence does not warrant a presumption of service connection for any of the diseases discussed in the four reports: *Gulf War and Health, Volume 1: Depleted Uranium, Sarin, Pyridostigmine Bromide, and Vaccines* (66 FR 35702 (2001)); *Gulf War and Health, Volume 2: Insecticides and Solvents* (72 FR 48734 (2007)); *Gulf War and Health: Updated Literature Review of Sarin* (73 FR 42411 (2008)); *Gulf War and Health, Volume 3: Fuels, Combustion Products, and Propellants* (73 FR 50856 (2008)); *Gulf War and Health, Volume 5: Infectious Diseases* (74 FR 15063 (2009)); *Gulf War and Health: Updated Literature Review of Depleted Uranium* (75 FR 10867 (2010)); and *Gulf War and Health, Volume 6: Physiologic, Psychologic, and Psychosocial Effects of Deployment-Related Stress* (76 FR 2447 (2011)).

The Volume 4 report is covered in this notice. The findings for *Gulf War and Health, Volume 7: Long-Term Consequences of Traumatic Brain Injury* are currently under review. The latest report, Volume 8, will also be covered in this notice. Based on Volume 4 and Volume 8, VA published a proposed rule on November 17, 2010 to clarify that FGIDs fall within the scope of the existing presumption of service connection for medically unexplained chronic multisymptom illnesses. 75 FR 70162. Aside from that clarification, VA has determined that no other changes to the existing presumptions relating to multisymptom illness, nor any new presumptions, are warranted at this time.

III. Gulf War and Health, Volume 4: Health Effects of Serving in the Gulf War

The NAS issued its Volume 4 report on September 12, 2006. This study differs from previous NAS work in that it compiles, evaluates, and summarizes in one location peer-reviewed scientific and medical literature on the current status of health effects in Veterans deployed to the Persian Gulf irrespective of exposure information, *i.e.,* health responses associated with deployment in the Gulf War Theatre alone. The purpose of the study was to inform VA of illnesses among Gulf War Veterans that might not be immediately evident. Based on this NAS report, the Secretary has determined that the scientific evidence presented in this report and other information available to the Secretary indicates that no new presumption of service connection is warranted at this time for any of the illnesses described in Volume 4.

The NAS committee for Volume 4 (NAS committee) was charged to review, evaluate, and summarize scientific and medical literature addressing the health status of Gulf War Veterans. The committee's objective was to determine the prevalence of diseases and symptoms in the Gulf War Veteran population, based primarily on studies comparing the health status of deployed Gulf War Veterans with the health status of their nondeployed counterparts. This information is useful in identifying areas of concern and needs of the Gulf War Veteran population, and may assist in guiding VA's actions in the areas of health care, compensation, and research. Because this was a disease prevalence study, the NAS committee generally did not attempt to associate diseases or symptoms with specific biological or chemical agents or other specific hazards of Gulf War service. However, the NAS committee did review certain studies that assessed exposures in Veterans and the influence of exposure information on the interpretation of Veterans' health.

The NAS committee conducted extensive searches of epidemiologic literature and extracted 850 potentially relevant epidemiologic studies for evaluation from a composite of over 4000 relevant references. The NAS committee based its conclusion on only peer-reviewed published scientific and medical literature. The process of peer review by fellow professionals increased the likelihood of high quality analysis, but did not guarantee the validity of a study. The NAS committee presumed neither the existence nor the absence of illnesses associated with deployment. It characterized and weighed the strengths and limitations of available evidence. The NAS committee read each study critically and considered its relevance and quality; however, the committee did not collect original data nor did it perform any secondary data analysis.

After securing the full text of the selected peer-reviewed epidemiologic studies, the NAS committee divided them into primary and secondary studies. Primary studies included information about specific health outcomes, demonstrated rigorous methods, described its methods in sufficient detail, included a control or reference group, had the statistical power to detect effects, and included reasonable adjustments for confounders. Secondary studies provided background information or "context" for the report.

There was no attempt to link health outcomes to exposures other than deployment to the Persian Gulf theater, for which there is no known animal model, and, because the NAS committee assessed disease prevalence rather than causation, it did not comprehensively review toxicologic, animal, or experimental studies. The NAS committee did evaluate the key animal and epidemiologic studies cited in the Research Advisory Committee on Gulf War Veterans' Illnesses (RAC) report. Epidemiologic studies that attempted to associate health effects with specific exposures, such as oil-well–fire smoke or nerve-gas agents, were also considered by the committee.

The committee's full report may be viewed at: *http://www.iom.edu/CMS/3793/24597/36955.aspx.*

IV. Gulf War and Health, Volume 8: Update of Health Effects of Serving in the Gulf War

The NAS issued its latest report, Volume 8, on April 9, 2010. The charge to the NAS update committee for Volume 8 (NAS update committee) was to review, evaluate, and summarize the literature on the health outcomes noted in Volume 4 that seemed to have higher incidence or prevalence in Gulf War deployed Veterans, namely: cancer (particularly brain and testicular), amyotrophic lateral sclerosis and other neurological diseases (such as Parkinson's disease and multiple sclerosis), birth defects and other adverse pregnancy outcomes, and post deployment psychiatric conditions. The NAS update committee also reviewed studies of cause-specific mortality in Gulf War Veterans and examined literature to identify emerging health outcomes. The NAS update committee limited its review to epidemiological studies of health outcomes published subsequent to the literature search for Volume 4 and those studies included in Volume 4. In order for a study to be considered, the NAS update committee required the study to compare the health status of Gulf War Veterans to nondeployed Veterans or Veterans deployed in other locations.

The NAS update committee conducted extensive searches of epidemiological literature published since 2005, employing the same search strategies as used for Volume 4, and retrieved over 1,000 potentially relevant references. The titles and the abstracts of the studies were assessed and then narrowed down to focus on 400 potentially relevant epidemiological studies for the review. Similar to the policy utilized in the Volume 4 review, the NAS update committee used only peer-reviewed published literature as the basis for its conclusions, with the exception of some governmental reports. As noted in regard to Volume 4, the process of peer review by fellow professionals increases the probability of a high quality study, but does not guarantee its validity. The NAS update committee did not collect any original data or perform any secondary data analysis.

The NAS update committee also reviewed the studies that had been included in Volume 4 as either primary or secondary studies. In Volume 4, the NAS committee did not make determinations as to the strength of the association between deployment to the Gulf War and the specific health effects. Therefore, the NAS update committee was asked to make such determinations during its review. To make these determinations, the NAS update committee reviewed the studies included in Volume 4 to ensure that they would still be classified as either primary or secondary studies.

The NAS update committee collectively reviewed all of the relevant studies cited in Volume 4 as well as the new studies identified from the updated literature. The NAS update committee weighed the evidence, reached a consensus and assigned a category of association for each health outcome considered in the report. This review provides an update on the health effects of serving in the Southwest Asia theater of operations during the Persian Gulf War. The purpose of this report was to determine the strength of associations between being deployed to the Gulf War and specific health effects. Specifically, the NAS update committee determined whether there was sufficient evidence of a causal relationship, sufficient evidence of an association, limited/suggestive evidence of an association,

inadequate/insufficient evidence to determine whether an association exists, or limited/suggestive evidence that no association exists between the health outcome and deployment to the Gulf War.

The committee's full report may be viewed at: *http://www.iom.edu/Reports/2010/Gulf-War-and-Health-Volume-8-Health-Effects-of-Serving-in-the-Gulf-War.aspx.*

V. Report Summaries for Volume 4 and Volume 8

The different approaches used by the NAS committee in evaluating Volume 4 and the NAS update committee in evaluating Volume 8 are reflected in the separate conclusions reached by each committee. The task of the NAS committee was to catalog the health outcomes that appeared to have greater prevalence in Veterans who had been deployed to the Gulf War in comparison with Veterans in the military at that time who were not deployed to the Gulf War. In Volume 4, the NAS committee did not specifically evaluate the strength of the association between Gulf War deployment and the specific health outcomes. The Volume 4 studies generally did not associate any observed health effects with exposure to specific hazards of Gulf War service, and therefore provide no basis for establishing new presumptions under 38 U.S.C. 1118 based on exposure to specific agents, hazards, or medicines associated with Gulf War service.

The NAS update committee reviewed epidemiologic studies of health outcomes published after the literature search conducted for the Volume 4 report as well as the studies included in Volume 4. The purpose of this report was to determine the strength of associations between being deployed to the Gulf War and specific health effects. The NAS update committee reviewed only studies that compared the health status of Gulf War Veterans with those of non-deployed Veterans and Veterans deployed to other locations, and then characterized the strength of the evidence for an association between Gulf War deployment and the specific health outcome. Based on the NAS update committee's findings, VA determined that Volume 8 did not present a basis for establishing new presumptions under 38 U.S.C. 1118 based on exposure to specific agents, hazards, or medicines associated with Gulf War service. Specific findings of Volume 4 and Volume 8 are discussed below.

Multisymptom Illness

The NAS committee for Volume 4 found that Veterans of the Gulf War report higher rates of symptoms or sets of symptoms than their non-deployed counterparts. The committee found that 29 percent of Gulf War Veterans meet a case definition of "multisymptom illness," compared to 16 percent of non-deployed Veterans. Among the symptoms most often reported by Gulf War Veterans are fatigue, memory loss, confusion, inability to concentrate, mood swings, somnolence, gastrointestinal symptoms, muscle and joint pains, and skin conditions. Gulf War Veterans also reported more instances of chronic multisymptom illness, including chronic fatigue syndrome, fibromyalgia, and multiple chemical sensitivity.

Under current law at 38 U.S.C. 1117 and 38 CFR 3.317, Gulf War Veterans are entitled to compensation for chronic disabilities associated with signs or symptoms of disabilities such as those described above or associated with chronic multisymptom illness. The findings in Volume 4 support the policies of the current presumptions and warrant no change to the existing regulatory presumptions of service connection in 38 CFR 3.317.

In a November 2008 report, the RAC, a Federal advisory committee established to provide research recommendations to VA, indicated that current medical and scientific evidence provides support for the theory that the increased symptomatology reported by Gulf War Veterans may be attributable to exposure to pyridostigmine bromide (PB) in pills given to U.S. troops as a protection against nerve gas and pesticides. The RAC found that several studies provide evidence of an association, including a dose-response relationship, between PB and multisymptom illnesses consistent with "Gulf War Illness," and between pesticide exposure and such multisymptom illness. The RAC noted also that animal studies had identified significant effects of exposure to combinations of PB, pesticides, sarin, and stress, at dosage levels similar to those experienced by Veterans in the Gulf War, although there is relatively little information from human studies concerning the effects of such combined exposures.

The NAS update committee for Volume 8 reviewed the literature cited in the RAC report, but disagreed with the RAC's conclusion that chronic multisymptom illness is caused by exposure to PB and pesticides. The NAS update committee concluded that current available evidence was not sufficient to establish a causative relationship between multisymptom illness and any specific drug, toxin, plume or other agent, either alone or in combination. The NAS update committee noted that some studies had found associations between self-reported exposures to PB, pesticides, nerve gas, and mixtures thereof, but that several well-designed studies have concluded that no associations exist for such exposures. The update committee also stated that, although some studies have found that central nervous system (CNS) disorders may persist following acute pesticide exposure, there is no evidence that Gulf War Veterans experienced such acute exposures and no significant evidence of chronic CNS effects from low-level exposures. Based on its review of the available evidence from both human and animal studies, the NAS update committee found insufficient support for the conclusion that pesticides, PB, insect repellants, or combinations thereof are responsible for multisymptom illnesses in Gulf War Veterans.

Based on review of the information in the reports of the NAS and the RAC, VA has determined that the evidence for an association between multisymptom illnesses and specific exposures, such as PB, pesticides, and combinations thereof, is not equal to or greater than the evidence against such an association. VA emphasizes, however, that this conclusion has no effect on VA's ability under existing law to provide compensation for such illnesses. Under 38 U.S.C. 1117 and 38 CFR 3.317, VA pays compensation for such illness without regard to its cause. VA will continue to evaluate developments regarding the possible causes of Gulf War Veterans' chronic multisymptom illnesses, which may affect the understanding and treatment of these illnesses.

The NAS update committee accepted multisymptom illness as a diagnostic entity and assessed the association between symptom reporting indicative of multisymptom illness and deployment to the Gulf War, instead of attempting to determine whether there appears to be a unique illness that could be defined by the symptoms. Most studies indicate an increased reporting of multisymptom illness among deployed Gulf War Veterans, which occurred in multiple studies from several countries, but were subjective with inconsistent findings on physical examinations and laboratory testing requiring further analysis. The NAS update committee determined that there is sufficient evidence of an association

between deployment to the Gulf War and chronic multisymptom illness, but noted that the basis for the relationship is unclear, and recommended further research. These findings support the policy in existing law to provide compensation for Gulf War Veterans' chronic multisymptom illnesses.

Psychiatric Symptoms

The NAS committee concluded that deployment places Veterans at increased risk for symptoms that meet the diagnostic criteria for certain psychiatric illnesses, including post-traumatic stress disorder (PTSD), anxiety, depression, and substance abuse. In Volume 6, the NAS committee explained that the increased risk of psychiatric symptoms has been associated with deployment during any period of war and is thus not limited to Gulf War deployments.

The NAS update committee determined that there is sufficient evidence of association between deployment to the Gulf War and several other psychiatric disorders, including generalized anxiety disorders, depression, and substance abuse. The results of long-term follow-up studies indicate that psychiatric disorders were still evident 10 years after deployment and were shown to be more than two times higher in deployed Veterans compared to non-deployed Veterans. The NAS update committee further noted that an inference can be made that the high prevalence of medically unexplained disability reported by Gulf War Veterans cannot be reliably attributed to any known psychiatric disorder. Lastly, the NAS update committee determined that traumatic war exposure experienced during deployment in the Gulf War is causally related to PTSD. The NAS update committee explained that though the evidence available from the Gulf War is somewhat limited, it is sufficient to support the conclusion of a causal relationship between combat exposure and the development of PTSD. The NAS committee further noted that similar evidence obtained from other wars is also supportive of their conclusion that combat exposure and PTSD in the Gulf War are causally related.

VA regulations at 38 CFR 4.125(a) require that mental disorders, including PTSD, be diagnosed in accordance with the *Diagnostic and Statistical Manual: Fourth Edition* (DSM–IV). Under the DSM–IV, the diagnosis of PTSD requires evidence of a pre-morbid traumatic exposure. In order for PTSD to be service connected, that traumatic exposure must have occurred during a period of military service. The NAS Update committee did not find a causal relationship between mere deployment to the Gulf War theater and PTSD, nor did it find PTSD to be associated with exposure to a particular toxic agent, hazard, medicine, or vaccine. Rather, it found a causal relationship between PTSD and the traumatic war exposures experienced during deployment to this war zone. Further, these types of exposures are not unique to the Gulf War, but are common to all episodes of combat. Consequently, we do not believe there is a sound basis for establishing a presumption of service connection for PTSD that is limited to Veterans of Gulf War combat service. Such a presumption would treat Gulf War combat Veterans differently than combat Veterans of other wars, without a rational basis for such disparate treatment.

Although the NAS committee found PTSD to be associated with "traumatic war exposure," and the NAS update committee found a causal relationship between "traumatic war exposures" experienced during Gulf War deployment and PTSD, PTSD could not be associated with the types of exposure outlined in 38 U.S.C. 1118, involving exposure to hazardous substances known or suspected to be associated with Gulf War service. VA interprets the use of the phrase "traumatic war exposures" used in the reports as being a general reference to the exposures to the dangers of service in a combat area, including risk of death or injury due to enemy attacks. Accordingly, VA does not believe that the reference to "traumatic war exposures" identifies an association between PTSD and a specific "exposure" within the meaning of section 1118.

VA also concludes that it is unnecessary to create a presumption for PTSD for all combat Veterans based on VA's general rulemaking authority. VA's current regulations afford combat Veterans essentially the same liberalized standard of proof that a presumption would provide. When a Veteran has been validly diagnosed with PTSD, service connection will be granted if the PTSD is associated with an in-service "stressor." As noted above, the Veteran must identify a stressor before a valid diagnosis of PTSD can be made. Under VA regulations at 38 CFR 3.304(f), if a Veteran engaged in combat and the claimed stressor relates to combat, VA will accept the Veteran's lay statement as sufficient evidence of the stressor. Further, under a recent amendment to that regulation, even if the Veteran did not engage in combat the Veteran's own statements alone may establish the occurrence of the claimed in-service stressor if the claimed stressor is related to the Veteran's fear of hostile military or terrorist activity and is confirmed as adequate to support a diagnosis of PTSD, the Veteran's symptoms are related to the claimed stressor, and the claimed stressor is consistent with the places, types, and circumstances of the Veteran's service. 75 FR 39843 (July 13, 2010). Accordingly, a Veteran whose claimed stressor relates to the perils of deployment to a war zone generally need not submit any evidence of a stressor beyond the statements made for purposes of the diagnosis of PTSD. A presumption of service connection for PTSD based on traumatic war exposures in the Gulf War theater would neither increase the likelihood of a legitimate claim being accepted, nor speed the process by which claims are adjudicated.

For similar reasons, VA has determined that the finding of increased prevalence of other psychiatric disorders in Gulf War Veterans does not warrant a presumption of service connection under section 1118. In Volume 4 and Volume 8, NAS found that psychiatric disorders are associated with deployment to the Gulf War, but did not find such disorders to be associated with any particular type of exposure during the Gulf War. In its Volume 6 report, NAS found that an increased risk of psychiatric disorders is associated with deployment to any war zone, and that the prevalence and severity of those disorders were associated with the level of combat experienced. This suggests that the increased prevalence of psychiatric disorders is more likely associated with the inherent perils of combat in any war than with exposure to specific agents, hazards, medicines, or vaccines associated with the Gulf War.

Section 1118(a)(2)(A) and (b)(1)(B) require VA to determine whether a presumption of service connection is warranted by reason of a disease having a positive association with exposure to a biological, chemical, or other toxic agent, environmental or wartime hazard, or preventive medicine or vaccine "known or presumed to be associated with service in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War." We conclude that the statutory phrase "associated with service in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War" is most reasonably construed to refer to a relationship between the substance or hazard and the specific circumstance of service in the Southwest Asia theater of operations during the Persian Gulf War, as distinguished from features of

military service that are not unique to service in the Gulf War. Section 1118 reflects the Government's commitment to addressing the unique health issues presented by Gulf War Veterans, by establishing a process for identifying diseases and illnesses that may be associated with Gulf War service. The requirement that the substances or hazards at issue be "associated with" Gulf War service makes clear that VA's task is to examine the unique exposure environment in the Persian Gulf during the Persian Gulf War. Establishing presumptions of service connection under section 1118 applicable only to Gulf War Veterans based on the general circumstance of deployment which is shared by significant other groups of Veterans would not significantly further the statute's purpose, but would create significant inequities in the Veterans' benefits system that Congress could not have intended.

VA has also decided not to establish a presumption of service connection for psychiatric disorders in Veterans of any period of deployment to a combat zone under VA's general rulemaking authority. The category of psychiatric disorders encompasses a diverse array of diagnoses. Further, psychiatric disorders are widespread and may be triggered by many life events, including those occurring before and after service. Although the NAS reports indicate that psychiatric disorders are associated with combat deployment, they provide no basis for evaluating whether Veterans' psychiatric disorders are more likely caused by wartime deployment than by any of the many other risk factors that are also associated with such disorders or for evaluating possible differences in the degree to which the numerous specific types of psychiatric disorders may be associated with wartime deployment. Accordingly, a general presumption of service connection for psychiatric disorders would be overly broad.

VA believes that VA psychiatric examinations are a more effective way of evaluating whether psychiatric disorders are related to military service than applying a broad presumption that would apply to all Veterans deployed to the Gulf War. VA routinely provides psychiatric examinations to Veterans claiming service connection for psychological disorders and believes that this process is effective.

Cardiovascular Disease, Diabetes, Arthralgia or Hospitalization

The NAS committee concluded that the evidence did not show that Gulf War Veterans have an increased risk of cardiovascular disease, diabetes, arthralgia, or hospitalization in comparison to non-deployed Veterans. The NAS update committee found that there is limited or suggestive evidence of no association between Gulf War deployment and mortality from cardiovascular disease in the first 10 years after war. The NAS update committee further found that there is insufficient or inadequate evidence to determine whether an association exists between Gulf War deployment and endocrine, nutritional, and metabolic diseases, including diabetes, and Gulf War deployment and musculoskeletal system diseases, including arthralgia. The NAS update committee did not review hospitalization as a separate category as reviewed in Volume 4; rather, the committee included hospitalization as a factor in each specific health outcome reviewed.

In order for a presumption to be warranted the Secretary must establish that there is a "positive association" between "the exposure of humans or animals to a biological, chemical or other toxic agent, environmental or wartime hazard, or preventive medicine or vaccine known or presumed to be associated with service in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War; and [] the occurrence of a diagnosed or undiagnosed illness in humans or animals." 38 U.S.C. 1118(b)(1)(B). An association is considered "positive" if the credible evidence for an association is equal to or outweighs the credible evidence against the association. 38 U.S.C. 1118(b)(3). For the conditions listed above, the NAS committee concluded that there was not an increased risk, and the update committee found that there was inadequate or insufficient evidence to determine whether an association exists or limited or suggestive evidence of no association with deployment to the Gulf War. Therefore, VA concludes that the evidence of an association for these conditions does not equal or outweigh the credible evidence against an association. Based on this analysis, VA has determined that no presumptions of service connection are warranted for any of the above-mentioned outcomes based on Gulf War service.

Cancer

The NAS committee concluded that the evidence did not show that Gulf War Veterans have an increased overall risk of cancer. However, in one study in Volume 4 an association of brain-cancer mortality with possible nerve-agent exposure was observed. The NAS committee noted that this finding should be interpreted with caution due to concerns about the exposure modeling and the fact that the study period was not within what is believed to be the usual latency period for brain cancer. Further, Volume 4 reported mixed results as to whether an association exists between testicular cancer and deployment to the Gulf War.

The NAS update committee determined that there was insufficient or inadequate evidence of an association between Gulf War exposures and brain cancer. The NAS update committee did not identify any new studies relating to testicular cancer. The NAS update committee noted that many Veterans of the Gulf War are still too young for cancer diagnoses and that the follow-up period following the Gulf War has probably been too short to expect significant results. Thus, the NAS update committee recommends further follow-up in order to make a conclusion about whether there is an association between deployment during the Gulf War and cancer outcomes. Based on the information provided in Volume 4 and Volume 8, the Secretary has determined that no new presumptions relating to cancer are warranted at this time.

Mortality From External Causes

The NAS committee noted that studies provided evidence that Gulf War Veterans had an increased risk of transportation-related injury and mortality in the first several years after such service when compared to non-deployed service members. The NAS committee found no evidence that this result was related to a specific exposure in Gulf War service or that it was related to a specific disease or illness.

The NAS update committee identified four new studies of external cause mortality and determined that the evidence indicates a modestly higher mortality from transportation-related causes among Gulf War deployed Veterans than other Veterans. The increase was due to motor-vehicle accidents which diminished or disappeared over time. The NAS update committee concluded that there is limited or suggestive evidence of an association between deployment to the Gulf War and increase in mortality from external causes primarily motor vehicle accidents, in the early years after deployment.

VA notes that VA and other researchers have documented this transitory post-combat-deployment health effect among Veterans of other combat deployments, including Vietnam. Further, the findings of Volume 4 and Volume 8 do not identify an "illness" or a specific identified risk factor (*e.g.*, a particular exposure)

known or suspected to be associated with Gulf War service. Without these conditions, 38 U.S.C. 1118 does not authorize VA to establish a presumption for the increased risk of transportation-related injury or death. Because this phenomenon has not been connected to a disease or injury incurred or aggravated in service, VA has no statutory authority to compensate Veterans or their survivors through a new presumption, absent new legislative authority. *See* 38 U.S.C. 501 and 1110. Thus, after careful review of the findings of mortality from external causes, primarily motor vehicle accidents, in the early years after deployment, the Secretary has determined that the scientific evidence presented in Volume 4 and Volume 8 indicates that no presumption of service connection is warranted at this time.

Skin Conditions

The NAS committee found that some studies provided evidence that Gulf War Veterans have a higher incidence of certain skin conditions (atopic dermatitis and warts) than non-deployed Veterans, but that the findings were not consistent among the relevant studies. The NAS committee identified no evidence linking those conditions to any particular exposure in Gulf War Service. The NAS update committee determined that there was insufficient or inadequate evidence of an association between deployment to the Gulf War and skin disorders and noted that the inconsistency in the studies suggests that the few positive findings may be due to chance. Based on the inconsistent evidence of an association between deployment to the Gulf War and skin disorders and because these skin conditions have not been attributed to any particular exposure in the Gulf War, VA has determined that no new presumption of service connection is warranted for dermatological conditions.

Amyotrophic Lateral Sclerosis

The NAS committee and the NAS update committee found that some studies indicate that Gulf War Veterans may have an increased risk of amyotrophic lateral sclerosis (ALS). In another report issued in November 2006, titled *Amyotrophic Lateral Sclerosis in Veterans: Review of the Scientific Literature,* a separate NAS committee concluded that there is evidence of an increased risk of ALS in Veterans of all periods of service.

In September 2008, VA issued regulations establishing a presumption of service connection for ALS following any period of qualifying service. 73 FR 54691 (Sept. 23, 2008). Because this presumption applies to all Gulf War Veterans, there is no need for a separate presumption that is applicable only to Gulf War Veterans.

Other Diseases of the Nervous System

The NAS committee found that available studies generally did not provide evidence of an increased prevalence among Gulf War Veterans of peripheral neuropathy. The NAS update committee found that available studies generally did not provide evidence of an increased prevalence among Gulf War Veterans of peripheral neuropathy, multiple sclerosis, other neurological diseases such as Alzheimer's disease, dementia and Parkinson's disease, or other neurological outcomes. The NAS update committee therefore concluded that there was inadequate or insufficient evidence to determine whether an association exists between deployment to the Gulf War and multiple sclerosis, other neurological diseases, or other neurological outcomes, and that there is limited or suggestive evidence of no association between such deployment and peripheral neuropathy. Based on the committees' findings, the Secretary has determined that no new presumptions are warranted for these conditions.

Neurocognitive and Neurobehavioral Performance

The NAS committee defined primary studies as "high quality studies that used neurobehavioral tests that had previously been used to detect adverse effects in population-based research on occupational groups." The findings compared neurobehavioral performance in deployed Veterans and non-deployed Veterans. The NAS committee concluded that the primary studies of Veterans deployed to the Gulf War compared to Veterans not deployed to the Gulf War do not demonstrate differences in cognitive and motor measures as determined through neurobehavioral testing. However, the NAS committee did conclude that Gulf War Veterans who had at least one symptom commonly reported by Gulf War Veterans (such as fatigue, memory loss, confusion, inability to concentrate, mood swings, somnolence, gastrointestinal distress, muscle or joint pain, or skin or mucous membrane complaints) had poorer performance on cognitive tests than returning Veterans who did not report any such symptoms.

The NAS update committee reviewed two additional studies that were classified as secondary. Primary studies of deployed Gulf War Veterans versus non-deployed Veterans did not demonstrate differences in cognitive and motor measures to determine the neurobehavioral testing. The NAS update committee concluded that there is inadequate or insufficient evidence to determine if an association exists between deployment to the Gulf War and neurocognitive and neurobehavioral performance.

Decreased neurocognitive or neurobehavioral performance is not in itself a disease or illness for which service connection may be established. Further, Volume 4 and Volume 8 did not find evidence of an association between such decreased performance and any Gulf War exposure. Accordingly, VA has determined that no presumption relating to neurocognitive and neurobehavioral performance is warranted at this time.

Sexual Dysfunction

The NAS committee reviewed one primary study on self-reported sexual dysfunction in Volume 4. In this study the self-reported sexual problems were verified through physician interviews. The NAS committee found that Gulf War Veterans consistently report an increased prevalence of sexual problems when compared to nondeployed Veterans.

The NAS update committee did not consider any new primary studies, but considered seven additional secondary studies in Volume 8. The NAS update committee noted that in one study, assessing exposures specific to Gulf War service, there was no association between nerve agent exposure and reported sexual problems among Veterans deployed to the Gulf War. The NAS update committee further noted that all of the studies relied exclusively on survey responses except for the primary study reviewed in Volume 4. The NAS update committee acknowledged that studies assessing the prevalence of sexual problems are generally limited to self-reported symptoms, but warned that these studies should be interpreted with caution given concerns about their susceptibility to selection and reporting biases. The NAS update committee concluded that there was limited or suggestive evidence of an increased prevalence of self-reported sexual difficulties among Gulf War Veterans.

Although the NAS update committee found limited or suggestive evidence of an increase in self-reported sexual dysfunction, it did not find an increase in any specific or verified disease, nor did it find evidence associating any such condition with a particular Gulf War exposure. Accordingly, VA has determined that a presumption of

service connection for sexual dysfunction is not warranted at this time.

Other Genitourinary Outcomes

The NAS committee did not discuss other genitourinary conditions in Volume 4. In Volume 8, the NAS update committee found that studies showed an increased incidence of self-reported genitourinary symptoms or diseases among Veterans of Gulf War deployments. It found that such studies were limited by self-reported outcomes, lack of clinical confirmation, potential recall bias, and generally poor response rates. The NAS update committee identified no reports based on confirmed diagnoses showing increased incidence of genitourinary conditions among Veterans of Gulf War deployments. The NAS update committee also found that hospitalization studies provide evidence that hospitalizations for genitourinary conditions were not increased in that population. Accordingly, the NAS update committee concluded that there was inadequate or insufficient evidence to determine whether an association exists between Gulf War deployment and specific conditions of the genitourinary system, and that there is limited or suggestive evidence of no association between Gulf War deployment and hospitalization for genitourinary diseases. Accordingly, VA has determined that a presumption of service connection for genitourinary conditions is not warranted at this time.

Fertility Problems

In Volume 4 and Volume 8, the NAS committee and the NAS update committee assessed fertility problems such as semen parameters, hospitalization for infertility or genitourinary system diseases, self-reported difficulties in achieving a pregnancy, and serum concentrations of reproductive hormones in males. The NAS committee reviewed two primary studies in Volume 4. The NAS committee found that, although it appears that there is no difference in the prevalence of male fertility problems or infertility between Veterans deployed to the Gulf War and nondeployed Veterans, it is difficult to draw any conclusions due to the small number of available studies.

The NAS update committee additionally reviewed one primary study and four secondary studies in Volume 8. The NAS update committee found that there was no evidence of significant differences in concentrations of male reproductive hormones between Gulf War Veterans and nondeployed Veterans, but noted that this question was only addressed by one study. The NAS update committee further noted that, although it appears that infertility problems are reported more frequently among Gulf War Veterans compared to their nondeployed counterparts, these findings should be interpreted with caution because of the small number of available studies and their susceptibility to reporting bias and selective participation. The NAS update committee concluded that there was inadequate or insufficient evidence to determine whether an association exists between deployment to the Gulf War and fertility problems. Based on the NAS committee and the NAS update committee's findings, VA has determined that no presumption of service connection for fertility problems is warranted at this time.

Adverse Pregnancy Outcomes

The NAS committee and the NAS update committee reviewed studies concerning adverse pregnancy outcomes, such as the prevalence of spontaneous abortions, stillbirths, ectopic pregnancies, preterm births, low birth weight, and macrosomia, in the pregnancies of Gulf War deployed and nondeployed men and women. In Volume 4, the NAS committee reviewed one primary study and two secondary studies. The primary study was the only study of adverse pregnancy outcomes that used hospital discharge records rather than relying exclusively on self-reported outcomes.

In Volume 8, the NAS update committee reviewed five additional secondary studies evaluating the effect of deployment on adverse pregnancy outcomes. The NAS update committee found that one of the primary studies reviewed in Volume 4 noted an increased risk of spontaneous abortion and ectopic pregnancy among active-duty personnel admitted to military hospitals for pregnancy-related diagnoses, but that these results may not be generalized to Veterans who have left service or to pregnancy-related admissions to nonmilitary hospitals. The NAS update committee observed that such findings for spontaneous abortion were not replicated in the four secondary studies of female Veterans reviewed in Volume 8. The NAS update committee further observed that, in Volume 8, the one secondary study that addressed ectopic pregnancies did not indicate any increased incidence among either male or female Veterans of Gulf War deployments. The NAS update committee found that, among males reporting on their female partners, there was no consistent association for abortions, spontaneous abortion, preterm birth or low birth weight, but three studies showed a modest increase in self reported miscarriages among deployed males reporting on their female partners. The NAS update committee concluded that there was inadequate or insufficient evidence to determine whether an association exists between deployment to the Gulf War and adverse pregnancy outcomes. Based on the NAS committee and the NAS update committee findings, VA has determined that a presumption of service connection for adverse pregnancy outcomes is not warranted at this time.

Birth Defects

In Volume 4, a study identified birth defects among infants of military personnel born from January 1, 1989, to December 31, 1993, from population-based birth defect registries in six States: Arizona, Hawaii, Iowa, Arkansas, California, and Georgia. The study compared 48 selected congenital anomalies diagnosed from birth to the age of 1 year between Gulf War Veterans' and non-deployed Veterans' infants conceived before, during or after the war; and between infants conceived by Gulf War Veterans before and after the war. The study found three cardiac defects and one kidney defect among infants conceived after the war to Gulf War Veteran fathers. The study also found a higher prevalence of hypospadias, a genitourinary defect among sons conceived post-war to Gulf War Veteran mothers compared to their non-deployed counterparts. Aortic valve stenosis, coarctation of aorta, and renal agenesis and hypoplasia were also elevated among infants conceived by Gulf War Veteran fathers post-war compared to those conceived prior to the war.

The NAS update committee reviewed the studies identified in the Volume 4 report and considered a study by Doyle *et al.* (2004) as a primary study due to medical confirmation of self-reported outcomes. The Doyle study was considered a secondary study in the Volume 4 report. The study evaluated the prevalence of self-reported birth defects among the offspring of Veterans deployed to the Gulf and among the offspring of non-deployed Veterans who responded to a postal questionnaire. No significant associations with birth defects were found for infants of mothers deployed to the Gulf, although the analyses were limited.

Based on the primary studies of both reports and the availability of medical confirmation in those studies, there is some suggestion of increased risk of

birth defects among the offspring of Gulf War Veterans. However, there is no consistent pattern of higher prevalence of birth defects among offspring of male or female Gulf War Veterans, and no single defect, except urinary tract abnormalities, has been found in more than one well-designed study. The NAS update committee concluded there is inadequate or insufficient evidence to determine whether an association exists between deployment to the Gulf War and specific birth defects. Accordingly, VA has determined that there is no basis for a presumption relating to birth defects of the offspring of Veterans deployed to the Gulf War. VA notes further that it has no authority under 38 U.S.C. 1118 or other statutes to pay benefits for disability in the children of Gulf War Veterans.

Respiratory Symptoms

The NAS committee found that the reporting of respiratory symptoms, but not specific respiratory illnesses, is more prevalent in deployed Gulf War Veterans than in their non-deployed counterparts. The NAS committee identified five primary studies that examined the association between pulmonary conditions and deployment to the Gulf War. The committee found that respiratory symptoms, but not specific respiratory illnesses, are more prevalent in deployed Gulf War Veterans than in their non-deployed counterparts. Two of these studies analyzed data of Gulf War Veterans and non-deployed Veterans derived from a cohort of randomly selected participants from a previous 1995 study who had completed the earlier mailed questionnaire on self-reports of health conditions. One study reported on the prevalence of self-reported asthma, bronchitis, and emphysema and found no significant differences between the Gulf War Veterans and non-deployed Veterans after adjusting for smoking and demographic variables. An additional study applied spirometry and symptom interviews to a random selection of Gulf War deployed Veterans compared to non-deployed Veterans. A 2004 study found that only a history of smoking and wheezing among the respiratory outcomes studied were significantly elevated in the deployed Veterans. Spirometric measurements also show no significant difference between the Gulf War deployed Veterans compared to non-deployed Veterans. The study also looked at the effect of potential exposure to the Khamisiyah nerve gas releases by selectively comparing Veterans deployed into the geographic areas potentially affected, and no significant differences were noted in the measured pulmonary functions of these Veterans when compared to non-deployed Veterans who were not exposed to the nerve gas. The last study examined the pulmonary function parameters of Gulf War Seabees and non-deployed Seabees and found no significant difference between the two groups, but respiratory symptoms and shortness of breath were more common among deployed Veterans compared with non-deployed Veterans.

Additional primary studies examined the association between exposure to smoke from the Kuwaiti oil-well fires and respiratory outcomes. One study examined the effect of exposure to oil-well–fire smoke using exposure estimates based on troop locations and National Oceanographic and Atmospheric Administration modeling. The NAS committee found that the risk of physician-diagnosed asthma increased with increasing exposure and self-reported exposure. There were no pulmonary function tests conducted and the study did not distinguish preexisting asthma from new onset asthma.

The NAS committee found that no study using objective estimates of exposure to nerve agents due to the destruction of a munitions site at Khamisiyah, Iraq, in 1991 found any increased risk of respiratory disease or other problems with pulmonary function. Based on the information in Volume 4, VA has determined that a presumption of service connection for respiratory disease with exposures at Khamisiyah is not warranted at this time.

The NAS update committee identified three additional primary studies of respiratory outcomes and the deployment to the Gulf War. The studies found a non-significant increase in respiratory disease hospitalizations for Veterans deployed to Southwest Asia after the Gulf War and no excess deaths due to diseases of the respiratory system among Gulf War Veterans versus non-deployed Veterans. The third study identified no increase in mortality risk due to respiratory diseases among Veterans exposed to the chemical munitions destruction at Khamisiyah compared to the unexposed Veterans. One study found a non-significant increase in respiratory disease hospitalizations for Veterans deployed to Southwest Asia after the Gulf War as compared to Gulf War Veterans. The NAS update committee found that studies based on self-reported symptoms and self-reported diagnoses related to respiratory disease have inconsistently but frequently shown an increase among Gulf War Veterans. There appears to be no increase in respiratory disease among Gulf War Veterans when examined with objective measures of disease. Pulmonary function studies and mortality studies have shown no significant excess of lung function abnormalities or of death due to respiratory disease among Gulf War Veterans. The NAS update committee concluded that there is inadequate or insufficient evidence to determine whether an association exists between deployments to the Gulf War and respiratory disease. The NAS update committee further concluded that there is limited or suggestive evidence of no association between deployment to the Gulf War and decreased lung function in the first 10 years after the war.

Current VA regulations at 38 CFR 3.317 provide a presumption of service connection for chronic disability due to signs or symptoms affecting the respiratory system. Because chronic respiratory signs and symptoms are already included in § 3.317 and because an association between deployment to the Gulf War and either respiratory disease or decreased lung function could not be established, VA has determined that a presumption of service connection for respiratory disease is not warranted at this time.

Diseases of the Blood and Blood-Forming Organs

The NAS committee in Volume 4 did not specifically address blood diseases. The NAS update committee in Volume 8 found that available studies did not show an increased incidence of diseases of the blood and blood-forming organs in Gulf War Veterans. Accordingly, the NAS update committee concluded that there was inadequate or insufficient evidence to determine whether an association exists between deployment to the Gulf War and such diseases. Based on the NAS update committee's findings, the Secretary has determined that no new presumption relating to diseases of the blood and blood-forming organs is warranted at this time.

Structural Gastrointestinal Diseases

The NAS committee and the NAS update committee found that studies showed an increased incidence of self-reported gastrointestinal symptoms or disorders among Veterans of Gulf War deployments. As noted above, the NAS update committee found sufficient evidence of an association between deployment to the Gulf War and functional gastrointestinal disorders and VA has addressed that finding in a separate rulemaking. 75 FR 70162 (proposed Nov. 17, 2010). The NAS

update committee also found that there was inadequate or insufficient evidence to determine whether an association exists between Gulf War deployment and structural gastrointestinal diseases, such as peptic ulcer and inflammatory bowel disease (which includes ulcerative colitis and Crohn's disease). Although some of the reviewed studies found increased incidence of self reports of certain structural gastrointestinal diseases, the NAS update committee noted that the lack of diagnostic testing to validate those results was a significant confounding factor, because physicians not infrequently place an organic disease label (such as gastritis or peptic ulcer) on a patient's symptoms without performing diagnostic studies. The NAS update committee also noted that studies did not find an increased incidence of hospitalization or death due to gastrointestinal disease in Veterans of Gulf War deployments. Based on these findings, the Secretary has determined that no new presumption relating to structural gastrointestinal diseases is warranted at this time.

VI. Conclusion

After careful review of the findings of Volume 4 and Volume 8, the Secretary has determined that the scientific evidence presented in these reports indicates that no new presumption of service connection is warranted at this time for any of the illnesses described in the NAS 2006 and NAS update committee's 2010 reports. It is important to note that VA's determination that presumptions of service connection are not warranted at this time for the health effects in question is not intended to suggest that they are irrelevant to further investigations of Gulf War Veterans' health or that they may not in any circumstances form the basis for presumptions of service connection under Public Law 105–277. In the event future evidence links any illnesses to exposures associated with Gulf War service, VA may establish presumptions of service connection for such illnesses pursuant to Public Law 105–277. It is equally important to note that VA's determinations not to establish presumptions do not in any way preclude claimants from seeking and establishing service connection for these diseases and illnesses or any other diseases or illnesses that may be shown by evidence in an individual case to be associated with service in the Gulf War.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on March 31, 2011, for publication.

Dated: April 8, 2011.

William F. Russo,

Deputy Director, Regulations Policy and Management, Department of Veterans Affairs.

[FR Doc. 2011–8937 Filed 4–13–11; 8:45 am]

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DEPARTMENT OF VETERANS AFFAIRS

Veterans' Rural Health Advisory Committee; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Veterans' Rural Health Advisory Committee will conduct a teleconference meeting on Thursday, April 21, 2011, from 2 p.m. to 4 p.m., in Room GL20, 1722 I Street, NW., Washington, DC. The toll-free number for the meeting is 1–800–767–1750, and the access code is 57165#. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on health care issues affecting enrolled Veterans residing in rural areas. The Committee examines programs and policies that impact the provision of VA health care to enrolled Veterans residing in rural areas and discusses ways to improve and enhance VA services for these Veterans.

The Committee will discuss the Committee's Annual Report to the VA Secretary, VA Veteran Centers services, rural women Veteran health care, and the meeting agenda and planning for the Committee's upcoming June 2011 meeting in Helena, Montana.

A 15-minute period will be reserved at 3:40 p.m. for public comments. Individuals who wish to address the Committee are invited to submit a 1–2 page summary of their comments for inclusion in the official meeting record. Members of the public may also submit written statements for the Committee's review to Christina White, Designated Federal Officer, Department of Veterans Affairs (10A5A), 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail at *rural.health.inquiry@va.gov*. Any member of the public wishing to attend or seeking additional information should contact Ms. White at (202) 461–7100.

Dated: April 11, 2011.

By direction of the Secretary.

William F. Russo,

Director of Regulations Management, Office of General Counsel.

[FR Doc. 2011–9087 Filed 4–13–11; 8:45 am]

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DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Prosthetics and Special-Disabilities Programs; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on Prosthetics and Special-Disabilities Programs will be held on May 3–4, 2011, in room 230, at VA Central Office, 810 Vermont Avenue, NW., Washington, DC. The sessions will convene at 8:30 a.m. on both days, and will adjourn at 4:30 p.m. on May 3 and at 12 noon on May 4. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on VA's prosthetics programs designed to provide state-of-the art prosthetics and the associated rehabilitation research, development, and evaluation of such technology. The Committee also provides advice to the Secretary on special disabilities programs which are defined as any program administered by the Secretary to serve Veterans with spinal cord injuries, blindness or visual impairments, loss of extremities or loss of function, deafness or hearing impairment, and other serious incapacities in terms of daily life functions.

On May 3, the Committee will be briefed by the Acting Assistant Deputy Under Secretary for Clinical Operations and Management; Chief Consultant for Social Work Service; Director of Blind Rehabilitation Service; and Chief Consultant for Spinal Cord Injury & Disorders Strategic Healthcare Group. On May 4, the Committee will be briefed by the Chief Consultant for Care Coordination, and Chief Consultant for Rehabilitation Services.

No time will be allocated for receiving oral presentations from the public. However, members of the public may submit written statements for review by the Committee to Mr. Larry N. Long, Designated Federal Officer, Veterans Health Administration, Patient Care Services, Rehabilitation Services (117D), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, or by e-mail at *lonlar@va.gov*.

Any member of the public wishing to attend the meeting or wishing further information should contact Mr. Long at (202) 461–7354.

Dated: April 11, 2011.

By direction of the Secretary.

William F. Russo,

Director of Regulations Management, Office of the General Counsel.

[FR Doc. 2011–9088 Filed 4–13–11; 8:45 am]

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DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Structural Safety of Department of Veterans Affairs Facilities; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on Structural Safety of Department of Veterans Affairs Facilities will be held on May 12–13, 2011, in Room 442, at the Export Import Bank, 811 Vermont Avenue, NW., Washington, DC. The May 12 session will be from 9 a.m. until 5 p.m., and the May 13 session will be from 8:30 a.m. until 12:30 p.m. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on matters of structural safety in the construction and remodeling of VA facilities and to recommend standards for use by VA in the construction and alteration of its facilities.

On May 12, the Committee will review developments in the fields of fire safety issues and structural design as they relate to seismic and other natural hazards impact on the safety of buildings. On May 13, the Committee will receive appropriate briefings and presentations on current seismic, natural hazards, and fire safety issues that are particularly relevant to facilities owned and leased by the Department. The Committee will also discuss appropriate structural and fire safety recommendations for inclusion in VA's standards.

No time will be allocated for receiving oral presentations from the public. However, members of the public may submit written statements for the Committee's review to Krishna K. Banga, Senior Structural Engineer, Facilities Quality Service, Office of Construction and Facilities Management (00CFM1A), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, or e-mail at *krishna.banga@va.gov*. Any member of the public wishing to attend or seeking additional information should contact Mr. Banga at (202) 461–8219.

Dated: April 11, 2011.

By Direction of the Secretary.

William F. Russo,

Director of Regulations Management, Office of the General Counsel.

[FR Doc. 2011–9093 Filed 4–13–11; 8:45 am]

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FEDERAL REGISTER

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Part II

Department of Agriculture

Rural Business-Cooperative Service
Rural Utilities Service

7 CFR Part 4280
Rural Energy for America Program; Final Rule

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Rural Utilities Service

7 CFR Part 4280

RIN 0575–AA76

Rural Energy for America Program

AGENCY: Rural Business-Cooperative Service and Rural Utilities Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: The Rural Business-Cooperative Service (Agency) is establishing an interim rule for the Rural Energy for America Program (REAP), which is authorized under the Food, Conservation, and Energy Act of 2008. This interim rule modifies the existing grant and guaranteed loan program for renewable energy systems and energy efficiency improvements. In addition, it adds a grant program for feasibility studies for renewable energy systems and a grant program for energy audits and renewable energy development assistance, as provided in the Food, Conservation, and Energy Act of 2008.

DATES: This interim rule is effective April 14, 2011. Written comments on this interim rule must be received on or before June 13, 2011.

ADDRESSES: You may submit comments on this interim rule by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742.
- *Hand Delivery/Courier:* Submit written comments via Federal Express Mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

All written comments will be available for public inspection during regular work hours at the 300 7th Street, SW., 7th Floor address listed above.

FOR FURTHER INFORMATION CONTACT: Diane Berger, Energy Branch, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Stop 3225, Washington, DC 20250–3201; telephone (202) 260–1508. E-mail: *diane.berger@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This interim rule has been reviewed under Executive Order (EO) 12866 and has been determined to be significant by the Office of Management and Budget. The EO 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 EO.

The Agency conducted a benefit-cost analysis to fulfill the requirements of EO 12866. In this analysis, the Agency identifies potential benefits and costs of REAP to lenders, borrowers, and the Agency. The analysis contains quantitative estimates of the burden to the public and the Federal government and qualitative descriptions of the expected economic, environmental, and energy impacts associated with REAP.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, Rural Development 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, or tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires Rural Development to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This interim rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Environmental Impact Statement

Under this program, the Agency conducts a National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, review for each application received. To date, no significant environmental impacts have been reported, and Findings of No Significant Impact (FONSI) have been issued for each approved application. Taken collectively, the applications show no potential for significant adverse cumulative effects.

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, "Environmental Program." Rural Development has determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment, and in accordance with NEPA, an Environmental Impact Statement is not required. Grant and guaranteed loan applications will be reviewed individually to determine compliance with NEPA.

Executive Order 12988, Civil Justice Reform

This interim rule has been reviewed under EO 12988, Civil Justice Reform. In accordance with this rule: (1) All State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings in accordance with the regulations of the Department of Agriculture's National Appeals Division (7 CFR part 11) must be exhausted before bringing suit in court challenging action taken under this rule unless those regulations specifically allow bringing suit at an earlier time.

Executive Order 13132, Federalism

It has been determined, under EO 13132, that this interim rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in the 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.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612) (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 an economically significant impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

In compliance with the RFA, Rural Development has determined that this action, while mostly affecting small entities, will not have a significant economic impact on a substantial number of these small entities. Rural Development made this determination based on the fact that this regulation only impacts those who choose to participate in the program. Small entity applicants will not be affected to a greater extent than large entity applicants.

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

The regulatory impact analysis conducted for this interim rule meets the requirements for EO 13211, which states that an agency undertaking regulatory actions related to energy supply, distribution, or use is to prepare a Statement of Energy Effects. This analysis finds that this interim rule will not have any adverse impacts on energy supply, distribution, or use.

Executive Order 12372, Intergovernmental Review of Federal Programs

This program is not subject to the provisions of EO 12372, which require intergovernmental consultation with State and local officials.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

United States Department of Agriculture (USDA) will undertake, within 6 months after this rule becomes effective, a series of regulation Tribal consultation sessions to gain input by elected Tribal officials or their designees concerning the impact of this rule on Tribal governments, communities, and individuals. These sessions will establish a baseline of consultation for future actions, should any be necessary, regarding this rule. Reports from these sessions for consultation will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule and will provide additional venues, such as webinars and teleconferences, to periodically host collaborative conversations with Tribal leaders and their representatives concerning ways to improve this rule in Indian country.

The policies contained in this rule will not have Tribal implications that preempt Tribal law.

Programs Affected

The Rural Energy for America Program is listed in the Catalog of Federal Domestic Assistance under Number 10.868.

Paperwork Reduction Act

The information collection requirements contained in this interim rule have been approved by the Office of Management and Budget (OMB) under three separate information collections. The information collection requirements associated with renewable energy system and energy efficiency improvement grants and guaranteed loans, as covered in this Interim Rule, has been approved by OMB under OMB Control Number 0570–0050. The information collection requirements associated with energy audit and renewable energy development assistance grants and with renewable energy feasibility study grants have been approved by OMB under OMB Control Number 0570–0059 and OMB Control Number 0570–0061, respectively.

The collection of information is vital for Rural Development to make wise decisions regarding the eligibility of projects and borrowers in order to ensure compliance with the regulations and that the funds obtained from the Government are used appropriately (*e.g.*, used for the purposes for which the guaranteed loans were awarded). The type of information required depends on the type of financial assistance being sought.

E-Government Act Compliance

Rural Development 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.

I. Background

Rural Development administers a multitude of Federal programs for the benefit of rural America, ranging from housing and community facilities to infrastructure and business development. Its mission is to increase economic opportunity and improve the quality of life in rural communities by providing the leadership, infrastructure, venture capital, and technical support that enables rural communities to prosper. To achieve its mission, Rural Development provides financial support (including direct loans, grants, and loan guarantees) and technical assistance to help enhance the quality of life and provide the foundation for economic development in rural areas.

In response to the Farm Security and Rural Investment Act of 2002 (FSRIA), which established the Renewable Energy Systems and Energy Efficiency Improvements Program under Title IX, Section 9006, the Agency promulgated a rule (70 FR 41264, July 18, 2005) establishing the RES and EEI program (7 CFR part 4280, subpart B) for making grants, loan guarantees, and direct loans to farmers and ranchers (agricultural producers) or rural small businesses to purchase renewable energy systems and make energy efficiency improvements. Renewable energy sources eligible for funding included bioenergy, anaerobic digesters, electric geothermal, direct geothermal, solar, hydrogen, and wind.

Section 9001 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) amended Title IX of the FSRIA. Under the 2008 Farm Bill and Section 9007 of the amended FSRIA, the Agency is authorized to continue providing to agricultural producers and rural small businesses loan guarantees and grants for the development and construction of RES and EEI projects. In addition to the current set of renewable energy projects eligible for funding, the 2008 Farm Bill expands the program to include two new renewable energy technologies: hydroelectric and ocean energy. Further, the 2008 Farm Bill authorizes the Agency to provide grants specifically for energy audits, renewable energy development assistance, and RES feasibility studies. This newly expanded program is referred to as REAP, which continues the Agency's assistance to the adoption of both renewable energy systems and energy efficiency improvements through Federal government loan guarantees and grants.

REAP has been operating since 2005 under 7 CFR part 4280, subpart B, and, since the 2008 Farm Bill, through a series of **Federal Register** notices implementing the provisions in the 2008 Farm Bill for RES feasibility studies, energy audits, and renewable energy development assistance. For the RES feasibility studies, these notices were published on May 26, 2009 (74 FR 24769) and August 6, 2010 (75 FR 47525). For energy audits and renewable energy development assistance, these notices were published on March 11,

2009 (74 FR 10533) and May 27, 2010 (75 FR 29706).

This regulation establishes a consolidated REAP program by including each part of the program in a single subpart. Up to now, only the RES and EEI grant and guaranteed loan program requirements have been implemented under 7 CFR part 4280, subpart B and, for requirements established by the 2008 Farm Bill, through **Federal Register** notices. The requirements for RES feasibility study grants and for energy audit and renewable energy development assistance grants have been implemented through a series of **Federal Register** notices. It is, and has been, the Agency's intent to consolidate each of these programs into one REAP program.

Given the history of the implementation of this program, as described above, it is important to immediately implement a regulation in an effort to signal full implementation of REAP. Since 2002, the Agency, through its operation of the program, has developed experience regarding how this authority can be used to address renewable energy and energy efficiency issues facing agricultural producers and rural small businesses. The interim rule responds to these lessons learned. In addition, in determining to publish this regulation as an interim rule, the Agency is balancing the interests of not forestalling the implementation and administration of the program while it develops program regulations versus its desire to obtain public comment. For these reasons, the Agency chose to publish this as an interim rule as opposed to publishing it as a proposed rule with a separate notice of funding availability for the Fiscal Year 2011 funding cycle as it has done in previous fiscal years. By publishing an interim rule, the Agency is able to obtain public comment regarding the operation of the program for Fiscal Year 2011. The Agency believes that this approach is in the best interest of the public.

Following the publication of this interim rule, the Agency will propose and promulgate a subsequent rule for REAP to replace this interim rule.

Interim rule. USDA Rural Development is issuing this regulation as an interim rule, effective April 14, 2011. All provisions of this regulation are adopted on an interim final basis, are subject to a 60-day comment period, and will remain in effect until the Agency adopts the final rule.

II. Development of the Interim Rule for REAP

As noted above, this interim rule establishes a consolidated REAP program by including each part of the program in a single subpart. The provisions in the interim rule are based on the following:

1. The existing program found at 7 CFR part 4280, subpart B, for renewable energy systems and energy efficiency improvements as modified by the 2008 Farm Bill and the Fiscal Year 2010 notice.

2. The Fiscal Year 2010 notices that implement the 2008 Farm Bill provisions for RES feasibility studies, energy audits, and renewable energy development assistance.

3. The inclusion of flexible fuel pumps that dispense blended liquid transportation fuel as an important new component of the Federal government's strategy for encouraging the use of renewable fuels. Section 9007(a)(2) authorizes the Agency to fund parts of renewable energy systems as well as renewable energy systems in whole. The Agency has determined that a flexible fuel pump is a uniquely critical aspect of a biofuel renewable energy system defined as the conversion of the biomass through the dispensing of the biofuel to a vehicle.

The policy rationale for the Agency to include flexible fuel pumps in REAP is to address a barrier that the Agency has determined impedes the broader use of biofuels as a liquid transportation fuel in the United States. For example, one major aspect of this barrier derives from two scenarios. The first is one of an insufficient availability of higher ethanol-blend fuels in the market place that discourages Americans from purchasing flexible fuel vehicles that can burn such higher ethanol-blend fuels and does not provide a sufficient level of higher ethanol-blend fuel to supply the existing flexible fuel vehicle fleet to fully take advantage of the fleet's ability to consume additional biofuel. The second is one of an insufficient number of flexible fuel vehicles on the road to encourage fuel station owners to expend the capital necessary to install flexible fuel pumps in response to market forces. By allowing REAP to provide financing through grants and loan guarantees to encourage the installation of flexible fuel pumps in rural areas, the Agency believes it can help overcome this barrier. The Agency acknowledges that there are other similar biofuel examples, including barriers to biodiesel.

The Agency recognizes that REAP is designed to address a variety of renewable energy and energy efficiency goals. With the inclusion of flexible fuel pumps for REAP funding, the Agency will ensure that it will not ignore the other important goals and purposes of the program.

4. The removal of citizenship requirements which the Agency has determined is in the best interest of furthering the Administration's goal of increasing the use of renewable energy systems and energy efficiency improvements to include applicants who are not U.S. citizens, provided the proposed project is located in a State and the applicant has a place of business located in a State. In addition, this change is consistent with recent litigation.

5. The modification of the rural area requirement for projects proposed by agricultural producers to allow such projects to be located in non-rural areas. The Agency determined to remove the rural area requirement as it applies to agricultural producers under REAP for several reasons. First, the Agency wanted REAP to be consistent with the Biorefinery Assistance Program, the Repowering Assistance Program, and the Advanced Biofuel Payment Program. The three programs do not include a rural area requirement in their respective interim rules published in February 2011. Second, the Agency has determined that there are a number of agricultural producers that operate in non-rural areas that can benefit from REAP. Such agricultural producers may include commercial nurseries and truck farms (the growing of one or more crops on a scale necessary for shipment to distant markets) that are located near urban areas.

6. The addition of a new paragraph to clarify how the Agency addresses changes in equipment for energy efficiency improvements for determining eligible project costs.

7. The replacement of "return on investment" with "simple payback." Using the term "return on investment" was creating confusion because the calculations used for this scoring criterion are not typically understood as return on investment. Therefore, we are clarifying the calculations and using the phrase "simple payback" because that is what we are calculating.

8. The correction of several inconsistencies in the previous implementation of 7 CFR part 4280, subpart B and in the Fiscal Year 2010 notices implementing REAP.

By taking into consideration each of the above factors, the Agency has developed an interim rule for REAP.

The Rural Energy for America Program

The following paragraphs discuss the interim rule in terms of changes from the current program as it relates to:

- General Provisions;

- RES and EEI grants;
- RES and EEI guaranteed loans;
- RES feasibility study grants;
- EA and REDA grants; and
- Appendices.

The changes discussed are how the interim rule varies from the existing RES and EEI program in 7 CFR part 4280, subpart B, and the Fiscal Year 2010 **Federal Register** notice for the RES and EEI program, and from the implementation of RES feasibility study grants and EA and REDA grants as found in their respective Fiscal Year 2010 notices.

1. General Provisions

The organization of this section follows the first six sections of the current regulation at 7 CFR part 4280, subpart B, with changes as discussed below. The interim rule includes several new sections to the general provisions, the contents of which mostly consolidate existing provisions from the Fiscal Year 2010 Notices that are applicable to each of the programs within REAP. Lastly, the applicant eligibility and project eligibility sections of the existing rule have been relocated to the RES and EEI grants section of the rule and modified as needed.

Purpose (§ 4280.101)

The primary revision to this section is adding reference to provision of grants for conducting RES feasibility studies and for energy audits and renewable energy development assistance. These provisions are being added as a result of the 2008 Farm Bill. In addition, reference to a direct loan program has been removed because direct loans are no longer authorized under the 2008 Farm Bill. Lastly, the Agency also removed current 7 CFR 4280.101(b), which the Agency has determined is unnecessary for the rule. Additional conforming changes were made in subsequent sections, but are not necessarily identified below.

Organization of Subpart (§ 4280.102)

This section is basically the same as existing 7 CFR 4280.102, in that it identifies the organization of the rule. The primary differences are editorial in nature, simplifying the discussion, expanding the section to cover FS, EA, and REDA grants and identifying more clearly the rule's organization.

Definitions (§ 4280.103)

This section was revised by adding, revising, and deleting a number of terms. The major revisions were the addition of definitions from the Fiscal Year 2010 notices for the RES/EEI, FS, EA, and REDA grants. The following present the changes made.

Added Terms

- *Administrator.* This term was added for clarity.
- *Blended liquid transportation fuel.* This term was added to implement the revision to allow retail pumps that combine and dispense a blended liquid transportation fuel to be eligible for grant funding.
- *Departmental regulations.* This term was added and is now referenced in the rule.
- *Flexible fuel pump.* This term was added because the Agency will allow flexible fuel pumps as an eligible RES project. The term refers to a retail pump that combines and dispenses a blended liquid transportation fuel or that dispenses a blended liquid transportation fuel with a percentage volume of renewable fuel in excess of the Federal or State requirements, whichever is higher.
- *Hydroelectric energy, hydropower, ocean energy and small hydropower.* These terms were added in response to the 2008 Farm Bill provisions that authorize these qualifying sources of renewable energy. The Agency is limiting the size of eligible hydropower projects to those that have a rated power of 30 megawatts or less. The Conference Managers Report to the 2008 Farm Bill specifically mentions allowing small hydroelectric systems to be eligible under the program. Per consultation with the U.S. Department of Energy, the Agency is defining small hydropower systems as having a rated power of 30 megawatts or less, which includes hydropower projects commonly referred to as "micro-hydro" and "mini-hydro." Thus, if the hydropower system has a rated power of more than 30 megawatts, it would not be eligible for this program.
- *Institution of higher education, instrumentality, and public power entity.* These terms were added because they are three of the eligible entities for energy audit and renewable energy development assistance grants.
- *Rated power.* This term was added to clarify the definitions in which it is used.
- *Renewable biomass.* This term was added as a result of the 2008 Farm Bill.
- *Renewable energy development assistance, renewable energy site assessment, and renewable energy technical assistance.* These terms were added to implement the Energy Audit and Renewable Energy Development Assistance grants.
- *Rural Energy for America Grant Agreement.* This term was added for clarity.
- *Simple payback.* This term was added to implement the scoring criterion for simple payback. It includes the method to be used to calculate simple payback.

Deleted Terms

- *Biomass.* This term has been replaced, under the 2008 Farm Bill, with "renewable biomass."
- *Demonstrated financial need.* This term was deleted because it is no longer part of the program as found in the 2008 Farm Bill.
- *In-kind contribution, loan-to-value, and parity.* These terms were deleted because they are not used in the rule.

Revised Terms

- *Agency.* This term was updated to refer to the Rural Energy for America Program rather than the 9006 program.
- *Anaerobic digester project.* This term was revised in order to allow facilities producing natural gas in a compressed gaseous or liquid state to qualify as an anaerobic digester project.
- *Biogas.* This term was revised to refer to "renewable biomass" rather than to "biomass."
- *Matching funds.* This term was revised to remove reference to direct loans.
- *Post-application.* This term was clarified.
- *Power purchase agreement.* This term was revised by replacing "arrangement" with "agreement."
- *Renewable energy.* This term was revised to conform to changes in the 2008 Farm Bill, including adding reference to ocean and hydroelectric energy as renewable energy sources and replacing "biomass" with "renewable biomass."
- *Rural or rural area.* This term was revised to conform to changes provided in the 2008 Farm Bill.
- *Small business.* In order for the Agency to clarify the application of the requirement that entities must operate independent of governmental control to certain Tribal enterprises, this term was revised to allow such enterprises to remain eligible if they are operated in a manner consistent to the Department of the Interior's regulation governing the establishment of Section 17 Corporations. This clarification is necessary to enable this program to be effectively administered in Indian Country.
- *State.* This term was clarified by adding "of the United States."

Exception Authority (§ 4280.104)

This section was updated to reflect the latest language the Agency uses, as reflected in the recent Agency energy

title interim rules. First, the exercise of this exception authority must be in the Federal government's interest. Under the current rule, this reads in the USDA's interest. Second, the exercise of this exception authority must be concurred to by the Secretary of Agriculture.

Appeals (§ 4280.105)

This section was revised by removing reference to direct loans to conform to the 2008 Farm Bill and deleting the last sentence of the section because it is inappropriate.

Conflict of Interest (§ 4280.106)

This section was revised by removing reference to direct loans to conform to the 2008 Farm Bill and adding a provision specifically prohibiting members of, or delegates to, Congress from receiving any grant or portion thereof or from receiving any benefit that might arise therefrom and specifically addressing assistance to Agency employees and their relatives and associates. The Agency added this provision to provide greater transparency and accountability in government.

USDA Departmental Regulations (§ 4280.107)

This section was added to clearly identify the incorporation by reference of the Departmental Regulations.

Laws That Contain Other Compliance Requirements (§ 4280.108)

This section was relocated under the "General" heading of the rule because it applies to each REAP program, with minor exceptions. Two of the changes made were to remove reference to direct loans in the paragraph on civil rights compliance because direct loans are not part of the program and to add a paragraph specific to guaranteed loans concerning the Americans with Disabilities Act.

Ineligible Applicants, Borrowers, and Owners (§ 4280.109)

With minor wording changes to make it applicable to both grants and guaranteed loans, this section replaces existing 7 CFR 4280.107(a)(4).

General Applicant and Application Provisions (§ 4280.110)

With minor wording changes, this new section gathers into one place three general requirements affecting each REAP program concerning:

- Complete applications;
- Application withdrawal; and
- Satisfactory progress.

Notifications (§ 4280.111)

This new section gathers into one place general requirements affecting each REAP program regarding notification of applicants and lenders, as applicable, if applicants and their projects are eligible, if their application is determined to be ineligible, and if their application receives an award.

2. Renewable Energy System and Energy Efficiency Improvement Grant Program

Applicant Eligibility (§ 4280.112)

This section has been reduced to just identifying the type of applicant eligible (*i.e.*, agricultural producer or rural small business, which is unchanged from the current rule) because the other provisions have been either deleted or moved, as discussed below.

The citizenship requirements currently found in 7 CFR 4280.107(a)(2) and (3) have been removed (and, in their place, the rule requires the project to be located in a State as defined in the rule). The Agency removed this requirement because, after reviewing public comments that it sought and received on a March 12, 2010, Notice of Contract for Proposal (NOCP) for payments to advanced biofuels producers, the Agency has determined that it is in the best interests of furthering the Administration's goal of increasing the use of renewable energy systems and energy efficiency improvements to include applicants who are not U.S. citizens, provided the proposed project is located in a State and the applicant has a place of business located in a State. In addition, this change is consistent with recent litigation.

The provisions in existing 7 CFR 4280.107(a)(4) and in 7 CFR 4280.107(b), as noted earlier, have been relocated to §§ 4280.109 and 4280.110(c), respectively.

The demonstrated financial need provisions in existing 7 CFR 4280.107(a)(5) have been removed to conform the rule to the 2008 Farm Bill.

Project Eligibility (§ 4280.113)

Numerous changes have been made to this section for determining whether a project is eligible to receive an RES or EEI grant under this subpart.

First. The Agency clarified that energy efficiency improvements to existing renewable energy systems are eligible energy efficiency improvement projects.

Second. Projects must be located in a State, as defined in the rule, as discussed above under applicant eligibility.

Third. The applicant must have a place of business located in a State, also as discussed above under applicant eligibility.

Fourth. The Agency is allowing projects for facilities located in non-rural areas to be eligible if the project is being proposed by an agricultural producer.

This conforms the rule to other programs that serve agricultural producers (*e.g.*, those provided by the Natural Resource Conservation Service and Farm Service Agency), which do not have a rural area requirement for agricultural producers. Further, the authorizing statute (the 2008 Farm Bill) does not restrict eligibility of agricultural producers to rural areas as it does with rural small businesses, where the language specifically uses the term "rural" in referring to small businesses. The Agency does not expect the inclusion of projects for facilities located in non-rural areas proposed by agricultural producers to affect a large number of agricultural producers because most agricultural producers' facilities are located within rural areas.

However, in allowing projects by agricultural producers for facilities in non-rural areas to be eligible, the Agency is also requiring that the application for such facilities be only for renewable energy systems or energy efficiency improvements on integral components of or that are directly related to the facility, such as vertically integrated operations, and are part of and co-located with the agricultural production operation. For example, if an agricultural producer grows vegetables in a greenhouse located in a non-rural area and sells those vegetables at a co-located retail operation, where both the greenhouse and the retail operation are owned by the applicant, the application may consider both the greenhouse and the retail operation. However, if the retail operation is not co-located with the greenhouse, in this example, the application may consider only the greenhouse and not the retail operation.

Fifth. If the project is for a hydropower project, only those hydropower projects with a rated power of 30 megawatts or less are eligible.

Sixth. The project must have demonstrated technical feasibility.

Seventh. The Agency revised the provision associated with residential costs to clarify the current regulation and how residential purposes relate to the eligibility of projects under REAP. The Agency notes that this provision, found in § 4280.113(k), does not preclude an applicant from applying for funding for the installation of a second meter or providing certification in the application that any excess power generated by the renewable energy

system will be sold to the grid and will not be used by the applicant for residential purposes.

Qualification for Simplified Applications (§ 4280.114)

The provisions of this section were modified by removing the certification by the applicant of demonstrated financial need.

RES and EEI Grant Funding (§ 4280.115)

Several changes were made to this section as described below.

- The prohibition on third-party, in-kind contributions was removed because it conflicts with the Agency's Departmental Regulations.
- The Agency added a provision specifically addressing energy efficiency improvements as eligible project costs (see § 4280.115(c)(10)). In the current rule, eligible energy efficiency improvement costs were included in the paragraph addressing construction of new EEI projects (see 7 CFR 4280.110(c)(9)). This is somewhat confusing. The new provision clearly states that energy efficiency improvements as eligible project costs are limited to only improvements identified in the energy assessment or energy audit. This is similar to the current text found in 7 CFR 4280.110(c)(9). The new paragraph also covers explicitly how the Agency will address the replacement of equipment identified in the energy audit as an eligible project cost. To illustrate this, an example is provided in the rule.
- The provisions associated with determining the amount of a RES or EEI grant were updated to reflect the 2008 Farm Bill (see § 4280.115(g)(4) through (g)(6)), which resulted in two substantive changes. The first is adding consideration of the expected energy efficiency of the renewable energy system. The second is deleting consideration of the extent to which the renewable energy system will be replicable.
- Unless otherwise agreed to by the Agency, any renewable energy system or energy efficiency improvement grant agreement under this subpart will terminate 2 years from the date the Agency signs the agreement.

Application and Documentation (§ 4280.116)

The primary change to this section was to include a new paragraph (a) that addresses general application requirements covering one funding type applications, environmental information, foreign technology, and commercial application demonstration of pre-commercial technology.

With regard to application content, the two primary changes made were to remove the requirement to include intergovernmental consultation comments (such consultation is not required for this program) and the requirement to certify to and provide sufficient information or documentation for determination of demonstrated financial need.

Evaluation of RES and EEI Grant Applications (§ 4280.117)

Several changes were made to this section as described below.

First. The paragraphs concerning ineligible applications and incomplete applications were relocated to the General section of the rule.

Second. Scoring for flexible fuel pumps was added to the first scoring criterion (see § 4280.117(c)(1)(iv)).

Third. The return on investment criterion was replaced with a simple payback criterion to more accurately reflect the actual scoring the Agency performs.

Fourth. A new scoring criterion was added that allows State Directors and the Administrator to award up to 10 priority points if the application is for an under-represented technology, is for flexible fuel pumps, or would help achieve geographic diversity.

Insurance Requirements (§ 4280.118)

No changes were made to this set of provisions.

Construction Planning and Performing Development (§ 4280.119)

One change was made to this set of provisions in § 4280.119(f)(3) where the Agency revised the text associated with an outdated American Institute of Architects form (*i.e.*, Form A191).

RES and EEI Grantee Requirements (§ 4280.120)

Three primary changes were made to this section as described below.

First. The requirement that grants must also abide by "any other applicable Federal statutes or regulations" was added.

Second. A statement that the failure to follow the requirements contained in the grant agreement, the subpart, and other applicable Federal statutes and regulations may result in termination of the grant and adoption of other available remedies was added.

Third. The requirement for the applicant to provide, where applicable, a copy of the executed power purchase agreement was added.

Servicing Grants (§ 4280.121)

The two changes to this section are:

- Adding reference to the Departmental Regulations when servicing RES and EEI grants; and
- Adding provisions for when a grantee seeks to change a contractor or vendor.

3. Renewable Energy System and Energy Efficiency Improvement Guaranteed Loans

Borrower and Project Eligibility (§§ 4280.122 and 4280.123)

Changes made to these sections reflect the same changes made to applicant and project eligibility for RES and EEI grants, as discussed above.

Guaranteed Loan Funding (§ 4280.124)

Several changes were made to this section:

- The maximum amount of the loan that will be made available to an eligible project was increased from 50 to 75 percent of total eligible project costs;
- Both the maximum amount of a guaranteed loan and the total amount of loans guaranteed by the Agency under this program to any one borrower were increased from $10 million to $25 million;
- A 60 percent guarantee was added for loans greater than $10 million; and
- Revised the criteria associated with determining the amount of a loan awarded in the same manner as described earlier for RES and EEI grants.

Application and Documentation (§ 4280.128)

As was done for grant application and documentation, the requirement to include intergovernmental consultation comments was removed (such consultation is not required for this program).

Evaluation of RES and EEI Guaranteed Loan Applications (§ 4280.129)

As was done for RES and EEI grants, the requirements associated with ineligible applications and incomplete applications were relocated under the "General" heading of the rule. A minor edit was made to paragraph (a) and cross-references were updated. No other changes were made to this section.

Conditions Precedent to Issuance of Loan Note Guarantee (§ 4280.146)

The one substantive change to this section was the addition of the requirement for the lender to provide, where applicable, a copy of the executed power purchase agreement.

Laws That Contain Other Compliance Requirements (§ 4280.151)

This section is now "Reserved," and the provisions regarding laws that

contain other compliance requirements have been incorporated into a similar section in the General Provisions portion of the interim rule.

Other Sections

Other than minor edits and updating cross references where applicable, no changes were made to the following guaranteed loan sections:

- Interest rates (§ 4280.125).
- Terms of loan (§ 4280.126).
- Guarantee/annual renewal fee percentage (§ 4280.127).
- Eligible lenders (§ 4280.130).
- Lender's functions and responsibilities (§ 4280.131).
- Access to records (§ 4280.132).
- Conditions of guarantee (§ 4280.133).
- Sale or assignment of guaranteed loan (§ 4280.134).
- Participation (§ 4280.135).
- Minimum retention (§ 4280.136).
- Repurchase from holder (§ 4280.137).
- Replacement of document (§ 4280.138).
- Credit quality (§ 4280.139).
- Financial statements (§ 4280.140).
- Appraisals (§ 4280.141).
- Personal and corporate guarantees (§ 4280.142).
- Loan approval and obligation of funds (§ 4280.143).
- Transfer of lenders (§ 4280.144).
- Changes in borrower (§ 4280.145).
- Issuance of the guarantee (§ 4280.147).
- Refusal to execute Loan Note Guarantee (§ 4280.148).
- Requirements after project construction (§ 4280.149).
- Insurance requirements (§ 4280.150).
- Servicing guaranteed loans (§ 4280.152).
- Substitution of lender (§ 4280.153).
- Default by borrower (§ 4280.154).
- Protective advances (§ 4280.155).
- Liquidation (§ 4280.156).
- Determination of loss and payment (§ 4280.157).
- Future recovery (§ 4280.158).
- Bankruptcy (§ 4280.159).
- Termination of guarantee (§ 4280.160).

4. Combined Funding

Other than updating cross-references, the only other change to this section was deleting the third-party, in-kind contribution prohibition as was done for RES and EEI grants.

5. Renewable Energy System Feasibility Study Grants

The provisions contained in the Fiscal Year 2010 notice for RES feasibility study grants that were specific to RES feasibility study grants are organized in the interim rule as shown in the following table. Other provisions in the Fiscal Year 2010 notice for RES feasibility study grants that are applicable to the other REAP programs are incorporated into the General provisions section of the interim rule.

Section name	Section number
Applicant eligibility	4280.170
Project eligibility	4280.171
Application eligibility provisions	4280.172
Grant funding for feasibility studies	4280.173
Feasibility study grant applications—content	4280.176
Evaluation of feasibility study grant applications	4280.177
Scoring feasibility study grant applications	4280.178
Selecting feasibility study grant applications for award	4280.179
Actions prior to grant closing	4280.180
Awarding and administering feasibility study grants	4280.181
Servicing feasibility study grants	4280.182

With a limited number of exceptions, the provisions found in the Fiscal Year 2010 notice for RES feasibility study grants have been incorporated into the interim rule. These exceptions are presented below.

Project eligibility (§ 4280.171). Three conforming changes were made to the requirements for project eligibility.

First. The project for which the RES feasibility study is to be performed must be located in a State. This is a conforming change necessitated by removing the citizenship requirement (which was incorporated by reference in the Fiscal Year 2010 Notice).

Second. The applicant must have a place of business in a State. This is also a conforming change necessitated by removing the citizenship requirement (which was incorporated by reference in the Fiscal Year 2010 notice).

Third. A RES feasibility study may be performed for a proposed RES project for a facility that is located in a non-rural area if the applicant is an agricultural producer. If the agricultural producer's facility is in a non-rural area, then the feasibility study can be for a renewable energy system on integral components of or directly related to the facility, such as vertically integrated operations, and are part of and co-located with the agriculture production operation. For example, if an agricultural producer grows vegetables in a greenhouse located in a non-rural area and sells those vegetables at a co-located retail operation, where both the greenhouse and the retail operation are owned by the applicant, the feasibility study may consider both the greenhouse and the retail operation. If the retail operation is not co-located with the greenhouse, in this example, the feasibility study could only consider the greenhouse and not the retail operation. Under the Fiscal Year 2010 notice, all projects were required to be in a rural area.

Forms and certifications (§ 4280.176). Two additional forms are identified for submittal with the application—Forms SF–424A and SF–424B. These forms are applicable for non-construction projects.

The certification that the renewable energy system is located in a rural area is limited to rural small businesses, because, under the interim rule, the rural area location requirement does not apply to projects from agricultural producers.

Evaluation of feasibility study grant applications (§ 4280.177). The sentence referring to the Agency continuing to process an application if the application contains certification that the applicant has neither sought nor received any other Federal or State assistance for a RES feasibility study on the subject facility was not included in the interim rule, because there are other reasons why the Agency may not continue processing an application.

Scoring feasibility study grant applications (§ 4280.178). Reference to "Other Federal or State assistance for only the RES feasibility study would make the request ineligible" under the scoring criterion for commitment of funds was not included in the interim rule because it is incorrect.

Awarding and administering feasibility study grants (§ 4280.181). The interim rule clarifies when which forms are to be submitted.

Servicing (§ 4280.182). The sentence "All non-confidential information resulting from the Grantee's activities shall be made available to the general public on an equal basis" is not included in the interim rule because it is not appropriate.

Intergovernmental review comments. This provision was not included in the interim rule because it is not applicable to this program.

Exception Authority. The exception authority provision in the Fiscal Year 2010 notice is replaced in the interim rule with a different exception authority provision that is a more recent provision and that is applicable across the entire subpart.

Appeals. The appeals provision in the Fiscal Year 2010 notice is replaced in the interim rule with a different appeals

provision that is applicable across the entire subpart.

6. Energy Audit and Renewable Energy Development Assistance Grants

As was done for RES feasibility study grants, the provisions contained in the Fiscal Year 2010 notice for EA and REDA grants that are specific to EA and REDA grants are organized in the interim rule as shown in the following table. Other provisions in the Fiscal Year 2010 notice for EA and REDA grants that are applicable to the other REAP programs are incorporated into the General provisions section of the interim rule.

Section name	Section number
Applicant eligibility	4280.186
Project eligibility	4280.187
Grant funding for energy audit and renewable energy development assistance	4280.188
EA/REDA grant applications—content	4280.190
Evaluation of energy audit and renewable energy development assistance grant applications	4280.191
Scoring energy audit and renewable energy development assistance grant applications	4280.192
Selecting energy audit and renewable energy development assistance grant applications for award	4280.193
Actions prior to grant closing	4280.194
Awarding and administering energy audit and renewable energy development assistance grants	4280.195
Servicing energy audit and renewable energy development assistance grants	4280.196

With a limited number of exceptions, the provisions found in the Fiscal Year 2010 notice for EA and REDA grants have been incorporated into the interim rule. These exceptions are presented below.

Applicant eligibility (§ 4280.186). The citizenship requirement found in the Fiscal Year 2010 notice is not included in the interim rule.

Project eligibility (§ 4280.187). In response to the removal of the citizenship requirement, the interim rule requires that the energy audit or renewable energy development assistance must be provided to a recipient in a State and the applicant must have a place of business in a State.

Another change is that the rural area requirement in the interim rule is not applicable to agricultural producers (as it was in the Fiscal Year 2010 notice). Instead, a facility owned by an agricultural producer for which an energy audit is being conducted or that is receiving renewable energy development assistance may be located in either a rural area or non-rural area. If the agricultural producer's facility is in a non-rural area, then the energy audit or renewable energy development assistance can be for a renewable energy system or energy efficiency improvement on integral components of or that are directly related to the facility, such as vertically integrated operations, and are part of and co-located with the agriculture production operation.

Grant funding for energy audit and renewable energy development assistance (§ 4280.188). Under the provisions for eligible project costs, the interim rule does not include "pay for assistance to any private business enterprise which does not meet the requirements of paragraph III.A(2) of this Notice" because the referenced paragraph in the Fiscal Year 2010 notice refers to meeting the citizenship requirement, which has been not been included in the interim rule, thus making this provision not applicable to the interim rule.

Application contents (§ 4280.190). The requirement to submit intergovernmental review comments was not included in the interim rule because intergovernmental review is not required for this program. In addition, the Agency removed the phrasing "(in addition to the required 25 percent contribution from the agricultural producer or rural small business for the cost of an energy audit)" from the title of the "leveraging and commitment of other sources of funding" scoring criterion because the Agency determined that it was confusing.

Scoring energy audit and renewable energy development assistance grant applications (§ 4280.192). The interim rule replaces "existing rural service area" with "existing service area."

Selecting energy audit and renewable energy development grant assistance applications for award (§ 4280.193). The interim rule does not include the Fiscal Year 2010 provision concerning objections raised by State or local governments during the intergovernmental review process, because the intergovernmental review process is not applicable to this program. Thus, this provision is not appropriate.

Awarding and administering energy audit and renewable energy development assistance grants (§ 4280.195). The text concerning forms was revised to clarify which forms are to be submitted to the Agency and to remove reference to the grant being considered closed on the obligation date, because that is incorrect and is not needed in the rule.

Servicing (§ 4280.196). In the requirements for performance reports, the phrase "final semiannual performance report" was revised to "final performance report" for clarity. In addition, the Agency recast the paragraph on the use of remaining funds to use the same phrasing as found in the deobligation provisions for RES feasibility study grants.

Intergovernmental review comments. This provision was not included in the interim rule because it is not applicable to this program.

Exception Authority. The exception authority provision in the Fiscal Year 2010 notice is replaced in the interim rule with a different exception authority provision that is a more recent provision and that is applicable across the entire subpart.

Appeals. The appeals provision in the Fiscal Year 2010 notice is replaced in the interim rule with a different appeals provision that is applicable across the entire subpart.

III. Request for Comments

The Agency is interested in receiving comments on all aspects of the interim rule. An area in which the Agency is seeking specific comments is identified below. All comments should be submitted as indicated in the **ADDRESSES** section of this preamble.

Demonstrated financial need. The Agency is seeking comment on whether to require demonstrated financial need for applicants seeking grants and, if so, what should the requirements be for such demonstration (*i.e.*, how would an applicant demonstrate financial need). Please be specific and provide rationale to support your position.

List of Subjects in 7 CFR Part 4280

Loan programs—Business and industry, Economic development, Energy, Energy audits, Energy efficiency improvements, Feasibility studies, Grant programs, Guaranteed loan programs, Renewable energy development assistance, Renewable energy systems, and Rural areas.

For the reasons set forth in the preamble, Chapter XLII of title 7 of the Code of Federal Regulations is amended as follows:

CHAPTER XLII—RURAL BUSINESS–COOPERATIVE SERVICE AND RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE

PART 4280—LOANS AND GRANTS

■ 1. The authority citation for part 4280 is revised to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 940c; 7 U.S.C. 8107.

■ 2. Subpart B of part 4280 is revised to read as follows:

Subpart B—Rural Energy for America Program General

Subpart B—Rural Energy for America Program

General

§ 4280.101 Purpose.

This subpart contains the procedures and requirements for providing the following financial assistance under the Rural Energy for America Program:

(a) Grants or guaranteed loans, or a combination grant and guaranteed loan, for the purpose of purchasing and installing renewable energy systems and energy efficiency improvements in rural areas;

(b) Grants for conducting renewable energy system feasibility studies; and

(c) Grants to assist agricultural producers and rural small businesses by conducting energy audits and providing recommendations and information on renewable energy development assistance and improving energy efficiency.

§ 4280.102 Organization of subpart.

(a) Sections 4280.103 through 4280.111 discuss definitions, exception authority, appeals, conflict of interest, USDA Departmental regulations, other applicable laws, ineligible applicants, borrowers, and owners, general applicant and application provisions, and notifications, which are applicable to all of the funding programs under this subpart.

(b) Sections 4280.112 through 4280.121 discuss the requirements specific to renewable energy system and energy efficiency improvement grants. Sections 4280.112 and 4280.113 discuss, respectively, applicant and project eligibility. Section 4280.114 discusses the circumstances under which an applicant may qualify to submit a simplified application for a grant. Sections 4280.115 through 4280.118 address grant funding, grant application content and required documentation, the evaluation process, and insurance requirements. Sections 4280.119 through 4280.121 address project planning, development, and completion, grantee requirements, and grant servicing.

(c) Sections 4280.122 through 4280.160 discuss the requirements

specific to renewable energy system and energy efficiency improvement guaranteed loans. Sections 4280.122 through 4280.127 discuss eligibility and requirements for making and processing loans guaranteed by the Agency. Section 4280.128 addresses the application and documentation requirements, separating the requirements for loans over $600,000 and for loans of $600,000 or less. Section 4280.129 addresses the evaluation of guaranteed loan applications. Sections 4280.130 through 4280.160 provide guaranteed loan origination and servicing requirements. These requirements apply to lenders, holders, and other parties involved in making, guaranteeing, holding, servicing, or liquidating such loans.

(d) Section 4280.165 presents the process by which the Agency will make combined loan guarantee and grant funding available for renewable energy system and energy efficiency improvement projects.

(e) Sections 4280.170 through 4280.182 presents the process by which the Agency will make renewable energy system feasibility study grant funding available. These sections cover applicant, project, and application eligibility; grant funding; application content, evaluation, scoring, and selection for award; and grant award, administration, and servicing.

(f) Sections 4280.186 through 4280.196 present the process by which the Agency will make energy audit and renewable energy development assistance grant funding available. These sections cover applicant and project eligibility; grant funding; application content, evaluation, scoring, and selection for award; and grant award, administration, and servicing.

(g) Appendices A through D of this subpart cover technical report requirements. Appendix A applies to projects with total eligible project costs of $200,000 or less; Appendix B applies projects with total eligible project costs greater than $200,000; Appendix C applies to hydropower projects; and Appendix D applies to flexible fuel pumps. Appendix E identifies the contents of the feasibility study that will be required to be submitted to the Agency if funding is provided under §§ 4280.170 through 4280.182.

§ 4280.103 Definitions.

Terms used in this subpart are defined in either § 4279.2 of this chapter or in this section. If a term is defined in both § 4279.2 and this section, it will have, for purposes of this subpart only, the meaning given in this section.

Administrator. The Administrator of the Rural Business-Cooperative Service within the Rural Development Mission Area of the U.S. Department of Agriculture.

Agency. The Rural Business-Cooperative Service or successor Agency assigned by the Secretary of Agriculture to administer the Rural Energy for America Program. References to the National Office, Finance Office, State Office, or other Agency offices or officials should be read as prefaced by "Agency" or "Rural Development" as applicable.

Agricultural producer. An individual or entity directly engaged in the production of agricultural products, including crops (including farming); livestock (including ranching); forestry products; hydroponics; nursery stock; or aquaculture, whereby 50 percent or greater of their gross income is derived from the operations.

Anaerobic digester project. A renewable energy system that uses animal waste and other organic substrates, via anaerobic digestion, to produce biomethane that is used to produce thermal or electrical energy or converted to a compressed gaseous or liquid state.

Annual receipts. The total income or gross income (sole proprietorship) plus cost of goods sold.

Applicant. The agricultural producer or rural small business that is seeking a grant, guaranteed loan, or a combination of a grant and loan, under this subpart.

Assignment Guarantee Agreement (Form RD 4279–6) or successor form. A signed agreement between the Agency, the lender, and the holder containing the terms and conditions of an assignment of a guaranteed portion of a loan.

Bioenergy project. A renewable energy system that produces fuel, thermal energy, or electric power from a biomass source, other than an anaerobic digester project.

Biogas. Renewable biomass converted to gaseous fuels.

Blended liquid transportation fuel. A fuel used for transportation that:

(1) Is composed of one or more fuel types, at least one of which must meet the Renewable Fuel Standard, and

(2) Results in a blended fuel that exceeds the highest requirement for the percentage volume for a renewable fuel.

Borrower. Any party or parties liable for a guaranteed loan made under this subpart except guarantors.

Capacity. The maximum load that an apparatus or heating unit is able to meet on a sustained basis as rated by the manufacturer.

Commercially available. A system that has a proven operating history specific to the proposed application. Such a system is based on established design, and installation procedures and practices. Professional service providers, trades, large construction equipment providers, and labor are familiar with installation procedures and practices. Proprietary and balance of system equipment and spare parts are readily available. Service is readily available to properly maintain and operate the system. An established warranty exists for parts, labor, and performance.

Conditional Commitment (Form RD 4279–3) or successor form. Agency notice to the lender that the loan guarantee is approved subject to the completion of all conditions and requirements set forth by the Agency.

Default. The condition where a borrower or grantee is not in compliance with one or more loan covenants or grant conditions as stipulated in the Letter of Conditions, Conditional Commitment, or loan or grant agreement.

Departmental regulations. The regulations of the Department of Agriculture's Office of Chief Financial Officer (or successor office) as codified in 2 CFR part 417 and 7 CFR parts 3000 through 3099, including, but not necessarily limited to, 7 CFR parts 3015 through 3019, 7 CFR part 3021, and 7 CFR part 3052.

Design/build method. A method of project development whereby all design, engineering, procurement, construction, and other related project activities are performed under a single contract. The prime contractor is solely responsible and accountable for successful delivery of the project to the owner.

Eligible project costs. The total project costs that are eligible to be paid with program funds.

Energy assessment. A report conducted by an experienced energy assessor, certified energy manager or professional engineer assessing energy cost and efficiency by analyzing energy bills and briefly surveying the target building, machinery, or system. The report identifies and provides a savings and cost analysis of low-cost/no-cost measures. The report will estimate the overall costs and expected energy savings from these improvements, and dollars saved per year. The report will estimate weighted-average payback period in years.

Energy assessor. An individual or entity that conducts an energy assessment.

Energy audit. An audit conducted by a certified energy manager or professional engineer that focuses on potential capital-intensive projects and involves detailed gathering of field data

and engineering analysis. The audit will provide detailed project costs and savings information with a high level of confidence sufficient for major capital investment decisions.

Energy auditor. An individual or entity that conducts an energy audit.

Energy efficiency improvement (EEI). Improvements to a facility, building, or process that reduce energy consumption, or reduce energy consumed per square foot.

Existing business. A business that has completed at least one full business cycle.

Fair market value of equity in real property. Fair market value of real property, as established by an appraisal, less the outstanding balance of any mortgages, liens, or encumbrances.

Feasibility study. An analysis of the economic, market, technical, financial, and management feasibility of a proposed project or business.

Financial feasibility. The ability of a project or business to achieve the income, credit, and cash flows to financially sustain a project over the long term. The concept of financial feasibility includes assessments of the cost-accounting system, the availability of short-term credit for seasonal businesses, and the adequacy of raw materials and supplies.

Flexible fuel pump. A retail pump that combines and dispenses a blended liquid transportation fuel or dispenses a blended liquid transportation fuel. If a flexible fuel pump dispenses more than one blend of liquid transportation fuel, at least one of the blends must meet the definition of blended liquid transportation fuel found in this section.

Geothermal, direct use. A system that uses thermal energy directly from a geothermal source.

Geothermal, electric generation. A system that uses geothermal energy to produce high pressure steam for electric power production.

Holder. A person or entity, other than the lender, who owns all or part of the guaranteed portion of the loan with no servicing responsibilities. When the single note option is used and the lender assigns a part of the guaranteed note to an assignee, the assignee becomes a holder only when the Agency receives notice and the transaction is completed through the use of Form RD 4279–6.

Hydroelectric energy. Energy created from various hydroelectric sources including, but not limited to, diverted run-of-river water, in-stream run-of-river water, and in-conduit water.

Hydrogen project. A renewable energy system that produces hydrogen or, a renewable energy system that uses mechanical or electric power or thermal energy from a renewable resource using hydrogen as an energy transport medium.

Hydropower. Energy created by hydroelectric or ocean energy.

Institution of higher education. As defined in 20 U.S.C. 1002(a).

Instrumentality. An organization recognized, established, and controlled by a State, tribal, or local government, for a public purpose or to carry out special purposes.

Interconnection agreement. The terms and conditions governing the interconnection and parallel operation of the grantee's or borrower's electric generation equipment and the utility's electric power system.

Interim financing. A temporary or short-term loan made with the clear intent that it will be repaid through another loan, cash, or other financing mechanism. Interim financing is frequently used to pay construction and other costs associated with a planned project, with permanent financing to be obtained after project completion.

Large solar, electric. Large solar electric systems are those for which the rated power of the system is larger than 10 kilowatts (kW). Large solar electric systems are either stand-alone (off grid) or interconnected to the grid (on grid).

Large solar, thermal. Large solar thermal systems are those for which the rated storage volume of the system is greater than 240 gallons or that have a collector area of more than 1,000 square feet.

Large wind system. A wind energy project for which the rated power of the individual wind turbine(s) is larger than 100kW.

Lender. The organization making, servicing, and collecting the loan that is guaranteed under the provisions of this subpart.

Lender's Agreement (Form RD 4279–4) or successor form. Agreement between the Agency and the lender setting forth the lender's loan responsibilities.

Loan Note Guarantee (Form RD 4279–5) or successor form. Instrument issued and executed by the Agency containing the terms and conditions of the guarantee.

Matching funds. The funds needed to pay for the portion of the eligible project costs not funded or guaranteed by the Agency through a grant or guaranteed loan under this program. Unless authorized by statute, other Federal grant funds cannot be used to meet a matching funds requirement.

Necessary capital improvement. A capital improvement required to keep an existing system in compliance with regulations or to maintain technical or operational feasibility.

Ocean energy. Energy created by use of various types of moving water including, but not limited to, tidal, wave, current, and thermal changes.

Participation. The sale of interest in a loan by the lender wherein the lender retains the note, collateral securing the note, and all responsibility for loan servicing and liquidation.

Passive investor. An equity investor that does not actively participate in management and operation decisions of the business entity as evidenced by a contractual arrangement.

Post-application. The period of time after the Agency has received a complete application, which contains all parts necessary for the Agency to determine applicant and project eligibility, to score the application, and to conduct the technical evaluation.

Power purchase agreement. The terms and conditions governing the sale and transportation of electricity produced by the grantee or borrower to another party.

Pre-commercial technology. Technology that has emerged through the research and development process and has technical and economic potential for commercial application, but is not yet commercially available.

Promissory Note. Evidence of debt. A note that a borrower signs promising to pay a specific amount of money at a stated time or on demand.

Public power entity. Is defined using the definition of state utility as defined in section 217(A)(4) of the Federal Power Act (16 U.S.C. 824q(a)(4)). As of this writing, the definition "means a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or a corporation that is wholly owned, directly or indirectly, by any one or more of the foregoing, competent to carry on the business of developing, transmitting, utilizing, or distributing power."

Qualified consultant. An entity possessing the knowledge, expertise, and experience to perform a specific task.

Qualified party. An independent third party entity possessing the knowledge, expertise, and experience to perform in an efficient, effective, and authoritative manner the specific task required.

Rated power. The maximum amount of energy that can be created at any given time.

Renewable biomass.

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands (as defined in section 103 of the

Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) that:

(i) Are byproducts of preventive treatments that are removed to reduce hazardous fuels; to reduce or contain disease or insect infestation; or to restore ecosystem health;

(ii) Would not otherwise be used for higher-value products; and

(iii) Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of paragraphs (e)(2), (e)(3), and (e)(4) and large-tree retention of subsection (f) of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512); or

(2) Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:

(i) Renewable plant material, including feed grains; other agricultural commodities; other plants and trees; and algae; and

(ii) Waste material, including crop residue; other vegetative waste material (including wood waste and wood residues); animal waste and byproducts (including fats, oils, greases, and manure); and food waste and yard waste.

Renewable energy. Energy derived from:

(1) A wind, solar, renewable biomass, ocean (including tidal, wave, current, and thermal), geothermal or hydroelectric source; or

(2) Hydrogen derived from renewable biomass or water using wind, solar, ocean (including tidal, wave, current, and thermal), geothermal or hydroelectric energy sources.

Renewable Energy Development Assistance. Assistance provided by eligible grantees to agricultural producers and rural small businesses to become more energy efficient and to use renewable energy technologies and resources. The renewable energy development assistance may consist of renewable energy site assessment and/or renewable energy technical assistance.

Renewable energy site assessment. A report provided to an agricultural producer or rural small business providing recommendations and information regarding the use of renewable energy technologies in its operation. The report shall be prepared by a qualified consultant and evaluate a specific site or geographic area for potential use of one or more renewable energy technologies. Typically, the report will evaluate a potential renewable energy project with an estimated total cost of construction of less than $200,000. The evaluation shall be based on existing data, which may include data regarding existing and/or proposed structures, commercially available technologies, feed-stocks, and other renewable energy resources. The report will consider factors such as the site and the potential uses of renewable energy technology at the site. The report will not include information about any residential dwelling(s).

Renewable energy system (RES). A system that produces or produces and delivers usable energy from a renewable energy source, or is a flexible fuel pump.

Renewable energy technical assistance. Assistance provided to agricultural producers and rural small businesses on how to use renewable energy technologies and resources in their operations.

Rural or rural area. Any area of a State not in a city or town that has a population of more than 50,000 inhabitants, according to the latest decennial census of the United States, or in the urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants, and any area that has been determined to be "rural in character" by the Under Secretary for Rural Development, or as otherwise identified in this definition.

(1) An area that is attached to the urbanized area of a city or town with more than 50,000 inhabitants by a contiguous area of urbanized census blocks that is not more than 2 census blocks wide. Applicants from such an area should work with their Rural Development State Office to request a determination of whether their project is located in a rural area under this provision.

(2) For the purposes of this definition, cities and towns are incorporated population centers with definite boundaries, local self government, and legal powers set forth in a charter granted by the State.

(3) For the Commonwealth of Puerto Rico, the island is considered rural and eligible for Business Programs assistance, except for the San Juan Census Designated Place (CDP) and any other CDP with greater than 50,000 inhabitants. CDPs with greater than 50,000 inhabitants, other than the San Juan CDP, may be determined to be eligible if they are "not urban in character."

(4) For the State of Hawaii, all areas within the State are considered rural and eligible for Business Programs assistance, except for the Honolulu CDP within the County of Honolulu.

(5) For the purpose of defining a rural area in the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands, the Agency shall determine what constitutes rural and rural area based on available population data.

(6) The determination that an area is "rural in character" will be made by the Under Secretary of Rural Development. The process to request a determination under this provision is outlined in paragraph (6)(ii) of this definition.

(i) The determination that an area is "rural in character" under this definition will apply to areas that are within:

(A) An urbanized area that has two points on its boundary that are at least 40 miles apart, which is not contiguous or adjacent to a city or town that has a population of greater than 150,000 inhabitants or the urbanized area of such a city or town; or

(B) An urbanized area contiguous and adjacent to a city or town of greater than 50,000 inhabitants that is within one-quarter mile of a rural area.

(ii) Units of local government may petition the Under Secretary of Rural Development for a "rural in character" designation by submitting a petition to both the appropriate Rural Development State Director and the Administrator on behalf of the Under Secretary. The petition shall document how the area meets the requirements of paragraph (6)(i)(A) or (B) of this definition and discuss why the petitioner believes the area is "rural in character," including, but not limited to, the area's population density, demographics, and topography and how the local economy is tied to a rural economic base. Upon receiving a petition, the Under Secretary will consult with the applicable Governor or leader in a similar position and request comments to be submitted within 5 business days, unless such comments were submitted with the petition. The Under Secretary will release to the public a notice of a petition filed by a unit of local government not later than 30 days after receipt of the petition by way of publication in a local newspaper and posting on the Agency's Web site, and the Under Secretary will make a determination not less than 15 days, but no more than 60 days, after the release of the notice. Upon a negative determination, the Under Secretary will provide to the petitioner an opportunity to appeal a determination to the Under Secretary, and the petitioner will have 10 business days to appeal the determination and provide further information for consideration.

Rural Energy for America Program Grant Agreement (Form RD 4280–2) or successor form. An agreement between the Agency and the grantee setting forth the provisions under which the grant will be administered.

Simple payback. The estimated simple payback of a project funded under this subpart as calculated using paragraph (1), (2), or (3), as applicable, of this definition.

(1) For energy generation projects, simple payback is calculated as follows:

(i) Simple payback = (Total Project Costs (including REAP Grant))/(Average Net Income + Interest Expense + Depreciation Expense (for the project))

(ii) Average net income:

(A) Is based on all energy related revenue streams which include monetary benefits from Production Tax Credit (PTC), Renewable Energy Credit, Carbon Credits, revenue from byproducts produced by the energy system, fair market value of byproducts produced by and used in the project or related enterprises, and other incentives that can be annualized.

(B) Is based on income remaining after all project obligations are paid (operating and maintenance), except interest and depreciation as noted above.

(C) Is based on the Agency's review and acceptance of the project's typical year income (which is after the project is operating and stabilized) projections at the time of application submittal.

(D) Does not allow Investment Tax Credits, State tax incentives, or other one-time construction and investment related benefits that cannot be annualized to be included as income or reduce total eligible project costs.

(2) For energy replacement and energy efficiency improvement projects, simple payback is calculated as follows:

(i) Simple payback = (Total Project Costs (including REAP Grant))/Dollar Value of Energy Generated or Saved (as applicable)

(ii) Dollar value of energy generated or saved incorporates the following:

(A) All energy related revenue streams, which include monetary benefits from PTC, Renewable Energy Credit, Carbon Credits, revenue from byproducts produced by the energy system, and other monetary incentives that can be annualized.

(B) Energy saved or replaced shall be calculated on the quantity of energy saved or replaced (e.g., BTU) and converted to a monetary value using a constant value or price of energy as determined under paragraph (2)(ii)(B)(*3*) of this definition.

(*1*) The actual total quantity of energy used (BTU) in the original building and equipment in the 12 months prior to the RES or EEI project application.

(*2*) Projected energy usage after the RES or EEI project shall be the projected total quantity of energy used (BTU) on an annual basis for the same size or capacity as the original building or equipment. For energy efficiency improvement to equipment, if the new piece of equipment has a different capacity than the piece of equipment being replaced, the projected total quantity of energy used for the new piece of equipment shall be adjusted based on the ratio of the capacity of the replaced piece of equipment to the capacity of the new piece of equipment.

(*3*) Value or price of energy shall be the actual average price paid over the last year and used as a constant for all calculations of the value of energy.

(C) Does not allow energy efficiency improvements to monetize benefits other than the dollar amount of the energy savings the agricultural producer or rural small business realizes as a result of the improvement.

(D) Does not allow Investment Tax Credits, State tax incentives, or other one-time construction and investment related benefits that cannot be annualized to be included as income or reduce total project costs.

(3) For flexible fuel pumps, the calculation for simple payback is as follows:

(i) Simple payback = (Total Project Costs (including REAP Grant))/(Increase in Net Income + Interest Expense + Depreciation Expense (for the project))

(ii) Increase in income:

(A) Is based on all flexible fuel pump related net income (the projected increase in annual net income resulting by the installation of the project), which includes monetary benefits from Tax Credits and other credits or incentives that can be annualized.

(B) Is based on income remaining after all project obligations are paid (operating and maintenance), except interest and depreciation as noted above.

(C) Is based on the Agency's review and acceptance of the project's typical year income (which is after the project is operating and stabilized) projections at the time of application submittal.

(D) Does not allow State tax incentives or other one-time construction and investment related benefits that cannot be annualized to be included as income or reduce total eligible project costs.

Simplified application. An application that conforms to the criteria and procedures specified in § 4280.114.

Small business. An entity is considered a small business in accordance with the Small Business Administration's (SBA) small business size standards by the North American Industry Classification System (NAICS) found in 13 CFR part 121. A private entity, including a sole proprietorship, partnership, corporation, cooperative (including a cooperative qualified under section 501(c)(12) of the Internal Revenue Code), and an electric utility, including a Tribal or governmental electric utility, that provides service to rural consumers on a cost-of-service basis without support from public funds or subsidy from the Government authority establishing the district, provided such utilities meet SBA's definition of small business. These entities must operate independent of direct Government control except for Tribal business entities formed as Section 17 Corporations as determined by the Secretary of the Interior or other Tribal business entities that have similar structures and relationships with their Tribal governments as determined by the Agency. The Agency shall determine the small business status of such a Tribal entity without regard to the resources of the Tribal government. With the exception of the entities described above, all other non-profit entities are excluded.

Small hydropower. A hydropower project for which the rated power of the system is 30 megawatts or less.

Small solar, electric. Small solar electric projects are those for which the rated power of the system is 10kW or smaller. Small solar electric projects are either stand-alone (off grid) or interconnected to the grid at less than 600 volts (on grid).

Small solar, thermal. Small solar thermal projects are those for which the rated storage volume of the system is 240 gallons or smaller or that have a collector area of 1,000 square feet or less.

Small wind system. Wind energy system for which the rated power of the wind turbine is 100kW or smaller and with a generator hub height of 120 feet or less. A small wind system is either stand-alone or connected to the local electrical system at less than 600 volts.

Spreadsheet. A table containing data from a series of financial statements of a business over a period of time. Financial statement analysis normally contains spreadsheets for balance sheets and income statements and may include cash flow statement data and commonly used ratios. The spreadsheets enable a reviewer to easily scan the data, spot trends, and make comparisons.

State. Any of the 50 states of the United States, the Commonwealth of Puerto Rico, the District of Columbia,

the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

Total project costs. The sum of all costs associated with a completed project.

Used equipment. Any equipment that has been used in any previous application and is provided in an "as is" condition.

Very small business. A business with fewer than 15 employees and less than $1 million in annual receipts.

§ 4280.104 Exception authority.

The Administrator may, with the concurrence of the Secretary of Agriculture, make an exception, on a case-by-case basis, to any requirement or provision of this subpart that is not inconsistent with any authorizing statute or applicable law, if the Administrator determines that application of the requirement or provision would adversely affect the Federal government's interest.

§ 4280.105 Appeals.

Only the grantee, borrower, lender, or holder can appeal an Agency decision made under this subpart. In cases where the Agency has denied or reduced the amount of final loss payment to the lender, the adverse decision may be appealed by the lender only. An adverse decision that only impacts the holder may be appealed by the holder only. A decision by a lender adverse to the interest of the borrower is not a decision by the Agency, whether or not concurred in by the Agency. An adverse decision regarding a grant application may be appealed by the applicant only. Appeals will be handled in accordance with 7 CFR part 11 of this title.

§ 4280.106 Conflict of interest.

(a) No conflict of interest or appearance of conflict of interest will be allowed. For purposes of this subpart, conflict of interest includes, but is not limited to, distribution or payment of grant and guaranteed loan funds or award of project contracts to an individual owner, partner, stockholder, or beneficiary of the applicant or borrower or a close relative of such an individual when such individual will retain any portion of the ownership of the applicant or borrower.

(b) No member of or delegate to Congress shall receive any share or part of this grant or any benefit that may arise there from; but this provision shall not be construed to bar as a contractor under the grant a publicly held corporation whose ownership might include a member of Congress.

§ 4280.107 USDA Departmental Regulations.

All projects funded under this subpart are subject to the provisions of the Departmental regulations (7 CFR subtitle A), as applicable.

§ 4280.108 Laws that contain other compliance requirements.

(a) *Equal employment opportunity.* For all construction contracts and grants in excess of $10,000, the contractor must comply with Executive Order 11246, as amended by Executive Order 11375, and as supplemented by applicable Department of Labor regulations (41 CFR part 60). The applicant or the lender and borrower, as applicable, is responsible for ensuring that the contractor complies with these requirements.

(b) *Equal opportunity and nondiscrimination.* The Agency will ensure that equal opportunity and nondiscrimination requirements are met in accordance with the Equal Credit Opportunity Act and 7 CFR part 15d, Nondiscrimination in Programs and Activities Conducted by USDA. The Agency will not discriminate against applicants on the basis of race, color, religion, national origin, sex, marital status, or age (provided that the applicant has the capacity to contract); the fact that all or part of the applicant's income derives from any public assistance program; or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act. Lenders will comply with the requirements of the Equal Credit Opportunity Act (see 12 CFR part 202). Such compliance will be accomplished prior to loan closing.

(c) *Civil rights compliance.* Recipients of grants must comply with the Americans with Disabilities Act of 1990, Title VI of the Civil Rights Act of 1964, and Section 504 of the Rehabilitation Act of 1973. This may include collection and maintenance of data on the race, sex, and national origin of the recipient's membership/ownership and employees. These data must be available to conduct compliance reviews in accordance with 7 CFR part 1901, subpart E, § 1901.204 of this title. Grants will require one subsequent compliance review after the last disbursement of grant funds has been made, and the facility has been in full operation for 90 days.

(d) *Americans with Disabilities Act (ADA).* Guaranteed loans that involve the construction of or addition to facilities that accommodate the public and commercial facilities, as defined by the ADA, must comply with the ADA. The lender and borrower are responsible for compliance.

(e) *Environmental analysis.* Subpart G of part 1940 of this title outlines environmental procedures and requirements for this subpart. Prospective applicants are advised to contact the Agency to determine environmental requirements as soon as practicable after they decide to pursue any form of financial assistance directly or indirectly available through the Agency.

(1) Any required environmental review must be completed by the Agency prior to the Agency obligating any funds.

(2) The applicant will be notified of all specific compliance requirements, including, but not limited to, the publication of public notices, and consultation with State Historic Preservation Offices and the U.S. Fish and Wildlife Service.

(3) A site visit by the Agency may be scheduled, if necessary, to determine the scope of the review.

(4) The applicant taking any actions or incurring any obligations during the time of application or application review and processing that would either limit the range of alternatives to be considered or that would have an adverse effect on the environment, such as the initiation of construction, will result in project ineligibility.

(f) *Executive Order 12898.* When a project is proposed and financial assistance requested, the Agency will conduct a Civil Rights Impact Analysis (CRIA) with regards to environmental justice. The CRIA must be conducted and the analysis documented utilizing Form RD 2006–38, "Civil Rights Impact Analysis Certification." This certification must be done prior to loan approval, obligation of funds, or other commitments of Agency resources, including issuance of a Letter of Conditions or Form RD 4279–3, whichever occurs first.

(g) *Discrimination complaints.* The regulations contained in 7 CFR part 1901, subpart E of this title apply to this program, with the exception of guaranteed loans. Any person or any specific class of person, believing they have been subjected to discrimination may file a complaint within 180 days of an alleged act of discrimination or from the time discrimination is known, or should have been known, with the USDA Director, Office of Adjudication, Room 3326–W, Whitten Building, 1400 Independence Avenue, SW., Washington, DC 20250–9410.

§ 4280.109 Ineligible applicants, borrowers, and owners.

Applicants, borrowers, and owners will be ineligible to receive funds under this subpart as discussed in paragraphs (a) and (b) of this section.

(a) If an applicant, borrower, or owner has an outstanding judgment obtained by the U.S. in a Federal Court (other than in the United States Tax Court), is delinquent in the payment of Federal income taxes, or is delinquent on a Federal debt, the applicant is not eligible to receive a grant or guaranteed loan until the judgment is paid in full or otherwise satisfied or the delinquency is resolved.

(b) If an applicant or borrower is debarred from receiving Federal assistance, the applicant is not eligible to receive a grant or guaranteed loan under this subpart.

§ 4280.110 General applicant and application provisions.

(a) *Complete applications.* Applicants must submit complete applications in order to be considered. If an application is incomplete, the Agency will identify those parts of the application that are incomplete and provide a written explanation to the applicant for possible future resubmission. Upon receipt of a complete application by the appropriate Agency office and by the applicable application deadline, the Agency will complete its evaluation.

(b) *Application withdrawal.* During the period between the submission of an application and the execution of loan and/or grant award documents, the applicant must notify the Agency, in writing, if the project is no longer viable or the applicant no longer is requesting financial assistance for the project. When the applicant so notifies the Agency, the selection will be rescinded or the application withdrawn.

(c) *Satisfactory progress.* An applicant that has received one or more grants and/or guaranteed loans under this program must make satisfactory progress, as determined by the Agency, toward completion of any previously funded projects before the applicant will be considered for subsequent funding under this subpart.

§ 4280.111 Notifications.

(a) *Eligibility.* If an applicant is determined by the Agency to be eligible for participation, the Agency will notify the applicant or lender, as applicable, in writing. If the applicant or the project is ineligible, the Agency will inform the applicant or lender, as applicable, in writing of the decision, reasons therefore, and any appeal rights. No further evaluation of the application will occur.

(b) *Ineligible applications.* If an application is determined to be ineligible at any time, the Agency will inform the applicant in writing of the decision, reasons therefore, and any appeal rights. No further evaluation of the application will occur.

(c) *Award.* Each applicant will be notified of the Agency's decision on their application.

Renewable Energy System and Energy Efficiency Improvement Grants

§ 4280.112 Applicant eligibility.

To receive a RES or EEI grant under this subpart, an applicant must be an agricultural producer or rural small business, as defined in § 4280.103.

§ 4280.113 Project eligibility.

For a renewable energy system or energy efficiency improvement project to be eligible to receive a RES or EEI grant under this subpart, the proposed project must meet each of the criteria, as applicable, in paragraphs (a) through (j), as applicable, of this section, and is subject to the limitations specified in paragraph (k) of this section.

(a) The project must be for the purchase of a renewable energy system or to make energy efficiency improvements. Energy efficiency improvements to existing renewable energy systems are eligible energy efficiency improvement projects.

(b) The project must be for a pre-commercial or commercially available, and replicable technology.

(c) The project must have technical merit, as determined using the procedures specified in § 4280.117(b).

(d) The facility for which the project is being proposed must be located in a rural area, as defined in § 4280.103, in a State if the type of applicant is a rural small business, or in a rural or non-rural area in a State if the type of applicant is an agricultural producer. If the agricultural producer's facility is in a non-rural area, then the application can only be for renewable energy systems or energy efficiency improvements on integral components of or that are directly related to the facility, such as vertically integrated operations, and are part of and co-located with the agriculture production operation.

(e) The applicant must have a place of business in a State.

(f) The applicant must be the owner of the project and control the revenues and expenses of the project, including operation and maintenance. A third-party under contract to the owner may be used to control revenues and expenses and manage the operation and/or maintenance of the project.

(g) Sites must be controlled by the agricultural producer or rural small business for the financing term of any associated Federal loans or loan guarantees.

(h) Satisfactory sources of revenue in an amount sufficient to provide for the operation, management, maintenance, and debt service of the project must be available for the life of the project.

(i) For the purposes of this subpart, only hydropower projects with a rated power of 30 megawatts or less are eligible. The Agency refers to these hydropower sources as "small hydropower," which includes hydropower projects commonly referred to as "micro-hydropower" and "mini-hydropower."

(j) The project has demonstrated technical feasibility.

(k) No renewable energy system or energy efficiency improvement, or portion thereof, can be used for any residential purpose, including any residential portion of a farm, ranch, agricultural facility, or rural small business. However, an applicant may apply for funding for the installation of a second meter or provide certification in the application that any excess power generated by the renewable energy system will be sold to the grid and will not be used by the applicant for residential purposes.

§ 4280.114 Qualification for simplified applications.

When applying for a RES or EEI grant, applicants may qualify for the simplified application process. In order to use the simplified application process, each of the conditions specified in paragraphs (a)(1) through (a)(8) of this section must be met.

(a) *Simplified application criteria.*

(1) The applicant must be eligible in accordance with § 4280.112.

(2) The project must be eligible in accordance with § 4280.113.

(3) Total eligible project costs must be $200,000 or less.

(4) The proposed project must use commercially available renewable energy systems or energy efficiency improvements.

(5) Construction planning and performing development must be performed in compliance with § 4280.119. The applicant or the applicant's prime contractor must assume all risks and responsibilities of project development.

(6) The applicant or the applicant's prime contractor is responsible for all interim financing.

(7) The proposed project is scheduled to be completed within 2 years after

entering into a grant agreement. The Agency may extend this period if the Agency determines, at its sole discretion, that the applicant is unable to complete the project for reasons beyond the applicant's control.

(8) The applicant agrees not to request reimbursement from funds obligated under this program until after project completion, including all operational testing and certifications acceptable to the Agency.

(b) *Application processing and administration.*

(1) *Application documents.* Application documents shall be submitted in accordance with § 4280.116 or, if applying for a combined grant and loan, also in accordance with § 4280.165(c).

(2) *Project development.* Section 4280.119 applies, except as follows:

(i) Any grantee may participate in project development without direct compensation subject to the approval in writing by the prime contractor, provided that all applicable construction practices, manufacturer instructions, and all safety codes and standards are followed during construction and testing, and the work product meets all applicable manufacture specifications, and all applicable codes and standards. The prime contractor remains responsible for the overall successful completion of the project, including any work done by the grantee, or

(ii) A grantee who can demonstrate to the Agency that the grantee has the necessary experience and other resources to successfully complete the project may serve as the prime contractor/installer. Projects where the grantee serves as the prime contractor will need to secure the services of an independent, professionally responsible, qualified consultant to certify testing specifications, procedures, and testing results.

(3) *Project completion.* The project is complete when the applicant has provided a written final project development, testing, and performance report acceptable to the Agency. Upon notification of receipt of an acceptable project completion report, the applicant may request grant reimbursement. The Agency reserves the right to observe the testing.

(4) *Insurance.* Section 4280.118 applies, except business interruption insurance is not required.

§ 4280.115 RES and EEI grant funding.

(a) The amount of grant funds that will be made available to an eligible RES or EEI project under this subpart will not exceed 25 percent of total eligible project costs. Eligible project costs are specified in paragraph (c) of this section.

(b) The applicant is responsible for securing the remainder of the total eligible project costs not covered by grant funds. The amount secured by the applicant must be the remainder of total eligible project costs.

(1) Without specific statutory authority, other Federal grant funds cannot be used to meet the matching fund requirement.

(2) Passive third-party equity contributions are acceptable for renewable energy system projects, including those that are eligible for Federal production tax credits, provided the applicant meets the requirements of § 4280.112.

(c) Eligible project costs are only those costs associated with the items identified in paragraphs (c)(1) through (c)(10) of this section, as long as the items are an integral and necessary part of the renewable energy system or energy efficiency improvement.

(1) Post-application purchase and installation of equipment (new, refurbished, or remanufactured), except agricultural tillage equipment, used equipment, and vehicles.

(2) Post-application construction or improvements, except residential.

(3) Energy audits or assessments.

(4) Permit and license fees.

(5) Professional service fees, except for application preparation.

(6) Feasibility studies and Technical reports.

(7) Business plans.

(8) Retrofitting.

(9) Construction of a new energy efficient facility only when the facility is used for the same purpose, is approximately the same size, and, based on the energy assessment or audit, will provide more energy savings than improving an existing facility. Only costs identified in the energy assessment or audit for energy efficiency improvements are allowed.

(10) Energy efficiency improvements are limited to only improvements identified in the energy assessment or audit. Equipment identified by the assessment or audit to be replaced shall be replaced with equipment similar in capacity. If the energy efficiency improvement has a greater capacity than the existing equipment, the Agency will pro-rate the energy efficiency improvement's total eligible project costs based on the capacity of the existing equipment. A calculation shall be performed by dividing the capacity of the existing equipment by the capacity of the proposed equipment to determine the percentage of the energy efficiency improvement's eligible project costs that the Agency will use in determining the maximum grant assistance under this subpart (see example).

Example. A business plans to build a new production line with a capacity of 625 units per hour to replace an existing production line that produces 500 units per hour. The total project costs of the new production line is $20,000, of which $15,000 would otherwise qualify as eligible project costs. However, because the new production line has a greater production capacity than the existing line (625 units per hour versus 500 units per hour), only a portion of the $15,000 of otherwise eligible project costs would be used in determining total eligible project cost and the maximum grant assistance available. In this example, because the original capacity (500 units per hour) is 80 percent of the new capacity (625 units per hour), only 80 percent of the $15,000 of otherwise eligible project costs associated with the new production line (*i.e.*, $12,000) will be considered as total eligible project cost to be financed under this subpart. The maximum grant award in this example would be $3,000, which is equal to $12,000 × 25 percent.

(d) The maximum amount of grant assistance to one individual or entity will not exceed $750,000 per Federal fiscal year. For those applicants that have not received a grant award during the previous 2 Federal fiscal years, additional points will be added to their priority score.

(e) Applications for renewable energy system grants will be accepted for a minimum grant request of $2,500 up to a maximum of $500,000.

(f) Applications for energy efficiency improvement grants will be accepted for a minimum grant request of $1,500 up to a maximum of $250,000.

(g) In determining the amount of a RES or EEI grant awarded, the Agency will take into consideration the following six criteria:

(1) The type of renewable energy system to be purchased;

(2) The estimated quantity of energy to be generated by the renewable energy system;

(3) The expected environmental benefits of the renewable energy system;

(4) The quantity of energy savings expected to be derived from the activity, as demonstrated by an energy audit;

(5) The estimated period of time for the energy savings generated by the activity to equal the cost of the activity; and

(6) The expected energy efficiency of the renewable energy system.

(h) *Time limit.* Unless otherwise agreed to by the Agency, any renewable energy system or energy efficiency improvement grant agreement under this subpart will terminate 2 years from the date the Agency signs the agreement.

§ 4280.116 Application and documentation.

The requirements in this section apply to RES and EEI grant applications under this subpart.

(a) *General.* To ensure that projects are accurately scored by the Agency, applicants are requested to number each evaluation criteria and include, in that section, its corresponding supporting documentation and calculations according to § 4280.117.

(1) *One funding type applications.* Only one type of funding application (grant-only, guaranteed loan-only, or guaranteed loan/grant combination) for each project can be submitted under this subpart per Federal fiscal year.

(2) *Environmental information.* Each application must include all environmental review documents with supporting documentation in accordance with 7 CFR part 1940, subpart G.

(3) *Foreign technology.* As stated in § 4280.113(b), projects must be for a pre-commercial or commercially available technology. The Agency's position is that if the system is currently commercially available only outside the United States (U.S.), then applicants must provide authoritative evidence of the foreign operating history, performance, and reliability in order to address the proven operating history identified in the definition. "Commercial" applicants must provide evidence that professional service providers, trades, large construction equipment providers and labor are readily available domestically and familiar with installation procedures and practices, and spare parts and service are readily available in the U.S. to properly maintain and operate the system. All warranties must be valid in the U.S.

(4) *Commercial application demonstration of pre-commercial technologies.* In accordance with the definition of "pre-commercial" technology found in § 4280.103, technical and economic potential for commercial application must be demonstrated to the Agency. In order to demonstrate the system has emerged through research and development as well as the demonstration process, applicants must provide authoritative evidence of the operating history, performance, and reliability past completion of start-up, shake-down, and commissioning. Typically, and in line with financial and operating performance evaluation protocol, the documented operating history, which may be established domestically or outside the U.S., should provide performance data for a minimum of 12 months. The time period will address the economic and technical performance potential of the pre-commercial technology, as defined in § 4280.103. Lastly, in accordance with demonstrating the potential for commercial application, applicants must provide evidence that professional service providers, trades, large construction equipment providers, and labor are readily available domestically and sufficiently familiar with installation procedures and practices, and spare parts and service are available in the U.S. to properly maintain and operate the system. Any warranties have to be valid in the U.S.

(b) *Grant application content.* Applications and documentation for projects using the simplified application process, as described in § 4280.114, must provide the required information organized pursuant to the Table of Contents in a chapter format presented in the order shown in paragraphs (b)(1) through (b)(3) and (b)(5) through (b)(7) of this section; paragraph (b)(4) of this section does not apply for projects using the simplified application process. Applications and documentation for projects not using the simplified application process must provide the required information organized pursuant to the Table of Contents in a chapter format presented in the order shown in paragraphs (b)(1) through (b)(8) of this section.

(1) *Forms, certifications, and organizational documents.* Each application must contain the items identified in paragraphs (b)(1)(i) through (b)(1)(iv) in this section.

(i) *Project specific forms.*

(A) Form SF–424, "Application for Federal Assistance."

(B) Form SF–424C, "Budget Information-Construction Programs." A more detailed budget breakdown is required in the Technical Report.

(C) Form SF–424D, "Assurances-Construction Programs."

(D) Form RD 1940–20, "Request for Environmental Information."

(ii) *Forms and certifications.*

(A) AD–1049, "Certification Regarding Drug-Free Workplace Requirements (Grants) Alternative I—For Grantees Other than Individuals."

(B) Form AD–1048, "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions."

(C) Exhibit A–1 of RD Instruction 1940–Q, "Certification for Contracts, Grants and Loans," required by 7 CFR 3018.110 if the grant exceeds $100,000.

(D) Form SF–LLL, "Disclosure of Lobbying Activities," must be completed if the applicant or borrower has made or agreed to make payment using funds other than Federal appropriated funds to influence or attempt to influence a decision in connection with the application.

(E) AD–1047, "Certification Regarding Debarment, Suspension, and Other Responsibility Matters-Primary Covered Transactions."

(F) Form RD 400–1, "Equal Opportunity Agreement."

(G) Form RD 400–4, "Assurance Agreement."

(H) Applicants and borrowers must provide a certification indicating whether or not there is a known relationship or association with an Agency employee.

(iii) *Organizational documents.* Except for sole proprietors, each applicant must submit, with the application, a copy of the legal organizational documents.

(iv) The applicant's Dun and Bradstreet Data Universal Numbering System (DUNS) number (except for individuals).

(2) *Table of Contents.* Include page numbers for each component of the application in the table of contents. Begin pagination immediately following the Table of Contents.

(3) *Project Summary.* Provide a concise summary of the project proposal and applicant information, project purpose and need, and project goals that includes the following:

(i) *Title.* Provide a descriptive title of the project (identified on SF 424).

(ii) *Applicant eligibility.* Describe how each of the applicable criteria identified in §§ 4280.109 and 4280.112 is met.

(iii) *Project eligibility.* Describe how each of the criteria in § 4280.113(a) through (j), as applicable, is met. Clearly state whether the application is for the purchase of a renewable energy system or to make energy efficiency improvements. The response to § 4280.113(a) must include a brief description of the system or improvement. This description must be sufficient to provide the reader with a frame of reference when reviewing the rest of the application. Additional project description information may be needed later in the application.

(iv) *Operation description.* Describe the applicant's total farm/ranch/business operation and the relationship

of the proposed project to the applicant's total farm/ranch/business operation. Provide a description of the ownership of the applicant, including a list of individuals and/or entities with ownership interest, names of any corporate parents, affiliates, and subsidiaries, as well as a description of the relationship, including products, between these entities.

(v) *Financial information for gross income or size determination.* Provide financial information to allow the Agency to determine the agricultural producer's percent of gross income derived from agricultural operations or the rural small business' size, as applicable. All information submitted under this paragraph must be substantiated by authoritative records.

(A) *Rural small businesses.* Provide sufficient information to determine total annual receipts for and number of employees of the business and any parent, subsidiary, or affiliates at other locations. Voluntarily providing tax returns is one means of satisfying this requirement. The information provided must be sufficient for the Agency to make a determination of business size as defined by SBA.

(B) *Agricultural producers.* Provide the gross market value of your agricultural products, gross agricultural income, and gross nonfarm income of the applicant for the calendar year preceding the year in which you submit your application.

(4) *Financial information.* Financial information is required on the total operation of the agricultural producer/rural small business and its parent, subsidiary, or affiliates at other locations. All information submitted under this paragraph must be substantiated by authoritative records.

(i) *Historical financial statements.* Provide historical financial statements prepared in accordance with Generally Accepted Accounting Practices (GAAP) for the past 3 years, including income statements and balance sheets. If agricultural producers are unable to present this information in accordance with GAAP, they may instead present financial information for the past years in the format that is generally required by commercial agriculture lenders.

(ii) *Current balance sheet and income statement.* Provide a current balance sheet and income statement prepared in accordance with GAAP and dated within 90 days of the application. Agricultural producers should present financial information in the format that is generally required by commercial agriculture lenders.

(iii) *Pro forma financial statements.* Provide pro forma balance sheet at start-up of the agricultural producer's/rural small business' business that reflects the use of the loan proceeds or grant award; and 3 additional years, indicating the necessary start-up capital, operating capital, and short-term credit; and projected cash flow and income statements for 3 years supported by a list of assumptions showing the basis for the projections.

(5) *Matching funds.* Submit a spreadsheet identifying sources of matching funds, amounts, and status of matching funds. The spreadsheet must also include a directory of matching funds source contact information. Attach any applications, correspondence, or other written communication between applicant and matching fund source.

(6) *Self-evaluation score.* Self-score the project using the evaluation criteria in § 4280.117(c). To justify the score, submit the total score along with appropriate calculations and attached documentation, or specific cross-references to information elsewhere in the application.

(7) *Renewable Energy System and Energy Efficiency Improvements Technical Report.* A Technical Report must be submitted as part of the application to allow the Agency to determine the overall technical merit of the renewable energy system or energy efficiency improvement project.

(i) *Simplified applications.* Simplified applications, which are submitted for renewable energy system projects or energy efficiency improvement projects with total eligible project costs of $200,000 or less, must include a Technical Report prepared in accordance with the requirements specified in paragraphs (b)(7)(i)(A) through (b)(7)(i)(C) of this section.

(A) The Technical Report must be prepared in accordance with Appendix A, C, or D, as applicable, of this subpart. If a renewable energy system project does not fit one of the technologies identified in Appendices A, C, and D, the applicant must submit a Technical Report in accordance with paragraph (b)(7)(ii) of this section. The information in all Technical Reports must be of sufficient detail to allow the Agency to score the project and evaluate its technical feasibility.

(B) Either an energy assessment or an energy audit is required for energy efficiency improvement projects. For energy efficiency improvement projects with total eligible project costs greater than $50,000, an energy audit must be conducted; it must be conducted by or reviewed and certified by an energy auditor. For energy efficiency improvement projects with total eligible project costs of $50,000 or less, an energy assessment or an energy audit may be conducted by either an energy assessor or an energy auditor.

(C) Technical Reports prepared prior to the applicant's selection of a prime contractor may be modified after selection, pursuant to input from the prime contractor, and submitted to the Agency, provided the overall scope of the project is not materially changed as determined by the Agency. Changes in the report must be accompanied by an updated Form RD 1940–20.

(ii) *Full applications.* Full applications, which must be submitted for applications for renewable energy system projects or energy efficiency improvement projects with total eligible project costs greater than $200,000, must include a Technical Report prepared in accordance with Appendix B, C, or D, as applicable, of this subpart and with paragraphs (b)(7)(ii)(A) through (b)(7)(ii)(G) of this section, as applicable.

(A) The Technical Report must demonstrate that the renewable energy system or energy efficiency improvement project can be installed and perform as intended in a reliable, safe, cost-effective, and legally compliant manner.

(B) Either an energy assessment or an energy audit is required for energy efficiency improvement projects. For energy efficiency improvement projects with total eligible project costs greater than $50,000, an energy audit must be conducted; it must be conducted by or reviewed and certified by an energy auditor. For energy efficiency improvement projects with total eligible project costs of $50,000 or less, an energy assessment or an energy audit may be conducted by either an energy assessor or an energy auditor.

(C) For renewable energy system projects with total eligible project costs greater than $400,000 and for energy efficiency improvement projects with total eligible project costs greater than $200,000, the design review, installation monitoring, testing prior to commercial operation, and project completion certification will require the services of a licensed professional engineer (PE) or team of licensed PEs.

(D) For projects with total eligible project costs greater than $1,200,000, the Technical Report must be reviewed and include an opinion and recommendation by an independent qualified consultant.

(E) Technical Reports prepared prior to the applicant's selection of a final design, equipment vendor, or prime contractor, or other significant decision may be modified and resubmitted to the

Agency, provided the overall scope of the project is not materially changed as determined by the Agency. Changes in the Technical Report must be accompanied by an updated Form RD 1940–20.

(F) All information provided in the Technical Report will be evaluated against the requirements provided in Appendix B, C, or D, as applicable, of this subpart. Any Technical Report not prepared in the following format and in accordance with Appendix B, C, or D, where applicable, will be penalized under scoring for technical merit.

(G) All Technical Reports shall follow the outline presented below and shall contain the information described in paragraphs (b)(7)(ii)(G)(*1*) through (b)(7)(ii)(G)(*10*) of this section and Appendix B, C, or D, as applicable, of this subpart if the technology is identified in Appendix B, C, or D for the particular project. If none of the Technical Reports in Appendix B apply to the proposed technology, the applicant may submit a Technical Report that conforms to the overall outline and subjects specified in paragraph (b)(7)(ii)(G) of this section. For Technical Reports prepared for technologies not identified in Appendices B, C, and D, the Agency will review the reports and notify, in writing, the applicant of the changes to the report required in order for the Agency to accept the report.

(*1*) *Qualifications of the project team.* Describe the project team, their professional credentials, and relevant experience. The description must support that the project team service, equipment, and installation providers have the necessary professional credentials, licenses, certifications, or relevant experience to develop the proposed project.

(*2*) *Agreements and permits.* Describe the necessary agreements and permits required for the project and the anticipated schedule for securing those agreements and permits. For example, interconnection agreements and purchase power agreements are necessary for all renewable energy projects electrically interconnected to the utility grid. The applicant must demonstrate that the applicant is familiar with the regulations and utility policies and that these arrangements will be secured in a reasonable timeframe.

(*3*) *Energy or resource assessment.* Describe the quality and availability of the renewable resource, and an assessment of expected energy savings through the deployment of the proposed system or increased production created by the system.

(*4*) *Design and engineering.* Describe the intended purpose of the project and the design, engineering, testing, and monitoring needed for the proposed project. The description must support that the system will be designed, engineered, tested, and monitored so as to meet its intended purpose, ensure public safety, and comply with applicable laws, regulations, agreements, permits, codes, and standards. In addition, the applicant must identify all the major equipment that is proprietary equipment and justify how this unique equipment is needed to meet the requirements of the proposed design.

(*5*) *Project development.* Describe the overall project development method, including the key project development activities and the proposed schedule for each activity. The description must identify each significant historical and projected activity, its beginning and end, and its relationship to the time needed to initiate and carry the activity through to successful project completion. The description must address applicant project development cash flow requirements. Details for equipment procurement and installation shall be addressed in paragraphs (b)(7)(ii)(G) (*7*) and (b)(7)(ii)(G)(*8*) of this section.

(*6*) *Project economic assessment.* Describe the financial performance of the proposed project. The description must address project costs, energy savings, and revenues, including applicable investment and production incentives. Cost centers include, but are not limited to, administrative and general, fuel supply, operations and maintenance, product delivery and debt service. Revenues to be considered must accrue from the sale of energy, offset or savings in energy costs, byproducts, and green tags. Incentives to be considered must accrue from government entities.

(*7*) *Equipment procurement.* Describe the availability of the equipment required by the system. The description must support that the required equipment is available and can be procured and delivered within the proposed project development schedule.

(*8*) *Equipment installation.* Describe the plan for site development and system installation, including any special equipment requirements. In all cases, the system or improvement must be installed in conformance with manufacturer's specifications and design requirements, and comply with applicable laws, regulations, agreements, permits, codes, and standards.

(*9*) *Operations and maintenance.* Describe the operations and maintenance requirements of the system, including major rebuilds and component replacements necessary for the system to operate as designed over the design life. All systems or improvements must have a warranty. The warranty must cover and provide protection against both breakdown and a degradation of performance. The performance of the renewable energy system or energy efficiency improvement must be monitored and recorded as appropriate to the specific technology.

(*10*) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives. The budget for and any unique concerns associated with the dismantling and disposal of project components and their wastes must also be described.

(8) *Business-level feasibility study for renewable energy systems.* For each application for a renewable energy system project, with total eligible project costs greater than $200,000, a business-level feasibility study by an independent, qualified consultant will be required by the Agency for start-up businesses or existing businesses. An acceptable business-level feasibility study must conform to the requirements of an acceptable feasibility study as specified in Appendix E of this subpart.

§ 4280.117 Evaluation of RES and EEI grant applications.

(a) *General review.* The Agency will evaluate each RES and EEI application and make a determination as to whether the applicant is eligible, the proposed grant is for an eligible project, and the proposed grant complies with all applicable statutes and regulations.

(b) *Technical merit.* The Agency's determination of a project's technical merit will be based on the information provided by the applicant. The Agency may engage the services of other government agencies or other recognized industry experts in the applicable technology field, at its discretion, to evaluate and rate the application. The Agency may use this evaluation and rating to determine the level of technical merit of the proposed project. Projects that the Agency determines are without technical merit shall be deemed ineligible.

(c) *Evaluation criteria.* Agency personnel will score each application based on the evaluation criteria specified in paragraphs (c)(1) through (c)(10) of this section.

(1) *Quantity of energy replaced, produced, or saved, and flexible fuel pumps.* Points may only be awarded for

energy replacement, energy savings, or energy generation, or for flexible fuel pumps. Points will not be awarded for more than one category.

(i) *Energy replacement.* If the proposed renewable energy system is intended primarily for self-use by the agricultural producer or rural small business and will provide energy replacement of greater than zero, but equal to or less than 25 percent, 5 points will be awarded; greater than 25 percent, but equal to or less than 50 percent, 10 points will be awarded; or greater than 50 percent, 15 points will be awarded. Energy replacement is to be determined by dividing the estimated quantity of renewable energy to be generated over a 12-month period by the estimated quantity of energy consumed over the same 12-month period during the previous year by the applicable energy application. The estimated quantities of energy must be converted to either British thermal units (BTUs), Watts, or similar energy equivalents to facilitate scoring. If the estimated energy produced equals more than 150 percent of the energy requirements of the applicable process(es), the project will be scored as an energy generation project.

(ii) *Energy savings.* If the estimated energy expected to be saved by the installation of the energy efficiency improvements will be from 20 percent up to, but not including 30 percent, 5 points will be awarded; 30 percent up to, but not including 35 percent, 10 points will be awarded; or, 35 percent or greater, 15 points will be awarded. Energy savings will be determined by the projections in an energy assessment or audit. Projects with total eligible project costs of $50,000 or less that opt to obtain a professional energy audit will be awarded an additional 5 points.

(iii) *Energy generation.* If the proposed renewable energy system is intended primarily for production of energy for sale, 10 points will be awarded.

(iv) *Flexible fuel pump(s).* (A) If the proposed project is for one or more flexible fuel pumps, points will be awarded based on the overall percentage of proposed flexible fuel pumps to the applicant's total retail pump inventory at the facility. The percentage of proposed flexible fuel pumps shall be calculated using the following equation.

Equation: $FFP\% = (FFPx/TP) \times 100$

where: FFP% = Proposed flexible fuel pump(s), percentage.

FFPx = Number of proposed flexible fuel pumps to be installed at applicant's facility.

TP = Number of proposed pumps to be installed plus the number of pumps installed and operating at the facility.

(B) If the proposed flexible fuel pump percentage calculated is 5 percent or below, 5 points will be awarded; above 5 percent and up to, but not including, 10 percent, 10 points will be awarded; or 10 percent and above, 15 points will be awarded.

(2) *Environmental benefits.* If the purpose of the proposed system contributes to the environmental goals and objectives of other Federal, State, or local programs, 10 points will be awarded. Points will only be awarded for this paragraph if the applicant is able to provide documentation from an appropriate authority supporting this claim.

(3) *Commercial availability.* If the proposed system or improvement is currently commercially available and replicable, 5 points will be awarded. If the proposed system or improvement is commercially available and replicable and is also provided with a 5-year or longer warranty providing the purchaser protection against system degradation or breakdown or component breakdown, 10 points will be awarded.

(4) *Technical merit score.* The Technical Merit of each project will be determined using the procedures specified in paragraphs (c)(4)(i) and (c)(4)(ii) of this section. The procedures specified in paragraph (c)(4)(i) will be used to score paragraphs (c)(4)(i)(A) through (c)(4)(i)(J) of this section. The final score awarded will be calculated using the procedures described in paragraph (c)(4)(ii) of this section.

(i) *Technical merit.* Each subparagraph has its own maximum possible score and will be scored according to the following criteria: If the description in the subparagraph has no significant weaknesses and exceeds the requirements of the subparagraph, 100 percent of the total possible score for the subparagraph will be awarded. If the description has one or more significant strengths and meets the requirements of the subparagraph, 80 percent of the total possible score will be awarded for the subparagraph. If the description meets the basic requirements of the subparagraph, but also has several weaknesses, 60 percent of the points will be awarded. If the description is lacking in one or more critical aspects, key issues have not been addressed, but the description demonstrates some merit or strengths, 40 percent of the total possible score will be awarded. If the description has serious deficiencies, internal inconsistencies, or is missing information, 20 percent of the total possible score will be awarded. If the description has no merit in this area, 0 percent of the total possible score will be awarded. The total possible points for Technical Merit is 35 points.

(A) *Qualifications of the project team (maximum score of 10 points).* The applicant has described the project team service providers, their professional credentials, and relevant experience. The description supports that the project team service, equipment, and installation providers have the necessary professional credentials, licenses, certifications, or relevant experience to develop the proposed project.

(B) *Agreements and permits (maximum score of 5 points).* The applicant has described the necessary agreements and permits required for the project and the schedule for securing those agreements and permits.

(C) *Energy or resource assessment (maximum score of 10 points).* The applicant has described the quality and availability of a suitable renewable resource or an assessment of expected energy savings for the proposed system.

(D) *Design and engineering (maximum score of 30 points).* The applicant has described the design, engineering, and testing needed for the proposed project. The description supports that the system will be designed, engineered, and tested so as to meet its intended purpose, ensure public safety, and comply with applicable laws, regulations, agreements, permits, codes, and standards.

(E) *Project development schedule (maximum score of 5 points).* The applicant has described the development method, including the key project development activities and the proposed schedule for each activity. The description identifies each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through to successful completion. The description addresses grantee or borrower project development cash flow requirements.

(F) *Project economic assessment (maximum score of 20 points).* The applicant has described the financial performance of the proposed project, including the calculation of simple payback. The description addresses project costs and revenues, such as applicable investment and production incentives, and other information to allow the assessment of the project's cost effectiveness.

(G) *Equipment procurement (maximum score of 5 points).* The applicant has described the availability of the equipment required by the system. The description supports that

the required equipment is available, and can be procured and delivered within the proposed project development schedule.

(H) *Equipment installation (maximum score of 5 points).* The applicant has described the plan for site development and system installation.

(I) *Operation and maintenance (maximum score of 5 points).* The applicant has described the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life.

(J) *Dismantling and disposal of project components (maximum score of 5 points).* The applicant has described the requirements for dismantling and disposing of project components at the end of their useful life and associated wastes.

(ii) *Calculation of Technical Merit Score.* To determine the actual points awarded a project for Technical Merit, the following procedure will be used: The score awarded for paragraphs (c)(4)(i)(A) through (c)(4)(i)(J) of this section will be added together and then divided by 100, the maximum possible score, to achieve a percentage. This percentage will then be multiplied by the total possible points of 35 to achieve the points awarded for the proposed project for Technical Merit.

(5) *Readiness.* If the applicant has written commitments from the source(s) confirming commitment of 50 percent up to but not including 75 percent of the matching funds prior to the Agency receiving the complete application, 5 points will be awarded. If the applicant has written commitments from the source(s) confirming commitment of 75 percent up to but not including 100 percent of the matching funds prior to the Agency receiving the complete application, 10 points will be awarded. If the applicant has written commitments from the source(s) of matching funds confirming commitment of 100 percent of the matching funds prior to the Agency receiving the complete application, 15 points will be awarded.

(6) *Small agricultural producer/very small business.* If the applicant is an agricultural producer producing agricultural products with a gross market value of less than $600,000 in the preceding year, 5 points will be awarded. If the applicant is an agricultural producer producing agricultural products with a gross market value of less than $200,000 in the preceding year or is a very small business, as defined in § 4280.103, 10 points will be awarded.

(7) *Simplified application/low cost projects.* If the applicant is eligible for and uses the simplified application process or the project has total eligible project costs of $200,000 or less, 5 points will be awarded.

(8) *Previous grantees and borrowers.* If an applicant has not been awarded a grant or loan under this program within the 2 previous Federal fiscal years, 5 points will be awarded.

(9) *Simple payback.* A maximum of 15 points will be awarded for either renewable energy systems or energy efficiency improvements; points will not be awarded for more than one category. In either case, points will be awarded based on the simple payback of the project.

(i) *Renewable energy systems, including flexible fuel pumps.* If the simple payback of the proposed project is:

(A) Less than 10 years, 15 points will be awarded;

(B) 10 years up to but not including 15 years, 10 points will be awarded;

(C) 15 years up to and including 20 years, 5 points will be awarded; or

(D) Longer than 20 years, no points will be awarded.

(ii) *Energy efficiency improvements.* If the simple payback of the proposed project is:

(A) Less than 4 years, 15 points will be awarded;

(B) 4 years up to but not including 8 years, 10 points will be awarded;

(C) 8 years up to and including 12 years, 5 points will be awarded; or

(D) Longer than 12 years, no points will be awarded.

(10) *State Director and Administrator priorities and points.* A State Director, for its State allocation under this subpart, or the Administrator, for making awards from the National Office reserve, may award up to 10 points to an application if the application is for an under-represented technology or for flexible fuel pumps or if selecting the application would help achieve geographic diversity. In no case shall an application receive more than 10 points under this criterion.

§ 4280.118 Insurance requirements.

Agency approved insurance coverage must be maintained for the life of the RES or EEI grant unless this requirement is waived or modified by the Agency in writing.

(a) National flood insurance is required in accordance with 7 CFR part 1806, subpart B, of this title, if applicable.

(b) Business interruption insurance is required except for projects with total eligible project costs of $200,000 or less.

§ 4280.119 Construction planning and performing development.

The requirements of this section apply for planning, designing, bidding, contracting, and constructing renewable energy systems and energy efficiency improvement projects as applicable. For contracts of $200,000 or less, the simple contract method, as specified in paragraph (e) of this section, may be used. Contracts greater than $200,000 shall use the contract method specified in paragraph (g) of this section.

(a) *Technical services.* Applicants are responsible for providing the engineering, architectural, and environmental services necessary for planning, designing, bidding, contracting, inspecting, and constructing their facilities. Services may be provided by the applicant's "in-house" engineer or architect or through contract, subject to Agency concurrence. Engineers and architects must be licensed in the State where the facility is to be constructed.

(b) *Design policies.* Facilities funded by the Agency will meet the requirements of § 1780.57(b), (c), (d), and (o) of this title. Final plans and specifications must be reviewed by the Agency and approved prior to the start of construction.

(c) *Owners accomplishing work.* In some instances, owners may wish to perform a part of the work themselves. For an owner to perform project development work, the owner must meet the experience requirements of § 1780.67 of this title. For an owner to provide a portion of the work, with the remainder to be completed by a contractor, a clear understanding of the division of work must be established and delineated in the contract. In such cases, the contractor will be required to inspect the owner's work and accept it. Owners are not eligible for payment for their own work as it is not an eligible project cost. See § 4280.115(c) of this subpart for further details on eligible project costs.

(d) *Equipment purchases.* Equipment purchases of less than $200,000 will not require a performance and payment bond, unless required by the applicant, as long as the contract purchase is a lump sum payment and the manufacturer provides the required warranties on the equipment as outlined in paragraph (i) in the applicable section found in Appendices A, B, C, and D of this subpart. Payment shall be certified by copies of the Manufacturer's paid invoices and warranty documents.

(e) *Simple contract method.* The simple contract method may be used for small projects with a contract not greater than $200,000. In smaller

projects, Agency funds will typically be used to reimburse project costs upon completion of the work as a lump sum payment. Partial payments will be made in accordance with Form RD 4280–2 and Form RD 1924–6, "Construction Contract," or other Agency approved contract. All construction work will be performed under a written contract, as described below. A design/build method, where the same person or entity provides design and engineering work, as well as construction or installation, may be used under this method.

(1) *Contracting requirements threshold.* For contracts above $100,000, certain Federal requirements, including surety, must be met. An attachment to the contract may be used to incorporate language for these requirements.

(2) *Forms used.* Form RD 1924–6 or other Agency approved contract must be used. Other contracts must be approved by the Agency and may be used only if they are customarily used in the area and protect the interest of the applicant and the Government with respect to compliance with items such as the drawings, specifications, payments for work, inspections, completion, nondiscrimination in construction work and acceptance of the work. The Agency will not become a party to a construction contract or incur any liability under it. No contract shall become effective until concurred in writing by the Agency. Such concurrence statement shall be attached to and made a part of the contract.

(3) *Contract provisions.* Contracts will have a listing of attachments and the minimum provisions of the contract will include:

(i) The contract sum;

(ii) The dates for starting and completing the work;

(iii) The amount of liquidated damages to be charged;

(iv) The amount, method, and frequency of payment;

(v) Whether or not surety bonds will be provided. If not, a latent defects bond may be required, as described in paragraph (e)(4) of this section;

(vi) The requirement that changes or additions must have prior written approval of the Agency; and

(vii) The warranty period to be provided in accordance with Appendices A and B, sections 1 through 10, paragraph (i)(1) and in Appendices C and D, paragraph (i)(1).

(4) *Surety.* Surety per 7 CFR part 1780, subpart C, § 1780.75(c) of this title will be required, and made a part of the contract, if the applicant requests it, or if the contractor requests partial payments for construction work. If the contractor will receive a lump sum payment at the end of work, the Agency will not require surety. In such cases where no surety is provided and the project involves pre-commercial technology, first of its type in the U.S., or new designs without sufficient operating hours to prove their merit, a latent defects bond may be required to cover the work.

(5) *Equal opportunity.* Section 1901.205 of 7 CFR part 1901, subpart E of this title applies to all financial assistance involving construction contracts and subcontracts in excess of $10,000. Language for this requirement is included in Form RD 1924–6. If this form is not used, such language must be made a part of the Agency approved contract.

(6) *Obtaining bids and selecting a contractor.*

(i) The applicant may select a contractor and negotiate a contract or contact several contractors and request each to submit a bid. The applicant will provide a statement to the Agency describing the process for obtaining the bid(s) and what alternatives were considered.

(ii) When a price has already been negotiated by an applicant and a contractor, the Agency will review the proposed contract. If the contractor is qualified to perform the development and provide a warranty of the work and the price compares favorably with the cost of similar construction in the area, further negotiation is unnecessary. If the Agency determines the price is too high or otherwise unreasonable, the applicant will be required to negotiate further with the contractor. If a reasonable price cannot be negotiated or if the contractor is not qualified, the applicant will be required to negotiate with another contractor.

(iii) When an applicant has proposed development with no contractor in mind, competition will be required. The applicant must obtain bids from as many qualified contractors, dealers, or trades people as feasible depending on the method and type of construction.

(iv) If the award of the contract is by competitive bidding, Form RD 1924–5, "Invitation for Bid (Construction Contract)," or another similar Agency approved invitation bid form containing the requirements of subpart E of part 1901 of this title may be used. All contractors from whom bids are requested should be informed of all conditions of the contract, including the time and place of opening bids. Conditions shall not be established which would give preference to a specific bidder or type of bidder. When applicable, copies of Forms RD 1924–6 and RD 400–6, "Compliance Statement," also should be provided to the prospective bidders.

(7) *Awarding the contract.* The applicant, with the concurrence of the Agency, will consider the amount of the bids or proposals, and all conditions listed in the invitation. On the basis of these considerations, the applicant will select and notify the lowest responsible bidder. The contract will be awarded using Form RD 1924–6 or similar Agency approved document as described in this section.

(8) *Final payments.* Prior to making final payment on the contract when a surety bond is not used, the Agency will be provided with Form RD 1924–9, "Certificate of Contractor's Release," and Form RD 1924–10, "Release by Claimants," executed by all persons who furnished materials or labor in connection with the contract. The applicant should furnish the contractor with a copy of Form RD 1924–10 at the beginning of the work in order that the contractor may obtain these releases as the work progresses.

(f) *Design/build contracts.* The design/build method, where the same person or entity provides design and engineering work, as well as construction or installation, may be used with Agency written approval. If the design/build contract amount is $200,000 or less, development and contracting will follow paragraph (e) of this section. If the design/build contract amount is greater than $200,000, Agency prior concurrence must be obtained as described below, and the remaining requirements of this section apply.

(1) *Concurrence information.* The applicant will request Agency concurrence by providing the Agency at least the information specified in paragraphs (f)(1)(i) through (f)(1)(viii) of this section.

(i) The owner's written request to use the design/build method with a description of the proposed method.

(ii) A proposed scope of work describing in clear, concise terms the technical requirements for the contract. It should include a nontechnical statement summarizing the work to be performed by the contractor and the results expected, and a proposed construction schedule showing the sequence in which the work is to be performed.

(iii) A proposed firm-fixed-price contract for the entire project which provides that the contractor shall be responsible for any extra cost which may result from errors or omissions in the services provided under the contract, as well as compliance with all

Federal, State, and local requirements effective on the contract execution date.

(iv) Where noncompetitive negotiation is proposed, an evaluation of the contractor's performance on previous similar projects in which the contractor acted in a similar capacity.

(v) A detailed listing and cost estimate of equipment and supplies not included in the construction contract but which are necessary to properly operate the facility.

(vi) Evidence that a qualified construction inspector who is independent of the contractor has or will be hired.

(vii) Preliminary plans and outline specifications. However, final plans and specifications must be completed and reviewed by the Agency prior to the start of construction.

(viii) The owner's attorney's opinion and comments regarding the legal adequacy of the proposed contract documents and evidence that the owner has the legal authority to enter into and fulfill the contract.

(2) *Agency concurrence of design/build method.* The Agency shall review the material submitted by the applicant. When all items are acceptable, the loan approval official will concur in the use of the design/build method for the proposal.

(3) *Forms used.* American Institute of Architects (AIA) contract forms between the owner and design-builder that are approved by the Agency should be used. Other Agency approved contract documents may be used provided they are customarily used in the area and protect the interest of the applicant and the Agency with respect to compliance with items such as the drawings, specifications, payments for work, inspections, completion, nondiscrimination in construction work, and acceptance of the work. The Agency will not become a party to a construction contract or incur any liability under it. No contract shall become effective until concurred in writing by the Agency. Such concurrence statement shall be attached to and made a part of the contract.

(4) *Contract provisions.* Contracts will have a listing of attachments and shall meet the following requirements:

(i) The contract sum;

(ii) The dates for starting and completing the work;

(iii) The amount of liquidated damages, if any, to be charged;

(iv) The amount, method, and frequency of payment;

(v) Surety provisions that meet the requirements of § 1780.75(c) of this title;

(vi) The requirement that changes or additions must have prior written approval of the Agency;

(vii) The warranty period to be provided in accordance with Appendices A and B, sections 1 through 10, paragraph (i) and Appendices C and D, paragraph (i);

(viii) Contract review and concurrence in accordance with § 1780.61(b) of this title;

(ix) Owner's contractual responsibility in accordance with § 1780.68 of this title; and

(x) Further contract provisions concerning remedies, termination, surety, equal employment opportunity, anti-kickback, records, State energy conservation plan, change orders, Agency concurrence, retainage, and other compliance requirements must be met in accordance with 7 CFR part 1780, subpart C, § 1780.75 of this title.

(5) *Obtaining bids and selecting a contractor.* The applicant may select a contractor based on competitive sealed bids, competitive negotiation, or noncompetitive negotiation as described in § 1780.72(b), (c), or (d) of this title.

(g) *Contract method.* If the contract amount is greater than $200,000 and is not of the design/build method, the following conditions must be met:

(1) *Procurement method.* Procurement method shall comply with the requirements of §§ 1780.72, 1780.75, and 1780.76 of this title.

(2) *Forms used.* The AIA Form A101, "Standard Form of Agreement Between Owner and Contractor," or Engineering Joint Counsel Document Committee (EJCDC) Form C–521, "Suggested Form of Agreement Between Owner and Contractor (Stipulated Price) Funding Agency Edition," should be used. Other Agency approved contract documents may be used provided they are customarily used in the area and protect the interest of the applicant and the Agency with respect to compliance with items such as the drawings, specifications, payments for work, inspections, completion, nondiscrimination in construction work, and acceptance of the work. The Agency will not become a party to a construction contract or incur any liability under it. No contract shall become effective until concurred in writing by the Agency. Such concurrence statement shall be attached to and made a part of the contract.

(3) *Contract provisions.* Contracts will have a listing of attachments and shall meet the requirements of § 1780.75 of this title and the following requirements:

(i) The contract sum;

(ii) The dates for starting and completing the work;

(iii) The amount of liquidated damages, if any, to be charged;

(iv) The amount, method, and frequency of payment;

(v) Surety provisions that meet the requirements of § 1780.75(c) of this title;

(vi) The requirement that changes or additions must have prior written approval of the Agency;

(vii) The warranty period to be provided in accordance with Appendices A and B, sections 1 through 10, paragraph (i) and with Appendices C and D, paragraph (i);

(viii) Contract review and concurrence in accordance with § 1780.61(b) of this title;

(ix) Owner's contractual responsibility in accordance with § 1780.68 of this title; and

(x) Further contract provisions concerning remedies, termination, surety, equal employment opportunity, anti-kickback, records, State energy conservation plan, change orders, Agency concurrence, retainage, and other compliance requirements must be met in accordance with § 1780.75 of this title.

(4) *Obtaining bids and selecting a contractor.* The applicant may select a contractor based on competitive sealed bids, competitive negotiation, or noncompetitive negotiation as described in § 1780.72(b), (c), or (d) of this title.

(5) *Contract award.* Applicants awarding contracts must comply with § 1780.70(h) of this title.

(6) *Contracts awarded prior to applications.* Applicants awarding contracts prior to filing an application must comply with § 1780.74 of this title.

(7) *Contract administration.* Contract administration must comply with § 1780.76 of this title. If another authority, such as a Federal or State agency, is providing funding and requires oversight of inspections, change orders, and pay requests, the Agency may accept copies of their reports or forms as meeting oversight requirements of the Agency.

§ 4280.120 RES and EEI grantee requirements.

(a) A Letter of Conditions will be prepared by the Agency, establishing conditions that must be understood and agreed to by the applicant before any obligation of funds can occur. The applicant must sign Form RD 1942–46, "Letter of Intent to Meet Conditions" and Form RD 1940–1, "Request for Obligation of Funds," if they accept the conditions of the grant.

(b) The applicant must complete, sign, and return the Form RD 4280–2. The

grantee must abide by all requirements contained in Form RD 4280–2, this subpart, and any other applicable Federal statutes or regulations. Failure to follow these requirements may result in termination of the grant and adoption of other available remedies.

(c) Where applicable, the grantee shall provide to the Agency a copy of the executed power purchase agreement within 12 months from the date that the grant agreement is executed, unless otherwise approved by the Agency.

§ 4280.121 Servicing grants.

(a) *General.* RES and EEI grants will be serviced in accordance with the Departmental Regulations, 7 CFR part 1951, subparts E and O of this title, and Form RD 4280–2.

(b) *Change of contractor or vendor.* After an award has been made, the recipient of the award can request to change a contractor or vendor if the technical merit score for the project remains the same or is higher. Prior to changing a contractor or vendor, the recipient must submit to the Agency a written request providing information that allows the Agency to re-score the project's technical merit. If the Agency determines that the project achieves the same or higher technical merit score, the recipient may make the change. No additional funding will be available from the Agency if costs for the project have increased. If the Agency determines that the project does not achieve the same or higher technical merit score, the change will not be approved.

Renewable Energy System and Energy Efficiency Improvement Guaranteed Loans

§ 4280.122 Borrower eligibility.

To receive a RES or EEI guaranteed loan under this subpart, a borrower must meet the criteria specified in §§ 4280.109 and 4280.112.

§ 4280.123 Project eligibility.

For a RES or EEI project to be eligible to receive a guaranteed loan under this subpart, the project must meet each of the criteria, as applicable, specified in § 4280.113(a) through (j). In addition, guaranteed loan funds may be used for necessary capital improvements to an existing renewable energy system.

§ 4280.124 Guaranteed loan funding.

(a) The amount of the loan that will be made available to an eligible project under this subpart will not exceed 75 percent of total eligible project costs. Eligible project costs are specified in paragraph (e) of this section.

(b) The minimum amount of a guaranteed loan made to a borrower will be $5,000, less any program grant amounts. The maximum amount of a guaranteed loan made to a borrower is $25 million.

(c) The percentage of guarantee, up to the maximum allowed by this section, will be negotiated between the lender and the Agency. The maximum percentage of guarantee is 85 percent for loans of $600,000 or less; 80 percent for loans greater than $600,000 up to and including $5 million; 70 percent for loans greater than $5 million up to and including $10 million; and 60 percent for loans greater than $10 million.

(d) The total amount of the loans guaranteed by the Agency under this program to one borrower, including the outstanding principal and interest balance of any existing loans guaranteed by the Agency under this program, and new loan request, must not exceed $25 million.

(e) Eligible project costs are only those costs associated with the items identified in paragraphs (e)(1) through (e)(12) of this section, as long as the items are an integral and necessary part of the renewable energy system or energy efficiency improvement.

(1) Post-application purchase and installation of equipment (new, refurbished, or remanufactured), except agricultural tillage equipment, used equipment, and vehicles.

(2) Post-application construction or improvements, except residential.

(3) Energy audits or assessments.

(4) Permit and license fees.

(5) Professional service fees, except for application preparation.

(6) Feasibility studies and technical reports.

(7) Business plans.

(8) Retrofitting.

(9) Construction of a new energy efficient facility only when the facility is used for the same purpose, is approximately the same size, and, based on the energy assessment or audit, will provide more energy savings than improving an existing facility. Only costs identified in the energy assessment or audit for energy efficiency improvements are allowed.

(10) Energy efficiency improvements are limited to only improvements identified in the energy assessment or audit. Equipment identified by the audit to be replaced shall be replaced with equipment similar in capacity. If the energy efficiency improvement has a greater capacity than the existing equipment, the Agency will pro-rate the energy efficiency improvement's total eligible project costs based on the capacity of the existing equipment. A calculation shall be performed by dividing the capacity of the existing equipment by the capacity of the proposed equipment to determine the percentage of the energy efficiency improvement's eligible project costs that the Agency will use in determining the maximum guaranteed loan assistance under this subpart (see example).

Example. A business plans to build a new production line with a capacity of 625 units per hour to replace an existing production line that produces 500 units per hour. The total project costs of the new production line is $20,000, of which $15,000 would otherwise qualify as eligible project costs. However, because the new production line has a greater production capacity than the existing line (625 units per hour versus 500 units per hour), only a portion of the $15,000 otherwise eligible project costs would be used in determining total eligible project cost and the maximum guaranteed loan assistance available. In this example, because the original capacity (500 units per hour) is 80 percent of the new capacity (625 units per hour), only 80 percent of the $15,000 of otherwise eligible project costs associated with the new production line (*i.e.*, $12,000) will be considered as total eligible project cost to be financed under this subpart. The maximum guaranteed loan award in this example would be $9,000, which is equal to $12,000 x 75 percent.

(11) Working capital.

(12) Land acquisition.

(f) In determining the amount of a loan awarded, the Agency will take into consideration the following six criteria:

(1) The type of renewable energy system to be purchased;

(2) The estimated quantity of energy to be generated by the renewable energy system;

(3) The expected environmental benefits of the renewable energy system;

(4) The quantity of energy savings expected to be derived from the activity, as demonstrated by an energy audit;

(5) The estimated period of time it would take for the energy savings generated by the activity to equal the cost of the activity; and

(6) The expected energy efficiency of the renewable energy system.

§ 4280.125 Interest rates.

(a) The interest rate for the guaranteed loan will be negotiated between the lender and the applicant and may be either fixed or variable as long as it is a legal rate. The variable rate must be based on published indices, such as money market indices. In no case, however, shall the rate be more than the rate customarily charged borrowers in

similar circumstances in the ordinary course of business. The interest rate charged is subject to Agency review and approval.

(b) Comply with § 4279.125(a), (b), and (d) of this chapter.

§ 4280.126 Terms of loan.

(a) The repayment term for a loan for:

(1) Real estate must not exceed 30 years;

(2) Machinery and equipment must not exceed 20 years, or the useful life, including major rebuilds and component replacement, whichever is less;

(3) Combined loans on real estate and equipment must not exceed 30 years; and

(4) Working capital loans must not exceed 7 years.

(b) The first installment of principal and interest will, if possible, be scheduled for payment after the project is operational and has begun to generate income.

(c) Payment terms must comply with § 4279.126(c) of this chapter.

(d) The maturity of a loan will be based on the use of proceeds, the useful life of the assets being financed, and the borrower's ability to repay.

(e) All loans guaranteed through this program must be sound, with reasonably assured repayment.

(f) Guarantees must be provided only after consideration is given to the borrower's overall credit quality and to the terms and conditions of renewable energy and energy efficiency subsidies, tax credits, and other such incentives.

(g) A principal plus interest repayment schedule is permissible.

§ 4280.127 Guarantee/annual renewal fee percentages.

(a) *Fee ceilings.* The maximum guarantee fee that may be charged is 1 percent. The maximum annual renewal fee that may be charged is 0.5 percent. The Agency will establish each year the guarantee fee and annual renewal fee and a notice will be published annually in the **Federal Register**.

(b) *Guarantee fee.* The guarantee fee will be paid to the Agency by the lender and is nonrefundable. The guarantee fee may be passed on to the borrower. The guarantee fee must be paid at the time the Loan Note Guarantee is issued.

(c) *Annual renewal fee.* The annual renewal fee will be calculated on the unpaid principal balance as of close of business on December 31 of each year. It will be calculated by multiplying the outstanding principal balance times the percent of guarantee times the annual renewal fee. The fee will be billed to the lender in accordance with the **Federal Register** publication. The annual renewal fee may not be passed on to the borrower.

§ 4280.128 Application and documentation.

The requirements in this section apply to guaranteed loan applications for RES and EEI projects under this subpart.

(a) *General.* Applications must be submitted in accordance with the requirements specified in § 4280.116(a).

(b) *Application content for guaranteed loans greater than $600,000.* Applications and documentation for guaranteed loans greater than $600,000 must provide the required information organized pursuant to a Table of Contents in a chapter format presented in the order shown in paragraphs (b)(1) and (b)(2) of this section.

(1) *Guaranteed loan application content.*

(i) *Table of contents.* Include page numbers for each component of the application in the table of contents. Begin pagination immediately following the Table of Contents.

(ii) *Project summary.* Provide a concise summary of the proposed project and applicant information, project purpose and need, and project goals, including the following:

(A) *Title.* Provide a descriptive title of the project.

(B) *Borrower eligibility.* Describe how each of the criteria identified in §§ 4280.109 and 4280.112 is met.

(C) *Project eligibility.* Describe how each of the criteria, as applicable, in § 4280.113(a) through (j) is met. Clearly state whether the application is for the purchase of a renewable energy system (including making necessary capital improvements to an existing renewable energy system) or to make energy efficiency improvements. The response to § 4280.113(a) must include a brief description of the system or improvement. This description is to provide the reader with a frame of reference for reviewing the rest of the application. Additional project description information will be needed later in the application.

(D) *Operation description.* Describe the applicant's total farm/ranch/business operation and the relationship of the proposed project to the applicant's total farm/ranch/business operation as specified in § 4280.116(b)(3)(iv).

(iii) *Financial information for gross income or size determination.* Provide financial information to allow the Agency to determine the agricultural producer's percent of gross income derived from agricultural operations or the rural small business' size, as applicable, as specified in § 4280.116(b)(3)(v).

(iv) *Matching funds.* Submit a spreadsheet identifying sources, amounts, and status of matching funds as specified in § 4280.116(b)(5).

(v) *Self-evaluation score.* Self-score the project using the evaluation criteria in § 4280.117(c) as specified in § 4280.116(b)(6).

(vi) *Renewable energy and energy efficiency technical report.* For both renewable energy system projects and energy efficiency improvement projects, submit a Technical Report in accordance with applicable provisions of Appendix B, C, or D, as applicable, of this subpart and as specified in § 4280.116(b)(7)(ii). For loan requests in excess of $600,000, the services of a licensed PE or a team of licensed PE's is required. If none of the Technical Reports in Appendices B, C, and D apply to the proposed technology, the applicant may submit a Technical Report that conforms to the overall outline and subjects specified in applicable provisions of § 4280.116(b)(7)(ii)(A) through (G).

(vii) *Business-level feasibility study for renewable energy systems.* For each application for a renewable energy system project submitted by a start-up or existing business, a business-level feasibility study by an independent qualified consultant will be required by the Agency. An acceptable business-level feasibility study must conform to the requirements of an acceptable feasibility study as specified in Appendix E of this subpart.

(2) *Lender forms, certifications, and agreements.* Each application submitted under paragraph (b)(1) of this section must contain applicable items described in paragraphs (b)(2)(i) through (b)(2)(xi) of this section.

(i) A completed Form RD 4279–1, "Application for Loan Guarantee."

(ii) Form RD 1940–20.

(iii) A personal credit report from an Agency approved credit reporting company for each owner, partner, officer, director, key employee, and stockholder owning 20 percent or more interest in the borrower's business, except passive investors and those corporations listed on a major stock exchange.

(iv) Appraisals completed in accordance with § 4280.141. Completed appraisals should be submitted when the application is filed. If the appraisal has not been completed when the application is filed, the applicant must submit an estimated appraisal. In all cases, a completed appraisal must be submitted prior to the loan being closed.

(v) Commercial credit reports obtained by the lender on the borrower and any parent, affiliate, and subsidiary firms.

(vi) Current personal and corporate financial statements of any guarantors.

(vii) Financial statements as specified in § 4280.116(b)(4)(i) through (iii). Financial information is required on the total operation of the agricultural producer/rural small business and its parent, subsidiary, or affiliates at other locations. All information submitted under this paragraph must be substantiated by authoritative records.

(viii) Business-level feasibility study.

(ix) Lender's complete comprehensive written analysis in accordance with § 4280.139.

(x) A certification by the lender that it has completed a comprehensive written analysis of the proposal, the borrower is eligible, the loan is for authorized purposes with technical merit, and there is reasonable assurance of repayment ability based on the borrower's history, projections, equity, and the collateral to be obtained.

(xi) A proposed loan agreement or a sample loan agreement with an attached list of the proposed loan agreement provisions. The following requirements must be addressed in the proposed or sample loan agreement:

(A) Prohibition against assuming liabilities or obligations of others;

(B) Restriction on dividend payments;

(C) Limitation on the purchase or sale of equipment and fixed assets;

(D) Limitation on compensation of officers and owners;

(E) Minimum working capital or current ratio requirement;

(F) Maximum debt-to-net worth ratio;

(G) Restrictions concerning consolidations, mergers, or other circumstances;

(H) Limitations on selling the business without the concurrence of the lender;

(I) Repayment and amortization of the loan;

(J) List of collateral and lien priority for the loan, including a list of persons and corporations guaranteeing the loan with a schedule for providing the lender with personal and corporate financial statements. Financial statements for corporate and personal guarantors must be updated at least annually once the guarantee is provided;

(K) Type and frequency of financial statements to be required from the borrower for the duration of the loan;

(L) The addition of any requirements imposed by the Agency in Form RD 4279–3;

(M) A reserved section for any Agency environmental requirements; and

(N) A provision for the lender or the Agency to have reasonable access to the project and its performance information during its useful life or the term of the loan, whichever is longer, including the periodic inspection of the project by a representative of the lender or the Agency.

(c) *Application content for guaranteed loans of $600,000 or less.* Applications and documentation for guaranteed loans $600,000 or less must comply with paragraphs (c)(1) and (c)(2) of this section.

(1) *Application Contents.* Applications and documentation for guaranteed loans $600,000 or less must provide the required information organized pursuant to a Table of Contents in a chapter format presented in the order shown in § 4280.116(b)(2) through (8), except as specified in paragraphs (c)(1)(i) through (c)(1)(iii) of this section.

(i) Section 4280.116(b)(7)(i) does not apply.

(ii) Technical Reports must be submitted according to paragraph (c)(1)(ii)(A) or (B) of this section, as applicable.

(A) For renewable energy system projects and energy efficiency improvement projects utilizing commercially available systems or improvements and with total eligible project costs of $200,000 or less, submit a Technical Report as described in Appendix A, C, or D, as applicable, of this subpart. If a renewable energy project does not fit one of the technologies identified in Appendices A, C, and D, the applicant must submit a Technical Report that conforms to the overall outline and subjects specified in § 4280.116(b)(7)(ii)(G).

(B) For renewable energy projects and energy efficiency projects utilizing pre-commercial technology or with total eligible project costs greater than $200,000, submit a Technical Report as described in Appendix B, C, or D, as applicable, of this subpart and as specified in § 4280.116(b)(7)(ii)(G)(*1*) through (*10*), as applicable.

(iii) *Business-level feasibility study for renewable energy systems.* For each application for a renewable energy system project submitted by a start-up or existing business, a business-level feasibility study by an independent qualified consultant will be required by the Agency. An acceptable business-level feasibility study must conform to the requirements of an acceptable feasibility study as specified in Appendix E of this subpart. Renewable energy projects with total eligible project costs of $200,000 or less are exempt from the feasibility study requirement.

(2) *Lender forms, certifications, and agreements.* Applications submitted under paragraph (c) of this section must use Form RD 4279–1A, "Application for Loan Guarantee, Short Form," and include the documentation contained in paragraphs (b)(2)(ii), (b)(2)(vii), (b)(2)(viii), (b)(2)(ix), and (b)(2)(xi) of this section. The lender must have the documentation contained in paragraphs (b)(2)(iii), (b)(2)(iv), (b)(2)(v), (b)(2)(vi), and (b)(2)(x) available in its files for the Agency's review.

§ 4280.129 Evaluation of RES and EEI guaranteed loan applications.

(a) *General review.* The Agency will evaluate each application and make a determination as to whether the borrower and project are eligible, the project has technical merit, there is reasonable assurance of repayment, there is sufficient collateral and equity, and the proposed loan complies with all applicable statutes and regulations. If the Agency determines it is unable to guarantee the loan, the lender will be informed in writing. Such notification will include the reasons for denial of the guarantee.

(b) *Technical merit determination.* The Agency's determination of a project's technical merit will be based on the information provided by the applicant. The Agency may engage the services of other government agencies or recognized industry experts in the applicable technology field, at its discretion, to evaluate and rate the application. The Agency may use this evaluation and rating to determine the level of technical merit of the proposed project. Projects determined by the Agency to be without technical merit shall be deemed ineligible.

(c) *Evaluation criteria.* The Agency will score each application based on the evaluation criteria specified in § 4280.117(c) (except for the criteria specified in § 4280.117(c)(5)) and in paragraphs (c)(1) and (c)(2) of this section. Points will be awarded for either paragraph (c)(1) or (c)(2) of this section, but not both.

(1) If the interest rate on the loan is to be below the prime rate (as published in The Wall Street Journal) plus 1.5 percent, 5 points will be awarded.

(2) If the interest rate on the loan is to be below the prime rate (as published in The Wall Street Journal) plus 1 percent, 10 points will be awarded.

§ 4280.130 Eligible lenders.

Eligible lenders are those identified in § 4279.29 of this chapter, excluding

mortgage companies that are part of a bank-holding company:

§ 4280.131 Lender's functions and responsibilities.

(a) *General.* Lenders are responsible for implementing the guaranteed loan program under this subpart. All lenders requesting or obtaining a loan guarantee must comply with § 4279.30(a)(1)(i) through (ix) of this chapter.

(b) *Credit evaluation.* The lender's credit evaluation must comply with § 4279.30(b) of this chapter.

(c) *Environmental information.* Lenders must ensure that borrowers furnish all environmental information required under 7 CFR part 1940, subpart G, and must comply with § 4279.30(c) of this chapter.

(d) *Construction planning and performing development.* The lender must comply with § 4279.156(a) and (b) of this chapter, except under § 4279.156(a) of this chapter, the lender must also ensure that all project facilities are designed utilizing accepted architectural and engineering practices that conform to the requirements of this subpart.

(e) *Loan closing.* The loan closing must be in compliance with § 4279.30(d) of this chapter.

§ 4280.132 Access to records.

Both the lender and borrower must permit representatives of the Agency (or other agencies of the U.S.) to inspect and make copies of any records pertaining to any Agency guaranteed loan during regular office hours of the lender or borrower or at any other time upon agreement between the lender, the borrower, and the Agency, as appropriate.

§ 4280.133 Conditions of guarantee.

All loan guarantees will be subject to § 4279.72 of this chapter.

§ 4280.134 Sale or assignment of guaranteed loan.

Any sale or assignment of the guaranteed loan must be in accordance with § 4279.75 of this chapter.

§ 4280.135 Participation.

All participation must be in accordance with § 4279.76 of this chapter.

§ 4280.136 Minimum retention.

Minimum retention must be in accordance with § 4279.77 of this chapter.

§ 4280.137 Repurchase from holder.

Any repurchase from a holder must be in accordance with § 4279.78 of this chapter.

§ 4280.138 Replacement of document.

Documents must be replaced in accordance with § 4279.84 of this chapter, except, in § 4279.84(b)(1)(v), a full statement of the circumstances of any defacement or mutilation of the Loan Note Guarantee or Assignment Guarantee Agreement would also need to be provided.

§ 4280.139 Credit quality.

The lender must determine credit quality and must address all of the elements of credit quality in a written credit analysis, including adequacy of equity, cash flow, collateral, history, management, and the current status of the industry for which credit is to be extended.

(a) *Cash flow.* All efforts will be made to structure debt so that the business has adequate debt coverage and the ability to accommodate expansion.

(b) *Collateral.* Collateral must have documented value sufficient to protect the interest of the lender and the Agency. The discounted collateral value will normally be at least equal to the loan amount. Lenders will discount collateral consistent with sound loan-to-value policy. Guaranteed loans made under this subpart shall have at least parity position with guaranteed loans made under 7 CFR part 4279, subpart B of this title.

(c) *Industry.* The current status of the industry will be considered. Borrowers developing well established commercially available renewable energy systems with significant support infrastructure may be considered for better terms and conditions than those borrowers developing systems with limited infrastructure.

(d) *Equity.* In determining the adequacy of equity, the lender must meet the criteria specified in paragraph (d)(1) of this section for loans over $600,000 and the criteria in paragraph (d)(2) of this section for loans of $600,000 or less. Cash equity injection, as discussed in paragraphs (d)(1) and (d)(2) of this section, must be in the form of cash. Federal grant funds may be counted as cash equity.

(1) For loans over $600,000, borrowers shall demonstrate evidence of cash equity injection in the project of not less than 25 percent of eligible project costs. The fair market value of equity in real property that is to be pledged as collateral for the loan may be substituted in whole or in part to meet the cash equity requirement. However, the appraisal completed to establish the fair market value of the real property must not be more than 1 year old and must meet Agency appraisal standards.

(2) For loans of $600,000 or less, borrowers shall demonstrate evidence of cash equity injection in the project of not less than 15 percent of eligible project costs. The fair market value of equity in real property that is to be pledged as collateral for the loan may be substituted in whole or in part to meet the cash equity requirement. However, the appraisal completed to establish the fair market value of the real property must not be more than 1 year old and must meet Agency appraisal standards.

(e) *Lien priorities.* The entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan. The unguaranteed portion of the loan will neither be paid first nor given any preference or priority over the guaranteed portion. A parity or junior position may be considered provided that discounted collateral values are adequate to secure the loan in accordance with paragraph (b) of this section after considering prior liens.

§ 4280.140 Financial statements.

(a) The financial information required in § 4280.116(b)(3)(v) and (b)(4) is required for the guaranteed loan program.

(b) If the proposed guaranteed loan exceeds $3 million, the Agency may require annual audited financial statements, at its sole discretion when the Agency is concerned about the applicant's credit risk.

§ 4280.141 Appraisals.

(a) *Conduct of appraisals.* All appraisals must be in accordance with § 4279.144 of this chapter.

(1) For loans of $600,000 or more, a complete self-contained appraisal must be conducted. Lenders must complete at least a Transaction Screen Questionnaire for any undeveloped sites and a Phase I environmental site assessment on existing business sites, which should be provided to the appraiser for completion of the self-contained appraisal.

(2) For loans for less than $600,000, a complete summary appraisal may be conducted in lieu of a complete self-contained appraisal as required under paragraph (a)(1) of this section. Summary appraisals must be conducted in accordance with Uniform Standards of Professional Appraisal Practice (USPAP).

(b) *Specialized appraisers.* Specialized appraisers will be required to complete appraisals in accordance with paragraphs (a)(1) and (a)(2) of this section. The Agency may approve a waiver of this requirement only if a specialized appraiser does not exist in a

specific industry or hiring one would cause an undue financial burden to the borrower.

§ 4280.142 Personal and corporate guarantees.

(a) All personal and corporate guarantees must be in accordance with § 4279.149(a) of this chapter.

(b) Except for passive investors, unconditional personal and corporate guarantees for those owners with a beneficial interest at least 20 percent of the borrower will be required where legally permissible.

§ 4280.143 Loan approval and obligation of funds.

The lender and applicant must comply with § 4279.173 of this chapter, except that either or both parties may also propose alternate conditions to the Conditional Commitment if certain conditions cannot be met.

§ 4280.144 Transfer of lenders.

All transfers of lenders must be in accordance with § 4279.174 of this chapter, except that it will be the Agency rather than the loan approval official who may approve the substitution of a new eligible lender.

§ 4280.145 Changes in borrower.

All changes in borrowers must be in accordance with § 4279.180 of this chapter, but the eligibility requirements of this program apply.

§ 4280.146 Conditions precedent to issuance of Loan Note Guarantee.

(a) The Loan Note Guarantee will not be issued until the lender certifies to the conditions identified in paragraphs § 4279.181(a) through (o) of this chapter and paragraphs (b) and (c) of this section.

(b) All planned property acquisitions and development have been performing at a steady state operating level in accordance with the technical requirements, plans, and specifications, conforms with applicable Federal, State, and local codes, and costs have not exceeded the amount approved by the lender and the Agency.

(c) Where applicable, the lender shall provide to the Agency a copy of the executed power purchase agreement.

§ 4280.147 Issuance of the guarantee.

(a) When loan closing plans are established, the lender must notify the Agency in writing. At the same time, or immediately after loan closing, the lender must provide the following to the Agency:

(1) Lender's certifications as required by § 4280.146;

(2) An executed Form RD 4279–4; and

(3) An executed Form RD 1980–19, "Guaranteed Loan Closing Report," and appropriate guarantee fee.

(b) When the Agency is satisfied that all conditions for the guarantee have been met, the Loan Note Guarantee and the following documents, as appropriate, will be issued:

(1) Assignment Guarantee Agreement. If the lender assigns the guaranteed portion of the loan to a holder, the lender, holder, and the Agency must execute the Assignment Guarantee Agreement;

(2) Certificate of Incumbency. If requested by the lender, the Agency will provide the lender with a copy of Form RD 4279–7, "Certificate of Incumbency and Signature," with the signature and title of the Agency official responsible for signing the Loan Note Guarantee, Lender's Agreement, and Assignment Guarantee Agreement;

(3) Copies of legal loan documents; and

(4) Disbursement plan, if working capital is a purpose of the project.

§ 4280.148 Refusal to execute Loan Note Guarantee.

If the Agency determines that it cannot execute the Loan Note Guarantee, § 4279.187 of this chapter will apply.

§ 4280.149 Requirements after project construction.

Once the project has been constructed, the lender must provide the Agency periodic reports from the borrower. The borrower's reports will include the information specified in paragraphs (a) and (b) of this section, as applicable.

(a) *Renewable energy projects.* For renewable energy projects, commencing the first full calendar year following the year in which project construction was completed and continuing for 3 full years, provide a report detailing the information specified in paragraphs (a)(1) through (a)(7) of this section.

(1) The actual amount of energy produced in BTUs, kilowatt-hours, or similar energy equivalents.

(2) If applicable, documentation that any identified health and/or sanitation problem has been solved.

(3) The annual income and/or energy savings of the renewable energy system.

(4) A summary of the cost of operating and maintaining the facility.

(5) A description of any maintenance or operational problems associated with the facility.

(6) Recommendations for development of future similar projects.

(7) Actual jobs created or saved.

(b) *Energy efficiency improvement projects.* For energy efficiency improvement projects, commencing the first full calendar year following the year in which project construction was completed and continuing for 2 full years, provide a report detailing the actual amount of energy saved due to the energy efficiency improvements.

§ 4280.150 Insurance requirements.

Each borrower must obtain the insurance required in § 4280.118. The coverage required by this section must be maintained for the life of the loan unless this requirement is waived or modified by the Agency in writing.

§ 4280.151 [Reserved]

§ 4280.152 Servicing guaranteed loans.

The lender must service the entire loan and must remain mortgagee and secured party of record notwithstanding the fact that another party may hold a portion of the loan. The entire loan must be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan. The unguaranteed portion of a loan will neither be paid first nor given any preference or priority over the guaranteed portion of the loan.

(a) *Routine servicing.* Comply with § 4287.107 of this chapter, except that all notifications from the lender to the Agency shall be in writing and all actions by the lender in servicing the entire loan must be consistent with the servicing actions that a reasonable, prudent lender would perform in servicing its own portfolio.

(b) *Interest rate adjustments.* Comply with § 4287.112 of this chapter, except that under § 4287.112(a)(3) of this chapter the interest rates, after adjustments, must comply with the requirements for interest rates on new loans as established by § 4280.125.

(c) *Release of collateral.*

(1) Collateral may only be released in accordance with § 4287.113(a) and (b) of this chapter and paragraph (c)(2) of this section.

(2) Within the parameters of paragraph (c)(1) of this section, lenders may, over the life of the loan, release collateral (other than personal and corporate guarantees) with a cumulative value of up to 20 percent of the original loan amount without Agency concurrence, if the proceeds generated are used to reduce the guaranteed loan or to buy replacement collateral or real estate equal to or greater than the collateral being replaced.

(d) *Subordination of lien position.* All subordinations of the lender's lien position must comply with § 4287.123 of this chapter.

(e) *Alterations of loan instruments.* All alterations of loan instruments must comply with § 4287.124 of this chapter.

(f) *Loan transfer and assumption.* All loan transfers and assumptions must comply with § 4287.134(c), (d), (f), (g), and (i) through (k) of this chapter in addition to the following:

(1) *Documentation of request.* All transfers and assumptions must be approved in writing by the Agency and must be to eligible applicants in accordance with § 4280.122. An individual credit report must be provided for transferee proprietors, partners, offices, directors, and stockholders with 20 percent or more interest in the business, along with such other documentation as the Agency may request to determine eligibility.

(2) *Terms.* Loan terms must not be changed unless the change is approved in writing by the Agency with the concurrence of any holder and the transferor (including guarantors), if they have not been or will not be released from liability. Any new loan terms must be within the terms authorized by § 4280.126. The lender's request for approval of new loan terms will be supported by an explanation of the reasons for the proposed change in loan terms.

(3) *Additional loans.* Loans to provide additional funds in connection with a transfer and assumption must be considered as a new loan application under § 4280.128.

(4) *Loss resulting from transfer.* If a loss should occur upon consummation of a complete transfer and assumption for less than the full amount of the debt and the transferor (including personal guarantors) is released from liability, the lender, if it holds the guaranteed portion, may file Form RD 449–30, "Loan Note Guarantee Report of Loss," to recover its pro rata share of the actual loss. If a holder owns any of the guaranteed portion, such portion must be repurchased by the lender or the Agency in accordance with § 4279.78(c) of this chapter. In completing the report of loss, the amount of the debt assumed will be entered as net collateral (recovery). Approved protective advances and accrued interest thereon made during the arrangement of a transfer and assumption will be included in the calculations.

§ 4280.153 Substitution of lender.

(a) All substitutions of lenders must comply with § 4287.135(a)(2) and (b) of this chapter and paragraph (b) of this section.

(b) The Agency may approve the substitution of a new lender if the proposed substitute lender:

(1) Is an eligible lender in accordance with § 4280.130;

(2) Is able to service the loan in accordance with the original loan documents; and

(3) Acquires title to the unguaranteed portion of the loan held by the original lender and assumes all original loan requirements, including liabilities and servicing responsibilities.

§ 4280.154 Default by borrower.

If the loan goes into default, the lender must comply with § 4287.145 of this chapter.

§ 4280.155 Protective advances.

All protective advances made by the lender must comply with § 4287.156 of this chapter.

§ 4280.156 Liquidation.

All liquidations must comply with § 4287.157 of this chapter, except as follows:

(a) Under § 4287.157(d)(13) of this chapter, whenever $200,000 is used substitute $100,000; and

(b) Under § 4287.157(d)(13) of this chapter, replace the sentence "The appraisal shall consider this aspect" with "Both the estimate and the appraisal shall consider this aspect."

§ 4280.157 Determination of loss and payment.

Loss and payments will be determined in accordance with § 4287.158 of this chapter.

§ 4280.158 Future recovery.

Future recoveries will be conducted in accordance with § 4287.169 of this chapter.

§ 4280.159 Bankruptcy.

Bankruptcies will be handled in accordance with § 4287.170 of this chapter, except that the notification required under § 4287.170(b)(4) of this chapter shall be made in writing.

§ 4280.160 Termination of guarantee.

Guarantees will be terminated in accordance with § 4287.180 of this chapter.

§§ 4280.161–4280.164 [Reserved]

Combined Funding for Renewable Energy Systems and Energy Efficiency Improvements

§ 4280.165 Combined funding for renewable energy systems and energy efficiency improvements.

The requirements for a RES or EEI project for which an applicant is seeking a combined grant and guaranteed loan are defined as follows:

(a) *Eligibility.* Applicants must meet the applicant eligibility requirements specified in §§ 4280.109 and 4280.112 and the borrower eligibility requirements specified in § 4280.122. Projects must meet the project eligibility requirements specified in §§ 4280.113 and 4280.123. Applicants may submit simplified applications if the project meets the requirements specified in § 4280.114.

(b) *Funding.* Funding provided under this section is subject to the limits described in paragraphs (b)(1) through (b)(3) of this section.

(1) The amount of any combined grant and guaranteed loan must not exceed 75 percent of total eligible project costs. For purposes of combined funding requests, total eligible project costs are based on the total costs associated with those items specified in §§ 4280.115(c) and 4280.124(e). The applicant must provide the remaining total funds needed to complete the project.

(2) The minimum combined funding request allowed is $5,000, with the grant portion of the funding request being at least $1,500.

(3) Applicants whose combination applications are approved for funding must utilize both the loan guarantee and the grant. The Agency reserves the right to reduce the total loan guarantee and grant award as appropriate.

(c) *Application and documentation.* When applying for combined funding, the applicant must submit separate applications for both types of assistance (grant and guaranteed loan). Each application must meet the requirements, including the requisite forms and certifications, specified in §§ 4280.116 and 4280.128. The separate applications must be submitted simultaneously. The applicant must submit at least one set of documentation, but does not need to submit duplicate forms or certifications.

(d) *Evaluation.* The Agency will evaluate each application according to applicable procedures specified in §§ 4280.117 and 4280.129.

(e) *Interest rate and terms of loan.* The interest rate and terms of the loan for the loan portion of the combined funding request will be determined based on the procedures specified in §§ 4280.125 and 4280.126 for guaranteed loans.

(f) *Other provisions.* In addition to the requirements specified in paragraphs (a) through (e) of this section, the combined funding request shall be subject to the other requirements specified in this subpart, including, but not limited to, processing and servicing requirements, as applicable, as described in paragraphs (f)(1) through (f)(3) of this section.

(1) All other provisions of §§ 4280.101 through 4280.111 apply to the combined funding request.

(2) All other provisions of §§ 4280.112 through 4280.121 apply to the grant portion of the combined funding request.

(3) All other provisions of §§ 4280.122 through 4280.160 apply to the guaranteed loan portion of the combined funding request.

§§ 4280.166–4280.169 [Reserved]

Renewable Energy System Feasibility Study Grants

§ 4280.170 Applicant eligibility.

To be eligible for a renewable energy system feasibility study grant under this subpart, the applicant must be an agricultural producer or a rural small business, as defined in § 4280.103, and must be the prospective owner of the renewable energy system for which the feasibility study grant is sought.

§ 4280.171 Project eligibility.

Only renewable energy system projects that meet the requirements specified in this section are eligible for feasibility study grants under this subpart. The project for which the feasibility study grant is sought shall:

(a) Be for the purchase, installation, expansion, or other energy-related improvement of a renewable energy system located in a State, as defined in § 4280.103;

(b) Be for a facility located in a rural area if the applicant is a rural small business, or in a rural or non-rural area if the applicant is an agricultural producer. If the agricultural producer's facility is in a non-rural area, then the feasibility study can only be for a renewable energy system on integral components of or directly related to the facility, such as vertically integrated operations, and are part of and co-located with the agriculture production operation;

(c) Be for technology that is pre-commercial or commercially available, and that is replicable;

(d) Not have had a feasibility study already completed for it with Federal and/or State assistance; and

(e) The applicant has a place of business in a State.

§ 4280.172 Application eligibility provisions.

(a) Applications for industry-level feasibility studies, also known as feasibility study templates or guides, are not eligible because the assistance is not provided to a specific project.

(b) Applications must be from the prospective owner(s) of the renewable energy system for which the feasibility study grant is sought. Applications from other entities (*e.g.*, entities that would be conducting the feasibility study and are not the prospective owners) will not be accepted.

(c) Applications can be submitted for a modification to an existing renewable energy system (e.g., for the expansion portion of an existing wind farm).

(d) Applications cannot be submitted in a Fiscal Year for an RES project if an RES application for the same renewable energy system is submitted in that same Fiscal Year and vice versa.

§ 4280.173 Grant funding for feasibility studies.

(a) *Maximum grant amount.* The maximum amount of grant funds that will be made available for an eligible feasibility study project under this subpart to any one recipient will not exceed $50,000 or 25 percent of the total eligible project cost of the study, whichever is less. Eligible project costs are specified in paragraph (b) of this section.

(b) *Eligible project costs.* Only post-application costs will be considered eligible. Eligible project costs for renewable energy system feasibility studies shall be specific to the completion of the feasibility study (refer to Appendix E of this subpart for information on the content of a feasibility study) including, but not limited to, the items listed in paragraphs (b)(1) through (b)(3) of this section.

(1) Resource assessment;

(2) Transmission study; and

(3) Environmental study.

(c) *Ineligible project costs.* Ineligible project costs for renewable energy system feasibility studies include, but are not limited to:

(1) Costs associated with selection of engineering, architectural, or environmental services;

(2) Designing, bidding, or contract development for the proposed facility;

(3) Permitting and other licensing costs required to construct the facility; and

(4) Any goods or services provided by a person or entity who has a conflict of interest as provided in § 4280.106.

(d) *Time limit.* The grantee will have 2 years from the date of the grant agreement to provide the Agency with a complete and acceptable feasibility study and to request disbursement of the funds. If the grantee does not submit to the Agency a complete and acceptable feasibility study within this 2 year period, the grant is subject to termination by and reimbursement to the Agency according to Departmental regulations.

§§ 4280.174–4280.175 [Reserved]

§ 4280.176 Feasibility study grant applications—content.

Applications for feasibility study grants must include a Table of Contents with clear pagination and chapter identification and shall contain the information specified in paragraphs (a) and (b) of this section and shall be presented in the same order.

(a) *Forms, documents, and certifications.* The application shall contain the forms and documents specified in paragraphs (a)(1) through (a)(11) of this section.

(1) Form SF–424.

(2) Form SF–424A, "Budget Information—Non-Construction Programs" (as applicable).

(3) Form SF–424B, "Assurances—Non-Construction Programs" (as applicable).

(4) Form SF–424C (as applicable).

(5) Form SF–424D (as applicable).

(6) Form RD 1940–20 (as applicable).

(7) Except for sole proprietors, a copy of legal organizational documents.

(8) A proposed work plan, which includes:

(i) A brief description of the proposed system the feasibility study will evaluate;

(ii) A description of the feasibility study to be conducted. The contents of an acceptable feasibility study are identified in Appendix E of this subpart. Applicants shall require those conducting the feasibility study to consider and document within the feasibility study the important environmental factors within the planning area and the potential environmental impacts of the project for which the feasibility study is being conducted, as well as the alternatives considered;

(iii) The timeframe for completion of the feasibility study;

(iv) The experience of the company/individual completing the feasibility study, including the number of similar projects the company/individual has performed, the number of years the company has been performing a similar service, and corresponding resumes; and

(v) The source and amount of other project funds needs to be clearly identified. Agency approved written documentation/confirmation from any third party committing a specific amount of such funds is required. Documentation includes such items as bank statements, lender commitment letters, and so forth;

(9) A certification that the applicant has not received any other Federal or State assistance for a feasibility study for the subject renewable energy system.

(10) If the applicant is a rural small business, certification that the feasibility study grant will be for a renewable energy system project that is located in a rural area.

(11) The applicant's Dun and Bradstreet Data Universal Numbering System (DUNS) number (except for individuals).

(b) *Financial information for gross income or size determination.* The application shall contain sufficient financial information to allow the Agency to determine the agricultural producer's percentage of gross income derived from agricultural operations or the rural small business' size, as applicable. All information submitted under this paragraph (b) must be substantiated by authoritative records:

(1) If the applicant is a rural small business, provide sufficient information to determine its total annual receipts and number of employees and the same information for any parent, subsidiary, or affiliates at other locations. Voluntarily providing tax returns is one means of satisfying this requirement. The information provided must be sufficient for the Agency to make a determination of business size as defined by the Small Business Administration; and

(2) If the applicant is an agricultural producer, provide the gross market value of the agricultural products, gross agricultural income, and gross nonfarm income of the applicant for the calendar year preceding the year in which the application is submitted.

§ 4280.177 Evaluation of feasibility study grant applications.

(a) *Agency evaluation.* Feasibility study applications submitted under this subpart will be evaluated by the Agency for eligibility, completeness, and scoring.

(b) *General review.* The Agency will evaluate each application and make a determination as to whether the applicant is eligible, the proposed grant is for an eligible feasibility study, and the proposed grant complies with all applicable statutes and regulations.

(1) *Applicant eligibility.* The Agency will first determine whether the entity is eligible to compete for a feasibility study grant. Applications for applicants determined by the Agency not to be eligible will not be processed further. The Agency will determine applicant eligibility based on the criteria specified in § 4280.170.

(2) *Proposal eligibility.* After determining applicant eligibility, the Agency will review the application to determine if the proposal is eligible. Applications determined by the Agency not to be eligible will not be processed further. The Agency will determine whether the application contains certification by the applicant that the applicant has not received any other Federal or State assistance for a feasibility study on the subject facility. If the application does not contain such certification, it is an ineligible application and the Agency will stop processing the application.

§ 4280.178 Scoring feasibility study grant applications.

Agency personnel will score each feasibility study application based on the evaluation criteria specified in paragraphs (a) through (f) of this section, with a maximum score of 100 points possible.

(a) *Energy replacement or generation.* The project can be for either replacement or generation, but not both. A maximum of 25 points can be awarded under this section.

(1) *Energy replacement.* 25 points will be awarded if proposed project will offset any portion of the applicant's energy needs.

(2) *Energy generation.* 15 points will be awarded if the proposed renewable energy system is intended primarily for production of energy for sale.

(b) *Commitment of funds for the feasibility study.* Appropriate documentation must verify commitment of funds. A maximum of 10 points can be awarded under this section.

(1) 10 points—100 percent of matching funds.

(2) 7.5 points—75 percent up to, but not including 100 percent of matching funds.

(3) 5 points—50 percent up to, but not including 75 percent of matching funds.

(4) 0 points—less than 50 percent of matching funds.

(c) *Designation as a Small agricultural producer/very small business.* An applicant will be considered either an agricultural producer or rural small business. No applicant will be considered as both. Points will only be awarded under either paragraph (c)(1) or (c)(2) of this section. A maximum of 20 points can be awarded under this section.

(1) For an Agricultural Producer:

(i) 10 points will be awarded if the applicant is an agricultural producer producing agricultural products with a gross market value of less than $600,000 in the preceding year, or

(ii) 20 points will be awarded if the applicant is an agricultural producer producing agricultural products with a gross market value of less than $200,000 in the preceding year.

(2) For a Rural Small Business, 20 points will be awarded if the applicant is a very small business, as defined in § 4280.103.

(d) *Experience and qualifications of the entity identified to perform the feasibility study.* A maximum of 15 points can be awarded under this section.

(1) 15 points will be awarded if the entity has 5 or more years experience in the field of study for the technology being proposed.

(2) 7.5 points will be awarded if the entity has 2 or more years, but less than 5 years, experience in the field of study for the technology field being proposed.

(3) 0 points will be awarded if the entity has less than 2 years experience in the field of study for the technology field being proposed.

(e) *Size of feasibility study grant request.* A maximum of 20 points can be awarded under this section. If the feasibility study request is:

(1) $10,000 or less, 20 points will be awarded.

(2) Greater than $10,000 up to and including $25,000, 10 points will be awarded.

(3) Greater than $25,000, 0 points will be awarded.

(f) *Resources to implement project.* Considering the technology being proposed, the applicant may qualify for other local or State programs to assist in the construction or operation of the facility. These programs will benefit the applicant and/or proposed project during or after the facility is constructed and operational. Points can be awarded for both types of assistance, for a maximum of 10 points.

(1) If the applicant has identified local programs, 5 points will be awarded.

(2) If the applicant has identified State programs, 5 points will be awarded.

§ 4280.179 Selecting feasibility study grant applications for award.

The Agency will use the following process to determine which feasibility study grants receive funding under this subpart.

(a) *Ranking of applications.* All scored applications will be ranked by the Agency as soon after the application deadline as possible. All applications that are ranked will be considered for selection for funding.

(b) *Selection of applications for funding.* Using the ranking created under paragraph (a) of this section, the Agency will consider the score an application has received compared to the scores of other ranked applications, with higher scoring applications receiving first consideration for funding.

(c) *Funding selected applications.* As applications are funded, if insufficient funds remain to fund the next highest

scoring application, the Agency may elect to fund a lower scoring application. Before this occurs, the Agency will provide the applicant of the higher scoring application the opportunity to reduce the amount of its grant request to the amount of funds available. If the applicant agrees to lower its grant request, it must certify that the purposes of the project can be met, and the Agency must determine the project is financially feasible at the lower amount.

(d) *Disposition of ranked applications not funded.* Based on the availability of funding, a ranked application may not be funded in the fiscal year in which it was submitted. Such ranked applications will not be carried forward into Fiscal Year 2012 and the Agency will notify the applicant in writing.

§ 4280.180 Actions prior to grant closing.

(a) *Environmental.* If construction is a component of the study, the appropriate level of environmental assessment must be completed prior to the obligation of funds. All feasibility study grants made under this subpart are subject to the requirements of 7 CFR part 1940, subpart G. When construction is not a component of the study, feasibility studies are considered planning assistance, which are categorically excluded from the environmental review process by § 1940.310 of this title.

(b) *Evidence of other funds.* Applicants expecting funds from other sources for use in completing projects being partially financed with Agency funds shall present evidence of the commitment of these funds from such other sources prior to disbursement of grant funds.

§ 4280.181 Awarding and administering feasibility study grants.

Renewable energy system feasibility study grants will be awarded and administered in accordance with Departmental regulations and paragraphs (a) through (e) of this section.

(a) *Letter of conditions.* The Agency will notify the approved applicant in writing, setting out the conditions under which the grant will be made. The notice will include those matters necessary to ensure that the proposed grant is completed in accordance with the terms of the scope of work and budget, that grant funds are expended for the feasibility study, and that the applicable requirements prescribed in the relevant Departmental regulations are complied with. The Letter of Conditions will be sent to the applicant.

(b) *Applicant's intent to meet conditions.* Upon reviewing the conditions and requirements in the Letter of Conditions, the applicant must complete, sign and return a Form RD 1942–46, "Letter of Intent to Meet Conditions," to the Agency; or if certain conditions cannot be met, the applicant may propose alternate conditions to the Agency. The Agency must concur with any changes proposed to the Letter of Conditions by the applicant before the application will be further processed.

(c) *Forms and certifications.* The forms specified in paragraphs (c)(1) through (c)(6) of this section will be attached to the letter of conditions referenced in paragraph (a) of this section. The forms specified in paragraphs (c)(1) through (c)(5) of this section and all of the certifications must be submitted prior to grant approval. The form specified in paragraph (c)(6), which is to be completed by the contractor (if any), does not need to be returned to the Agency, but must be kept on file.

(1) Form AD–1047.

(2) Form AD–1049.

(3) Either Form SF–LLL or Exhibit A–1 of RD Instruction 1940–Q.

(4) Form RD 400–1.

(5) Form RD 400–4.

(6) Form AD–1048.

(d) *Grant approval.* The applicant will be sent a copy of the executed Form RD 1940–1, the approved scope of work, and Form RD 4280–2. Form RD 1940–1 must be signed by the applicant.

(e) *Grant agreement.* Prior to grant disbursement, but after grant obligation, the applicant must complete, sign, and return Form RD 4280–2. The grantee must abide by all requirements contained in Form RD 4280–2, this subpart, and any other applicable Federal statutes or regulations. Failure to follow these requirements may result in termination of the grant and adoption of other available remedies.

§ 4280.182 Servicing feasibility study grants.

Feasibility study grants will be serviced in accordance with Departmental regulations; 7 CFR part 1951, subparts E and O; and paragraphs (a) through (n) of this section.

(a) *Inspections.* Grantees will permit periodic inspection of the project records and operations by a representative of the Agency.

(b) *Programmatic changes.* The grantee shall obtain prior Agency approval for any change to the scope or objectives of the approved project. Failure to obtain prior approval of changes to the scope of work or budget may result in suspension, termination, and recovery of grant funds.

(c) *Changes in project cost or scope.* If there is a significant reduction in project cost or changes in project scope, the applicant's funding needs, eligibility, and scoring, as applicable, will be reassessed. Decreases in Agency funds will be based on revised project costs and other selection factors; however, other factors, including Agency regulations and Notices used at the time of grant approval, will remain the same. Obligated grant funds not needed to complete the project will be de-obligated.

(d) *Transfer of obligations.* Subject to Agency approval, an obligation of funds established for a grantee may be transferred to a different (substituted) grantee provided:

(1) The substituted grantee

(i) Is eligible;

(ii) Has a close and genuine relationship with the original grantee; and

(iii) Has the authority to receive the assistance approved for the original grantee; and

(2) The type of renewable energy technology and the scope of the project for which the Agency funds will be used remain unchanged.

(e) *Financial management system and records.* Grantees are required to maintain a financial management system and records in accordance with Departmental regulations.

(f) *Fund disbursement.* Grant funds will be expended on a pro rata basis with matching funds.

(1) Requests for reimbursement may be submitted monthly or more frequently if authorized to do so by the Agency. Ordinarily, payment will be made within 30 days after receipt of a proper request for reimbursement.

(2) The Grantee shall not request reimbursement for the Federal share of amounts withheld from contractors to ensure satisfactory completion of work until after it makes those payments.

(3) Payment shall be made by electronic funds transfer.

(4) Standard Form 270, "Request for Advance or Reimbursement," or other format prescribed by the Agency shall be used to request grant reimbursements.

(5) For renewable energy system feasibility studies, grant funds will be disbursed in accordance with the above through 90 percent of grant disbursement. The final 10 percent of grant funds will be held by the Agency until a feasibility study acceptable to the Agency has been submitted.

(g) *Deobligation of grant funds.* Funds remaining after all costs incident to the project have been paid or provided for are subject to deobligation.

(h) *Monitoring of project.* Grantees are responsible for ensuring that all activities are performed within the approved scope of work and that funds are only used for approved purposes. Grantees shall constantly monitor performance to ensure that time schedules are being met, projected work by time periods is being accomplished, financial resources are being appropriately expended by contractors (if applicable), and any other performance objectives identified in the scope of work are being achieved. The Agency will monitor grantees to ensure that activities are performed in accordance with the Agency-approved scope of work and to ensure that funds are expended for approved purposes. The Agency's monitoring of grantees neither relieves the grantee of its responsibilities to ensure that activities are performed within the scope of work approved by the Agency and that funds are expended for approved purposes only nor provides recourse or a defense to the grantee should the grantee conduct unapproved activities, engage in unethical conduct, engage in activities that are or give the appearance of a conflict of interest, or expend funds for unapproved purposes.

(i) *Federal financial reports.* A SF–425, "Federal Financial Report," and a project performance report will be required of all grantees on a semiannual basis. The grantee will complete the project within the total sums available to it, including the grant, in accordance with the scope of work and any necessary modifications thereof prepared by the grantee and approved by the Agency. The final federal financial report must be submitted to the Agency within 90 days after the feasibility study has been completed.

(j) *Performance reports.* Grantees must submit to the Agency, in writing, semiannual performance reports and a final performance report. Grantees are to submit an original of each report to the Agency.

(1) *Semiannual performance reports.* Each semiannual performance report shall describe current progress and identify any problems, delays, or adverse conditions, if any, which have affected or will affect attainment of overall project objectives or prevent meeting time frame for completion of the feasibility study within 2 years. This disclosure shall be accompanied by a statement of the action taken or planned to resolve the situation.

(2) *Final performance report.* A final performance report, which will serve as the last semiannual performance report, will be required within 90 days after the feasibility study has been completed. The final performance report shall summarize any problems, delays, or adverse conditions, if any, which have affected the project objectives or prevented meeting time frames for completion of the feasibility study. The final performance report should indicate if the grantee intends to proceed with the construction of the project.

(k) *Final deliverables.* Upon completion of the feasibility study, the grantee shall submit the following to the Agency:

(1) The project feasibility study; and

(2) SF–270.

(l) *Renewable energy feasibility studies.* Beginning the first full year after the feasibility study has been completed, grantees shall report annually for 2 years on the following:

(1) Is the renewable energy system project for which the feasibility study was conducted underway? If "yes," describe how far along the renewable energy system project is (e.g., financing has been secured, site has been secured, construction contracts are in place, project is completed).

(2) Is the renewable energy system project complete? If so, what is the actual amount of energy being produced?

(m) *Other reports.* For clarification purposes, the Agency may request any additional project and/or performance data for the project for which grant funds have been received.

(n) *Grant close-out and related activities.* Grant close-out and related activities shall be performed in accordance with the Departmental Regulations. In addition, failure to submit satisfactory reports on time under the provisions of paragraphs (i) through (m) of this section may result in the suspension or termination of a grant. The provisions of this section apply to grants and sub-grants.

§§ 4280.183–4280.185 [Reserved]

Energy Audit and Renewable Energy Development Assistance Grants

§ 4280.186 Applicant eligibility.

To be eligible for an energy audit grant or a renewable energy development assistance grant under this subpart, the applicant must meet each of the criteria, as applicable, specified in paragraphs (a) through (c) of this section. The Agency will determine an applicant's eligibility.

(a) *Type of applicant.* The applicant must be one of the following:

(1) A unit of State, tribal, or local government;

(2) A land-grant college or university, or other institution of higher education;

(3) A rural electric cooperative;

(4) A public power entity; or

(5) An instrumentality of a State, tribal, or local government.

(b) *Capacity to perform.* The applicant must have sufficient capacity to perform the energy audit or renewable energy development assistance activities proposed in the application to ensure success. The Agency will make this assessment based on the information provided in the application.

(c) *Legal authority and responsibility.* Each applicant must have, or obtain, the legal authority necessary to carry out the purpose of the grant.

§ 4280.187 Project eligibility.

To be eligible for an energy audit or a renewable energy development assistance grant, the grant funds for a project must be used by the grant recipient to assist agricultural producers or rural small businesses located in a State in one or both of the purposes specified in paragraphs (a) and (b) of this section, and shall also comply with paragraphs (c) through (e), and, if applicable, paragraph (f) of this section.

(a) Grant funds may be used to conduct and promote energy audits that meet the requirements of the energy audit as defined in this subpart. Energy audits must cover the following:

(1) *Situation report.* Provide a narrative description of the facility or process being audited; its energy system(s) and usage; its activity profile; and the price per unit of energy (electricity, natural gas, propane, fuel oil, renewable energy, etc.) paid by the customer on the date of the audit. Any energy conversion data should be based on use and source.

(2) *Potential improvements.* List specific information regarding all potential energy-saving opportunities and the associated cost.

(3) *Technical analysis.* Discuss the interactions of the potential improvements with existing energy systems.

(i) Estimate the annual energy and energy costs savings expected from each improvement identified for the potential project.

(ii) Estimate all direct and attendant indirect costs of each improvement.

(iii) Rank potential improvement measures by cost-effectiveness.

(4) *Potential improvement description.* Provide a narrative summary of the potential improvement and its ability to provide needed benefits, including a discussion of non-energy benefits such as project reliability and durability.

(i) Provide preliminary specifications for critical components.

(ii) Provide preliminary drawings of project layout, including any related structural changes.

(iii) Document baseline data compared to projected consumption, together with any explanatory notes. Provide the actual total quantity of energy used (BTU) in the original building and/or equipment in the 12 months prior to the EEI project and the projected energy usage after the EEI project shall be the projected total quantity of energy used (BTU) on an annual basis for the same size or capacity as the original building or equipment. For energy efficiency improvement to equipment, if the new piece of equipment has a different capacity than the piece of equipment being replaced, the projected total quantity of energy used for the new piece of equipment shall be adjusted based on the ratio of the capacity of the replaced piece of equipment to the capacity of the new piece of equipment. When appropriate, show before-and-after data in terms of consumption per unit of production, time or area. Include at least 1 year's bills for those energy sources/fuel types affected by this project. Also submit utility rate schedules, if appropriate.

(iv) Identify significant changes in future related operations and maintenance costs.

(v) Describe explicitly how outcomes will be measured annually.

(b) Grant funds may be used to conduct and promote renewable energy development assistance by providing to agricultural producers and rural small businesses recommendations and information on how to improve the energy efficiency of their operations and to use renewable energy technologies and resources in their operations.

(c) Energy audit and renewable energy development assistance can be provided only to a facility located in a rural area unless the owner of such facility is an agricultural producer. If the facility is owned by an agricultural producer, the facility for which such services are being provided may be located in either a rural or non-rural area. If the agricultural producer's facility is in a non-rural area, then the energy audit or renewable energy development assistance can only be for a renewable energy system or energy efficiency improvement on integral components of or directly related to the facility, such as vertically integrated operations, and are part of and co-located with the agriculture production operation.

(d) The energy audit or renewable energy development assistance must be provided to a recipient in a State.

(e) The applicant must have a place of business in a State.

(f) For the purposes of this subpart, only small hydropower projects are eligible for energy audits and renewable energy development assistance. Per consultation with the U.S. Department of Energy, the Agency is defining small hydropower as having a rated power of 30 megawatts or less, which includes hydropower projects commonly referred to as "micro-hydropower" and "mini-hydropower."

§ 4280.188 Grant funding for energy audit and renewable energy development assistance.

(a) *Maximum grant amount.* The maximum aggregate amount of energy audit and renewable energy development assistance grants awarded to any one recipient under this subpart cannot exceed $100,000. Grant funds awarded for energy audit and renewable energy development assistance projects may be used only to pay eligible project costs, as described in paragraph (b) of this section. Grant funds awarded for energy audits and renewable energy development assistance projects are prohibited from being used to pay costs associated with the items listed in paragraph (c) of this section.

(b) *Eligible project costs.* Eligible project costs for energy audits and renewable energy development assistance are those post-application expenses directly related to conducting and promoting energy audits and renewable energy development assistance, which include but are not limited to:

(1) Salaries directly or indirectly related to the project;

(2) Travel expenses directly related to conducting energy audits or renewable energy development assistance;

(3) Office supplies (*e.g.*, paper, pens, file folders); and

(4) Administrative expenses, up to a maximum of 5 percent of the grant, which include but are not limited to:

(i) Utilities;

(ii) Office space;

(iii) Operation expenses of office and other project-related equipment (*e.g.*, computers, cameras, printers, copiers, scanners); and

(iv) Expenses for outreach and marketing of the energy audit and renewable energy development assistance activities, including associated travel expenses.

(c) *Ineligible project purposes.* Grant funds may not be used to:

(1) Pay for any construction-related activities;

(2) Purchase equipment;

(3) Pay any costs of preparing the application package for funding under this subpart;

(4) Pay any costs of the project incurred prior to the application date of the grant made under this subpart;

(5) Fund political or lobbying activities; and

(6) Pay any judgment or debt owed to the United States.

(d) *Energy audits.* A recipient of a grant under this subpart that conducts an energy audit shall require that, as a condition of the energy audit, the agricultural producer or rural small business pay at least 25 percent of the cost of the energy audit. Further, the amount paid by the agricultural producer or rural small business will be retained by the recipient as a contribution towards the cost of the energy audit.

(e) *Time limit.* Unless otherwise agreed to by the Agency, any energy audit or renewable energy development assistance grant agreement under this subpart will terminate 2 years from the date the Agency signs the agreement.

§ 4280.189 [Reserved]

§ 4280.190 EA/REDA grant applications—content.

Applications must contain the elements specified in paragraphs (a) through (g) of this section.

(a) Form SF–424.

(b) Form SF–424A.

(c) Form SF–424B.

(d) If applicable, a copy of the applicant's organizational documents showing the applicant's legal existence and authority to perform the activities under the grant.

(e) A proposed scope of work, including a description of the proposed project, details of the proposed activities to be accomplished and timeframes for completion of each task, the number of months duration of the project, and the estimated time it will take from grant approval to beginning of project implementation. A written narrative to be used as the scope of work which includes, at a minimum, the following items:

(1) An Executive Summary;

(2) The plan and schedule for implementation;

(3) The anticipated number of agricultural producers and/or rural small businesses to be served;

(4) An itemized budget—compute total cost per rural small business or agricultural producer served—matching funds should be clearly identified as cash;

(5) The geographic scope of the proposed project;

(6) Applicant's experience as follows:

(i) If applying for a renewable energy development assistance grant, the applicant's experience in completing similar renewable energy development assistance activities, including the number of similar projects the applicant has performed and the number of years the applicant has been performing a similar service.

(ii) If applying for an energy audit grant, the number of energy audits and assessments the applicant has completed and the number of years the applicant has been performing those services;

(iii) For all applicants, the amount of experience in administering energy audit, renewable energy development assistance, or similar activities using State or Federal support.

(7) Applicant's resources, including personnel, finances, and technology, to complete what is proposed. If an application is for projects located in multiple states, resources must be sufficient to complete all projects;

(8) Leveraging and commitment of other sources of funding being brought to the project. Leveraged funds should be clearly identified as cash and by source. Written documentation/confirmation from the party committing a specific amount of leveraged funds is required;

(9) Outreach activities/marketing efforts specific to conducting energy audit and renewable energy development assistance including:

(i) Project title;

(ii) Goals of the project;

(iii) Identified need;

(iv) Target audience;

(v) Timeline and type of activities/action plan; and

(vi) Marketing strategies.

(10) Method and rationale used to select the areas and businesses that will receive the service.

(11) Brief description of how the work will be performed, including whether organizational staff, consultants, or contractors will be used.

(f) The most recent financial audit (not more than 18 months old) of the applicant, or subdivision thereof, that will be performing the proposed work. If such an audit is not available, the latest financial information that shows the financial capacity of the applicant, or subdivision thereof, to perform the proposed work. Such information may include, but is not limited to, the most recent year-end balance sheet, income statement, and other appropriate data that identify the applicant's resources.

(g) The applicant's Dun and Bradstreet Data Universal Numbering System (DUNS) number.

§ 4280.191 Evaluation of energy audit and renewable energy development assistance grant applications.

Upon receipt of an application, the Agency will conduct a review to determine if the applicant and project are eligible. The Agency will notify the applicant in writing of the Agency's findings. If the Agency has determined that either the applicant or project is ineligible, it will include in the notification the reason(s) for its determination(s).

§ 4280.192 Scoring energy audit and renewable energy development assistance grant applications.

Agency personnel will score each application using the criteria specified in paragraphs (a) through (h) of this section, with a maximum score of 100 points possible.

(a) *Project proposal (maximum score of 10 points).* The applicant will be scored based on its in-house ability to conduct audits versus using third party auditing organizations as illustrated in the application.

(1) If the applicant proposes to use at least 51 percent of the awarded funding to employ internal, qualified auditors and/or renewable energy specialists for program implementation, up to 10 points will be awarded as follows:

(i) If the percentage is between 51 percent and 75 percent (inclusive), 5 points will be awarded.

(ii) If the percentage is more than 75 percent, 10 points will be awarded.

(2) If the applicant proposes to use less than 51 percent of the awarded funding to employ internal, qualified auditors and/or renewable energy specialists for program implementation, zero points will be awarded.

(b) *Use of Grant Funds for Administrative Expenses (maximum score of 10 points).* Grantees selected to participate may use up to 5 percent of their award for administrative expenses.

(1) If the applicant proposes to use none of the grant funds for Administrative Expenses, 10 points will be awarded.

(2) If the applicant proposes to use a portion (up to 5 percent) of the grant funds for Administrative Expenses, zero points will be awarded.

(c) *Applicant's organizational experience in completing proposed activity (maximum score of 15 points).* The applicant will be scored on the experience of the organization in meeting the benchmarks below. This means that an organization must have been in business and provided services as noted in the scoring requirements. An organization's experience must be documented with references and resumes. Points will be awarded as follows:

(1) More than 3 years of experience, 15 points will be awarded.

(2) At least 2 years and up to and including 3 years of experience, 10 points will be awarded.

(3) At least 1 year but less than 2 years of experience, 5 points will be awarded.

(4) Less than 1 year of experience, zero points will be awarded.

(d) *Geographic scope of project in relation to identified need (maximum score of 10 points).*

(1) If the applicant's proposed or existing service area is State-wide or includes all or parts of multiple states, and the marketing and outreach plan has identified needs throughout that service area, 10 points will be awarded.

(2) If the applicant's proposed or existing service area consists of multiple counties in a single State and the marketing and outreach plan has identified needs throughout that service area, 7.5 points will be awarded.

(3) If the applicant's service area consists of a single county or municipality and the marketing and outreach plan has identified needs throughout that service area, 5 points will be awarded.

(e) *Number of agricultural producers/rural small businesses to be served (maximum score of 15 points).*

(1) If the applicant plans to provide audits to ultimate recipients with average audit costs of $1,000 or less, 15 points will be awarded.

(2) If the applicant plans to provide audits to ultimate recipients with average audit costs over $1,000 but less than $1,500, 10 points will be awarded.

(3) If the applicant plans to provide audits to ultimate recipients with average audit costs of at least $1,500 but less than $2,000, 5 points will be awarded.

(f) *Potential of project to produce energy savings and its attending environmental benefits (maximum score of 25 points).* Applicants can be awarded points under both paragraphs (f)(1) and (f)(2) of this section.

(1) If the applicant has an existing program that can demonstrate the achievement of energy savings with the agricultural producers and/or rural small businesses it has served, 13 points will be awarded.

(2) If the applicant provides evidence that it has received awards in recognition of its renewable energy, energy savings, or energy-based technical assistance, up to 12 points will be awarded based on number of awards and rigorousness of the competition for each award.

(g) *Marketing and outreach plan (maximum score of 10 points).* If the

applicant includes in the application a marketing and outreach plan and provides a satisfactory discussion of each of the following criteria, two points for each of the following will be awarded:

(1) The goals of the project;

(2) Identified need;

(3) Target beneficiaries;

(4) Timeline and action plan; and

(5) Marketing strategies and supporting data for strategies.

(h) *Level and commitment of other funds for the project (maximum score of 5 points).*

(1) If the applicant proposes to leverage grant funding with 50 percent or more in non-State and non-Federal government matching funds for the subject grant, and has a written commitment for those funds, 5 points will be awarded.

(2) If the applicant proposes to leverage grant funding with less than 50 percent but more than 20 percent in non-State and non-Federal government matching funds for the subject grant, and has a written commitment for those funds, 2 points will be awarded.

(3) If the applicant proposes 20 percent or less in non-State and non-Federal government matching funds, zero points will be awarded.

§ 4280.193 Selecting energy audit and renewable energy development assistance grant applications for award.

Applications will be scored by the State Offices and submitted to the National Office for review. To ensure the equitable geographic distribution of funds, the two highest scoring applications from each State, based on the scoring criteria established under § 4280.192 will be submitted to the National Office to compete for funding.

(a) *Ranking of applications.* All applications submitted to the National Office will be ranked. All applications that are ranked will be considered for selection for funding.

(b) *Selection of applications for funding.* Using the ranking created under paragraph (a) of this section, the Agency will consider the score an application has received compared to the scores of other ranked applications, with higher scoring applications receiving first consideration for funding.

(c) *Funding selected applications.* As applications are funded, if insufficient funds remain to fund the next highest scoring application, the Agency may elect to fund a lower scoring application. Before this occurs, the Agency will provide the applicant of the higher scoring application the opportunity to reduce the amount of its grant request to the amount of funds available. If the applicant agrees to lower its grant request, it must certify that the purposes of the project can be met, and the Administrator must determine the project is financially feasible at the lower amount.

(d) *Disposition of ranked applications not funded.* Based on the availability of funding, a ranked application submitted under this subpart may not be funded. Such ranked applications will not be carried forward into Fiscal Year 2012 and the Agency will notify the applicant in writing.

§ 4280.194 Actions prior to grant closing.

Applicants expecting funds from other sources for use in completing projects being partially financed with Agency funds must have these funds from other such sources prior to grant closing. Agency funds will not be expended in advance of funds committed to the project from other sources without prior Agency approval.

§ 4280.195 Awarding and administering energy audit and renewable energy development assistance grants.

Energy audit and renewable energy development assistance grants under this subpart will be awarded and administered in accordance with Departmental regulations and with paragraphs (a) through (e) of this section.

(a) *Letter of conditions.* The Agency will notify the approved applicant in writing, setting out the conditions under which the grant will be made. The notice will include those matters necessary to ensure that the proposed grant is completed in accordance with the terms of the scope of work and budget, that grant funds are expended for authorized purposes, and that the applicable requirements prescribed in the relevant Departmental regulations are complied with. The Letter of Conditions will be sent to the applicant.

(b) *Applicant's intent to meet conditions.* Upon reviewing the conditions and requirements in the letter of conditions, the applicant must complete, sign, and return Form RD 1942–46 to the Agency; or if certain conditions cannot be met, the applicant may propose alternate conditions to the Agency. The Agency must concur with any changes proposed to the Letter of Conditions by the applicant before the application will be further processed.

(c) *Forms.* The forms specified in paragraphs (c)(1) through (c)(6) of this section will be attached to the letter of conditions referenced in paragraph (a) of this section. The forms specified in paragraphs (c)(1) through (c)(5) of this section must be submitted prior to grant approval. The form specified in paragraph (c)(6), which is to be completed by the contractor (if any), does not need to be returned to the Agency, but must be kept on file.

(1) Form RD 1942–46.

(2) Form AD–1047.

(3) Form AD–1049.

(4) Either Form SF–LLL or Exhibit A–1 of RD Instruction 1940–Q.

(5) Form RD 400–4.

(6) Form AD–1048.

(d) *Grant approval.* The applicant will be sent a copy of the executed Form RD 1940–1, the approved scope of work, and Form RD 4280–2. Form RD 1940–1 must be signed by the applicant.

(e) *Grant agreement.* Prior to grant approval, the applicant must complete, sign, and return Form RD 4280–2. The grantee must abide by all requirements contained in Form RD 4280–2, this subpart, and any other applicable Federal statutes or regulations. Failure to follow these requirements may result in termination of the grant and adoption of other available remedies.

§ 4280.196 Servicing energy audit and renewable energy development assistance grants.

Energy audit and renewable energy development assistance grants will be serviced in accordance the requirements specified in Departmental regulations, 7 CFR part 1951, subparts E and O, and paragraphs (a) through (n) of this section.

(a) *Inspections.* Grantees will permit periodic inspection of the project operations by a representative of the Agency.

(b) *Programmatic changes.* The grantee shall obtain prior Agency approval for any change to the scope or objectives of the approved project. Failure to obtain prior approval of changes to the scope of work or budget may result in suspension, termination, and recovery of grant funds.

(c) *Changes in project cost or scope.* If there is a significant reduction in project cost or changes in project scope, the applicant's funding needs, eligibility, and scoring, as applicable, will be reassessed. Decreases in Agency funds will be based on revised project costs and other selection factors; however, other factors, including Agency regulations used at the time of grant approval, will remain the same. Obligated grant funds not needed to complete the project will be de-obligated.

(d) *Transfer of obligations.* The grantee may request a transfer of obligation to a different (substitute) grantee. Subject to Agency approval, an obligation of funds established for a

grantee may be transferred to a substitute grantee provided:

(1) The substituted grantee

(i) Is eligible;

(ii) Has a close and genuine relationship with the original grantee; and

(iii) Has the authority to receive the assistance approved for the original grantee; and

(2) The need, purpose(s), and scope of the project for which the Agency funds will be used remain substantially unchanged.

(e) *Financial management system and records.*

(1) The grantee will provide for Financial Management Systems that will include:

(i) Accurate, current, and complete disclosure of the financial result of each grant.

(ii) Records that identify adequately the source and application of funds for grant-supporting activities, together with documentation to support the records. Those records shall contain information pertaining to grant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays, and income.

(iii) Effective control over and accountability for all funds. Grantee shall adequately safeguard all such assets and shall ensure that funds are used solely for authorized purposes.

(2) The grantee will retain financial records, supporting documents, statistical records, and all other records pertinent to the grant for a period of at least 3 years after completion of grant activities except that the records shall be retained beyond the 3-year period if audit findings have not been resolved or if directed by the United States. Microfilm copies may be substituted in lieu of original records. The Agency and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the grantee which are pertinent to the specific grant for the purpose of making audit, examination, excerpts, and transcripts.

(f) *Audit requirements.* Grantees must provide an annual audit in accordance with 7 CFR part 3052.

(g) *Fund disbursement.* The Agency will determine, based on the applicable Departmental regulations, whether disbursement of a grant will be by advance or reimbursement. A SF–270 must be completed by the grantee and submitted to the Agency no more often than monthly to request either advance or reimbursement of funds. Upon receipt of a properly completed SF–270, the funds will be requested through the field office terminal system. Ordinarily, payment will be made within 30 days after receipt of a proper request for advance or reimbursement.

(h) *Deobligation of grant funds.* Funds remaining after all costs incident to the project have been paid or provided for are subject to deobligation.

(i) *Monitoring of project.* Grantees are responsible for ensuring that all activities are performed within the approved scope of work and that funds are only used for approved purposes. Grantees shall constantly monitor performance to ensure that time schedules are being met, projected work by time periods is being accomplished, financial resources are appropriately expended by contractors (if applicable), and any other performance objectives identified in the scope of work are being achieved. The Agency will monitor grantees to ensure that activities are performed in accordance with the Agency-approved scope of work and to ensure that funds are expended for approved purposes. The Agency's monitoring of grantees neither relieves the grantee of its responsibilities to ensure that activities are performed within the scope of work approved by the Agency and that funds are expended for approved purposes only nor provides recourse or a defense to the grantee should the grantee conduct unapproved activities, engage in unethical conduct, engage in activities that are or give the appearance of a conflict of interest, or expend funds for unapproved purposes.

(j) *Federal financial reports.* A SF–425 and a project performance report will be required of all grantees on a semiannual basis. The grantee will complete the project within the total sums available to it, including the grant, in accordance with the scope of work and any necessary modifications thereof prepared by grantee and approved by the Agency.

(k) *Performance reports.* Grantees must submit to the Agency, in writing, semiannual performance reports and a final performance report. Grantees are to submit an original of each report to the Agency.

(1) *Semiannual performance reports.* Project performance reports shall include, but not be limited to, the following:

(i) A comparison of actual accomplishments to the objectives established for that period (e.g., the number of audits performed, number of recipients of renewable energy development assistance);

(ii) A list of recipients, each recipient's location, and each recipient's NAICS code;

(iii) Problems, delays, or adverse conditions, if any, that have in the past or will in the future affect attainment of overall project objectives, prevent meeting time schedules or objectives, or preclude the attainment of particular project work elements during established time periods. This disclosure shall be accompanied by a statement of the action taken or planned to resolve the situation;

(iv) Percentage of financial resources expended on contractors; and

(v) Objectives and timetable established for the next reporting period.

(2) *Final performance report.* A final performance report will be required with the final Federal financial report within 90 days after project completion. In addition to the information required under paragraph (k)(1) of this section, the final performance report must contain the information specified in paragraphs (k)(2)(i) and (k)(2)(ii), as applicable, of this section.

(i) For energy audit projects, the final performance report must provide complete information regarding:

(A) The number of audits conducted,

(B) A list of recipients (agricultural producers and rural small businesses) with each recipient's North American Industry Classification System code,

(C) The location of each recipient,

(D) The cost of each audit,

(E) The expected energy saved for each audit conducted if the audit is implemented, and

(F) The percentage of financial resources expended on contractors.

(ii) For renewable energy development assistance projects, the final performance report must provide complete information regarding:

(A) A list of recipients with each recipient's North American Industry Classification System code,

(B) The location of each recipient,

(C) The expected renewable energy that would be generated if the projects were implemented, and

(D) The percentage of financial resources expended on contractors.

(l) *Final status report.* One year after submittal of the final performance report, the grantee will provide the Agency a final status report on the number of projects that are proceeding with one or all of the grantee's recommendations, including the amount of energy saved and the amount of renewable energy generated, as applicable.

(m) *Other reports.* The Agency may request any additional project and/or performance data for the project for which grant funds have been received.

(n) *Grant close-out and related activities.* In addition to the

requirements specified in the Departmental regulations, failure to submit satisfactory reports on time under the provisions of paragraphs (i) through (m) of this section may result in the suspension or termination of a grant. The provisions of this section apply to grants and sub-grants.

§§ 4280.197–4280.199 [Reserved]

§ 4280.200 OMB control numbers.

The information collection requirements contained in the regulation have been approved by the Office of Management and Budget (OMB) and have been assigned OMB control numbers 0570–0050, 0570–0059, and 0570–0061. A person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Appendix A to Subpart B of Part 4280—Technical Reports for Projects With Total Eligible Project Costs of $200,000 or Less

The Technical Report for projects with total eligible project costs of $200,000 or less must demonstrate that the project design, procurement, installation, startup, operation, and maintenance of the renewable energy system or energy efficiency improvement will operate or perform as specified over its design life in a reliable and a cost-effective manner. The Technical Report must also identify all necessary project agreements, demonstrate that those agreements will be in place, and that necessary project equipment and services are available over the design life.

All technical information provided must follow the format specified in Sections 1 through 10 of this appendix. Supporting information may be submitted in other formats. Design drawings and process flowcharts are encouraged as exhibits. A discussion of each topic is not necessary if the topic is not applicable to the specific project. Questions identified in the Agency's technical review of the project must be answered to the Agency's satisfaction before the application will be approved. The applicant must submit the original technical report plus one copy to the Rural Development State Office. Depending on the level of engineering required for the specific project or if necessary to ensure public safety, the services of a licensed professional engineer or a team of licensed professional engineers may be required.

Section 1. Bioenergy

The technical requirements specified in this section apply to bioenergy projects, which are, as defined in § 4280.103, renewable system[s] that produce fuel, thermal energy, or electric power from a biomass source, other than an anaerobic digester project.

(a) *Qualifications of key project service providers.* List all key project service providers. If one or more licensed professionals are involved in the project, provide the credentials for each professional.

(b) *Agreements, permits, and certifications.*

(1) Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits.

(2) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program as their interconnection agreement, describe the applicable local net metering program.

(3) Identify all environmental issues, including any compliance issues associated with or expected as a result of the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(c) *Resources assessment.* Provide adequate and appropriate evidence of the availability of the renewable resource required for the system to operate as designed. Indicate the type, quantity, quality, and seasonality of the biomass resource, including harvest and storage, where applicable. Where applicable, indicate shipping or receiving method and required infrastructure for shipping. For proposed projects with an established resource, provide a summary of the resource.

(d) *Design and engineering.* Applicants must submit a statement certifying that their project will be designed and engineered so as to meet the intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. In addition, applicants must:

(1) Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose;

(2) List possible suppliers and models of major pieces of equipment;

(3) Provide a description of the components, materials, or systems to be installed. Include the location of the project;

(4) Provide a one-line diagram for the electrical interconnection. Provide diagrams or schematics as required showing all major installed structural, mechanical, and electrical components of the system;

(5) Describe the expected electric power, fuel production, or thermal energy production of the proposed system as rated and as expected in actual field conditions. For systems with a capacity of more than 20 tons per day of biomass, address performance on a monthly and annual basis. For small projects such as a commercial biomass furnace or pelletizer of up to 5 tons daily capacity, proven, commercially available devices need not be addressed in detail. Describe the uses of or the market for electricity, heat, or fuel produced by the system;

(6) Discuss the impact of reduced or interrupted biomass availability on the system process; and

(7) Describe the project site and address issues such as proximity to the load or the electrical grid, unique safety concerns, and whether special circumstances exist.

(e) *Project development schedule.* Provide a project schedule in an appropriate level of detail that will demonstrate that the project can be adequately managed and be able to identify impacts of any delays on the project completion. The applicant must submit a statement certifying that the project will be completed within 2 years from the date of approval.

(f) *Project economic assessment.* Provide an analysis of the proposed project to demonstrate its financial performance, including the calculation of simple payback. The analysis should include applicable investment incentives, productivity incentives, loans and grants, and expected energy offsets or sales on a monthly and annual basis. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* The project must be installed in accordance with applicable local, State, and national building and electrical codes and regulations. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules. Upon successful system installation and following established operation, the successful applicant must deliver invoices and evidence of payment.

(i) *Operations and maintenance.* Identify any unique operations and maintenance requirements of the project necessary for the system to operate as designed over the design life. State the design life of the system.

(1) Provide information on all system warranties. A minimum 3-year warranty for equipment and a 10-year warranty on design are expected.

(2) If the project has any unique operation and maintenance issues, describe them.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives.

Section 2. Anaerobic Digester Projects

The technical requirements specified in this section apply to anaerobic digester projects, which are, as defined in § 4280.103, renewable energy systems that use animal waste and other organic substrates to produce thermal or electrical energy via anaerobic digestion.

(a) *Qualifications of key project service providers.* List all key project service providers. If one or more licensed professionals are involved in the project, provide the credentials for each professional.

(b) *Agreements, permits, and certifications.*

(1) Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits.

(2) For systems planning to interconnect with a utility, describe the utility's system

interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program as their interconnection agreement, describe the applicable local net metering program.

(3) Identify all environmental issues, including any compliance issues associated with or expected as a result of the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the amount of digestible substrate resource available. Indicate the source of the data and assumptions. Indicate the substrates used as digester inputs, including animal wastes, food-processing wastes, or other organic wastes in terms of type, quantity, seasonality, and frequency of collection. Describe any special handling of feedstock that may be necessary. Describe the process for determining the feedstock resource. Show the digestion conversion factors and calculations used to estimate biogas production and heat or power production.

(d) *Design and engineering.* Applicants must submit a statement certifying that their project will be designed and engineered so as to meet the intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. In addition, applicants must:

(1) Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose;

(2) List possible suppliers and models of major pieces of equipment;

(3) Provide a description of the components, materials, or systems to be installed. Include the location of the project;

(4) Provide a one-line diagram for the electrical interconnection. Provide diagrams or schematics as required showing all major installed structural, mechanical, and electrical components of the system;

(5) Describe the expected electric power, fuel production, or thermal energy production of the proposed system as rated and as expected in actual field conditions. Describe the uses of or the market for electricity, heat, or fuel produced by the system; and

(6) Describe the project site and address issues such as proximity to the load or the electrical grid, unique safety concerns, and whether special circumstances exist.

(e) *Project development schedule.* Provide a project schedule in an appropriate level of detail that will demonstrate the project can be adequately managed and be able to identify impacts of any delays on the project completion. The applicant must submit a statement certifying that the project will be completed within 2 years from the date of approval.

(f) *Project economic assessment.* Provide an analysis of the proposed project to demonstrate its financial performance, including the calculation of simple payback. The analysis should include applicable investment incentives, productivity incentives, loans and grants, and expected energy offsets or sales on a monthly and annual basis. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Include a statement from the applicant certifying "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* The project must be installed in accordance with applicable local, State, and national building and electrical codes and regulations. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules. Upon successful system installation and following established operation, the successful applicant must deliver invoices and evidence of payment.

(i) *Operations and maintenance.* Identify any unique operations and maintenance requirements of the project necessary for the system to operate as designed over the design life. State the design life of the system.

(1) Provide information on all system warranties. A minimum 3-year warranty for equipment and a 10-year warranty on design are expected.

(2) If the project has any unique operation and maintenance issues, describe them.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives.

Section 3. Geothermal, Electric Generation

The technical requirements specified in this section apply to electric generation geothermal projects, which are, as defined in § 4280.103, systems that use geothermal energy to produce high pressure steam for electric power production.

(a) *Qualifications of key project service providers.* List all key project service providers. If one or more licensed professionals are involved in the project, provide the credential for each professional.

(b) *Agreements, permits, and certifications.*

(1) Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including any permits or agreements required for well construction and for disposal or re-injection of cooled geothermal waters and the schedule for securing those agreements and permits.

(2) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program as their interconnection agreement, describe the applicable local net metering program.

(3) Identify all environmental issues, including any compliance issues associated with or expected as a result of the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(c) *Resources assessment.* Provide adequate and appropriate evidence of the availability of the renewable resource required for the system to operate as designed. Indicate the quality of the geothermal resource, including temperature, flow, and sustainability and what conversion system is to be installed. Describe any special handling of cooled geothermal waters that may be necessary. Describe the process for determining the geothermal resource, including measurement setup for the collection of the geothermal resource data. For proposed projects with an established resource, provide a summary of the resource and the specifications of the measurement setup.

(d) *Design and engineering.* Applicants must submit a statement certifying that their project will be designed and engineered so as to meet the intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. In addition, applicants must:

(1) Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose;

(2) List possible suppliers and models of major pieces of equipment;

(3) Provide a description of the components, materials, or systems to be installed. Include the location of the project;

(4) Provide a one-line diagram for the electrical interconnection. Provide diagrams or schematics as required showing all major installed structural, mechanical, and electrical components of the system;

(5) Describe the expected electric power, fuel production, or thermal energy production of the proposed system as rated and as expected in actual field conditions. Describe the uses of or the market for electricity, heat, or fuel produced by the system; and

(6) Describe the project site and address issues such as proximity to the load or the electrical grid, unique safety concerns, and whether special circumstances exist.

(e) *Project development schedule.* Provide a project schedule in an appropriate level of detail that will demonstrate that the project can be adequately managed and be able to identify impacts of any delays on the project completion. The applicant must submit a statement certifying that the project will be completed within 2 years from the date of approval.

(f) *Project economic assessment.* Provide an analysis of the proposed project to demonstrate its financial performance, including the calculation of simple payback. The analysis should include applicable investment incentives, productivity incentives, loans and grants, and expected energy offsets or sales on a monthly and annual basis. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Include a statement from the applicant certifying that "open and free" competition will be used for

the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* The project must be installed in accordance with applicable local, State, and national building and electrical codes and regulations. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules. Upon successful system installation and following established operation, the successful applicant must deliver invoices and evidence of payment.

(i) *Operations and maintenance.* Identify any unique operations and maintenance requirements of the project necessary for the system to operate as designed over the design life. State the design life of the system.

(1) Provide information on all system warranties. A minimum 3-year warranty for equipment and a 10-year warranty on design are expected.

(2) If the project has any unique operation and maintenance issues, describe them.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives.

Section 4. Geothermal, Direct Use

The technical requirements specified in this section apply to direct use geothermal projects, which are, as defined in § 4280.103, systems that use thermal energy directly from a geothermal source.

(a) *Qualifications of key project service providers.* List all key project service providers. If one or more licensed professionals are involved in the project, provide the credentials for each professional.

(b) *Agreements, permits, and certifications.*

(1) Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including any permits or agreements required for well construction and for disposal or re-injection of cooled geothermal waters and the schedule for securing those agreements and permits.

(2) Identify all environmental issues, including any compliance issues associated with or expected as a result of the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(c) *Resources assessment.* Provide adequate and appropriate evidence of the availability of the renewable resource required for the system to operate as designed. Indicate the quality of the geothermal resource, including temperature, flow, and sustainability and what direct use system is to be installed. Describe any special handling of cooled geothermal waters that may be necessary. Describe the process for determining the geothermal resource, including measurement setup for the collection of the geothermal resource data. For proposed projects with an established resource, provide a summary of the resource and the specifications of the measurement setup.

(d) *Design and engineering.* Applicants must submit a statement certifying that their project will be designed and engineered so as to meet the intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. In addition, applicants must:

(1) Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose;

(2) List possible suppliers and models of major pieces of equipment;

(3) Provide a description of the components, materials, or systems to be installed. Include the location of the project;

(4) Provide one-line diagram for the electrical interconnection. Provide diagrams or schematics as required showing all major installed structural, mechanical, and electrical components of the system;

(5) Describe the expected thermal energy production of the proposed system as rated and as expected in actual field conditions. Describe the uses of, or the market for, heat produced by the system; and

(6) Describe the project site and address issues such as proximity to the load, unique safety concerns, and whether special circumstances exist.

(e) *Project development schedule.* Provide a project schedule in an appropriate level of detail that will demonstrate the project can be adequately managed and be able to identify impacts of any delays on the project completion. The applicant must submit a statement certifying that the project will be completed within 2 years from the date of approval.

(f) *Project economic assessment.* Provide an analysis of the proposed project to demonstrate its financial performance, including the calculation of simple payback. The analysis should include applicable investment incentives, productivity incentives, loans and grants, and expected energy offsets or sales on a monthly and annual basis. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* The project must be installed in accordance with applicable local, State, and national building and electrical codes and regulations. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules. Upon successful system installation and following established operation, the successful applicant must deliver invoices and evidence of payment.

(i) *Operations and maintenance.* Identify any unique operations and maintenance requirements of the project necessary for the system to operate as designed over the design life. State the design life of the system.

(1) Provide information on all system warranties. A minimum 3-year warranty for equipment and a 10-year warranty on design are expected.

(2) If the project has any unique operation and maintenance issues, describe them.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives.

Section 5. Hydrogen

The technical requirements specified in this section apply to hydrogen projects, which are, as defined in § 4280.103, renewable energy systems that produce hydrogen, or a renewable energy system that uses mechanical or electric power or thermal energy from a renewable resource using hydrogen as an energy transport medium.

(a) *Qualifications of key project service providers.* List all key project service providers. If one or more licensed professionals are involved in the project, provide the credentials for each professional.

(b) *Agreements, permits, and certifications.*

(1) Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits.

(2) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program as their interconnection agreement, describe the applicable local net metering program.

(3) Identify all environmental issues, including any compliance issues associated with or expected as a result of the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the type, quantity, quality, and seasonality of the local renewable resource that will be used to produce the hydrogen.

(d) *Design and engineering.* Applicants must submit a statement certifying that their project will be designed and engineered so as to meet the intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. In addition, applicants must:

(1) Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose;

(2) List possible suppliers and models of major pieces of equipment;

(3) Provide a description of the components, materials, or systems to be installed. Include the location of the project;

(4) Provide a one-line diagram for the electrical interconnection. Provide diagrams or schematics as required showing all major installed structural, mechanical, and electrical components of the system; and

(5) Describe the project site and address issues such as proximity to the load or the electrical grid, unique safety concerns, and whether special circumstances exist.

(e) *Project development schedule.* Provide a project schedule in an appropriate level of

detail that will demonstrate the project can be adequately managed and be able to identify impacts of any delays on the project completion. The applicant must submit a statement certifying that the project will be completed within 2 years from the date of approval.

(f) *Project economic assessment.* Provide an analysis of the proposed project to demonstrate its financial performance, including the calculation of simple payback. The analysis should include applicable investment incentives, productivity incentives, loans and grants, and expected energy offsets or sales on a monthly and annual basis. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* The project must be installed in accordance with applicable local, State, and national building and electrical codes and regulations. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules. Upon successful system installation and following established operation, the successful applicant must deliver invoices and evidence of payment.

(i) *Operations and maintenance.* Identify any unique operations and maintenance requirements of the project necessary for the system to operate as designed over the design life. State the design life of the system.

(1) Provide information on all system warranties. A minimum 3-year warranty for equipment and a 10-year warranty on design are expected.

(2) If the project has any unique operation and maintenance issues, describe them.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives.

Section 6. Solar, Small

The technical requirements specified in this section apply to small solar electric projects and small solar thermal projects, as defined in § 4280.103.

Small solar electric projects are those for which the rated power of the system is 10kW or smaller. Small solar electric projects are either stand-alone (off grid) or interconnected to the grid at less than 600 volts (on grid).

Small solar thermal projects are those for which the rated storage volume of the system is 240 gallons or smaller, or which have a collector area of 1,000 square feet or less.

(a) *Qualifications of key project service providers.* List all key project service providers. If one or more licensed professionals are involved in the project, provide the credentials for each professional.

(b) *Agreements, permits, and certifications.*

(1) Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits.

(2) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program as their interconnection agreement, describe the applicable local net metering program.

(3) Identify all environmental issues, including any compliance issues associated with or expected as a result of the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the amount of solar resource available. Indicate the source of the solar data and assumptions.

(d) *Design and engineering.* Applicants must submit a statement certifying that their project will be designed and engineered so as to meet the intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. In addition, applicants must:

(1) Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose;

(2) List possible suppliers and models of major pieces of equipment;

(3) Provide a description of the components, materials, or systems to be installed. Include the location of the project;

(4) Provide a one-line diagram for the electrical interconnection. Provide diagrams or schematics as required showing all major installed structural, mechanical, and electrical components of the system; and

(5) Describe the project site and address issues such as solar access, orientation, proximity to the load or the electrical grid, unique safety concerns, and whether special circumstances exist.

(e) *Project development schedule.* Provide a project schedule in an appropriate level of detail that will demonstrate that the project can be adequately managed and be able to identify impacts of any delays on the project completion. The applicant must submit a statement certifying that the project will be completed within 2 years from the date of approval.

(f) *Project economic assessment.* Provide an analysis of the proposed project to demonstrate its financial performance, including the calculation of simple payback. The analysis should include applicable investment incentives, productivity incentives, loans and grants, and expected energy offsets or sales on a monthly and annual basis. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* The project must be installed in accordance with applicable local, State, and national building and electrical codes and regulations. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules. Upon successful system installation and following established operation, the successful applicant must deliver invoices and evidence of payment.

(i) *Operations and maintenance.* Identify any unique operations and maintenance requirements of the project necessary for the system to operate as designed over the design life. State the design life of the system.

(1) Provide information on all system warranties. A minimum 3-year warranty for equipment and a 10-year warranty on design are expected.

(2) If the project has any unique operation and maintenance issues, describe them.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives.

Section 7. Solar, Large

The technical requirements specified in this section apply to large solar electric projects and large solar thermal projects, as defined in § 4280.103.

Large solar electric systems are those for which the rated power of the system is larger than 10kW. Large solar electric systems are either stand-alone (off grid) or interconnected to the grid (on grid).

Large solar thermal systems are those for which the rated storage volume of the system is greater than 240 gallons or that have a collector area of more than 1,000 square feet.

(a) *Qualifications of key project service providers.* List all key project service providers. If one or more licensed professionals are involved in the project, provide the credential for each professional.

(b) *Agreements, permits, and certifications.*

(1) Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits.

(2) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program as their interconnection agreement, describe the applicable local net metering program.

(3) Identify all environmental issues, including any compliance issues associated with or expected as a result of the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the amount of solar resource available. Indicate the source of the solar data and assumptions.

(d) *Design and engineering.* Applicants must submit a statement certifying that their project will be designed and engineered so as

to meet the intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. In addition, applicants must:

(1) Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose;

(2) List possible suppliers and models of major pieces of equipment;

(3) Provide a description of the components, materials, or systems to be installed. Include the location of the project;

(4) Provide a one-line diagram for the electrical interconnection. Provide diagrams or schematics as required showing all major installed structural, mechanical, and electrical components of the system; and

(5) Describe the project site and address issues such as solar access, orientation, proximity to the load or the electrical grid, unique safety concerns, and whether special circumstances exist.

(e) *Project development schedule.* Provide a project schedule in an appropriate level of detail that will demonstrate the project can be adequately managed and be able to identify impacts of any delays on the project completion. The applicant must submit a statement certifying that the project will be completed within 2 years from the date of approval.

(f) *Project economic assessment.* Provide an analysis of the proposed project to demonstrate its financial performance, including the calculation of simple payback. The analysis should include applicable investment incentives, productivity incentives, loans and grants, and expected energy offsets or sales on a monthly and annual basis. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* The project must be installed in accordance with applicable local, State, and national building and electrical codes and regulations. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules. Upon successful system installation and following established operation, the successful applicant must deliver invoices and evidence of payment.

(i) *Operations and maintenance.* Identify any unique operations and maintenance requirements of the project necessary for the system to operate as designed over the design life. State the design life of the system.

(1) Provide information on all system warranties. A minimum 3-year warranty for equipment and a 10-year warranty on design are expected.

(2) If the project has any unique operation and maintenance issues, describe them.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives.

Section 8. Wind, Small

The technical requirements specified in this section apply to small wind systems, which are, as defined in § 4280.103, wind energy systems for which the rated power of the wind turbine is 100kW or smaller and with a generator huh height of 120 feet or less. Small wind systems are either stand-alone or connected to the local electrical system at less than 600 volts.

(a) *Qualifications of key project service providers.* List all key project service providers. If one or more licensed professionals are involved in the project, provide the credentials for each professional.

(b) *Agreements, permits, and certifications.*

(1) Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits.

(2) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program as their interconnection agreement, describe the applicable local net metering program.

(3) Identify all environmental issues, including any compliance issues associated with or expected as a result of the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the amount of local wind resource where the small wind turbine is to be installed. Indicate the source of the wind data and assumptions.

(d) *Design and engineering.* Applicants must certify that their project will be designed and engineered so as to meet the intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. In addition, applicants must:

(1) Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose;

(2) List possible suppliers and models of major pieces of equipment;

(3) Provide a description of the components, materials, or systems to he installed. Include the location of the project;

(4) Provide a one-line diagram for the electrical interconnection. Provide diagrams or schematics as required showing all major installed structural, mechanical, and electrical components of the system; and

(5) Describe the project site and address issues such as proximity to the load or the electrical grid, unique safety concerns, and whether special circumstances exist.

(e) *Project development schedule.* Provide a project schedule in an appropriate level of detail that will demonstrate the project can be adequately managed and be able to identify impacts of any delays on the project completion. The applicant must submit a statement certifying that the project will be completed within 2 years from the date of approval.

(f) *Project economic assessment.* Provide an analysis of the proposed project to demonstrate its financial performance, including the calculation of simple payback. The analysis should include applicable investment incentives, productivity incentives, loans and grants, and expected energy offsets or sales on a monthly and annual basis. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* The project must be installed in accordance with applicable local, State, and national building and electrical codes and regulations. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules. Upon successful system installation and following established operation, the successful applicant must deliver invoices and evidence of payment.

(i) *Operations and maintenance.* Identify any unique operations and maintenance requirements of the project necessary for the system to operate as designed over the design life. State the design life of the system.

(1) Provide information on all system warranties. A minimum 3-year warranty for equipment and a 10-year warranty on design are expected.

(2) If the project has any unique operation and maintenance issues, describe them.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives.

Section 9. Wind, Large

The technical requirements specified in this section apply to large wind systems, which are, as defined in § 4280.103, wind energy projects for which the rated power of the individual wind turbine(s) is larger than 100kW.

(a) *Qualifications of key project service providers.* List all key project service providers. If one or more licensed professionals are involved in the project, provide the credentials for each professional.

(b) *Agreements, permits, and certifications.*

(1) Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits.

(2) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program as their interconnection agreement, describe the applicable local net metering program.

(3) Identify all environmental issues, including any compliance issues associated

with or expected as a result of the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the amount of local wind resource where the large wind turbine is to be installed. Indicate the source of the wind data and assumptions. Projects greater than 500kW must obtain wind data from the proposed project site. For such projects, describe the proposed measurement setup for the collection of the wind resource data. For proposed projects with an established wind resource, provide a summary of the wind resource and the specifications of the measurement setup. Large wind systems larger than 500kW in size will typically require at least 1 year of on-site monitoring. If less than 1 year of data is used, the qualified meteorological consultant must provide a detailed analysis of correlation between the site data and a nearby long-term measurement site.

(d) *Design and engineering.* Applicants must submit a statement certifying that their project will be designed and engineered so as to meet the intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. In addition, applicants must:

(1) Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose;

(2) List possible suppliers and models of major pieces of equipment;

(3) Provide a description of the components, materials, or systems to be installed. Include the location of the project;

(4) Provide one-line diagram for the electrical interconnection. Provide diagrams or schematics as required showing all major installed structural, mechanical, and electrical components of the system; and

(5) Describe the project site and address issues such as proximity to the load or the electrical grid, unique safety concerns, and whether special circumstances exist.

(e) *Project development schedule.* Provide a project schedule in an appropriate level of detail that will demonstrate the project can be adequately managed and be able to identify impacts of any delays on the project completion. The applicant must submit a statement certifying that the project will be completed within 3 years from the date of approval.

(f) *Project economic assessment.* Provide an analysis of the proposed project to demonstrate its financial performance, including the calculation of simple payback. The analysis should include applicable investment incentives, productivity incentives, loans and grants, and expected energy offsets or sales on a monthly and annual basis. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* The project must be installed in accordance with applicable local, State, and national building and electrical codes and regulations. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules. Upon successful system installation and following established operation, the successful applicant must deliver invoices and evidence of payment.

(i) *Operations and maintenance.* Identify any unique operations and maintenance requirements of the project necessary for the system to operate as designed over the design life. State the design life of the system.

(1) Provide information on all system warranties. A minimum 3-year warranty for equipment and a 10-year warranty on design are expected.

(2) If the project has any unique operation and maintenance issues, describe them.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives.

Section 10. Energy Efficiency Improvements

The technical requirements specified in this section apply to energy efficiency improvement projects, which are, as defined in § 4280.103, improvements to a facility, building, or process that reduce energy consumption, or reduce energy consumed per square foot.

(a) *Qualifications of key project service providers.* List all key project service providers. If one or more licensed professionals are involved in the project, provide the credentials for each professional. For projects with total eligible project costs greater than $50,000, also discuss the qualifications of the energy auditor, including any relevant certifications by recognized organizations or bodies.

(b) *Agreements, permits, and certifications.*

(1) The applicant must certify that they will comply with all necessary agreements and permits required for the project. Indicate the status and schedule for securing those agreements and permits.

(2) Identify all environmental issues, including any compliance issues associated with or expected as a result of the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(c) *Energy assessment and audits.* For all energy efficiency improvement projects, provide adequate and appropriate evidence of energy savings expected when the system is operated as designed.

(1) For energy efficiency improvement projects with total eligible project costs greater than $50,000, an energy audit must be conducted. An energy audit is a written report by an independent, qualified party that documents current energy usage, recommended potential improvements and their costs, energy savings from these improvements, dollars saved per year, and simple payback. The methodology of the energy audit must meet professional and industry standards.

(2) The energy assessment or energy audit must cover the following:

(i) *Situation report.* Provide a narrative description of the facility or process, its energy system(s) and usage, and activity profile. Also include price per unit of energy (electricity, natural gas, propane, fuel oil, renewable energy, etc.,) paid by the customer on the date of the assessment or audit. Any energy conversion should be based on use rather than source.

(ii) *Potential improvements.* List specific information on all potential energy-saving opportunities and the associated costs.

(iii) *Technical analysis.* Discuss the interactions of the potential improvements with existing energy systems.

(A) Estimate the annual energy and energy costs savings expected from each improvement identified in the potential project.

(B) Calculate all direct and attendant indirect costs of each improvement.

(C) Rank potential improvement measures by cost-effectiveness.

(iv) *Potential improvement description.* Provide a narrative summary of the potential improvement and its ability to provide needed benefits, including a discussion of non-energy benefits such as project reliability and durability.

(A) Provide preliminary specifications for critical components.

(B) Provide preliminary drawings of project layout, including any related structural changes.

(C) Document baseline data compared to projected consumption, together with any explanatory notes. Provide the actual total quantity of energy used (BTU)in the original building and/or equipment in the 12 months prior to the EEI project and the projected energy usage after the EEI project shall be the projected total quantity of energy used (BTU) on an annual basis for the same size or capacity as the original building or equipment. For energy efficiency improvement to equipment, if the new piece of equipment has a different capacity than the piece of equipment being replaced, the projected total quantity of energy used for the new piece of equipment shall be adjusted based on the ratio of the capacity of the replaced piece of equipment to the capacity of the new piece of equipment in accordance with the regulation. When appropriate, show before-and-after data in terms of consumption per unit of production, time or area. Include at least 1 year's bills for those energy sources/fuel types affected by this project. Also submit utility rate schedules, if appropriate.

(D) Identify significant changes in future related operations and maintenance costs.

(E) Describe explicitly how outcomes will be measured.

(d) *Design and engineering.* The applicant must submit a statement certifying that their project will be designed and engineered so as to meet the intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards.

(1) Identify possible suppliers and models of major pieces of equipment.

(2) Describe the components, materials, or systems to be installed. Include the location of the project.

(e) *Project development schedule.* Provide a project schedule in an appropriate level of detail that will demonstrate the project can be adequately managed. The applicant must submit a statement certifying that the project will be completed within 2 years from the date of approval.

(f) *Project economic assessment.* For projects with total eligible project costs greater than $50,000, provide an analysis of the proposed project to demonstrate its financial performance, including the calculation of simple payback. The analysis should include applicable investment incentives, productivity incentives, loans and grants, and expected energy offsets or sales on a monthly and annual basis. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* The project must be installed in accordance with applicable local, State, and national building and electrical codes and regulations. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules. Upon successful system installation and following established operation, the successful applicant must deliver invoices and evidence of payment.

(i) *Operations and maintenance.* Identify any unique operations and maintenance requirements of the project necessary for the improvement(s) to perform as designed over the design life. State the design life of the improvement(s). Provide information regarding component warranties.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and proper disposal of the project components and associated wastes at the end of their useful lives.

Appendix B to Subpart B of Part 4280—Technical Reports for Projects With Total Eligible Project Costs of Greater Than $200,000

The Technical Report for projects with total eligible project costs greater than $200,000 (and for any other project that must submit a Technical Report under this appendix) must demonstrate that the project design, procurement, installation, startup, operation, and maintenance of the renewable energy system or energy efficiency improvement will operate or perform as specified over its design life in a reliable and a cost-effective manner. The Technical Report must also identify all necessary project agreements, demonstrate that those agreements will be in place, and that necessary project equipment and services are available over the design life.

All technical information provided must follow the format specified in Sections 1 through 10 of this appendix. Supporting information may be submitted in other formats. Design drawings and process flowcharts are encouraged as exhibits. A discussion of each topic is not necessary if the topic is not applicable to the specific project. Questions identified in the Agency's technical review of the project must be answered to the Agency's satisfaction before the application will be approved. The applicant must submit the original technical report plus one copy to the Rural Development State Office. Renewable energy projects with total eligible project costs greater than $400,000 and for energy efficiency improvement projects with total eligible project costs greater than $200,000 require the services of a licensed professional engineer (PE) or team of PEs. Depending on the level of engineering required for the specific project or if necessary to ensure public safety, the services of a licensed PE or a team of licensed PEs may be required for smaller projects.

Section 1. Bioenergy

The technical requirements specified in this section apply to bioenergy projects, which are, as defined in § 4280.103, renewable energy systems that produces fuel, thermal energy, or electric power from a renewable biomass source only, other than an anaerobic digester project.

(a) *Qualifications of project team.* The bioenergy project team will vary according to the complexity and scale of the project. For engineered systems, the project team should consist of a system designer, a project manager, an equipment supplier, a project engineer, a construction contractor or system installer, and a system operator and maintainer. One individual or entity may serve more than one role. The project team must have demonstrated expertise in similar bioenergy systems development, engineering, installation, and maintenance. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services must be provided. Authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life must also be provided. The application must:

(1) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design/build method, often referred to as turnkey, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(2) Discuss the bioenergy system equipment manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(3) Discuss the project manager, equipment supplier, system designer, project engineer, and construction contractor qualifications for engineering, designing, and installing bioenergy systems, including any relevant certifications by recognized organizations. Provide a list of the same or similar projects designed, installed, or supplied and currently operating with references, if available; and

(4) Describe the system operator's qualifications and experience for servicing, operating, and maintaining bioenergy renewable energy equipment or projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating with references, if available.

(b) *Agreements, permits, and certifications.* Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (b)(1) through (8).

(1) Identify zoning and code issues, and required permits and the anticipated schedule for meeting those requirements and securing those permits.

(2) Identify licenses where required and the schedule for obtaining those licenses.

(3) Identify land use agreements required for the project and the anticipated schedule for securing the agreements and the term of those agreements.

(4) Identify any permits or agreements required for solid, liquid, and gaseous emissions or effluents and the schedule for securing those permits and agreements.

(5) Identify available component warranties for the specific project location and size.

(6) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program as their interconnection agreement, describe the applicable local net metering program.

(7) Identify all environmental issues, including environmental compliance issues, associated with the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(8) Submit a statement certifying that the project will be installed in accordance with applicable local, State, and national codes and regulations.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the type, quantity, quality, and seasonality of the biomass resource, including harvest and storage, where applicable. Where applicable, also indicate shipping or receiving method and required infrastructure for shipping. For proposed projects with an established resource, provide a summary of the resource.

(d) *Design and engineering.* Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified party. Systems must be engineered as a complete, integrated system with matched components. The engineering must

be comprehensive, including site selection, system and component selections, and system monitoring equipment. Systems must be constructed by a qualified party.

(1) Provide a concise but complete description of the bioenergy project, including location of the project, resource characteristics, system specifications, electric power system interconnection, and monitoring equipment. Identify possible vendors and models of major system components. Describe the expected electric power, fuel production, or thermal energy production of the proposed system as rated and as expected in actual field conditions. For systems with a capacity of more than 20 tons per day of biomass, address performance on a monthly and annual basis. For small projects such as a commercial biomass furnace or pelletizer of up to 5 tons daily capacity, proven, commercially available devices need not be addressed in detail. Describe the uses of or the market for electricity, heat, or fuel produced by the system. Discuss the impact of reduced or interrupted biomass availability on the system process.

(2) Describe the project site and address issues such as site access, foundations, backup equipment when applicable, and environmental concerns with emphasis on land use, air quality, water quality, soil degradation, habitat fragmentation, land use, visibility, odor, noise, construction, and installation issues. Identify any unique construction and installation issues.

(e) *Project development schedule.* Identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline, including resource assessment, system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(f) *Project economic assessment.* Provide a study that describes the costs and revenues of the proposed project to demonstrate the financial performance of the project, including the calculation of simple payback. Provide a detailed analysis and description of project costs, including project management, resource assessment, project design, project permitting, land agreements, equipment, site preparation, system installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed analysis and description of annual project revenues and expenses. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Bioenergy systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Identify all the major equipment that is proprietary and justify how this unique equipment is needed to meet the requirements of the proposed design. Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* Fully describe the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment needed for project construction, and provide a description of the startup and shakedown specifications and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules.

(i) *Operations and maintenance.* Identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. In addition:

(1) Provide information regarding available system and component warranties and availability of spare parts;

(2) Describe the routine operations and maintenance requirements of the proposed system, including maintenance schedule for the mechanical, piping, and electrical systems and system monitoring and control requirements. Provide information that supports expected design life of the system and timing of major component replacement or rebuilds. Discuss the costs and labor associated with the operation and maintenance of the system, and plans for in-sourcing or out-sourcing. Describe opportunities for technology transfer for long-term project operations and maintenance by a local entity or owner/operator; and

(3) For systems having a biomass input capacity exceeding 10 tons of biomass per day, provide and discuss the risk management plan for handling large, potential failures of major components.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives. Describe the budget for and any unique concerns associated with the dismantling and disposal of project components and their wastes.

Section 2. Anaerobic Digester Projects

The technical requirements specified in this section apply to anaerobic digester projects, which are, as defined in § 4280.103, renewable energy systems that use animal or other waste and may include other organic substrates to produce biofuel, biogas, thermal, or electrical energy via anaerobic digestion.

(a) *Qualifications of project team.* The anaerobic digester project team should consist of a system designer, a project manager, an equipment supplier, a project engineer, a construction contractor, and a system operator or maintainer. One individual or entity may serve more than one role. The project team must have demonstrated commercial-scale expertise in anaerobic digester systems development, engineering, installation, and maintenance as related to the organic materials and operating mode of the system. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services must be provided. Authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life must also be provided. The application must:

(1) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design/build method, often referred to as turnkey, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(2) Discuss the anaerobic digester system equipment manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(3) Discuss the project manager, equipment supplier, system designer, project engineer, and construction contractor qualifications for engineering, designing, and installing anaerobic digester systems, including any relevant certifications by recognized organizations. Provide a list of the same or similar projects designed, installed, or supplied and currently operating consistent with the substrate material with references, if available; and

(4) For regional or centralized digester plants, describe the system operator's qualifications and experience for servicing, operating, and maintaining similar projects. Farm scale systems may not require operator experience as the developer is typically required to provide operational training during system startup and shakedown. Provide a list of the same or similar projects designed, installed, or supplied and currently operating consistent with the substrate material with references, if available.

(b) *Agreements, permits, and certifications.* Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (b)(1) through (8).

(1) Identify zoning and code issues, and required permits and the anticipated schedule for meeting those requirements and securing those permits.

(2) Identify licenses where required and the schedule for obtaining those licenses.

(3) For regional or centralized digester plants, identify feedstock access agreements required for the project and the anticipated schedule for securing those agreements and the term of those agreements.

(4) Identify any permits or agreements required for transport and ultimate waste disposal and the schedule for securing those agreements and permits.

(5) Identify available component warranties for the specific project location and size.

(6) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program as their interconnection agreement, describe the applicable local net metering program.

(7) Identify all environmental issues, including environmental compliance issues, associated with the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(8) Submit a statement certifying that the project will be installed in accordance with applicable local, State, and national codes and regulations.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the substrates used as digester inputs, including animal wastes, food processing wastes, or other organic wastes in terms of type, quantity, seasonality, and frequency of collection. Describe any special handling of feedstock that may be necessary. Describe the process for determining the feedstock resource. Provide either tabular values or laboratory analysis of representative samples that include biodegradability studies to produce gas production estimates for the project on daily, monthly, and seasonal basis.

(d) *Design and engineering.* Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified party. Systems must be engineered as a complete, integrated system with matched components. The engineering must be comprehensive, including site selection, digester component selection, gas handling component selection, and gas use component selection. Systems must be constructed by a qualified party.

(1) Provide a concise but complete description of the anaerobic digester project, including location of the project, farm description, feedstock characteristics, a step-by-step flowchart of unit operations, electric power system interconnection equipment, and any required monitoring equipment. Identify possible vendors and models of major system components. Provide the expected system energy production, heat balances, and material balances as part of the unit operations flowchart.

(2) Describe the project site and address issues such as site access, foundations, backup equipment when applicable, and environmental concerns with emphasis on land use, air quality, water quality, soil degradation, habitat degradation, land use, visibility, odor, noise, construction, and installation issues. Identify any unique construction and installation issues.

(e) *Project development schedule.* Identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline, including feedstock assessment, system and site designs, permits and agreements, equipment procurement, system installation from excavation through startup and shakedown, and operator training.

(f) *Project economic assessment.* Provide a study that describes the costs and revenues of the proposed project to demonstrate the financial performance of the project, including the calculation of simple payback. Provide a detailed analysis and description of project costs, including project management, feedstock assessment, project design, project permitting, land agreements, equipment, site preparation, system installation, startup and shakedown, warranties, insurance, financing, professional services, training and operations, and maintenance costs of both the digester and the gas use systems. Provide a detailed analysis and description of annual project revenues and expenses. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Anaerobic digester systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Identify all the major equipment that is proprietary and justify how this unique equipment is needed to meet the requirements of the proposed design. Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* Describe fully the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment needed for project construction, and provide a description of the startup and shakedown specifications and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules.

(i) *Operations and maintenance.* Identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The application must:

(1) Ensure that systems must have at least a 3-year warranty for equipment and a 10-year warranty on design. Provide information regarding system warranties and availability of spare parts;

(2) Describe the routine operations and maintenance requirements of the proposed project, including maintenance for the digester, the gas handling equipment, and the gas use systems. Describe any maintenance requirements for system monitoring and control equipment;

(3) Provide information that supports the expected design life of the system and the timing of major component replacement or rebuilds;

(4) Provide and discuss the risk management plan for handling large, potential failures of major components. Include in the discussion, costs and labor associated with the operation and maintenance of the system, and plans for in-sourcing or out-sourcing; and

(5) Describe opportunities for technology transfer for long-term project operations and maintenance by a local entity or owner/operator.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives. Describe the budget for and any unique concerns associated with the dismantling and disposal of project components and their wastes.

Section 3. Geothermal, Electric Generation

The technical requirements specified in this section apply to electric generation geothermal projects, which are, as defined in § 4280.103, systems that use geothermal energy to produce high pressure steam for electric power production.

(a) *Qualifications of project team.* The electric generating geothermal plant project team should consist of a system designer, a project manager, an equipment supplier, a project engineer, a construction contractor, and a system operator and maintainer. One individual or entity may serve more than one role. The project team must have demonstrated expertise in geothermal electric generation systems development, engineering, installation, and maintenance. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services must be provided. Authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life must also be provided. The application must:

(1) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design/build method, often referred to as turnkey, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(2) Discuss the geothermal plant equipment manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(3) Discuss the project manager, equipment supplier, system designer, project engineer,

and construction contractor qualifications for engineering, designing, and installing geothermal electric generation systems, including any relevant certifications by recognized organizations. Provide a list of the same or similar projects designed, installed, or supplied and currently operating with references, if available; and

(4) Describe the system operator's qualifications and experience for servicing, operating, and maintaining electric generating geothermal projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating with references, if available.

(b) *Agreements, permits, and certifications.* Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (b)(1) through (7).

(1) Identify zoning and code issues and required permits and the anticipated schedule for meeting those requirements and securing those permits.

(2) Identify any permits or agreements required for well construction and for disposal or re-injection of cooled geothermal waters and the schedule for securing those agreements and permits.

(3) Identify land use or access to the resource agreements required for the project and the anticipated schedule for securing the agreements and the term of those agreements.

(4) Identify available component warranties for the specific project location and size.

(5) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements.

(6) Identify all environmental issues, including environmental compliance issues, associated with the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(7) Submit a statement certifying that the project will be installed in accordance with applicable local, State, and national codes and regulations.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the quality of the geothermal resource, including temperature, flow, and sustainability and what conversion system is to be installed. Describe any special handling of cooled geothermal waters that may be necessary. Describe the process for determining the geothermal resource, including measurement setup for the collection of the geothermal resource data. For proposed projects with an established resource, provide a summary of the resource and the specifications of the measurement setup.

(d) *Design and engineering.* Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified party. Systems must be engineered as a complete, integrated system with matched components. The engineering must be comprehensive, including site selection, system and component selection, conversion system component and selection, design of the local collection grid, interconnection equipment selection, and system monitoring equipment. Systems must be constructed by a qualified party.

(1) Provide a concise but complete description of the geothermal project, including location of the project, resource characteristics, thermal system specifications, electric power system interconnection equipment and project monitoring equipment. Identify possible vendors and models of major system components. Provide the expected system energy production on a monthly and annual basis.

(2) Describe the project site and address issues such as site access, proximity to the electrical grid, environmental concerns with emphasis on land use, air quality, water quality, habitat fragmentation, visibility, noise. construction, and installation issues. Identify any unique construction and installation issues.

(e) *Project development schedule.* Identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline, including resource assessment, system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(f) *Project economic assessment.* Provide a study that describes the costs and revenues of the proposed project to demonstrate the financial performance of the project, including the calculation of simple payback. Provide a detailed analysis and description of project costs, including project management, resource assessment, project design, project permitting, land agreements, equipment, site preparation, system installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed analysis and description of annual project revenues, including electricity sales, production tax credits, revenues from green tags, and any other production incentive programs throughout the life of the project. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Geothermal systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Identify all the major equipment that is proprietary and justify how this unique equipment is needed to meet the requirements of the proposed design. Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* Describe fully the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment needed for project construction, and provide a description of the startup and shakedown specifications and process and the conditions required for startup or shakedown for each equipment item individually and for the system as a whole. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules.

(i) *Operations and maintenance.* Identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The application must:

(1) Ensure that systems must have at least a 3-year warranty for equipment. Provide information regarding turbine warranties and availability of spare parts;

(2) Describe the routine operations and maintenance requirements of the proposed project, including maintenance for the mechanical and electrical systems and system monitoring and control requirements;

(3) Provide information that supports expected design life of the system and timing of major component replacement or rebuilds;

(4) Provide and discuss the risk management plan for handling large, potential failures of major components such as the turbine. Include in the discussion, costs and labor associated with the operation and maintenance of the system, and plans for in-sourcing or out-sourcing; and

(5) Describe opportunities for technology transfer for long-term project operations and maintenance by a local entity or owner/operator.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives. Describe the budget for and any unique concerns associated with the dismantling and disposal of project components and their wastes.

Section 4. Geothermal, Direct Use

The technical requirements specified in this section apply to direct use geothermal projects, which are, as defined in § 4280.103, systems that use thermal energy directly from a geothermal source.

(a) *Qualifications of project team.* The geothermal project team should consist of a system designer, a project manager, an equipment supplier, a project engineer, a construction contractor, and a system operator and maintainer. One individual or entity may serve more than one role. The project team must have demonstrated expertise in geothermal heating systems development, engineering, installation, and maintenance. Authoritative evidence that project team service providers have the

necessary professional credentials or relevant experience to perform the required services must be provided. Authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life must also be provided. The application must:

(1) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design/build method, often referred to as turnkey, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(2) Discuss the geothermal system equipment manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(3) Discuss the project manager, equipment supplier, system designer, project engineer, and construction contractor qualifications for engineering, designing, and installing direct use geothermal systems, including any relevant certifications by recognized organizations. Provide a list of the same or similar projects designed, installed, or supplied and currently operating with references, if available; and

(4) Describe system operator's qualifications and experience for servicing, operating, and maintaining direct use generating geothermal projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating with references, if available.

(b) *Agreements, permits, and certifications.* Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (b)(1) through (7).

(1) Identify zoning and code issues, and required permits and the anticipated schedule for meeting those requirements and securing those permits.

(2) Identify licenses where required and the schedule for obtaining those licenses.

(3) Identify land use or access to the resource agreements required for the project and the anticipated schedule for securing the agreements and the term of those agreements.

(4) Identify any permits or agreements required for well construction and for disposal or re-injection of cooled geothermal waters and the anticipated schedule for securing those permits and agreements.

(5) Identify available component warranties for the specific project location and size.

(6) Identify all environmental issues, including environmental compliance issues, associated with the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(7) Submit a statement certifying that the project will be installed in accordance with applicable local, State, and national codes and regulations.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the quality of the geothermal resource, including temperature, flow, and sustainability and what direct use system is to be installed. Describe any special handling of cooled geothermal waters that may be necessary. Describe the process for determining the geothermal resource, including measurement setup for the collection of the geothermal resource data. For proposed projects with an established resource, provide a summary of the resource and the specifications of the measurement setup.

(d) *Design and engineering.* Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified party. Systems must be engineered as a complete, integrated system with matched components. The engineering must be comprehensive, including site selection, system and component selection, thermal system component selection, and system monitoring equipment. Systems must be constructed by a qualified party.

(1) Provide a concise but complete description of the geothermal project, including location of the project, resource characteristics, thermal system specifications, and monitoring equipment. Identify possible vendors and models of major system components. Provide the expected system energy production on a monthly and annual basis.

(2) Describe the project site and address issues such as site access, thermal backup equipment, environmental concerns with emphasis on land use, air quality, water quality, habitat fragmentation, visibility, noise, construction, and installation issues. Identify any unique construction and installation issues.

(e) *Project development schedule.* Identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline, including resource assessment, system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(f) *Project economic assessment.* Provide a study that describes the costs and revenues of the proposed project to demonstrate the financial performance of the project, including the calculation of simple payback. Provide a detailed analysis and description of project costs, including project management, resource assessment, project design, project permitting, land agreements, equipment, site preparation, system installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed analysis and description of annual project revenues and expenses. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Geothermal systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Identify all the major equipment that is proprietary and justify how this unique equipment is needed to meet the requirements of the proposed design. Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* Describe fully the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment needed for project construction, and provide a description of the startup and shakedown specifications and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules.

(i) *Operations and maintenance.* Identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The application must:

(1) Ensure that systems must have at least a 3-year warranty for equipment. Provide information regarding system warranties and availability of spare parts;

(2) Describe the routine operations and maintenance requirements of the proposed project, including maintenance for the mechanical and electrical systems and system monitoring and control requirements;

(3) Provide information that supports expected design life of the system and timing of major component replacement or rebuilds;

(4) Provide and discuss the risk management plan for handling large, potential failures of major components. Include in the discussion, costs and labor associated with the operation and maintenance of the system, and plans for in-sourcing or out-sourcing; and

(5) Describe opportunities for technology transfer for long-term project operations and maintenance by a local entity or owner/operator.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives. Describe the budget for and any unique concerns associated with the dismantling and disposal of project components and their wastes.

Section 5. Hydrogen Projects

The technical requirements specified in this section apply to hydrogen projects, which are, as defined in § 4280.103, renewable energy systems that produce

hydrogen or, a renewable energy system that uses mechanical or electric power or thermal energy from a renewable resource using hydrogen as an energy transport medium.

(a) *Qualifications of project team.* The hydrogen project team will vary according to the complexity and scale of the project. For engineered systems, the project team should consist of a system designer, a project manager, an equipment supplier, a project engineer, a construction contractor or system installer, and a system operator and maintainer. One individual or entity may serve more than one role. The project team must have demonstrated expertise in similar hydrogen systems development, engineering, installation, and maintenance. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services must be provided. Authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life must also be provided. The application must:

(1) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design/build method, often referred to as turnkey, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(2) Discuss the hydrogen system equipment manufacturers of major components for the hydrogen system being considered in terms of the length of time in the business and the number of units installed at the capacity and scale being considered;

(3) Discuss the project manager, equipment supplier, system designer, project engineer, and construction contractor qualifications for engineering, designing, and installing hydrogen systems, including any relevant certifications by recognized organizations. Provide a list of the same or similar projects designed, installed, or supplied and currently operating with references, if available; and

(4) Describe the system operator's qualifications and experience for servicing, operating, and maintaining hydrogen system equipment or projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating with references, if available.

(b) *Agreements, permits, and certifications.* Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (b)(1) through (8).

(1) Identify zoning and building code issues, and required permits and the anticipated schedule for meeting those requirements and securing those permits.

(2) Identify licenses where required and the schedule for obtaining those licenses.

(3) Identify land use agreements required for the project and the anticipated schedule for securing the agreements and the term of those agreements.

(4) Identify any permits or agreements required for solid, liquid, and gaseous emissions or effluents and the anticipated schedule for securing those permits and agreements.

(5) Identify available component warranties for the specific project location and size.

(6) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program as their interconnection agreement, describe the applicable local net metering program.

(7) Identify all environmental issues, including environmental compliance issues, associated with the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(8) Submit a statement certifying that the project will be installed in accordance with applicable local, State, and national codes and regulations.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the type, quantity, quality, and seasonality of the biomass resource. For solar, wind, or geothermal sources of energy used to generate hydrogen, indicate the local renewable resource where the hydrogen system is to be installed. Local resource maps may be used as an acceptable preliminary source of renewable resource data. For proposed projects with an established renewable resource, provide a summary of the resource.

(d) *Design and engineering.* Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified party. Systems must be engineered as a complete, integrated system with matched components. The engineering must be comprehensive, including site selection, system and component selection, and system monitoring equipment. Systems must be constructed by a qualified party.

(1) Provide a concise but complete description of the hydrogen project, including location of the project, resource characteristics, system specifications, electric power system interconnection equipment, and monitoring equipment. Identify possible vendors and models of major system components. Describe the expected electric power, fuel production, or thermal energy production of the proposed system. Address performance on a monthly and annual basis. Describe the uses of or the market for electricity, heat, or fuel produced by the system. Discuss the impact of reduced or interrupted resource availability on the system process.

(2) Describe the project site and address issues such as site access, foundations, backup equipment when applicable, and any environmental and safety concerns with emphasis on land use, air quality, water quality, and safety hazards. Identify any unique construction and installation issues.

(e) *Project development schedule.* Identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline, including resource assessment, system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(f) *Project economic assessment.* Provide a study that describes the costs and revenues of the proposed project to demonstrate the financial performance of the project, including the calculation of simple payback. Provide a detailed analysis and description of project costs, including project management, resource assessment, project design and engineering, project permitting, land agreements, equipment, site preparation, system installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed analysis and description of annual project revenues and expenses. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Hydrogen systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues, such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, and receiving, and on-site storage or inventory. Identify all the major equipment that is proprietary and justify how this unique equipment is needed to meet the requirements of the proposed design. Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* Describe fully the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment needed for project construction, and provide a description of the startup and shakedown specifications and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules.

(i) *Operations and maintenance.* Identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The application must:

(1) Provide information regarding system warranties and availability of spare parts;

(2) Describe the routine operations and maintenance requirements of the proposed project, including maintenance of the reformer, electrolyzer, or fuel cell as appropriate, and other mechanical, piping, and electrical systems and system monitoring and control requirements;

(3) Provide information that supports expected design life of the system and timing of major component replacement or rebuilds;

(4) Provide and discuss the risk management plan for handling large, potential failures of major components. Include in the discussion, costs and labor associated with the operation and maintenance of the system, and plans for in-sourcing or out-sourcing; and

(5) Describe opportunities for technology transfer for long-term project operations and maintenance by a local entity or owner/operator.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives. Describe the budget for and any unique concerns associated with the dismantling and disposal of project components and their wastes.

Section 6. Solar, Small

The technical requirements specified in this section apply to small solar electric projects and small solar thermal projects, as defined in § 4280.103.

Small solar electric projects are those for which the rated power of the system is 10kW or smaller. Small solar electric projects are either stand-alone (off grid) or interconnected to the grid at less than 600 volts (on grid).

Small solar thermal projects are those for which the rated storage volume of the system is 240 gallons or smaller, or which have a collector area of 1,000 square feet or less.

(a) *Qualifications of project team.* The small solar project team should consist of a system designer, a project manager or general contractor, an equipment supplier of major components, a system installer, a system maintainer, and, in some cases, the owner of the application or load served by the system. One individual or entity may serve more than one role. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services must be provided. Authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life must also be provided. The application must:

(1) Discuss the qualifications of the suppliers of major components being considered;

(2) Describe the knowledge, skills, and abilities needed to service, operate, and maintain the system for the proposed application; and

(3) Discuss the project manager, system designer, and system installer qualifications for engineering, designing, and installing small solar systems, including any relevant certifications by recognized organizations. Provide a list of the same or similar systems designed or installed by the design and installation team and currently operating with references, if available.

(b) *Agreements, permits, and certifications.* Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (b)(1) through (5).

(1) Identify zoning, building, and electrical code issues, and required permits and the anticipated schedule for meeting those requirements and securing those permits.

(2) Identify available component warranties for the specific project location and size.

(3) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program as their interconnection agreement, describe the applicable local net metering program.

(4) Identify all environmental issues, including environmental compliance issues, associated with the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(5) Submit a statement certifying that the project will be installed in accordance with applicable local, State, and national codes and regulations.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the source of the solar data and assumptions.

(d) *Design and engineering.* Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. For small solar electric systems, the engineering must be comprehensive, including solar collector design and selection, support structure design and selection, power conditioning design and selection, surface or submersible water pumps and energy storage requirements as applicable, and selection of cabling, disconnects and interconnection equipment. For small solar thermal systems, the engineering must be comprehensive, including solar collector design and selection, support structure design and selection, pump and piping design and selection, and energy storage design and selection.

(1) Provide a concise but complete description of the small solar system, including location of the project and proposed equipment specifications. Identify possible vendors and models of major system components. Provide the expected system energy production based on available solar resource data on a monthly (when possible) and annual basis and how the energy produced by the system will be used.

(2) Describe the project site and address issues such as solar access, orientation, proximity to the load or the electrical grid, environmental concerns such as water quality and land use, unique safety concerns such as hazardous materials handling, construction, and installation issues, and whether special circumstances exist.

(e) *Project development schedule.* Identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline, including system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(f) *Project economic assessment.* Provide a study that describes the costs and revenues of the proposed project to demonstrate the financial performance of the project, including the calculation of simple payback. Provide a detailed analysis and description of project costs, including design, permitting, equipment, site preparation, system installation, system startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. Provide a detailed description of historic or expected energy use and expected energy offsets or sales on a monthly and annual basis. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Small solar systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Provide a detailed description of equipment certification. Identify all the major equipment that is proprietary and justify how this unique equipment is needed to meet the requirements of the proposed design. Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* Describe fully the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment needed for project construction, and provide a description of the startup and shakedown specifications and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules.

(i) *Operations and maintenance.* Identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The application must:

(1) Ensure that systems must have at least a 5-year warranty for equipment. Provide

information regarding system warranty and availability of spare parts;

(2) Describe the routine operations and maintenance requirements of the proposed system, including maintenance schedules for the mechanical and electrical and software systems;

(3) For owner maintained portions of the system, describe any unique knowledge, skills, or abilities needed for service operations or maintenance; and

(4) Provide information regarding expected system design life and timing of major component replacement or rebuilds. Include in the discussion, costs and labor associated with the operation and maintenance of the system, and plans for in-sourcing or out-sourcing.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives. Describe the budget for and any unique concerns associated with the dismantling and disposal of project components and their wastes. Describe any environmental compliance requirements such as proper disposal or recycling procedures to reduce potential impact from any hazardous chemicals.

Section 7. Solar, Large

The technical requirements specified in this section apply to large solar electric projects and large solar thermal projects, as defined in § 4280.103.

Large solar electric systems are those for which the rated power of the system is larger than 10kW. Large solar electric systems are either stand-alone (off grid) or interconnected to the grid (on grid).

Large solar thermal systems are those for which the rated storage volume of the system is greater than 240 gallons or that have a collector area of more than 1,000 square feet.

(a) *Qualifications of project team.* The large solar project team should consist of an equipment supplier of major components, a project manager, general contractor, system engineer, system installer, and system maintainer. One individual or entity may serve more than one role. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services must be provided. Authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life must also be provided. The application must:

(1) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design/build method, often referred to as turnkey, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(2) Discuss the qualifications of the suppliers of major components being considered;

(3) Discuss the project manager, general contractor, system engineer, and system installer qualifications for engineering, designing, and installing large solar systems, including any relevant certifications by recognized organizations. Provide a list of the same or similar systems designed or installed by the design, engineering, and installation team and currently operating with references, if available; and

(4) Describe the system operator's qualifications and experience for servicing, operating, and maintaining the system for the proposed application. Provide a list of the same or similar systems designed or installed by the design, engineering, and installation team and currently operating with references, if available.

(b) *Agreements, permits, and certifications.* Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (b)(1) through (5).

(1) Identify zoning, building, and electrical code issues, and required permits and the anticipated schedule for meeting those requirements and securing those permits.

(2) Identify available component warranties for the specific project location and size.

(3) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program as their interconnection agreement, describe the applicable local net metering program.

(4) Identify all environmental issues, including environmental compliance issues, associated with the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(5) Submit a statement certifying that the project will be installed in accordance with applicable local, State, and national codes and regulations.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the source of the solar data and assumptions.

(d) *Design and engineering.* Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards.

(1) For large solar electric systems, the engineering must be comprehensive, including solar collector design and selection, support structure design and selection, power conditioning design and selection, surface or submersible water pumps and energy storage requirements as applicable, and selection of cabling, disconnects, and interconnection equipment. A complete set of engineering drawings, stamped by a professional engineer, must be provided.

(2) For large solar thermal systems, the engineering must be comprehensive, including solar collector design and selection, support structure design and selection, pump and piping design and selection, and energy storage design and selection. Provide a complete set of engineering drawings stamped by a professional engineer.

(3) For either type of system, provide a concise but complete description of the large solar system, including location of the project and proposed equipment and system specifications. Identify possible vendors and models of major system components. Provide the expected system energy production based on available solar resource data on a monthly (when possible) and annual basis and how the energy produced by the system will be used.

(4) For either type of system, provide a description of the project site and address issues such as solar access, orientation, proximity to the load or the electrical grid, environmental concerns such as land use, water quality, habitat fragmentation, and aesthetics, unique safety concerns, construction, and installation issues, and whether special circumstances exist.

(e) *Project development schedule.* Identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline, including system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(f) *Project economic assessment.* Provide a study that describes the costs and revenues of the proposed project to demonstrate the financial performance of the project, including the calculation of simple payback. Provide a detailed analysis and description of project costs, including *Design and engineering,* permitting, equipment, site preparation, system installation, system startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. Provide a detailed description of historic or expected energy use and expected energy offsets or sales on a monthly and annual basis. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Large solar systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Provide a detailed description of equipment certification. Identify all the major equipment that is proprietary and justify how this unique equipment is needed to meet the requirements of the proposed design. Include a statement from the applicant certifying that

"open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* Describe fully the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment, including cranes and other devices needed for project construction, and provide a description of the startup and shakedown specifications and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules.

(i) *Operations and maintenance.* Identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The application must:

(1) Ensure that systems must have at least a 5-year warranty for equipment. Provide information regarding system warranty and availability of spare parts;

(2) Describe the routine operations and maintenance requirements of the proposed system, including maintenance schedules for the mechanical, electrical, and software systems;

(3) For owner maintained portions of the system, describe any unique knowledge, skills, or abilities needed for service operations or maintenance; and

(4) Provide information regarding expected system design life and timing of major component replacement or rebuilds. Include in the discussion, costs and labor associated with the operation and maintenance of the system, and plans for in-sourcing or out-sourcing.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives. Describe the budget for and any unique concerns associated with the dismantling and disposal of project components and their wastes. Describe any environmental compliance requirements such as proper disposal or recycling procedures to reduce any potential impact from hazardous chemicals.

Section 8. Wind, Small

The technical requirements specified in this section apply to small wind systems, which are, as defined in § 4280.103, wind energy systems for which the rated power of the wind turbine is 100kW or smaller and with a generator hub height of 120 ft or less. Small wind systems are either stand-alone or connected to the local electrical system at less than 600 volts.

(a) *Qualifications of project team.* The small wind project team should consist of a system designer, a project manager or general contractor, an equipment supplier of major components, a system installer, a system maintainer, and, in some cases, the owner of the application or load served by the system. One individual or entity may serve more than one role. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services must be provided. Authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life must also be provided. The application must:

(1) Discuss the small wind turbine manufacturers and other equipment suppliers of major components being considered in terms of their length of time in business and the number of units installed at the capacity and scale being considered;

(2) Describe the knowledge, skills, and abilities needed to service, operate, and maintain the system for the proposed application; and

(3) Discuss the project manager, system designer, and system installer qualifications for engineering, designing, and installing small wind systems, including any relevant certifications by recognized organizations. Provide a list of the same or similar systems designed, installed, or supplied and currently operating with references, if available.

(b) *Agreements, permits, and certifications.* Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (b)(1) through (5).

(1) Identify zoning, building, and electrical code issues, and required permits and the anticipated schedule for meeting those requirements and securing those permits.

(2) Identify available component warranties for the specific project location and size.

(3) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses, where required, and the anticipated schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program as their interconnection agreement, describe the applicable local net metering program.

(4) Identify all environmental issues, including environmental compliance issues, associated with the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(5) Submit a statement certifying that the project will be installed in accordance with applicable local, State, and national codes and regulations.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the source of the wind data and the conditions of the wind monitoring when collected at the site or assumptions made when applying nearby wind data to the site.

(d) *Design and engineering.* Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Small wind systems must be engineered by either the wind turbine manufacturer or other qualified party. Systems must be offered as a complete, integrated system with matched components. The engineering must be comprehensive, including turbine design and selection, tower design and selection, specification of guy wire anchors and tower foundation, inverter/controller design and selection, energy storage requirements as applicable, and selection of cabling, disconnects, and interconnection equipment, as well as the engineering data needed to match the wind system output to the application load, if applicable.

(1) Provide a concise but complete description of the small wind system, including location of the project, proposed turbine specifications, tower height and type of tower, type of energy storage and location of storage if applicable, proposed inverter manufacturer and model, electric power system interconnection equipment, and application load and load interconnection equipment as applicable. Identify possible vendors and models of major system components. Provide the expected system energy production based on available wind resource data on a monthly (when possible) and annual hasis and how the energy produced by the system will be used.

(2) Describe the project site and address issues such as access to the wind resource, proximity to the electrical grid or application load, environmental concerns with emphasis on historic properties, visibility, noise, bird and bat populations, and wildlife habitat destruction and/or fragmentation, construction, and installation issues and whether special circumstances such as proximity to airports exist. Provide a 360-degree panoramic photograph of the proposed site, including indication of prevailing winds when possible.

(e) *Project development schedule.* Identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline, including system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(f) *Project economic assessment.* Provide a study that describes the costs and revenues of the proposed project to demonstrate the financial performance of the project, including the calculation of simple payback. Provide a detailed analysis and description of project costs, including design, permitting, equipment, site preparation, system installation, system startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. Provide a detailed description of historic or expected energy use and expected energy offsets or sales on a monthly and annual basis. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Demonstrate that equipment required by the system is available and can be procured and delivered

within the proposed project development schedule. Small wind systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Provide a detailed description of equipment certification. Identify all the major equipment that is proprietary and justify how this unique equipment is needed to meet the requirements of the proposed design. Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* Describe fully the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment, including cranes and other devices needed for project construction, and provide a description of the startup and shakedown specifications and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules.

(i) *Operations and maintenance.* Identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The application must:

(1) Ensure that systems must have at least a 5-year warranty for equipment and a commitment from the supplier to have spare parts available. Provide information regarding system warranty and availability of spare parts;

(2) Describe the routine operations and maintenance requirements of the proposed system, including maintenance schedules for the mechanical, electrical, and software systems;

(3) Provide historical or engineering information that supports expected design life of the system and timing of major component replacement or rebuilds. Include in the discussion, costs and labor associated with the operation and maintenance of the system, and plans for in-sourcing or out-sourcing; and

(4) For owner maintained portions of the system, describe any unique knowledge, skills, or abilities needed for service operations or maintenance.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives. Describe the budget for and any unique concerns associated with the dismantling and disposal of project components and their wastes.

Section 9. Wind, Large

The technical requirements specified in this section apply to wind energy systems, which are, as defined in § 4280.103, wind energy projects for which the rated power of the individual wind turbine(s) is larger than 100kW.

(a) *Qualifications of project team.* The large wind project team should consist of a project manager, a meteorologist, an equipment supplier, a project engineer, a primary or general contractor, construction contractor, and a system operator and maintainer and, in some cases, the owner of the application or load served by the system. One individual or entity may serve more than one role. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services must be provided. Authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life must also be provided. The application must:

(1) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design/build method, often referred to as turnkey, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(2) Discuss the large wind turbine manufacturers and other equipment suppliers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(3) Discuss the project manager, equipment supplier, project engineer, and construction contractor qualifications for engineering, designing, and installing large wind systems, including any relevant certifications by recognized organizations. Provide a list of the same or similar projects designed, installed, or supplied and currently operating with references, if available;

(4) Discuss the qualifications of the meteorologist, including references; and

(5) Describe system operator's qualifications and experience for servicing, operating, and maintaining the system for the proposed application. Provide a list of the same or similar projects designed, installed, or supplied and currently operating with references, if available.

(b) *Agreements, permits, and certifications.* Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (b)(1) through (6).

(1) Identify zoning, building, and electrical code issues, and required permits and the anticipated schedule for meeting those requirements and securing those permits.

(2) Identify land use agreements required for the project and the anticipated schedule for securing the agreements and the term of those agreements.

(3) Identify available component warranties for the specific project location and size.

(4) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements.

(5) Identify all environmental issues, including environmental compliance issues, associated with the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(6) Submit a statement certifying that the project will be installed in accordance with applicable local, State, and national codes and regulations.

(c) *Resources assessment.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Projects greater than 500kW must obtain wind data from the proposed project site. For such projects, describe the proposed measurement setup for the collection of the wind resource data. For proposed projects with an established wind resource, provide a summary of the wind resource and the specifications of the measurement setup. Large wind systems larger than 500kW in size will typically require at least 1 year of on-site monitoring. If less than 1 year of data is used, the qualified meteorological consultant must provide a detailed analysis of the correlation between the site data and a nearby, long-term measurement site.

(d) *Design and engineering.* Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Large wind systems must be engineered by a qualified party. Systems must be engineered as complete, integrated systems with matched components. The engineering must be comprehensive, including site selection, turbine selection, tower selection, tower foundation, design of the local collection grid, interconnection equipment selection, and system monitoring equipment. For stand-alone, non-grid applications, engineering information must be provided that demonstrates appropriate matching of wind turbine and load.

(1) Provide a concise, but complete, description of the large wind project, including location of the project, proposed turbine specifications, tower height and type of tower, the collection grid, interconnection equipment, and monitoring equipment. Identify possible vendors and models of major system components. Provide the expected system energy production based on available wind resource data on a monthly and annual basis. For wind projects larger than 500kW in size, provide the expected system energy production over the life of the project, including a discussion on inter-annual variation using a comparison of the on-site monitoring data with long-term meteorological data from a nearby monitored site.

(2) Describe the project site and address issues such as site access, proximity to the electrical grid or application load, environmental concerns with emphasis on historic properties, visibility, noise, bird and bat populations, and wildlife habitat destruction and/or fragmentation, construction, and installation issues and

whether special circumstances such as proximity to airports exist.

(e) *Project development schedule.* Identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline, including resource assessment, system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(f) *Project economic assessment.* Provide a study that describes the costs and revenues of the proposed project to demonstrate the financial performance of the proposed project. Provide a detailed analysis and description of project costs, including project management, resource assessment, project design, project permitting, land agreements, equipment, site preparation, system installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. Provide a detailed analysis and description of annual project revenues, including electricity sales, production tax credits, revenues from green tags, and any other production incentive programs throughout the life of the project. Provide a description of planned contingency fees or reserve funds to be used for unexpected large component replacement or repairs and for low productivity periods. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Large wind turbines may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Provide a detailed description of equipment certification. Identify all the major equipment that is proprietary and justify how this unique equipment is needed to meet the requirements of the proposed design. Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* Describe fully the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment, including cranes or other devices, needed for project construction, and provide a description of the startup and shakedown specifications and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules.

(i) *Operations and maintenance.* Identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The application must:

(1) Ensure that systems must have at least a 3-year warranty for equipment. Provide information regarding turbine warranties and availability of spare parts;

(2) Describe the routine operations and maintenance requirements of the proposed project, including maintenance schedules for the mechanical and electrical systems and system monitoring and control requirements;

(3) Provide information that supports expected design life of the system and timing of major component replacement or rebuilds;

(4) Provide and discuss the risk management plan for handling large, potential failures of major components such as the turbine gearbox or rotor. Include in the discussion, costs and labor associated with the operation and maintenance of the system, and plans for in-sourcing or out-sourcing;

(5) Describe opportunities for technology transfer for long-term project operations and maintenance by a local entity or owner/operator; and

(6) For owner maintained portions of the system, describe any unique knowledge, skills, or abilities needed for service operations or maintenance.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives. Describe the budget for and any unique concerns associated with the dismantling and disposal of project components and their wastes.

Section 10. Energy Efficiency Improvements

The technical requirements specified in this section apply to projects that involve energy efficiency improvements, which are, as defined in § 4280.103, improvements to a facility, building, or process that reduce energy consumption, or reduce energy consumed per square foot. The system engineering for such projects must be performed by a qualified party or certified Professional Engineer.

(a) *Qualifications of project team.* The energy efficiency project team is expected to consist of an energy auditor or other service provider, a project manager, an equipment supplier of major components, a project engineer, and a construction contractor or system installer. One individual or entity may serve more than one role. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services must be provided. Authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life must also be provided. The application must:

(1) Discuss the qualifications of the various project team members, including any relevant certifications by recognized organizations;

(2) Describe qualifications or experience of the team as related to installation, service, operation and maintenance of the project;

(3) Provide a list of the same or similarly engineered projects designed, installed, or supplied by the team or by team members and currently operating. Provide references if available; and

(4) Discuss the manufacturers of major energy efficiency equipment being considered, including length of time in business.

(b) *Agreements, permits, and certifications.* Identify all necessary agreements and permits required for the energy efficiency improvement(s) and the status and anticipated schedule for securing those agreements and permits, including the items specified in paragraphs (b)(1) through (4). The applicant must also submit a statement certifying that the applicant will comply with all necessary agreements and permits for the energy efficiency improvement(s).

(1) Identify building code, electrical code, and zoning issues and required permits, and the anticipated schedule for meeting those requirements and securing those permits.

(2) Identify available component warranties for the specific project location and size.

(3) Identify all environmental issues, including environmental compliance issues, associated with the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(4) Submit a statement certifying that the project will be installed in accordance with applicable local, State, and national codes and regulations.

(c) *Energy audits.* For all energy efficiency improvement projects, provide adequate and appropriate evidence of energy savings expected when the system is operated as designed.

(1) An energy audit is a written report by an independent, qualified party that documents current energy usage, recommended potential improvements and their costs, energy savings from these improvements, dollars saved per year, and simple payback. The methodology of the energy audit must meet professional and industry standards.

(2) The energy audit must cover the following:

(i) *Situation report.* Provide a narrative description of the facility or process, its energy system(s) and usage, and activity profile. Also include price per unit of energy (electricity, natural gas, propane, fuel oil, renewable energy, etc.,) paid by the customer on the date of the audit. Any energy conversion should be based on use rather than source.

(ii) *Potential improvements.* List specific information on all potential energy-saving opportunities and the associated costs.

(iii) *Technical analysis.* Discuss the interactions of the potential improvements with existing energy systems.

(A) Estimate the annual energy and energy costs savings expected from each improvement identified in the potential project.

(B) Calculate all direct and attendant indirect costs of each improvement.

(C) Rank potential improvement measures by cost-effectiveness.

(iv) *Potential improvement description.* Provide a narrative summary of the potential improvement and its ability to provide needed benefits, including a discussion of non-energy benefits such as project reliability and durability.

(A) Provide preliminary specifications for critical components.

(B) Provide preliminary drawings of project layout, including any related structural changes.

(C) Document baseline data compared to projected consumption, together with any explanatory notes. Provide the actual total quantity of energy used (BTU) in the original building and/or equipment in the 12 months prior to the EEI project and the projected energy usage after the EEI project shall be the projected total quantity of energy used (BTU) on an annual basis for the same size or capacity as the original building or equipment. For energy efficiency improvement to equipment, if the new piece of equipment has a different capacity than the piece of equipment being replaced, the projected total quantity of energy used for the new piece of equipment shall be adjusted based on the ratio of the capacity of the replaced piece of equipment to the capacity of the new piece of equipment in accordance with the regulation. When appropriate, show before-and-after data in terms of consumption per unit of production, time or area. Include at least 1 year's bills for those energy sources/fuel types affected by this project. Also submit utility rate schedules, if appropriate.

(D) Identify significant changes in future related operations and maintenance costs.

(E) Describe explicitly how outcomes will be measured.

(d) *Design and engineering.* Provide authoritative evidence that the energy efficiency improvement(s) will be designed and engineered so as to meet its intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards.

(1) Energy efficiency improvement projects in excess of $50,000 must be engineered by a qualified party. Systems must be engineered as a complete, integrated system with matched components.

(2) For all energy efficiency improvement projects, identify and itemize major energy efficiency improvements, including associated project costs. Specifically delineate which costs of the project are directly associated with energy efficiency improvements. Describe the components, materials or systems to be installed and how they improve the energy efficiency of the process or facility being modified. Discuss passive improvements that reduce energy loads, such as improving the thermal efficiency of a storage facility, and active improvements that directly reduce energy consumption, such as replacing existing energy consuming equipment with high efficiency equipment, as separate topics. Discuss any anticipated synergy between active and passive improvements or other energy systems. Include in the discussion any change in on-site effluents, pollutants, or other by-products.

(3) Identify possible suppliers and models of major pieces of equipment.

(e) *Project development schedule.* Identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline, including energy audit (if applicable), system and site design, permits and agreements, equipment procurement, and system installation from site preparation through startup and shakedown.

(f) *Project economic assessment.* For projects whose total eligible costs are greater than $50,000, provide an analysis of the proposed project to demonstrate its financial performance, including the calculation of simple payback. The analysis should include applicable investment incentives, productivity incentives, loans and grants, and expected energy offsets or sales on a monthly and annual basis. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Demonstrate that equipment required for the energy efficiency improvement(s) is available and can be procured and delivered within the proposed project development schedule. Energy efficiency improvements may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Provide a detailed description of equipment certification. Identify all the major equipment that is proprietary and justify how this unique equipment is needed to meet the requirements of the proposed design. Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* Describe fully the management of and plan for installation of the energy efficiency improvement(s), identify specific issues associated with installation, provide details regarding the scheduling of major installation equipment needed for project discussion, and provide a description of the startup and shakedown specifications and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole. Include in this discussion any unique concerns, such as the effects of energy efficiency improvements on system power quality. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules.

(i) *Operations and maintenance.* Identify the operations and maintenance requirements of the energy efficiency improvement(s) necessary for the energy efficiency improvement(s) to perform as designed over the design life. The application must:

(1) Provide information regarding component warranties and the availability of spare parts;

(2) Describe the routine operation and maintenance requirements of the proposed project, including maintenance schedules for the mechanical and electrical systems and system monitoring and control requirements;

(3) Provide information that supports expected design life of the improvement(s) and timing of major component replacement or rebuilds;

(4) Provide and discuss the risk management plan for handling large, potential failures of major components. Include in the discussion, costs and labor associated with the operation and maintenance of the improvement(s), and plans for in-sourcing or out-sourcing; and

(5) For owner maintained portions of the improvement(s), describe any unique knowledge, skills, or abilities needed for service operations or maintenance.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives. Describe the budget for and any unique concerns associated with the dismantling and disposal of project components and their wastes.

Appendix C to Subpart B of Part 4280—Technical Report for Hydropower Projects

The technical requirements specified in this appendix apply to all hydropower projects. Hydropower projects are those projects that create hydroelectric or ocean energy.

The Technical Report for hydropower projects must demonstrate that the project design, procurement, installation, startup, operation, and maintenance of the renewable energy system will operate or perform as specified over its design life in a reliable and a cost-effective manner. The Technical Report must also identify all necessary project agreements, demonstrate that those agreements will be in place, and that necessary project equipment and services are available over the design life.

All technical information provided must follow the format specified in this appendix. Supporting information may be submitted in other formats. Design drawings and process flowcharts are encouraged as exhibits. A discussion of each topic is not necessary if the topic is not applicable to the specific project. Questions identified in the Agency's technical review of the project must be answered to the Agency's satisfaction before the application will be approved. The applicant must submit the original Technical Report plus one copy to the Rural Development State Office. Hydropower projects with total eligible project costs greater than $400,000 require the services of a licensed professional engineer (PE) or team of PEs. Depending on the level of engineering required for the specific project or if necessary to ensure public safety, the services of a licensed PE or a team of licensed PEs may be required for smaller projects.

(a) *Qualifications of project team.* The hydropower project team should consist of a system designer, a project manager, an equipment supplier, a project engineer, a construction contractor, and a system operator and maintainer. One individual or entity may serve more than one role. The

project team must have demonstrated expertise in hydropower development, engineering, installation, and maintenance. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services must be provided. Authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life must also be provided. The application must:

(1) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design/build method, often referred to as turnkey, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(2) Discuss the hydropower equipment manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(3) Discuss the project manager, equipment supplier, system designer, project engineer, and construction contractor qualifications for engineering, designing, and installing hydropower systems, including any relevant certifications by recognized organizations. Provide a list of the same or similar projects designed, installed, or supplied and currently operating with references, if available; and

(4) Describe the system operator's qualifications and experience for servicing, operating, and maintaining hydropower projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating with references, if available.

(b) *Agreements, permits, and certifications.* Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (b)(1) through (b)(6).

(1) Identify zoning and code issues and required permits and the anticipated schedule for meeting those requirements and securing those permits. This list should include all local, state, and federal permits required, estimated timeline for each permit and current status of acquiring each permit.

(2) Identify land use agreements required for the project and the anticipated schedule for securing the agreements and the term of those agreements.

(3) Identify available component warranties for the specific project location and size.

(4) For systems planning to interconnect with a utility, describe the utility's system interconnection requirements, power purchase agreements, or licenses where required and the anticipated schedule for meeting those requirements and obtaining those agreements.

(5) Identify all environmental issues, including environmental compliance issues, associated with the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G. (Note: The environmental review process, including all required publications, must be completed prior to approval of any Rural Development funding.) The applicant may want to work with all Federal organizations involved with the project to promulgate a single environmental review document.

(6) Submit a statement certifying that the project will be installed in accordance with applicable local, State, and national codes, regulations, and permits.

(c) *Resource assessment.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the quality of the resource, including temperature (if applicable), flow, and sustainability of the resource, including a summary of the resource evaluation process and the specifications of the measurement setup and the date and duration of the evaluation process and proximity to the proposed site. If less than 1 year of data is used, a qualified consultant must provide a detailed analysis of the correlation between the site data and a nearby, long-term measurement site.

(d) *Design and engineering.* Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified party. Systems must be engineered as a complete, integrated system with matched components. The engineering must be comprehensive, including site selection, system and component selection, conversion system component selection, design of the local collection grid, interconnection equipment selection, and system monitoring equipment. Systems must be constructed by a qualified party.

(1) Provide a concise but complete description of the hydropower project, including location of the project, resource characteristics, system specifications, electric power system interconnection equipment and project monitoring equipment. Identify possible vendors and models of major system components. Provide the expected system energy production on a monthly and annual basis.

(2) Describe the project site and address issues such as site access, proximity to the electrical grid, environmental concerns with emphasis on land use, air quality, water quality, habitat fragmentation, visibility, noise, construction, and installation issues. Identify any unique construction and installation issues.

(e) *Project development schedule.* Identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline, including resource assessment, system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(f) *Project economic assessment.* Provide a study that describes the costs and revenues of the proposed project to demonstrate the financial performance of the proposed project. Provide a detailed analysis and description of project costs, including project management, resource assessment, project design, project permitting, land agreements, equipment, site preparation, system installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. Provide a detailed analysis and description of annual project revenues, including electricity sales, production tax credits, revenues from green tags, and any other production incentive programs throughout the life of the project. Provide a description of planned contingency fees or reserve funds to be used for unexpected large component replacement or repairs and for low productivity periods. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Hydropower systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Provide a detailed description of equipment certification. Identify all the major equipment that is proprietary and justify how this unique equipment is needed to meet the requirements of the proposed design. Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015 of this title.

(h) *Equipment installation.* Describe fully the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment, including cranes, barges or other devices, needed for project construction, and provide a description of the startup and shakedown specifications and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules.

(i) *Operations and maintenance.* Identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The application must:

(1) Ensure that systems must have at least a 3-year warranty for equipment. Provide information regarding turbine warranties and availability of spare parts;

(2) Describe the routine operations and maintenance requirements of the proposed project, including maintenance schedules for the mechanical and electrical systems and system monitoring and control requirements;

(3) Provide information that supports expected design life of the system and timing of major component replacement or rebuilds;

(4) Provide and discuss the risk management plan for handling large, potential failures of major components such as the turbine gearbox or rotor. Include in the discussion, costs and labor associated with the operation and maintenance of the system, and plans for in-sourcing or out-sourcing;

(5) Describe opportunities for technology transfer for long-term project operations and maintenance by a local entity or owner/operator; and

(6) For owner maintained portions of the system, describe any unique knowledge, skills, or abilities needed for service operations or maintenance.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives. Describe the budget for and any unique concerns associated with the dismantling and disposal of project components and their wastes.

Appendix D to Subpart B of Part 4280—Technical Report for Flexible Fuel Pumps

The technical requirements specified in this appendix apply to flexible fuel pump projects, as defined in § 4280.103.

(a) *Qualifications of project team.* The flexible fuel pump project team is expected to consist of a project manager, an equipment supplier of major components, a project engineer, and a construction contractor or system installer. One individual or entity may serve more than one role. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services must be provided. Authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life must also be provided. The application must:

(1) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design/build method, often referred to as turnkey, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(2) Discuss the flexible fuel system equipment, manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(3) Discuss the project manager, equipment supplier, system designer, project engineer, and construction contractor qualifications for engineering, designing, and installing fuel dispensing systems, including any relevant certifications by recognized organizations. Provide a list of the same or similar projects designed, installed, or supplied and currently operating with references, if available; and

(4) Describe the system operator's qualifications and experience for servicing, operating, and maintaining fuel dispensing equipment or projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating with references, if available.

(b) *Agreements, permits, and certifications.* Identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (b)(1) through (b)(8).

(1) Include Underwriters Laboratory certifications for installed flexible fuel pumps.

(2) Identify zoning and code issues and required permits and the anticipated schedule for meeting those requirements and securing those permits.

(3) Identify licenses where required and the schedule for obtaining those licenses.

(4) Identify land use agreements required for the project and the anticipated schedule for securing the agreements and the term of those agreements.

(5) Identify any permits or agreements required for solid, liquid, and gaseous emissions or effluents and the schedule for securing those permits and agreements.

(6) Identify available component warranties for the specific project location and size.

(7) Identify all environmental issues, including environmental compliance issues, associated with the project on Form RD 1940–20, "Request for Environmental Information," and in compliance with 7 CFR part 1940, subpart G of this title.

(8) Submit a statement certifying that the project will be installed in accordance with applicable local, State, and national codes and regulations.

(c) *Resource assessment.* Provide adequate and appropriate data to demonstrate the amount of renewable fuels available. Indicate the type, quantity, and quality and the demand for that fuel in its service area.

(d) *Design and engineering.* Provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified party. Systems must be engineered as a complete, integrated system with matched components. The engineering must be comprehensive, including site selection, system and component selections, and system monitoring equipment. Systems must be constructed by a qualified party.

(1) Provide a concise but complete description of the flexible fuel pump project, including location of the project, resource characteristics, system specifications, electric power system, fire suppression systems, and monitoring equipment. Identify possible vendors and models of major system components. Describe the system capacity, storage tank(s), and dispensing apparatus of the proposed system as rated and as expected in actual field conditions.

(2) Describe the project site and address issues such as site access, foundations, backup equipment when applicable, and environmental concerns with emphasis on land use, air quality, water quality, soil degradation, habitat fragmentation, land use, visibility, odor, noise, construction, and installation issues. Identify any unique construction and installation issues.

(e) *Project development schedule.* Identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline, including resource assessment, system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(f) *Project economic assessment.* Provide a report that describes the costs and revenues of the proposed project to demonstrate the financial performance of the project (the projected increase in annual net income resulting by the installation of the project) and include the calculation of simple payback. Provide a detailed analysis and description of project costs, including project management, resource assessment, project design, project permitting, equipment, site preparation, system installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed analysis and description of annual project revenues and expenses. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. In addition, provide other information necessary to assess the project's cost effectiveness.

(g) *Equipment procurement.* Demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Flexible fuel systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Identify all the major equipment that is proprietary and justify how this unique equipment is needed to meet the requirements of the proposed design. Include a statement from the applicant certifying that "open and free" competition will be used for the procurement of project components in a manner consistent with the requirements of 7 CFR part 3015.

(h) *Equipment installation.* Fully describe the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment needed for project construction, and provide a description of the startup and shakedown specifications and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole. Include a statement from the applicant certifying that equipment installation will be made in accordance with all applicable safety and work rules.

(i) *Operations and maintenance.* Identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. In addition:

(1) Provide information regarding available system and component warranties and availability of spare parts;

(2) Describe the routine operations and maintenance requirements of the proposed system, including maintenance schedule for the mechanical, piping, and electrical systems and system monitoring and control requirements. Provide information that supports expected design life of the system and timing of major component replacement or rebuilds. Discuss the costs and labor associated with the operation and maintenance of the system, and plans for in-sourcing or out-sourcing. Water infiltration should be checked daily. Replace filters if pump/dispenser is running slowly. Check/calibrate pump two weeks after initial load conversion.

(j) *Dismantling and disposal of project components.* Describe a plan for dismantling and disposing of project components and associated wastes at the end of their useful lives. Describe the budget for and any unique concerns associated with the dismantling and disposal of project components and their wastes.

Appendix E to Subpart B of Part 4280—Feasibility Study Content

Elements in an acceptable feasibility study include, but are not necessarily limited to, the elements specified in Sections A through G, as applicable, of this Appendix. Both a technical report for the project and an economic analysis of the project are required as part of the feasibility study. The technical report to be provided must conform to that required under Appendix A, B, C, or D of this subpart, as applicable.

Section A. Executive Summary. Provide an introduction and overview of the project. In the overview, describe the nature and scope of the proposed project, including purpose, project location, design features, capacity, and estimated total capital cost. Include a summary of each of the elements of the feasibility study, including:

(1) Economic feasibility determinations;

(2) Market feasibility determinations;

(3) Technical feasibility determinations;

(4) Financial feasibility determinations;

(5) Management feasibility determinations; and

(6) Recommendations for implementation of the proposed project.

Section B. Economic Feasibility. Provide information regarding project site; the availability of trained or trainable labor; and the availability of infrastructure, including utilities, and rail, air and road service to the site. Discuss feedstock source management, including feedstock collection, pre-treatment, transportation, and storage, and provide estimates of feedstock volumes and costs. Discuss the proposed project's potential impacts on existing manufacturing plants or other facilities that use similar feedstock if the proposed technology is adopted. Provide projected impacts of the proposed project on resource conservation, public health, and the environment. Provide an overall economic impact of the project including any additional markets created (*e.g.*, for agricultural and forestry products and agricultural waste material) and potential for rural economic development. Provide feasibility/plans of project to work with producer associations or cooperatives including estimated amount of annual feedstock and biofuel and byproduct dollars from producer associations and cooperatives.

Section C. Market Feasibility. Provide information on the sales organization and management. Discuss the nature and extent of market and market area and provide marketing plans for sale of projected output, including both the principal products and the by-products. Discuss the extent of competition including other similar facilities in the market area. Provide projected total supply of and projected competitive demand for raw materials. Describe the procurement plan, including projected procurement costs and the form of commitment of raw materials (*e.g.*, marketing agreements, etc.). Identify commitments from customers or brokers for both the principal products and the by-products. Discuss all risks related to the industry, including industry status.

Section D. Technical Feasibility. The technical feasibility report shall be based upon verifiable data and contain sufficient information and analysis so that a determination may be made on the technical feasibility of achieving the levels of income or production that are projected in the financial statements. The project engineer or architect is considered an independent party provided neither the principals of the firm nor any individual of the firm who participates in the technical feasibility report has a financial interest in the project. If no other individual or firm with the expertise necessary to make such a determination is reasonably available to perform the function, an individual or firm that is not independent may be used.

(1) Identify any constraints or limitations in the financial projections and any other facility or design-related factors that might affect the success of the enterprise. Identify and estimate project operation and development costs and specify the level of accuracy of these estimates and the assumptions on which these estimates have been based.

(2) Discuss all risks related to construction of the project and regulation and governmental action as they affect the technical feasibility of the project.

Section E. Financial Feasibility. Discuss the reliability of the financial projections and assumptions on which the financial statements are based including all sources of project capital both private and public, such as Federal funds. Provide 3 years (minimum) projected Balance Sheets and Income Statements and cash flow projections for the life of the project. Discuss the ability of the business to achieve the projected income and cash flow. Provide an assessment of the cost accounting system. Discuss the availability of short-term credit or other means to meet seasonable business costs and the adequacy of raw materials and supplies. Provide a sensitivity analysis, including feedstock and energy costs. Discuss all risks related to the project, financing plan, the operational units, and tax issues.

Section F. Management Feasibility. Discuss the continuity and adequacy of management. Identify applicant and/or management's previous experience concerning the receipt of federal financial assistance, including amount of funding, date received, purpose, and outcome. Discuss all risks related to the applicant as a company (e.g., applicant is at the Development-Stage) and conflicts of interest, including appearances of conflicts of interest.

Section G. Qualifications. Provide a resume or statement of qualifications of the author of the feasibility study, including prior experience.

Appendixes A and B to Part 4280 [Removed]

■ 3. Appendixes A and B to part 4280 are removed.

Dated: April 1, 2011.

Dallas Tonsager,

Under Secretary, Rural Development.

[FR Doc. 2011–8460 Filed 4–13–11; 8:45 am]

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FEDERAL REGISTER

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Part III

Department of the Treasury

Office of the Comptroller of the Currency
12 CFR Part 42

Federal Reserve System

12 CFR Part 236

Federal Deposit Insurance Corporation

12 CFR Part 372

Department of the Treasury

Office of Thrift Supervision
12 CFR Part 563h

National Credit Union Administration

12 CFR Parts 741 and 751

Securities and Exchange Commission

17 CFR Part 248

Federal Housing Finance Agency

12 CFR Part 1232
Incentive-Based Compensation Arrangements; Proposed Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 42

[Docket No. OCC–2011–0001]

RIN 1557–AD39

FEDERAL RESERVE SYSTEM

12 CFR Part 236

[Docket No. R–1410]

RIN 7100–AD69

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 372

RIN 3064–AD56

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 563h

[Docket No. OTS–2011–0004]

RIN 1550–AC49

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 741 and 751

RIN 3133–AD88

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 248

[Release No. 34–64140; File no. S7–12–11]

RIN 3235–AL06

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1232

RIN 2590–AA42

Incentive-Based Compensation Arrangements

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision, Treasury (OTS); National Credit Union Administration (NCUA); U.S. Securities and Exchange Commission (SEC); and Federal Housing Finance Agency (FHFA).

ACTION: Proposed Rule.

SUMMARY: The OCC, Board, FDIC, OTS, NCUA, SEC, and FHFA (the Agencies) are proposing rules to implement section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The proposed rule would require the reporting of incentive-based compensation arrangements by a covered financial institution and prohibit incentive-based compensation arrangements at a covered financial institution that provide excessive compensation or that could expose the institution to inappropriate risks that could lead to material financial loss.

DATES: Comments must be received by May 31, 2011.

ADDRESSES: Although the Agencies will jointly review all the comments submitted, it would facilitate review of the comments if interested parties send comments to the Agency that is the appropriate Federal regulator, as defined in section 956(e) of the Dodd-Frank Act for the type of covered financial institution addressed in the comments. Commenters are encouraged to use the title "Incentive-based Compensation Arrangements" to facilitate the organization and distribution of comments among the Agencies. Interested parties are invited to submit written comments to:

Office of the Comptroller of the Currency: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or e-mail, if possible. Please use the title "Incentive-based Compensation Arrangements" to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—Regulations.gov:* Go to *http://www.regulations.gov*. Select "Document Type" of "Proposed Rule", and in "Enter Keyword or ID Box", enter Docket ID "OCC–2011–0001", and click "Search." On "View By Relevance" tab at bottom of screen, in the "Agency" column, locate the proposed rule for OCC, in the "Action" column, click on "Submit a Comment" or "Open Docket Folder" to submit or view public comments and to view supporting and related materials for this proposed rule.
- Click on the "Help" tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.
- *E-mail: regs.comments@occ.treas.gov.*
- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.
- *Fax:* (202) 874–5274.
- *Hand Delivery/Courier:* 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.

Instructions: You must include "OCC" as the agency name and "Docket ID OCC–2011–0001" in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this proposed rule by any of the following methods:

- *Viewing Comments Electronically:* Go to *http://www.regulations.gov*. Select "Document Type" of "Public Submission," in "Enter Keyword or ID Box," enter Docket ID "OCC–2011–0001", and click "Search." Comments will be listed under "View By Relevance" tab at bottom of screen. If comments from more than one agency are listed, the "Agency" column will indicate which comments were received by the OCC.
- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.
- *Docket:* You may also view or request available background documents and project summaries using the methods described above.

Board of Governors of the Federal Reserve System: You may submit comments, identified by Docket No. R–1410 and RIN No. 7100–AD69, 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.

• *E-mail: regs.comments@federalreserve.gov.* Include the docket number and RIN number in the subject line of the message.

• *Fax:* (202) 452–3819 or (202) 452–3102.

• *Mail:* Address to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments will be made available on the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

Federal Deposit Insurance Corporation: You may submit comments, identified by RIN number, by any of the following methods:

• *Agency Web Site: http://www.FDIC.gov/regulations/laws/federal/propose.html.* Follow instructions for submitting comments on the Agency Web Site.

• *E-mail: Comments@FDIC.gov.* Include the RIN number on the subject line of the message.

• *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

• *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Instructions: All comments received must include the agency name and RIN for this rulemaking and will be posted without change to *http://www.fdic.gov/regulations/laws/Federal/propose.html,* including any personal information provided.

Office of Thrift Supervision: You may submit comments, identified by OTS–2011–0004, by any of the following methods:

• *Federal eRulemaking Portal—Regulations.gov:* Go to *http://www.regulations.gov* and follow the directions.

• *E-mail: regs.comments@ots.treas.gov.* Please include OTS–2011–0004 in the subject line of the message and include your name and telephone number in the message.

• *Mail:* Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552. Attention: OTS–2011–0004.

• *Facsimile:* (202) 906–6518.

• *Hand Delivery/Courier:* Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, Attention: OTS–2011–0004.

• *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be entered into the docket and posted on Regulations.gov without change, including any personal information provided. Comments, including attachments and other supporting materials received, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

• *Viewing Comments On-Site:* You may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–6518. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

National Credit Union Administration: You may submit comments by any of the following methods (please send comments by one method only): *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Agency Web site: http://www.ncua.gov/Resources/RegulationsOpinionsLaws/ProposedRegulations.aspx.* Follow the instructions for submitting comments.

• *E-mail:* Address to *regcomments@ncua.gov.* Include "[Your name] Comments on "Notice of Proposed Rulemaking for Incentive-based Compensation Arrangements" in the e-mail subject line.

• *Fax:* (703) 518–6319. Use the subject line described above for e-mail.

• *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

• *Hand Delivery/Courier:* Same as mail address.

• *Public Inspection:* All public comments are available on the agency's Web site at *http://www.ncua.gov/Resources/RegulationsOpinionsLaws/ProposedRegulations.aspx* as submitted, except when not possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6546 or send an e-mail to *OGCMail@ncua.gov.*

Securities and Exchange Commission: You may submit comments by the following method:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/exorders.shtml*); or

• Send an e-mail to *rule-comments@sec.gov* Please include File Number S7–12–11 on the subject line; or

• Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

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 S7–12–11. This file number should be included on the subject line if e-mail is used. To help us 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/proposed.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F St., NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. 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.

Federal Housing Finance Agency: You may submit your written comments on the proposed rulemaking, identified by RIN number 2590–AA42, by any of the following methods:

- *E-mail:* Comments to Alfred M. Pollard, General Counsel, may be sent by e-mail at *RegComments@fhfa.gov*. Please include "RIN 2590–AA42" 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 e-mail to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by the Agency. Please include "RIN 2590–AA42" in the subject line of the message.
- *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–AA42, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552.
- *Hand Delivery/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA42, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. A hand-delivered package should be logged at the Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

All comments received by the deadline will be posted for public inspection on the FHFA Web site at *http://www.fhfa.gov*. Copies of all comments timely received will be available for public inspection and copying at the address above on government-business days between the hours of 10 a.m. and 3 p.m. To make an appointment to inspect comments please call the Office of General Counsel at (202) 414–6924.

FOR FURTHER INFORMATION CONTACT:

OCC: Michele Meyer, Assistant Director, and Patrick Tierney, Counsel, Legislative and Regulatory Activities, (202) 874–5090, and Karen Kwilosz, Director, Operational Risk Policy, (202) 874–5350, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Michael Waldron, Counsel, (202) 452–2798, or Amanda Allexon, Counsel, (202) 452–3818, Legal Division; William F. Treacy, Advisor, (202) 452–3859, or Meg Donovan, Supervisory Financial Analyst, (202) 452–7542, Division of Banking Supervision and Regulation; Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

FDIC: Steven D. Fritts, Associate Director, Risk Management Policy Branch, DSC, (202) 898–3723; Melinda West, Chief, Policy & Program Development, DSC, (202) 898–7221, George Parkerson, Senior Policy Analyst, (202) 898–3648; Rose Kushmeider, Senior Financial Economist, (202) 898–3861; Daniel Lonergan, Counsel, (202) 898–6791, Rodney Ray, Counsel, (202) 898–3556, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

OTS: Mary Jo Johnson, Senior Project Manager, Examination Programs, (202) 906–5739, Richard Bennett, Senior Compliance Counsel, Regulations and Legislation Division, (202) 906–7409; Robyn Dennis, Director, Examination Programs, (202) 906–5751; James Caton, Managing Director, Economic and Industry Analysis, (202) 906–5680, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

NCUA: Regina Metz, Staff Attorney, Office of General Counsel, (703) 518–6561; or Vickie Apperson, Program Officer, Office of Examination & Insurance, (703) 518–6385, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314.

SEC: Raymond A. Lombardo, Branch Chief, Division of Trading & Markets, (202) 551–5755; Timothy C. Fox, Special Counsel, Division of Trading & Markets, (202) 551–5687; Nadya B. Roytblat, Assistant Chief Counsel, Division of Investment Management, (202) 551–6823; or Jennifer R. Porter, Attorney-Advisor, Division of Investment Management, (202) 551–6787, United States Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

FHFA: Alfred M. Pollard, General Counsel, (202) 414–3788 or Patrick J. Lawler, Associate Director and Chief Economist (202) 414–3746, Federal Housing Finance Agency, Fourth Floor, 1700 G Street NW., Washington, DC 20552. The telephone number of the Telecommunications Device for the Deaf is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act") (Pub. L. 111–203, section 956, 124 Stat. 1376, 2011–2018 (2010)), which was signed into law on July 21, 2010, requires the Agencies to jointly prescribe regulations or guidelines with respect to incentive-based compensation practices at covered financial institutions. Specifically, section 956 of the Dodd-Frank Act (codified at 12 U.S.C. 5641) requires that the Agencies prohibit incentive-based payment arrangements, or any feature of any such arrangement, at a covered financial institution that the Agencies determine encourages inappropriate risks by a financial institution by providing excessive compensation or that could lead to material financial loss. Under the Act, a covered financial institution also must disclose to its appropriate Federal regulator the structure of its incentive-based compensation arrangements sufficient to determine whether the structure provides "excessive compensation, fees, or benefits" or "could lead to material financial loss" to the institution. The Dodd-Frank Act does not require a covered financial institution to report the actual compensation of particular individuals as part of this requirement.

The Act defines "covered financial institution" to include any of the following types of institutions that have $1 billion or more in assets: (A) A depository institution or depository institution holding company, as such terms are defined in section 3 of the Federal Deposit Insurance Act ("FDIA") (12 U.S.C. 1813); (B) a broker-dealer registered under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o); (C) a credit union, as described in section 19(b)(1)(A)(iv) of the Federal Reserve Act; (D) an investment adviser, as such term is defined in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11)); (E) the Federal National Mortgage Association (Fannie Mae); (F) the Federal Home Loan Mortgage Corporation (Freddie Mac); and (G) any other financial institution that the appropriate Federal regulators, jointly, by rule, determine should be treated as a covered financial institution for these purposes.

The Act also requires the Agencies to ensure that any standards adopted with regard to excessive compensation under section 956 of the Act are comparable to the compensation-related safety and soundness standards applicable to insured depository institutions under section 39 of the FDIA (12 U.S.C. 1831p– 1(c)),[1] and to take the compensation standards described in section 39 of the FDIA into consideration in establishing

[1] The Federal banking agencies each have adopted guidelines implementing the compensation-related and other safety and soundness standards in section 39 of the FDIA. *See* 12 CFR part 30, Appendix A (OCC); 12 CFR part 208, Appendix D–1 (Board); 12 CFR part 364, Appendix A (FDIC); 12 CFR part 570, Appendix A (OTS).

compensation standards under section 956 of the Act.

Compensation arrangements are critical tools in the successful management of financial institutions. These arrangements serve several important objectives, including attracting and retaining skilled staff, promoting better organizational and individual employee performance, and providing retirement security to employees.

At the same time, improperly structured compensation arrangements can provide executives and employees with incentives to take imprudent risks that are not consistent with the long-term health of the organization. The Agencies believe that flawed incentive compensation practices in the financial industry were one of many factors contributing to the financial crisis that began in 2007.

Shareholders and, for a credit union, members of a covered financial institution have an interest in aligning the interests of managers and other employees of the institution with its long-term health. Aligning the interests of shareholders or members and employees, however, is not always sufficient to protect the safety and soundness of an organization, deter excessive compensation, or deter behavior that could lead to material financial loss at the organization. Managers and employees of a covered financial institution may be willing to tolerate a degree of risk that is inconsistent with broader public policy goals. In addition, particularly at larger institutions, shareholders or members may have difficulty effectively monitoring and controlling the incentive-based compensation arrangements throughout the institution that may materially affect the institution's risk profile, even with increased disclosure provisions. As a result, supervision and regulation of incentive compensation, as with other aspects of financial oversight, can play an important role in helping ensure that incentive compensation practices at covered financial institutions do not threaten their safety and soundness, are not excessive, or do not lead to material financial loss.

II. Overview of the Proposed Rule

The Agencies have elected to propose rules, rather than guidelines, in order to establish general requirements applicable to the incentive-based compensation arrangements of all covered financial institutions ("Proposed Rule"). The Proposed Rule would supplement existing rules, guidance, and ongoing supervisory efforts of the Agencies.

The Proposed Rule has the following components:

- The Proposed Rule would prohibit incentive-based compensation arrangements at a covered financial institution that encourage executive officers, employees, directors, or principal shareholders ("covered persons") to expose the institution to inappropriate risks by providing the covered person excessive compensation. As described further below, consistent with the directive of section 956, the Agencies propose to use standards comparable to those developed under section 39 of the FDIA for purposes of determining whether incentive-based compensation is "excessive" in a particular case.
- The Proposed Rule would prohibit a covered financial institution from establishing or maintaining any incentive-based compensation arrangements for covered persons that encourage inappropriate risks by the covered financial institution that could lead to material financial loss. The Agencies propose to adopt standards for determining whether an incentive-based compensation arrangement may encourage inappropriate risk-taking that are consistent with the key principles established for incentive compensation in the Interagency Guidance on Sound Incentive Compensation Policies ("Banking Agency Guidance") adopted by the Federal banking agencies.[2] The Proposed Rule would also require deferral of a portion of incentive-based compensation for executive officers of larger covered financial institutions. The Proposed Rule would also require that, at larger covered financial institutions, the board of directors or a committee of such a board identify those covered persons (other than executive officers) that have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance. The Proposed Rule would require that the board of directors, or a committee thereof, of the institution approve the incentive-based compensation arrangement for such individuals, and maintain documentation of such approval. The term "larger covered financial institution" for the Federal banking agencies and the SEC means those covered financial institutions with total consolidated assets of $50 billion or more. For the NCUA, all credit unions with total consolidated assets of $10 billion or more are larger covered financial institutions. For the FHFA, all Federal Home Loan Banks with total consolidated assets of $1 billion or more are larger covered financial institutions.
- In connection with these restrictions, the Proposed Rule would require covered financial institutions to maintain policies and procedures appropriate to their size, complexity, and use of incentive-based compensation to help ensure compliance with these requirements and prohibitions.
- The Proposed Rule also would require covered financial institutions to provide certain information to their appropriate Federal regulator(s) concerning their incentive-based compensation arrangements for covered persons.

The Proposed Rule would supplement existing rules and guidance adopted by the Agencies regarding compensation and incentive-based compensation.[3] These include the Banking Agency Guidance, the Standards for Safety and Soundness adopted by the Federal banking agencies,[4] the compensation-related disclosure requirements adopted by the SEC for public companies,[5] the rules and guidance adopted by the FHFA for regulatory oversight of the executive compensation practices of its regulated entities[6] and the compensation rules adopted by the NCUA for institutions under its supervision.[7] Each Agency may issue

[2] Guidance on Sound Incentive Compensation Policies, 75 FR 36395 (June 25, 2010), adopted by the Federal banking agencies, meaning the OCC, Board, FDIC, and OTS.

[3] *See, e.g.*, Banking Agency Guidance, *supra* note 2.

[4] 60 FR 35674 (July 10, 1995), as amended at 61 FR 43948 (Aug. 27, 1996).

[5] *See, e.g.*, Item 402(s) of Regulation S–K, 17 CFR 229.402(s), adopted in Securities Act Release No. 9089 (Dec. 16, 2009), 74 FR 68334 (Dec. 23, 2009).

[6] 12 CFR 1770.1 (b) (1) requires the FHFA Director to prohibit the excessive compensation of executive officers. Section 1770.4 provides specific details as to the categories of information that are required to be submitted to the FHFA pertaining to the prohibition of excessive compensation (Sept. 12, 2001). FHFA's examination guidance (PG–06–002), "Examination for Compensation Practices," sets forth the disclosure requirements pertaining to the compensation and benefits programs of Fannie Mae and Freddie Mac (together, the Enterprises) (Nov. 8, 2006). In carrying out its corporate governance requirements, the FHFA is guided by the provisions set forth in 12 CFR 1710.13. FHFA's Advisory Bulletin (2009–AB–02), "Principles for Executive Compensation at the Federal Home Loan Banks and the Office of Finance," provides guidance to the Home Loan Banks on reporting requirements (Oct. 27, 2009). FHFA's proposed rule on executive compensation, 74 FR 26989 (June 5, 2009), includes incentive compensation in its prohibition on excessive compensation. For the FHFA, the regulated entities are, collectively: the Enterprises, the Federal Home Loan Banks, and the Office of Finance.

[7] *See, e.g.*, 12 U.S.C. 1761a; 12 CFR 701.2 & 12 CFR part 701 App. A, Art. VII. § 8; 12 CFR

Continued

supplemental guidance specific to their regulated entities, including guidance as necessary to clarify the regulatory requirements proposed in this rulemaking. Covered financial institutions supervised by the Federal banking agencies should continue to consult the Banking Agency Guidance for additional information on how to balance risk and financial rewards.

The Agencies propose to make the terms of the Proposed Rule, if adopted, effective six months after publication of the final rule in the **Federal Register**, with annual reports due within 90 days of the end of each covered financial institution's fiscal year. The Agencies request specific comment on whether these dates will provide sufficient time for covered financial institutions to comply with the rule and, if not, why. Commenters are also asked to address whether the Agencies should designate different compliance dates for different types of covered financial institutions, or consider designating different compliance dates for different parts of the Proposed Rule (*e.g.*, disclosure, prohibition, and policies and procedures).

A detailed description of the Proposed Rule with a request for comments is set forth below. Although this is a joint-interagency rulemaking, each Agency will codify its version of the rule in its specified portion of the Code of Federal Regulations in order to accommodate differences between regulated entities as well as other applicable statutory and regulatory requirements. Any significant differences between the Proposed Rules issued by individual agencies are noted below.[8]

III. Section-By-Section Description of the Proposed Rule

§ __.1 *Authority.* Section __.1 provides that this rule is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203). Certain Agencies also have listed their general rulemaking authority in their respective authority citations.

§ __.2 *Scope and Purpose.* Section __.2 provides that this rule applies to a covered financial institution that has total consolidated assets of $1 billion or more that offers incentive-based compensation arrangements to covered persons. This section also notes that this rule would in no way limit the authority of any Agency under other provisions of applicable law and regulations.

§ __.3 *Definitions.* Section __.3 defines the various terms used in the Proposed Rule. If a term is defined in section 956 of the Dodd-Frank Act, the Proposed Rule generally incorporates that definition.[9]

Compensation. The Proposed Rule defines "compensation" to mean all direct and indirect payments, fees or benefits, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to the covered financial institution, including, but not limited to, payments or benefits pursuant to an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement. For credit unions, the definition of compensation specifically excludes reimbursement for reasonable and proper costs incurred by covered persons in carrying out official credit union business; provision of reasonable health, accident and related types of personal insurance protection; and indemnification. This is consistent with NCUA's regulations at 12 CFR 701.33. The Agencies seek comment on this proposed definition.

Covered Financial Institution. As noted above, only "covered financial institutions" that have total consolidated assets of $1 billion or more would be subject to the Proposed Rule. Under the Proposed Rule, a "covered financial institution" would include:

- In the case of the OCC, a national bank and Federal branch and agency of a foreign bank;
- In the case of the Board, a state member bank; a bank holding company; a state-licensed uninsured branch or agency of a foreign bank; and the U.S. operations of a foreign bank with more than $1 billion of U.S. assets that is treated as a bank holding company pursuant to section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a)). A covered financial institution includes the subsidiaries of the institution;
- In the case of the FDIC, a state nonmember bank and an insured U.S. branch of a foreign bank;
- In the case of the OTS, a savings association as defined in 12 U.S.C. 1813(b) and a savings and loan holding company as defined in 12 U.S.C. 1467a(a). (A covered financial institution also includes an operating subsidiary of a Federal savings association as defined in 12 CFR 559.2.) The Board, OCC, and FDIC will assume supervisory and rulemaking responsibility for these entities on the transfer date provided in Title III of the Dodd-Frank Act. These agencies expect to adopt, or incorporate, as appropriate, any final rule adopted by OTS as part of this rulemaking for relevant covered financial institutions that come under their respective supervisory authority after the transfer date;
- In the case of the NCUA, a credit union, as described in section 19(b)(1)(A)(iv) of the Federal Reserve Act, meaning an insured credit union as defined under 12 U.S.C. 1752(7) or credit union eligible to make application to become an insured credit union under 12 U.S.C. 1781. Instead of the term "covered financial institution", the NCUA uses the term "credit union" throughout its proposed rule;
- In the case of the SEC, a broker-dealer registered under section 15 of the Securities Exchange Act of 1934, 15 U.S.C. 78o; and an investment adviser, as such term is defined in section 202(a)(11) of the Investment Advisers Act of 1940, 15 U.S.C. 80b–2(a)(11); [10]
- The FHFA, because it proposes to extend the requirements of the rule to the Federal Home Loan Bank System's Office of Finance,[11] which is not a financial institution, is not proposing to use the term "covered financial institution," but rather the term "covered entity," defined to mean Fannie Mae, Freddie Mac, the Federal Home Loan Banks, and the Office of Finance.

As indicated in the above listing, the Agencies propose to expand the definition of a covered financial institution beyond those specifically identified in section 956, as authorized by section 956(e)(2)(G) of the Dodd-Frank Act. Consistent with the principle of national treatment and equality of competitive opportunity, the Agencies propose to include as covered financial institutions the uninsured branches and

701.21(c)(8)(i); 12 CFR 701.23(g) (1); 12 CFR 701.33; 12 CFR 702.203 & 702.204; 12 CFR 703.17; 12 CFR 704.19 & 704.20; 12 CFR part 708a; 12 CFR 712.8; 12 CFR 721.7; 12 CFR part 750; and NCUA Examiners Guide Ch. 7 at *http://www.ncua.gov/GenInfo/GuidesManuals/examiners_guide/chapters/Chapter07.pdf.*

[8] Since the Agencies' proposed rules use consistent section numbering, relevant sections are cited, for example, as "§ __.1."

[9] These definitions are proposed for purposes of administering Section 956 and are not intended to affect the interpretation or construction of the same or similar terms for purposes of any other statute or regulation administered by the Agencies.

[10] By its terms, the definition of "covered financial institution" in section 956 includes any firm that meets the definition of "investment adviser" under the Investment Advisers Act of 1940 ("Investment Advisers Act"), regardless of whether the firm is registered as an investment adviser under that Act. Banks and bank holding companies are generally excluded from the definition of "investment adviser" under section 202(a)(11) of the Investment Advisers Act.

[11] The Office of Finance is a joint agency of the twelve Federal Home Loan Banks and is described and regulated in the FHFA's rules at 12 CFR part 1273.

agencies of a foreign bank, as well as the other U.S. operations of foreign banking organizations that are treated as bank holding companies pursuant to section 8(a) of the International Banking Act of 1978. These offices and operations currently are subject to the Banking Agency Guidance, and are subject to section 8 of the FDIA, which prohibits institutions from engaging in unsafe or unsound practices to the same extent as insured depository institutions and bank holding companies.[12]

The Agencies also propose including the Federal Home Loan Banks because they pose similar risks and should be subject to the same regulatory regime. FHFA also proposes to subject the Office of Finance to the Proposed Rule, using authority other than section 956.[13]

Commenters are specifically asked to address whether there are there other types of financial institutions, such as a credit union service organization ("CUSO"), that the Agencies should treat as a covered financial institution to better promote the purpose of section 956 and competitive equity. Currently no CUSOs wholly owned by a federally insured credit union have total consolidated assets of $1 billion or more.

Covered Person. Only incentive-based compensation paid to "covered persons" would be subject to the requirements of this Proposed Rule. A "covered person" would be any executive officer, employee, director, or principal shareholder of a covered financial institution. No specific categories of employees are excluded from the scope of the Proposed Rule, although it is the underlying purpose of this rulemaking to address those incentive-based compensation arrangements for covered persons or groups of covered persons that encourage inappropriate risk because they provide excessive compensation or pose a risk of material financial loss to a covered financial institution. Accordingly, as will be discussed later in this **SUPPLEMENTARY INFORMATION** section, certain prohibitions in the Proposed Rule apply only to a subset of covered persons. As a result, the proposal contains separate definitions of director, executive officer, and principal shareholder. For Federal credit unions, only one director, if any, may be considered a covered person since, under the Federal Credit Union Act section 112 (12 U.S.C. 1761a) and NCUA's regulations at 12 CFR 701.33, only one director may be compensated as an officer of the board.

Director and Board of Directors. The Proposed Rule defines "director" of a covered financial institution as a member of the board of directors of the covered financial institution or of a board or committee performing a similar function to a board of directors. For NCUA's proposed rule, the director is always a member of the credit union's board of directors so the definition is omitted. The Proposed Rule also defines "board of directors" as the governing body of any covered financial institution performing functions similar to a board of directors. For a foreign banking organization, "board of directors" refers to the relevant senior management or oversight body for the firm's U.S. branch, agency or operations, consistent with the foreign banking organization's overall corporate and management structure. The Agencies seek comment on these proposed definitions.

Executive Officer. As discussed in more detail later in this Supplementary Information, the Proposed Rule would apply certain restrictions to the incentive-based compensation of "executive officers" of larger covered financial institutions.[14] The Proposed Rule defines "executive officer" of a covered financial institution as a person who holds the title or performs the function (regardless of title, salary or compensation) of one or more of the following positions: President, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, or head of a major business line.[15]

- The Agencies seek comment on whether the types of positions identified in this proposed definition are appropriate, whether additional positions should be included, or if certain positions should be removed.
- Should the Agencies define "head of a major business line?"

Incentive-based Compensation. Consistent with section 956 of the Dodd-Frank Act, the Proposed Rule would apply only to incentive-based compensation arrangements. The Proposed Rule defines "incentive-based compensation" to mean any variable compensation that serves as an incentive for performance. The definition is broad and principles-based to address the objectives of section 956 in a manner that provides for flexibility as forms of compensation evolve. The form of payment, whether it is cash, an equity award, or other property, does not affect whether compensation meets the definition of "incentive-based compensation."

There are types of compensation that would not fall within the scope of this definition. Generally, compensation that is awarded solely for, and the payment of which is solely tied to, continued employment (*e.g.*, salary) would not be considered incentive-based compensation. Similarly, a compensation arrangement that provides rewards solely for activities or behaviors that do not involve risk-taking (for example, payments solely for achieving or maintaining a professional certification or higher level of educational achievement) would not be considered incentive-based compensation under the proposal. In addition, the Agencies do not envision that this definition would include compensation arrangements that are determined based solely on the covered person's level of fixed compensation and do not vary based on one or more performance metrics (*e.g.*, employer contributions to a 401(k) retirement savings plan computed based on a fixed percentage of an employee's salary). The

[12] *See* 12 U.S.C. 1813(c)(3) and 1818(b)(4).

[13] The Office of Finance is an agent of the Federal Home Loan Banks in issuing the hundreds of billions of dollars' worth of Federal Home Loan Bank System obligations that are outstanding at any time. It is not a financial institution, but because of its critical role in the mortgage finance system, it is proposed to be made subject to the provisions of the Proposed Rule that apply to financial institutions with assets of over $50 billion. Because it is not a financial institution and hence not within the scope of section 956, FHFA bases its authority over the Office of Finance for this purpose not on section 956 but on the Federal Housing Enterprises Financial Safety and Soundness Act, which in section 1311(b)(2) (12 U.S.C. 4511(b)(2)) grants FHFA general regulatory authority over the Office of Finance.

[14] As discussed previously, the term "larger covered financial institution" for the Federal banking agencies and the SEC means those covered financial institutions with total consolidated assets of $50 billion or more. For the NCUA, all credit unions with total consolidated assets of $10 billion or more are larger covered financial institutions. For the FHFA, Fannie Mae, Freddie Mac, and all of the Federal Home Loan Banks with total consolidated assets of $1 billion or more are larger covered financial institutions. In addition, the FHFA proposes to make the same requirements applicable to the Office of Finance.

[15] For the FHFA, the Safety and Soundness Act of 1992, as reflected in 12 CFR 1770.3 (g)–(1), defines the term Executive Officer to mean, for Fannie Mae and Freddie Mac: The Chairman of the Board of Directors, chief executive officer, chief financial officer, chief operating officer, president, vice chairman, any executive vice president, and any individual who performs functions similar to such positions whether or not the individual has an official title; and any senior vice president or other individual with similar responsibilities, without regard to title: (A) Who is in charge of a principal business unit, division or function, or (B) who reports directly to the chairman of the board of directors, vice chairman, president or chief operating officer. The Proposed Rule adopts a modified version of the definitions for Fannie Mae and Freddie Mac, and a definition for the Federal Home Loan Banks and for the Office of Finance that the FHFA has determined is appropriate for them.

proposed definition also would not include dividends paid and appreciation realized on stock or other equity instruments that are owned outright by a covered person. However, stock or other equity instruments awarded to a covered person under a contract, arrangement, plan, or benefit would not be considered owned outright while subject to any vesting or deferral arrangement (irrespective of whether such deferral is mandatory).

The Agencies request comment generally on this proposed definition. Comment is also requested on the following questions:

- Is the definition of incentive-based compensation sufficiently broad to include all types of compensation that should be covered under the rule?
- Are there any particular forms of compensation that should be specifically designated as incentive-based compensation?
- Are there any other forms of compensation that the Agencies should clarify are not incentive-based compensation?

Principal Shareholder. Under the Proposed Rule, a "principal shareholder" means an individual that directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10 percent or more of any class of voting securities of a covered financial institution.[16] The Agencies request comment on this proposed definition. The NCUA's proposed rule does not include this definition since credit unions are not-for-profit financial cooperatives with member owners.

Total Consolidated Assets. As provided in section 956, the Proposed Rule would apply to all covered financial institutions that have total consolidated assets of $1 billion or more. Additional requirements would apply to certain larger covered financial institutions. With the exception of the FHFA, the Agencies have specified how total consolidated assets should be calculated in their agency specific rule text.

- *OCC:* Total consolidated assets means (i) for a national bank, calculating the average of the total assets reported in the bank's four most recent Consolidated Reports of Condition and Income ("Call Report") and (ii) for a Federal branch and agency, calculating the average of the total assets reported in the Federal branch or agency's four most recent Reports of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks—FFIEC 002.
- *Board:* For a state member bank, total consolidated assets as determined based on the average of the bank's four most recent Consolidated Reports of Condition and Income ("Call Report"); for a bank holding company, total consolidated assets as determined based on the average of the company's four most recent Consolidated Financial Statements for Bank Holding Companies ("FR Y–9C"); for a state-licensed uninsured branch or agency of a foreign bank, total consolidated assets as determined based on the average of the branch or agency's four most recent Reports of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks—FFIEC 002; and for the U.S. operations of a foreign bank, total consolidated U.S. assets as determined by the Board.
- *FDIC:* For state nonmember banks, asset size would be determined by calculating the average of the total assets reported in the institution's four most recent Call Reports. For insured U.S. branches of foreign banks, asset size will be determined by calculating the average of the total assets reported in the branch's four most recent Reports of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks.
- *OTS:* For covered financial institutions regulated by the OTS, asset size will be determined by calculating the average of total assets reported in the institution's four most recent Thrift Financial Reports.
- *NCUA:* For credit unions, asset size will be determined by calculating the average of the total assets reported in the credit union's four most recent 5300 Call Reports.
- *SEC:* For brokers or dealers registered with the SEC, asset size would be determined by the total consolidated assets reported in the firm's most recent year-end audited Consolidated Statement of Financial Condition filed pursuant to Rule 17a–5 under the Securities Exchange Act of 1934. For investment advisers, asset size would be determined by the adviser's total assets shown on the balance sheet for the adviser's most recent fiscal year end. The proposed method of calculation for investment advisers is consistent with the SEC's recent proposal that each investment adviser filing Form ADV Part 1A indicate whether the adviser had $1 billion or more in "assets," defined as the total assets shown on the balance sheet for the adviser's most recent fiscal year end.[17] In connection with that proposal, the SEC requested comment on the reporting requirement and the proposed method that advisers would use to determine the amount of their assets (*i.e.*, total assets as shown on the adviser's balance sheet). Commenters are asked to provide additional comments on the proposed method of determining asset size for investment advisers, and specifically to address whether the determination of total assets should be further tailored for certain types of advisers, such as advisers to hedge funds or private equity funds, and if so, why and in what manner.
- *FHFA:* The FHFA is not including a definition of total consolidated assets in its proposed rule because it is proposing to make all requirements of the rule applicable to all the entities it regulates without regard to asset size.[18]

The Agencies believe that by generally establishing a rolling average for asset size (with the exception of the SEC and the FHFA), the frequency that an institution may fall in or out of covered financial institution status would be minimized. If a covered financial institution has fewer than four reports, the institution must average total assets from its existing reports for purposes of determining total consolidated assets. If a covered financial institution has a mix of two or more different types of reports covering the relevant period, those should be averaged for purposes of determining asset size (*e.g.*, an institution with two Call Reports and two Thrift Financial Reports as its four most recent reports would have its total assets from all four reports averaged).

Should all of the Agencies use a uniform method to determine whether an institution has $1 billion or more in assets? If so, what would commenters suggest as such a uniform method? If different calculations are required for each type of institution, should any of the Agencies define total consolidated assets differently than the proposed calculations described above?

§ ____.4 *Required Reports.* Section 956(a)(1) of the Dodd-Frank Act requires that a covered financial institution submit an annual report to its

[16] The 10 percent threshold used in the definition of "principal shareholder" is also used in a number of bank regulatory contexts. *See e.g.*, 12 CFR 215.2(m), 12 CFR 225.2(n)(2), 12 CFR 225.41(c)(2).

[17] *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Release No. 3110, nn. 194–196 and related text (Nov. 19, 2010) 75 FR 77052 (Dec. 10, 2010).

[18] Fannie Mae, Freddie Mac, and the Federal Home Loan Banks are all far larger than the $1 billion asset threshold in section 956, while the FHFA is basing its regulatory authority over the Office of Finance on a different statute. And, for policy reasons, the FHFA is proposing not to distinguish "larger" entities from others for purposes of this rule.

appropriate Federal regulator disclosing the structure of its incentive-based compensation arrangements that is sufficient to determine whether the incentive-based compensation structure provides covered persons with excessive compensation, fees, or benefits, or could lead to material financial loss to the covered financial institution. In order to fulfill this requirement, the Proposed Rule would establish the general rule that a covered financial institution must submit a report annually to its appropriate regulator or supervisor in a format specified by its appropriate Federal regulator that describes the structure of the covered financial institution's incentive-based compensation arrangements for covered persons. The report must contain:

(1) A clear narrative description of the components of the covered financial institution's incentive-based compensation arrangements applicable to covered persons and specifying the types of covered persons to which they apply;

(2) A succinct description of the covered financial institution's policies and procedures governing its incentive-based compensation arrangements for covered persons;

(3) For larger covered financial institutions, a succinct description of any specific incentive compensation policies and procedures for the institution's executive officers, and other covered persons who the board, or a committee thereof determines under § __.5(b)(3)(ii) of the Proposed Rule individually have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance;

(4) Any material changes to the covered financial institution's incentive-based compensation arrangements and policies and procedures made since the covered financial institution's last report was submitted; and

(5) The specific reasons why the covered financial institution believes the structure of its incentive-based compensation plan does not encourage inappropriate risks by the covered financial institution by providing covered persons with excessive compensation or incentive-based compensation that could lead to material financial loss to the covered financial institution.

In developing the proposed reporting provisions, the Agencies have taken into account that substantially all the covered financial institutions are already supervised and/or subject to examination by one or more of the Agencies. Accordingly, in the Proposed Rule, the Agencies have tailored the annual reporting requirement to the types of information that would most efficiently assist the relevant Agency in determining whether there are any areas of potential concern with respect to the structure of the covered financial institution's incentive-based compensation arrangements. Generally, each Agency has reporting, examination and enforcement authority for substantially all of the covered financial institutions under its respective jurisdiction that the Agency may use if the information provided under section 956 were to indicate that the structure of a covered financial institution's incentive-based compensation arrangements may provide excessive compensation or encourage inappropriate risk-taking.[19] In this way, the Proposed Rule seeks to achieve the objective of section 956 in a manner that limits unnecessary reporting burden on covered financial institutions and leverages the existing supervisory framework for institutions.

The Agencies note that they have intentionally chosen phrases like "clear narrative description" and "succinct description" to describe the disclosures being sought. The Agencies also note that the use of the word "specific" in the Proposed Rule is designed to elicit statements that are direct and meaningful explanations of why a covered financial institution believes its incentive-based compensation plan properly addresses the "excessive compensation" and "material financial loss" components of section 956. These provisions are designed to help ensure that covered financial institutions will provide the Agencies with a streamlined set of materials that will help the Agencies promptly and effectively identify and address any areas of concern, rather than with voluminous materials that may obfuscate the actual structure and likely effects of an institution's incentive-based compensation arrangements. Further, in light of the nature of the information that will be provided to the Agencies under § __.4 of the Proposed Rule, and the purposes for which the Agencies are requiring the information, the Agencies generally will maintain the confidentiality of the information submitted to the Agencies, and the information will be nonpublic, to the extent permitted by law.[20] The nature of the reported information likely will be sensitive for a variety of reasons, including competitive reasons.

The volume and detail of information provided annually by a covered financial institution should be commensurate with the size and complexity of the institution, as well as the scope and nature of its incentive-based compensation arrangements. As such, the Agencies expect that the volume and detail of information provided by a large, complex institution that uses incentive-based arrangements to a significant degree would be substantially greater than that submitted by a smaller institution that has only a few incentive-based compensation arrangements or arrangements that affect only a limited number of covered persons.

The Agencies request comment on all aspects of the reporting provisions in the Proposed Rule. Specifically, the Agencies request comment on the following:

- Does the Proposed Rule fulfill the requirement to obtain meaningful and useful descriptions of incentive-based compensation arrangements for supervisory and compliance purposes?
- Does the Proposed Rule impose a reasonable burden and minimize the potential for voluminous boilerplate disclosure?
- Is the language in the Proposed Rule sufficiently clear in describing the kinds of information the Agencies intend to solicit from covered financial institutions?
- Are there simpler and less burdensome methods of reporting to the Agencies that would still be sufficiently robust to help the Agencies assess whether the institution's compensation arrangements appropriately balance risk and financial rewards? For example, would setting up an electronic means of filing the required disclosure lessen the burden on covered financial institutions, and are there specific factors the Agencies should consider in developing such a disclosure mechanism?
- Are there any additional types of information that the Agencies should solicit in order to more accurately assess whether incentive-based compensation

[19] NCUA would likely consult with the appropriate state regulator in cases involving a state-chartered credit union.

[20] The Freedom of Information Act ("FOIA") provides at least two pertinent exemptions under which the Agencies have authority to withhold certain information. FOIA Exemption 4 provides an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). FOIA Exemption 8 provides an exemption for matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. 552(b)(8).

arrangements are consistent with the objectives of section 956?

• Should the Agencies consider modifying the Proposed Rule to require covered financial institutions to update their incentive-based compensation disclosure—between annual disclosure cycles—if any material changes to their respective incentive-based compensation plans occur?

§ __.5 *Prohibitions.* Section __.5 of the Proposed Rule would implement section 956(b) of the Dodd-Frank Act by prohibiting a covered financial institution from having incentive-based compensation arrangements that may encourage inappropriate risks (a) by providing excessive compensation or (b) that could lead to material financial loss to the covered financial institution. Consistent with section 956(c), the Proposed Rule also would establish standards for determining whether an incentive-based compensation arrangement violates these prohibitions.

Excessive Compensation. The Proposed Rule would establish a general rule that a covered financial institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered financial institution by providing a covered person with excessive compensation. As noted previously, section 956 requires the Agencies to ensure that any compensation standards established under section 956 are comparable to those established under section 39 of the FDIA. In light of this directive, the Proposed Rule includes standards for determining whether an incentive-based compensation arrangement provides excessive compensation that are comparable to, and based on, the standards established under section 39 of the FDIA. Specifically, under the Proposed Rule, incentive-based compensation for a covered person would be considered excessive when amounts paid are unreasonable or disproportionate to, among other things, the amount, nature, quality, and scope of services performed by the covered person. In making such a determination, the Agencies will consider:

(1) The combined value of all cash and non-cash benefits provided to the covered person;

(2) The compensation history of the covered person and other individuals with comparable expertise at the covered financial institution;

(3) The financial condition of the covered financial institution;

(4) Comparable compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the institution's operations and assets;

(5) For postemployment benefits, the projected total cost and benefit to the covered financial institution;

(6) Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered financial institution; and

(7) Any other factors the Agency determines to be relevant.

The Agencies request comment on these standards, including comment on the appropriate factors to consider when evaluating comparable compensation practices at comparable institutions. Should additional factors be included, such as the nature of the operations at the comparable institutions?

Inappropriate Risks that May Lead to Material Financial Loss. Section 956(b)(2) of the Act requires the Agencies to adopt regulations or guidelines that prohibit any type of incentive-based payment arrangement, or any feature of any such arrangement, that the Agencies determine encourages inappropriate risks by a covered financial institution that could lead to material financial loss to the covered institution. Section 39 of the FDIA does not include standards for determining whether compensation arrangements may encourage inappropriate risks that could lead to material financial loss. Accordingly the Agencies have considered the language and purpose of section 956, existing supervisory guidance that addresses incentive-based compensation arrangements that may encourage excessive risk-taking,[21] the Principles for Sound Compensation Practices and the related Implementation Standards adopted by the Financial Stability Board,[22] and other relevant material in considering how to implement this aspect of section 956.

As an initial matter, the Agencies note that section 956 is focused on incentive-based compensation arrangements that could lead to material financial loss to a covered financial institution. Accordingly, this prohibition would apply only to those incentive-based compensation arrangements for individual covered persons, or groups of covered persons, whose activities may expose the covered financial institution to material financial loss. Such covered persons include:

• Executive officers and other covered persons who are responsible for oversight of the covered financial institution's firm-wide activities or material business lines;

• Other individual covered persons, including non-executive employees, whose activities may expose the covered financial institution to material financial loss (*e.g.*, traders with large position limits relative to the covered financial institution's overall risk tolerance); and

• Groups of covered persons who are subject to the same or similar incentive-based compensation arrangements and who, in the aggregate, could expose the covered financial institution to material financial loss, even if no individual covered person in the group could expose the covered financial institution to material financial loss (*e.g.*, loan officers who, as a group, originate loans that account for a material amount of the covered financial institution's credit risk).

To implement section 956(b)(2) of the Act, § __.5(b)(1) of the Proposed Rule would prohibit a covered financial institution from establishing or maintaining any type of incentive compensation arrangement, or any feature of any such arrangement, for these covered persons or groups of covered persons, that could lead to material financial loss to the covered financial institution. Section __.5(b)(2) of the Proposed Rule provides that an incentive-based compensation arrangement established or maintained by a covered financial institution for one or more covered persons does not comply with § __.5(b)(1) unless it:

• Balances risk and financial rewards, for example by using deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods;

• Is compatible with effective controls and risk management; and

• Is supported by strong corporate governance.

These three standards are consistent with the principles for sound compensation practices in the Banking Agency Guidance.

The following describes these proposed standards in greater detail. In order to help ensure that the incentive-based compensation arrangements of covered financial institutions are consistent with their standards, § __.6 of the Proposed Rule would require that covered financial institutions establish and maintain policies and procedures related to these standards.

[21] *See, e.g.*, Banking Agency Guidance.

[22] Financial Stability Board, FSF Principles for Sound Compensation Practices, Basel, Switzerland (April 2009); Financial Stability Board, FSB Principles for Sound Compensation Practices: Implementation Standards, Basel, Switzerland (September 2009).

Balance of Risk and Financial Rewards

Incentive-based compensation arrangements typically attempt to encourage actions that result in greater revenue or profit for the covered financial institution. However, short-run revenue or profit can often diverge sharply from actual long-run profit because risk outcomes may become clear only over time. Activities that carry higher risk typically yield higher short-term revenue, and a covered person who is given incentives to increase short-term revenue or profit, without regard to risk, will naturally be attracted to opportunities to expose the institution to more risk.[23]

Accordingly, to be consistent with section 956, incentive-based compensation arrangements at a covered financial institution should balance risk and financial rewards in a manner that does not provide covered persons with incentives to take inappropriate risks that could lead to material financial loss at the covered financial institution. The Agencies would deem an incentive-based compensation arrangement to be balanced when the amounts paid to a covered person appropriately take into account the risks, as well as the financial benefits, from the covered person's activities and the impact of those activities on the covered financial institution.

In assessing whether incentive-based compensation arrangements are balanced, the Agencies will consider the full range of risks associated with a covered person's activities, as well as the time horizon over which those risks may be realized. The activities of a covered person may create a wide range of risks for a covered financial institution, including credit, market, liquidity, operational, legal, compliance, and reputational risks. Some of these risks may be realized in the short term, while others may become apparent only over the long term.

The Proposed Rule identifies four methods that currently are often used to make compensation more sensitive to risk. These methods are:

Risk Adjustment of Awards: Under this method of making a covered person's incentive-based compensation appropriately risk-sensitive, the amount of the person's incentive-based compensation award is adjusted based on measures that take into account the risk the covered person's activities pose to the covered financial institution. Such measures may be quantitative, or the size of a risk adjustment may be set based on managerial judgment, subject to appropriate oversight.

Deferral of Payment: Under this method, the actual payout of an award to a covered person is delayed significantly beyond the end of the performance period, and the amounts paid are adjusted for actual losses to the covered financial institution or other aspects of performance that become clear only during the deferral period. Deferred payouts may be altered according to risk outcomes either formulaically or based on managerial judgment, though extensive use of judgment might make it more difficult to execute deferral arrangements in a sufficiently predictable fashion to influence the risk-taking behavior of a covered person. To be most effective in ensuring balance, the deferral period should be sufficiently long to allow for the realization of a substantial portion of the risks from the covered person's activities, and the measures of loss should be clearly explained to covered persons and closely tied to their activities during the relevant performance period.

Longer Performance Periods: Under this method of making incentive-based compensation risk sensitive, the time period covered by the performance measures used in determining a covered person's award is extended (for example, from one year to two years). Longer performance periods and deferral of payment are related in that both methods allow awards or payments to be made after some or all risk outcomes associated with a covered person's activities are realized or better known.

Reduced Sensitivity to Short-Term Performance: A covered financial institution using this method reduces the rate at which awards increase as a covered person achieves higher levels of the relevant performance measure(s) used in the person's incentive-based compensation arrangement. Rather than offsetting risk-taking incentives associated with the use of short-term performance measures, this method reduces the magnitude of such incentives.

The Agencies recognize that these methods for achieving balance are not exclusive, and additional methods or variations of these approaches may exist or be developed.[24] Methods and practices for making compensation sensitive to risk-taking are likely to evolve during the next few years. Moreover, each method has its own advantages and disadvantages that may differ depending upon the situation in which they are used. For example, where reliable risk measures exist, risk adjustment of awards may be more effective than deferral of payment in reducing incentives for inappropriate risk-taking. This is because risk adjustment potentially can take account of the full range and time horizon of risks, rather than just those risk outcomes that occur or become evident during the deferral period. On the other hand, deferral of payment may be more effective than risk adjustment in mitigating incentives to take hard-to-measure risks (such as the risks of new activities or products, or certain risks such as reputational or operational risk that may be difficult to measure with respect to particular activities), especially if such risks are likely to be realized during the deferral period. In some cases, two or more methods may be needed in combination for an incentive-based compensation arrangement to be balanced. The greater the potential incentives that an arrangement creates for a covered person to increase the risks borne by the covered financial institution, the stronger the effect should be of the methods applied to achieve balance.[25]

Compatibility With Effective Controls and Risk Management

A covered financial institution's risk management processes and internal controls should reinforce and support the development and maintenance of balanced incentive-based compensation arrangements.[26] In particular, under this proposed standard, the Agencies would expect a covered financial institution to have strong controls governing its processes for designing, implementing and monitoring incentive-based compensation arrangements, and for ensuring that risk-management personnel have an appropriate role in the institution's processes for designing incentive-based compensation arrangements, monitoring their use, and assessing whether they achieve balance. Covered financial institutions should have appropriate controls to ensure that their processes for achieving balanced compensation arrangements are followed and to maintain the integrity of their risk management and other functions. Such controls are important because covered persons may seek to evade or weaken an institution's processes to achieve balanced incentive-based compensation arrangements in order to increase their own compensation. For example, in order to increase his or her own incentive

[23] *See* Banking Agency Guidance at 36407.

[24] *See* Banking Agency Guidance at 36407.

[25] *See* Banking Agency Guidance at 36409.

[26] *See* Banking Agency Guidance at 36410–11.

compensation, a covered person may seek to influence inappropriately the risk measures, information, or judgments used to balance the covered person's compensation. These activities can have additional damaging effects on the institution's financial health if they result in the weakening of the information or processes that the institution uses for other risk management, internal control, or financial purposes.[27]

Strong Corporate Governance

Strong and effective corporate governance is critical to the establishment and maintenance of sound compensation practices.[28] The board of directors of a covered financial institution, or committee thereof, should actively oversee incentive-based compensation arrangements and is ultimately responsible for ensuring that the covered financial institution's incentive compensation arrangements are appropriately balanced. Accordingly, the board of directors, or a committee thereof, should actively oversee the development and operation of a covered financial institution's incentive-based compensation systems and related control processes. For example, the board of directors, or a committee thereof, should review and approve the overall goals and purposes of the covered financial institution's incentive-based compensation system and ensure its consistency with the institution's overall risk tolerance. In addition, the board of directors, or committee thereof, should receive data and analysis to assess whether the overall design, as well as the performance, of the institution's incentive compensation arrangements are consistent with section 956.

The Agencies request comment on all aspects of § __.5 of the Proposed Rule. The Agencies also request comment on whether there are additional factors that should be considered in evaluating whether compensation is excessive or could lead to material financial loss and whether the Proposed Rule should include additional details about each of these standards.

Larger Covered Financial Institutions

Deferral Arrangements Required for Executive Officers

Paragraph (b)(3) of § ____.5 of the Proposed Rule would establish a deferral requirement for larger covered financial institutions (i.e., generally those with $50 billion or more in total consolidated assets).[29] At these larger covered financial institutions, at least 50 percent of the incentive-based compensation of an "executive officer" (as previously defined), would have to be deferred over a period of at least three years. The Proposed Rule also would require that deferred amounts paid be adjusted for actual losses of the covered financial institution or other measures or aspects of performance that are realized or become better known during the deferral period.

The Agencies believe that incentive-based compensation arrangements for executive officers at larger covered financial institutions are likely to be better balanced if they involve the deferral of a substantial portion of the executives' incentive compensation over a multi-year period in a way that reduces the amount received in the event of poor performance. The decisions of executive officers have a significant impact on the entire organization and often involve substantial strategic or other risks that are difficult to measure and model—particularly at larger covered financial institutions—and therefore difficult to address adequately by ex ante risk adjustments.

Requiring deferral for executive officers is consistent with international standards[30] that establish the expectation that large interconnected firms require the deferral of a substantial portion of incentive-based compensation (identified as 40 to 60 percent of the incentive award, or more) for certain employees for a fixed period of time not less than three years and that incentives be correctly aligned with the nature of the business, its risks, and the activities of the employees in question. Because the risks of strategic and other high-level decisions of executive officers may not be apparent or become better known for many years, the Proposed Rule would require that the deferral arrangement for executive officers at these larger covered financial institutions extend for at least three years. Larger covered financial institutions tend to have more diverse business operations, which can make it more difficult to immediately recognize and assess risks for the organization as a whole. Furthermore, in enacting the Dodd-Frank Act, Congress recognized that larger organizations may pose a greater risk to the financial system by requiring the creation of enhanced prudential standards for certain bank holding companies with total consolidated assets greater than $50 billion.[31]

The Proposed Rule recognizes that requiring deferral for this discrete group of individuals at larger covered institutions, where ex ante risk adjustment measures are less likely to be effective in and of themselves, is likely to be a useful balancing tool that allows a period of time for risks not previously discerned or quantifiable to ultimately materialize, and concurrently provides for adjustment of unreleased (or "unvested") deferral payments on the basis of observed consequences and actual performance as opposed to only predicted results.

If a covered financial institution is required to use deferral, the Proposed Rule provides it with flexibility in administering its specific deferral program. A covered financial institution may decide to release (or allow vesting of) the full deferred amount in a lump-sum only at the conclusion of the deferral period; alternatively, the institution may release the deferred amounts (or allow vesting) in equal increments, pro rata, for each year of the deferral period. However, in no event may the release or vesting of amounts required to be deferred under § ____.5(b)(3) of the Proposed Rule be faster than a pro rata equal-annual-increments distribution. For instance, an institution required to apply a three-year deferral to a $150,000 deferral amount could release a maximum of $50,000 each year or could withhold the entire sum for the entire period and distribute it as a lump-sum at the conclusion of the three-year period. The institution could also employ an alternate distribution that is less rapid than a pro-rata equal-annual-increments schedule, such as releasing no amount after the first year, releasing a maximum of $100,000 the second year, and then $50,000 for the third year.

Specific comment is solicited on all aspects of the scope, and specific requirements, of this proposed deferral requirement. In particular, commenters

[27] See Banking Agency Guidance at 36411.

[28] See Banking Agency Guidance at 36412.

[29] As noted above, the FHFA is proposing to adopt this requirement for all the entities it regulates—Fannie Mae, Freddie Mac, the twelve Federal Home Loan Banks, and the Office of Finance, without regard to asset size, except for covered entities in conservatorship, receivership, or bridge status. FHFA, as conservator of Fannie Mae and Freddie Mac, requires that one-third of incentive pay for named executive officers be deferred over a two-year period. This deferred pay is based on corporate and individual performance. In addition, deferred pay is paid to Senior Vice Presidents and above in quarterly installments in the year following the performance year. One-half of this one-year deferral of payments is based on the Board of Directors' determination of corporate performance. As a result, more than one-half of the annual incentive-based compensation is deferred for senior executives.

[30] See supra note 22.

[31] 12 U.S.C. 5635.

are asked to address whether it is appropriate to mandate deferral for executive officers at larger covered financial institutions to promote the alignment of employees' incentives with the risk undertaken by such employees. For example, comment is solicited on whether deferral is generally an appropriate method for achieving balanced incentive compensation arrangements for each type of executive officer at these institutions or whether there are alternative or more effective ways to achieve such balance. Commenters are also asked to address the possible impact that the required minimum deferral provisions for senior executives may have on larger covered financial institutions and whether the proposed or different deferral requirements should apply to senior executives at institutions other than larger covered financial institutions. For example, would it be prudent to mandate deferred incentive-based compensation for certain types of covered financial institutions but not require such deferral for other institutions (*e.g.*, investment advisers) based on the business, risks inherent to that business, or other relevant factors? Are there additional considerations, such as tax or accounting considerations, that may affect the ability of larger covered financial institutions to comply with the proposed deferral requirement or that the Agencies should consider in designing this provision in the rule? Comment is also sought on whether the mandatory deferral provisions of the rule should apply to a differently defined group of individuals at larger covered financial institutions, such as the institution's top 25 earners of incentive-based compensation? Commenters also are asked to address whether the three-year and 50 percent of incentive-based compensation minimums are appropriate? Should the minimum required deferral period be extended to, for example, five years?

Special Review and Approval Requirement for Other Designated Individuals

Other individuals at a larger covered financial institution, beyond the institution's executive officers may have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance. In order to help ensure that the incentive compensation arrangements for these individuals are appropriately balanced, and do not encourage the individual to expose the institution to risks that could pose a risk of material financial loss to the covered financial institution, the Proposed Rule would require that, at a larger covered financial institution, the board of directors, or a committee thereof, identify those covered persons (other than executive officers) that individually have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance.[32] The proposal notes that these covered persons may include, for example, traders with large position limits relative to the institution's overall risk tolerance and other individuals that have the authority to place at risk a substantial part of the capital of the covered financial institution. In addition, the Proposed Rule would require that the board of directors, or a committee thereof, of the institution approve the incentive-based compensation arrangement for such individuals, and maintain documentation of such approval.

Under the proposal, the board of directors, or committee thereof, of a larger covered financial institution may not approve the incentive-based compensation arrangement for an individual identified by the board of directors, or committee thereof, unless the board (or committee) determines that the arrangement, including the method of paying compensation under the arrangement, effectively balances the financial rewards to the covered person and the range and time horizon of risks associated with the covered person's activities, employing appropriate methods for ensuring risk sensitivity. The proposal recognizes that the methods used to balance the rewards and risks of the individual's activities may include deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods, or other appropriate methods. However, the board of directors, or committee thereof, must determine that the method(s) used effectively balance the financial rewards to the covered person and the range and time horizons of the risks associated with the covered person's activities. In performing its duties in this regard, the board, or committee thereof, must evaluate the overall effectiveness of the balancing methods used in the identified covered person's incentive compensation arrangements in reducing incentives for inappropriate risk taking by the identified covered person, as well as the ability of the methods used to make payments sensitive to the full range of risks presented by that covered person's activities, including those risks that may be difficult to predict, measure, or model.

The Agencies request comment on these proposed additional identification, review, and approval requirements for larger covered financial institutions with respect to individuals that have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance. Is the proposed special treatment of these covered persons necessary or appropriate, or is their incentive compensation adequately addressed by the prohibitions applicable to all other covered persons (other than executive officers at larger covered financial institutions) under the proposal? Is it sufficient that, as under the proposal, such covered persons are not subject to mandatory deferral but instead are separately identified by the institution's board and the board is required to approve the incentive-based compensation arrangement for the covered person after ensuring it is balanced and sensitive to risk? Should further guidance be provided as to the meaning of the phrase "substantial in relation to the institution's size, capital, or overall risk tolerance"?

§ ____.6 *Policies and Procedures.* As noted above, the Agencies believe that the incentive-based compensation practices of covered financial institutions should be supported by policies and procedures, appropriate to the size and complexity of the covered financial institution, to foster transparency of each covered financial institution's incentive-based compensation practices and to promote compliance and accountability regarding the practices that the Agencies propose to prohibit. Accordingly, the Proposed Rule would require covered financial institutions to have policies and procedures governing the award of incentive-based compensation as a way to help ensure the full implementation of the prohibitions in the Proposed Rule.

The Agencies believe that the policies and procedures developed by each covered financial institution in this area should be appropriately tailored to balance risk and reward for an institution of its size, complexity, and business activity, as well as the scope and nature of the covered financial institution's incentive-based compensation arrangements. Therefore, the policies and procedures of smaller covered financial institutions with less

[32] In addition to the compensation-deferral requirement described above, the FHFA proposes to apply this requirement to all of the entities it regulates without regard to asset size.

complex incentive-based compensation programs would be expected to be less extensive than those of larger covered financial institutions with relatively complex programs and business activities. The Agencies note, however, that no categories of covered financial institutions using incentive-based compensation would be systematically or completely exempt from developing, maintaining, and documenting their incentive-based compensation policies and procedures.

As noted above, the prohibition on incentive-based compensation arrangements that could lead to material financial loss would affect only those arrangements for covered persons that, either individually or as a group, may expose the institution to material financial loss. Accordingly, the policies and procedures of an institution related to this prohibition should be focused on these covered persons. Depending on the facts and circumstances of the individual covered financial institution, certain jobs and classes of jobs may not have the ability to expose the organization to material financial loss and, as a result, incentive-based compensation arrangements for these covered persons within these job classes may be outside the scope of these restrictions. Examples of jobs and classes of jobs that may be unlikely to expose the institution to material risk include tellers, bookkeepers, couriers, or data processing personnel.

Paragraph (b)(1) of § ____.6 of the Proposed Rule would require that the policies and procedures, at a minimum, be designed to address the § ____.4 reporting requirements and the § ____.5 prohibitions.[33] Requiring such policies and procedures of covered financial institutions that award incentive-based compensation would promote compliance with the prohibitions in practice.

In order to help ensure that the risks inherent in a covered person's actions are appropriately captured, the Agencies believe that risk-management, risk-oversight, and internal-control personnel should be involved in all phases of the process for designing incentive-based compensation arrangements. Risk-management and risk-oversight personnel also should have responsibility for ongoing assessment of incentive-based compensation policies to help to ensure that the covered financial institution's processes remain up-to-date and effective relative to its incentive compensation practices. The ongoing involvement of such personnel in the evaluation of incentive-based compensation arrangements also helps to ensure that risks are properly understood and evaluated as such risks change over time in light of a continuously changing business environment. Accordingly, paragraph (b)(2) of § ____.6 of the Proposed Rule would make such a requirement part of the covered financial institution's policies and procedures governing incentive-based compensation.

Paragraph (b)(3) of § ____.6 would require that a covered financial institution's policies and procedures provide for the monitoring by a group or person independent of the covered person, where practicable in light of the institution's size and complexity, of incentive-based compensation awards and payments, risks taken, and actual risk outcomes to determine whether incentive-based compensation payments are reduced to reflect adverse risk outcomes or high levels of risk taken. To be considered independent under the Proposed Rule, the group or person at the covered financial institution monitoring or assessing incentive-based compensation awards must have a separate reporting line to senior management from the covered person who is creating the risks so as to help ensure that the analysis of risk is unbiased. Given the dynamic nature of risk management, the Proposed Rule also provides for incentive-based compensation awards to be monitored in light of risks taken and outcomes to determine whether incentive-based payments should be modified. The Agencies contemplate that the procedures relating to the adjustment of deferred amounts would be used by covered financial institutions required to defer a portion of their incentive-based compensation under § ____.6 of this Rule to augment their compliance with the deferral obligation.

Paragraph (b)(4) of § ____.6 would require a covered financial institution to develop and maintain policies and procedures designed to ensure that the covered financial institution's board of directors, or a committee thereof, receive data and analysis from management and other sources sufficient to allow it to assess whether the overall design and performance of the firm's incentive-based compensation arrangements are consistent with section 956 of the Act. As with other provisions of the Proposed Rule, the scope and nature of the data and analysis should be appropriate to the size and complexity of the covered financial institution and its use of incentive-based compensation. The Agencies expect that the board of directors, or committee thereof, would take into consideration the firm's overall risk management policies and procedures and the requirements of section 956(b) of the Act when assessing compliance with the Act.

Paragraph (b)(5) of § ____.6 of the Proposed Rule would specify that the policies and procedures of a covered financial institution must provide that the institution maintains sufficient documentation of the institution's processes for establishing, implementing, modifying, and monitoring incentive-based compensation arrangements sufficient to enable the institution's appropriate Federal regulator to determine the covered financial institution's compliance with section 956 of the Act and the Proposed Rule. Given that the determinations to be made regarding incentive-based compensation are fact-specific, the Agencies believe that effective documentation of the covered financial institution's policies, procedures and actions related to incentive-based compensation is essential both to help promote the risk-based discipline that section 956 of the Act seeks to foster with respect to covered financial institutions and to facilitate meaningful oversight and examination. In this context, the Agencies would expect the documentation maintained by a covered financial institution under the Proposed Rule to include, but not be limited to, the following:

(1) A copy of the covered financial institution's incentive-based compensation arrangement(s) or plan(s);

(2) The names and titles of individuals covered by such arrangement(s) or plan(s);

(3) A record of the incentive-based compensation awards made under the arrangement(s) or plan(s); and

(4) Records reflecting the persons or units involved in the approval and ongoing monitoring of the arrangement(s) or plan(s).

Paragraph (b)(6) of § ____.6 of the Proposed Rule would provide that, where a covered financial institution uses deferral in connection with an incentive-based compensation arrangement, the institution's policies and procedures provide for deferral of any such payments in amounts and for periods of time appropriate to the duties

[33] In addition, for U.S. operations of foreign banking organizations ("FBOs"), the organization's policies, including management, review, and approval requirements for its U.S. operations, should be coordinated with the FBO's group-wide policies developed in accordance with the rules of the FBO's home country supervisor. The policies of the FBO's U.S. operations should also be consistent with the FBO's overall corporate and management structure, as well as its framework for risk-management and internal controls.

and responsibilities of the covered financial institution's covered persons, the risks associated with those duties and responsibilities, and the size and complexity of the covered financial institution.[34] Further, proposed paragraph (b)(6) would require that any such deferred amounts paid be adjusted for actual losses or other measures or aspects of performance that are realized or become better known during the deferral period. The Agencies believe that risk-management personnel at the covered financial institution would play a substantial role in identifying and evaluating risks that become better known with the passage of time. The Agencies contemplate that the procedures relating to the adjustment of deferred amounts would be used by covered financial institutions required to defer a portion of their incentive-based compensation under § ___.5 of the Proposed Rule to facilitate their compliance with the deferral obligation.

Given the importance of incentive-based compensation arrangements to a covered financial institution's safety and soundness, paragraph (b)(7) of § ___.6 would require the policies and procedures to subject any incentive-based compensation arrangement or component thereof to a corporate governance framework that provides for ongoing oversight by the board of directors or a committee of the board of directors. As discussed above, covered financial institutions should have strong and effective corporate governance to help ensure sound compensation practices, including active and effective oversight by the board of directors. The Agencies believe that the board of directors or a committee thereof is ultimately responsible for a covered institution's incentive-based compensation arrangements, which should appropriately balance risk and rewards. Therefore, the board or its committee should engage in regular oversight of the covered financial institution's incentive-based compensation arrangements.

The Agencies are aware that covered persons at certain covered financial institutions who have been awarded equity as part of a deferred incentive-based compensation arrangement may wish to use personal hedging strategies as a way to lock in value for equity compensation that is vested over time. The Agencies are concerned that undertaking such hedging strategies during deferral periods could diminish the alignment between risk and financial rewards that may be achieved through these types of deferral arrangements. The Agencies have not included policies and procedures regarding such personal hedging strategies in the Proposed Rule, but the Agencies are concerned that, to the extent personal hedging strategies may be widespread, such practices would serve to diminish the effectiveness of a covered financial institution's policies and procedures. Thus, the Agencies are considering whether a covered financial institution's policies and procedures should be required to specifically include limits on personal hedging strategies. To assist in the evaluation of such a provision, in addition to requesting comment on all aspects of § ___.6 of the Proposed Rule, the Agencies are requesting commenters to describe the extent to which covered financial institutions prohibit such practices among their covered persons today. Would prohibiting the use of financial derivatives, insurance contracts or other similar mechanisms to hedge against the market risk of equity-based incentive-based compensation be an effective means to help to ensure that incentive-based compensation arrangements remain aligned with the risk assumed by covered persons? Are there other factors the Agencies should take into account when considering if, or how, to address personal hedging activity by covered persons?

§ ___.7 *Evasion.* Section ___.7 of the Proposed Rule would prohibit a covered financial institution from evading the restrictions of the rule by doing any act or thing indirectly, or through or by any other person, that would be unlawful for the covered institution to do directly under the Proposed Rule. This anti-evasion provision is designed to prevent covered financial institutions from, for example, making substantial numbers of its covered persons independent contractors for the purpose of evading this subpart. The Agencies do not intend, however, to disrupt bona fide independent contractor relationships of covered financial institutions. Comments are invited on whether greater specificity is required in identifying possible evasion tactics, and on all aspects of § ___.7.

IV. Request for Comments

The Agencies encourage comment on any aspect of this proposal and especially on those issues specifically noted in this preamble.

Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Federal banking agencies invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

NCUA Agency Regulatory Goal

NCUA's goal is to promulgate clear and understandable regulations that impose minimal regulatory burden. We request your comments on whether the proposed rule is understandable and minimally intrusive if implemented as proposed.

V. Regulatory Analysis

A. Regulatory Flexibility Act

OCC: Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 603 of the RFA is not required if the agency certifies that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include banks and Federal branches and agencies with assets less than or equal to $175 million) and publishes its certification and a short, explanatory statement in the **Federal Register** along with its proposed rule.

Consistent with section 956(f) of the Dodd-Frank Act, the OCC's proposed rule only would apply to national banks and Federal branches and agencies that have total consolidated assets of $1 billion or more. The Proposed Rule

[34] The Proposed Rule would require deferral for at least three years of at least 50 percent of the incentive-based compensation for executive officers of larger covered financial institutions (generally those with $50 billion or more in total consolidated assets). Most covered financial institutions with total consolidated assets under $50 billion would be required to adopt procedures applicable to deferred compensation only when the firm elects to use deferral in its incentive-based compensation program.

would not apply to any small national banks and Federal branches and agencies, as defined by the RFA. Therefore, the OCC certifies that the Proposed Rule would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Board: The Board has considered the potential impact of the Proposed Rule on small banking organizations in accordance with the Regulatory Flexibility Act (5 U.S.C. 603(b)). As discussed in the **SUPPLEMENTARY INFORMATION** above, section 956 of the Dodd-Frank Act (codified at 12 U.S.C. 5641) requires that the Agencies prohibit any incentive-based payment arrangement, or any feature of any such arrangement, at a covered financial institution that the Agencies determine encourages inappropriate risks by a financial institution by providing excessive compensation or that could lead to material financial loss. In addition, under the Act a covered financial institution also must disclose to its appropriate Federal regulator the structure of its incentive-based compensation arrangements. The Board and the other Agencies have issued the Proposed Rule in response to these requirements of the Dodd-Frank Act.

The Proposed Rule would apply to "covered financial institutions" as defined in section 956 of the Dodd-Frank Act. Covered financial institutions as so defined include specifically listed types of institutions, as well as other institutions added by the Agencies acting jointly by rule. In every case, however, covered financial institutions must have at least $1 billion in total consolidated assets pursuant to section 956(f). Thus the Proposed Rule is not expected to apply to any small banking organizations (defined as banking organizations with $175 million or less in total assets). See 13 CFR 121.201.

The Proposed Rule would implement section 956(a) of the Dodd-Frank act by requiring a covered financial institution to submit a report annually to its appropriate regulator or supervisor in a format specified by its appropriate Federal regulator that describes the structure of the covered financial institution's incentive-based compensation arrangements for covered persons. The volume and detail of information provided annually by a covered financial institution should be commensurate with the size and complexity of the institution, as well as the scope and nature of its incentive-based compensation arrangements. As such, the Board expects that the volume and detail of information provided by a large, complex institution that uses incentive-based arrangements to a significant degree would be substantially greater than that submitted by a smaller institution that has only a few incentive-based compensation arrangements or arrangements that affect only a limited number of covered persons.

The Proposed Rule would implement section 956(b) of the Dodd-Frank Act by prohibiting a covered financial institution from having incentive-based compensation arrangements that may encourage inappropriate risks (i) by providing excessive compensation or (ii) that could lead to material financial loss. The Proposed Rule would establish standards for determining whether an incentive-based compensation arrangement violates these prohibitions. These standards would include deferral and other requirements for certain covered persons at covered financial institutions with total consolidated assets of more than $50 billion. Consistent with section 956(c), the standards adopted under section 956 are comparable to the compensation-related safety and soundness standards applicable to insured depository institutions under section 39 of the FDIA. The Proposed Rule also would supplement existing guidance adopted by the Board and the other Federal banking agencies regarding incentive-based compensation (*i.e.*, the Banking Agency Guidance, as defined in the "Supplementary Information" above).

The Proposed Rule would require covered financial institutions to have policies and procedures governing the award of incentive-based compensation as a way to help ensure the full implementation of the prohibitions in the Proposed Rule. The Board believes that the policies and procedures developed by each covered financial institution in this area should be appropriately tailored to balance risk and reward for an institution of its size, complexity, and business activity, as well as the scope and nature of the covered financial institution's incentive-based compensation arrangements. Therefore, the policies and procedures of smaller covered financial institutions with less complex incentive-based compensation programs would be expected to be less extensive than those of larger covered financial institutions with relatively complex programs and business activities.

As noted above, because the Proposed Rule applies to institutions that have more than $1 billion in total consolidated assets, if adopted in final form it is not expected to apply to any small banking organizations for purposes of the Regulatory Flexibility Act. In light of the foregoing, the Board does not believe that the Proposed Rule, if adopted in final form, would have a significant economic impact on a substantial number of small entities supervised by the Board. The Board specifically seeks comment on whether the Proposed Rule would impose undue burdens on, or have unintended consequences for, small organizations and whether there are ways such potential burdens or consequences could be addressed in a manner consistent with section 956 of the Dodd-Frank Act.

FDIC: In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601–612 (RFA), an agency must publish an initial regulatory flexibility analysis with its Proposed Rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, small entities are defined to include banks with less than $175 million in assets.

Consistent with section 956 of the Dodd-Frank Act, the FDIC's Proposed Rule would only apply to a State nonmember bank and an insured U.S. branch of a foreign bank that has total consolidated assets of $1 billion or more and offers incentive compensation. The Proposed Rule would not apply to any small banks as defined by the RFA. Thus, the FDIC certifies that the Proposed Rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.

OTS: Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 603 of the RFA is not required if the agency certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its proposed rule. OTS certifies that the Proposed Rule would not have a significant impact on a substantial number of small entities. The Small Business Administration has defined "small entities" for banking purposes as a bank or savings association with $175 million or less in assets. 13 CFR 121.201. Since OTS's Proposed Rule only applies to savings associations and savings and loan holding companies with $1 billion or more of assets, it will not apply to any small entities.

FHFA: The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a rule 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 rule's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the rule 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 final rule under the Regulatory Flexibility Act. FHFA certifies that the final rule is not likely to have a significant economic impact on a substantial number of small business entities because the rule is applicable only to FHFA's covered entities, which are not small entities for purposes of the Regulatory Flexibility Act.

NCUA: In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601–612 (RFA), NCUA must publish an initial regulatory flexibility analysis with its proposed rule, unless NCUA certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities, meaning those credit unions under $10 million in assets. NCUA Interpretive Ruling and Policy Statement 03–2, 68 FR 31949 (May 29, 2003). The Dodd-Frank Act section 956 and the NCUA's proposed rule only apply to credit unions of $1 billion in assets or more. Accordingly, NCUA certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities since the credit unions covered under NCUA's proposed rule are not small entities for RFA purposes.

SEC: The Commission has prepared the following Initial Regulatory Flexibility Analysis (IRFA), in accordance with the provisions of the Regulatory Flexibility Act [35] regarding proposed Sections 248.201 through 248.207. The Commission encourages comments with respect to any aspect of this IRFA, including comments with respect to the number of small entities that may be affected by the proposed rules. Comments should specify the costs of compliance with the proposed rules and suggest alternatives that would accomplish the goals of the rules. Comments will be considered in determining whether a Final Regulatory Flexibility Analysis is required and will be placed in the same public file as comments on the proposed rules. Comments should be submitted to the Commission at the addresses previously indicated.

[35] 5 U.S.C. 603.

1. Small Entities Subject to the Rule

As described in more detail above, the proposed rules would implement section 956 of the Dodd-Frank Act, codified as 12 U.S.C. 5641. For purposes of Commission rulemaking in connection with the RFA, a small entity includes a broker-dealer: (i) With total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the Exchange Act, and (ii) is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this section.[36] Commission rules further provide that, for the purposes of the Investment Advisers Act of 1940, an investment adviser generally is a small entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had $5 million or more on the last day of its most recent fiscal year ("small adviser").[37]

Section 956 of the Dodd-Frank Act requires regulators, including the Commission, to jointly promulgate rules that apply to covered financial institutions with assets of at least $1 billion. The Commission believes that broker-dealers and investment advisers that would be subject to the proposed rule would either have $1 billion in assets or be affiliated with a firm that is characterized by at least $1 billion in assets. Therefore, the Commission preliminarily believes that there should not be any small broker-dealers or investment advisers impacted by this proposed rule.

2. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no Federal rules that duplicate, overlap, or conflict with the proposed rules.

3. Significant Alternatives

Pursuant to section 3(c) of the RFA,[38] the Commission must consider certain types of alternatives, including (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities, (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities, (3) the use of performance rather than design standards, and (4) an exemption from coverage of the rule, or any part of the rule, for small entities.

The Commission does not believe it is necessary or appropriate to establish different compliance or reporting requirements or timetables; clarify, consolidate, or simplify compliance and reporting requirements under the rule for small entities; or summarily exempt small entities from coverage of the rule, or any part of the rule because the proposed rule will not apply to any small entities.

4. Request for Comments

The Commission encourages the submission of comments to any aspect of this portion of the IRFA. In particular, comments are encouraged on whether any small entities would be subject to the terms of the proposed rule. Comments should specify costs of compliance with the proposed rules and suggest alternatives that would accomplish the objective of the proposed rules.

B. Paperwork Reduction Act

Request for Comment on Proposed Information Collection

In accordance with section 3512 of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), agencies may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The information collection requirements contained in this joint notice have been submitted by the FDIC, OCC, OTS, NCUA, and SEC to OMB for review and approval under section 3506 of the PRA and § 1320.11 of OMB's implementing regulations (5 CFR 1320). For the FHFA, the proposed rule does not contain any information collected from Fannie Mae, Freddie Mac and the Federal Home Loan Banks, including the Office of Finance, that requires the approval of OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). The Board reviewed the proposed rule under the authority delegated to the Board by OMB. The proposed rule contains requirements subject to the PRA. The reporting requirements are found in § __.4 and the recordkeeping requirements are found in

[36] 17 CFR 240.0–10(c). *See* 17 CFR 240.17a–5(d).
[37] Rule 0–7(a). 17 CFR 275.0–7(a).
[38] 5 U.S.C. 603(c).

§§ __.5(b)(3)(ii)(B), __.6(a), and __.6(b)(5).

Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

(b) The accuracy of the estimate of the burden of the 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 startup costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments should be addressed to:

FDIC: You may submit written comments, identified by the RIN, by any of the following methods:

- *Agency Web Site: http://www.fdic.gov/regulations/laws/federal/propose.html.* Follow the instructions for submitting comments on the FDIC Web site.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: Comments@FDIC.gov.* Include RIN 3064–AD56 on the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, FDIC, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery/Courier:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Public Inspection: All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/propose.html* including any personal information provided. Comments may be inspected at the FDIC Public Information Center, Room E–1002, 3501 Fairfax Drive, Arlington, VA 22226, between 9 a.m. and 5 p.m. on business days.

OCC: You should direct all written comments to: Communications Division, Office of the Comptroller of the Currency, Public Information Room, Mailstop 2–3, Attention: 1557–NEW, 250 E Street, SW., Washington, DC 20219. In addition, comments may be sent by fax to 202–874–5274, or by electronic mail to *regs.comments@occ.treas.gov.* You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling 202–874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

OTS: Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to 202–906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet site at *http://www.ots.treas.gov.* In addition, interested persons may inspect the comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call 202–906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to 202–906–7755.

NCUA: You may submit comments by any of the following methods (Please send comments by one method only):

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Agency Web site: *http://www.ncua.gov/RegulationsOpinionsLaws/proposedregs/proposedregs.html.* Follow the instructions for submitting comments.
- E-mail: Address to *regcomments@ncua.gov.* Include "[Your name] Comments on Notice of Proposed Rulemaking Incentive-based Compensation Arrangements" in the e-mail subject line.
- *Fax:* 703–518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to David Chow, Deputy Chief Information Officer, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

Additionally, you should send a copy of your comments to the OMB Desk Officer for the NCUA, by mail to U.S. Office of Management and Budget, 725 17th Street, NW., 10235, Washington, DC 20503, or by fax to 202–395–6974. The Paperwork Reduction Act requires OMB to make a decision concerning the collection of information contained in the proposed regulation between 30 and 60 days after publication of this document in the **Federal Register.** Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the NCUA on the proposed regulation.

SEC: Comments should be directed to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503, and commenters also should send a copy of their comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, and refer to File No. S7–12–11. We will post all public comments we receive without change, including any personal information you provide, such as your name and address, on the SEC Web site at *http://www.sec.gov.* Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7–12–11, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549–0213. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release in the **Federal Register.** A comment to OMB is best assured of having full effect if OMB receives it within 30 days after publication of this release.

Board: You may submit comments, identified by Docket No. R–1410, by any of the following methods:

- *Agency Web site: http://www.federalreserve.gov.* Follow the instructions for submitting comments on the *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.
- *FAX:* 202–452–3819 or 202–452–3102.
- *Mail:* Jennifer J. Johnson, 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 *http://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 in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

Proposed Information Collection

Title of Information Collection: Reporting and Recordkeeping Requirements Associated with Incentive-based Compensation Arrangements.

Frequency of Response: Annual.

Affected Public: Businesses or other for-profit.

Respondents:

FDIC: State nonmember banks or an insured U.S. branch of a foreign bank that has total consolidated assets of $1 billion or more.

OCC: National banks and Federal branches and agencies of foreign banks with $1 billion or more in total assets.

OTS: Savings associations and savings and loan holding companies with $1 billion or more in total assets.

NCUA: Credit unions with $1 billion or more in total assets.

SEC: Broker-dealers registered under section 15 of the Securities Exchange Act of 1934 [39] with $1 billion or more in total assets and investment advisers, as such term is defined in section 202(a)(11) of the Investment Advisers Act of 1940, with $1 billion or more in total assets [40] (collectively "covered BDs and IAs").

Board: State member banks, bank holding companies, and state-licensed uninsured branches and agencies of foreign banks with more than $1 billion in total assets, and the U.S. operations of foreign banking organizations with $1 billion or more in U.S. assets.

Abstract: Section 956 of the Dodd-Frank Act requires that the agencies prohibit incentive-based payment arrangements at a covered financial institution that encourage inappropriate risks by a financial institution by providing excessive compensation or that could lead to material financial loss. Under the Dodd-Frank Act, a covered financial institution also must disclose to its appropriate Federal regulator the structure of its incentive-based compensation arrangements sufficient to determine whether the structure provides "excessive compensation, fees, or benefits" or "could lead to material financial loss" to the institution. The Dodd-Frank Act does not require a covered financial institution to disclose compensation of individuals as part of this requirement.

Section __.4(a) would require covered financial institutions that have total consolidated assets of $1 billion or more to submit a report annually to the Agency that describes the structure of the covered financial institution's incentive-based compensation arrangements for covered persons and that is sufficient to allow an assessment of whether the structure or features of those arrangements provide or are likely to provide covered persons with excessive compensation, fees, or benefits to covered persons or could lead to material financial loss to the institution. Section __.4(b) would require the following minimum standards:

(1) A clear narrative description of the components of the covered financial institution's incentive-based compensation arrangements applicable to covered persons;

(2) A succinct description of the covered financial institution's policies and procedures governing its incentive-based compensation arrangements;

(3) If the covered financial institution has total consolidated assets of $50 billion or more,[39] an additional succinct description of incentive-based compensation policies and procedures specific to the covered financial institution's:

(i) Executive officers; and

(ii) Other covered persons who the board of directors, or a committee thereof, of the institution has identified and determined under § ___.5(b)(3)(ii) of this part individually have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance;

(4) Any material changes to the covered financial institution's incentive-based compensation arrangements and policies and procedures made since the covered financial institution's last report submitted under paragraph (a)(1) of this section; and

(5) The specific reasons why the covered financial institution believes the structure of its incentive-based compensation plan: (i) Does not provide covered persons incentives to engage in behavior that is likely to cause the covered financial institution to suffer material financial loss; and (ii) does not provide covered persons with excessive compensation.

Section __.5(b)(3)(ii)(B) would require the board of directors of covered financial institutions that have total consolidated assets of $50 billion or more to approve and document the identification of those covered persons that individually have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance.

Section __.6(b)(5) would ensure that documentation of the institution's processes for establishing, implementing, modifying, and monitoring incentive-based compensation arrangements is maintained that is sufficient to enable the Agency to determine the institution's compliance with 12 U.S.C. 5641.

Estimated Burden:

FDIC

Number of respondents: 301 (12 institutions with total consolidated assets of $50 billion or more and 289 institutions with total consolidated assets between $1 billion and $50 billion; 4,466 institutions with total consolidated assets below $1 billion are exempt).

Burden per respondent for initial set up: 180 hours for institutions with $50 billion or more in total assets (80 hours for reporting requirements and 100 hours for recordkeeping requirements) and 70 hours for institutions between $1 billion and $50 billion in total assets (30 hours for reporting requirements and 40 hours for recordkeeping requirements).

Burden per respondent for ongoing compliance: 70 hours for institutions with $50 billion or more in total assets (40 hours for reporting requirements and 30 hours for recordkeeping requirements) and 25 hours for institutions between $1 billion and $50 billion in total assets (15 hours for reporting requirements and 10 hours for recordkeeping requirements).

Total FDIC annual burden: 30,455 hours (22,390 hours for initial set-up and 8,065 hours for ongoing compliance).

OCC

Number of respondents: 158 (18 institutions with total consolidated assets of $50 billion or more and 140 institutions with total consolidated assets between $1 billion and $50 billion; 1,215 institutions and 67 trust companies with total consolidated assets below $1 billion are exempt).

[39] 15 U.S.C. 78o.

[40] 15 U.S.C. 80b–2(a)(11). By its terms, the definition of "covered financial institution" in Section 956 includes any firm that meets the definition of "investment adviser" under the Investment Advisers Act of 1940 ("Investment Advisers Act"), regardless of whether the firm is registered as an investment adviser under the Act. Banks and bank holding companies are generally excluded from the definition of "investment adviser" under section 202(a)(11) of the Investment Advisers Act.

[39] For credit unions, $10 billion or more.

Burden per respondent for initial set up: 180 hours for institutions with $50 billion or more in total assets (80 hours for reporting requirements and 100 hours for recordkeeping requirements) and 70 hours for institutions between $1 billion and $50 billion in total assets (30 hours for reporting requirements and 40 hours for recordkeeping requirements).

Burden per respondent for ongoing compliance: 70 hours for institutions with $50 billion or more in total assets (40 hours for reporting requirements and 30 hours for recordkeeping requirements) and 25 hours for institutions between $1 billion and $50 billion in total assets (15 hours for reporting requirements and 10 hours for recordkeeping requirements).

Total OCC annual burden: 17,800 hours (13,040 hours for initial set-up and 4,760 hours for ongoing compliance).

OTS

Number of respondents: 163 (17 institutions with total consolidated assets of $50 billion or more and 146 institutions with total consolidated assets between $1 billion and $50 billion.

Burden per respondent for initial set up: 180 hours for institutions with $50 billion or more in total assets (80 hours for reporting requirements and 100 hours for recordkeeping requirements) and 70 hours for institutions between $1 billion and $50 billion in total assets (30 hours for reporting requirements and 40 hours for recordkeeping requirements).

Burden per respondent for ongoing compliance: 70 hours for institutions with $50 billion or more in total assets (40 hours for reporting requirements and 30 hours for recordkeeping requirements) and 25 hours for institutions between $1 billion and $50 billion in total assets (15 hours for reporting requirements and 10 hours for recordkeeping requirements).

Total OTS annual burden: 18,120 hours (13,280 hours for initial set-up and 4,840 hours for ongoing compliance).

NCUA

Number of respondents: 184 (6 institutions with total consolidated assets of $10 billion or more and 178 institutions with total consolidated assets between $1 billion and $10 billion).

Burden per respondent for initial set up: 180 hours for institutions with $10 billion or more in total assets (80 hours for reporting requirements and 100 hours for recordkeeping requirements) and 70 hours for institutions between $1 billion and $10 billion in total assets (30 hours for reporting requirements and 40 hours for recordkeeping requirements).

Burden per respondent for ongoing compliance: 70 hours for institutions with $10 billion or more in total assets (40 hours for reporting requirements and 30 hours for recordkeeping requirements) and 25 hours for institutions between $1 billion and $10 billion in total assets (15 hours for reporting requirements and 10 hours for recordkeeping requirements).

Total NCUA annual burden: 18,410 hours (13,540 hours for initial set-up and 4,870 hours for ongoing compliance).

SEC

Number of respondents: The proposed rule would establish additional reporting and recordkeeping burdens for broker-dealers that are covered financial institutions ("covered BDs and IAs") with assets of at least $50 billion, as compared to covered BDs and IAs with assets between $1 billion and $50 billion. The Commission estimates that approximately 200 respondents (approximately 130 broker-dealers and approximately 70 investment advisers) would be affected generally by the proposed rules, and that approximately 30 of the 200 respondents would be affected by proposed §§ 248.204(c)(3) and 248.205(b)(3)(ii)(B).[40]

(A) Proposed Section 248.204 (Required Reports)

The Commission, jointly with the other Agencies, proposes that covered BDs and IAs be required to describe the structure of the firms' incentive-based compensation arrangements for covered persons in a manner that is sufficient to allow an assessment of whether the structure or features of those arrangements provide or are likely to provide covered persons with excessive compensation, fees, or benefits to covered persons or could lead to material financial loss to the firm. Proposed § 248.204(c)(1) would require a narrative description of the components of the incentive-based compensation arrangements applicable to covered persons, specifying the types of covered persons to which they apply. Proposed § 248.204(c)(2) would require that covered BDs and IAs provide a succinct description of their incentive-based compensation policies and procedures. Proposed § 248.204(c)(3) would require that covered BDs and IAs with total consolidated assets of $50 billion or more provide the Commission with a succinct description of incentive-based compensation policies and procedures applicable to executive officers and other covered persons whom the board of directors, or a committee thereof, has identified as having the ability to expose the institution to possible losses that are substantial in relation to the firm's size, capital, or overall risk tolerance. Proposed § 248.204(c)(4) would require covered BDs and IAs to describe the material changes to the firm's incentive based compensation arrangements. Proposed § 248.204(c)(5) would require each covered BD and IA to describe the specific reasons why it believes the structure of its incentive-based compensation does not encourage inappropriate risks by the covered financial institution by providing covered persons with excessive compensation or incentive-based compensation that could lead to material financial loss to the covered financial institution.

Based on the initial and ongoing burden the Commission estimated in connection with the adoption of the executive compensation reporting requirements for public companies filing Form 10–Ks under the Exchange Act (*i.e.* Item 402 of Regulation S–K), the Commission estimates that the burden for the covered BD and IA respondents imposed by the proposed reporting requirements would be 100 hours.[41] Since the proposed rule does

[40] Each Federal regulator has proposed how to calculate a firm's "total consolidated assets". For broker-dealers, the determination of whether the broker-dealer had $1 billion in assets would be made by reference to the broker-dealer's year-end audited consolidated statement of financial condition filed with the Commission pursuant to Rule 17a–5. For investment advisers, asset size would be determined by the adviser's total assets shown on the balance sheet for the adviser's most recent fiscal year end. Data from the SEC's Office of Risk, Strategy and Financial Innovation indicates that there are 132 registered broker-dealers with assets of $1 billion or more and 18 broker-dealers with assets of at least $50 billion. Most investment advisers currently do not report to the Commission the amount of their own assets, so the Commission is unable to determine how many have $1 billion or more in assets and $50 billion or more in total consolidated assets. *See* Form ADV, Part 1A, Item 12. The Commission estimates that advisers with assets under management of $100 billion or more would have total consolidated assets of $1 billion or more. Based on data from the Investment Adviser Registration Depository ("IARD"), the SEC's Division of Investment Management estimates that 68 registered advisers with assets under management of at least $100 billion would have assets of $1 billion or more, and 7 registered advisers with assets under management of at least $500 billion would have total consolidated assets of at least $50 billion. The Commission has rounded these numbers to 70 and 10 for purposes of its analysis.

[41] The Commission estimated that public company respondents would incur approximately 95 hours of annual burden in connection with the adoption of Item 402 of Regulation S–K. *See* Securities Act of 1933 Release No. 8432A and Securities Exchange Act Release No. 54302A.(August 29, 2006), 71 FR 53158, 53217

not provide for different reporting requirements for smaller covered BDs and IAs with assets between $1 billion and $50 billion and for larger firms with assets of at least $50 billion, the Commission has not estimated separate reporting burdens for larger covered BDs and IAs. Therefore, the Commission estimates a collective reporting burden of 20,000 hours for covered BDs and IAs.[42]

(B) Documentation of Determining Designated Persons (Section 248.205(b)(3)(ii)(B))

For covered BDs and IAs with assets of at least $50 billion, proposed § 248.205(b)(3)(ii)(B) would require a firm's board of directors, or a committee thereof, to identify those covered persons (other than executive officers) that individually have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance. These covered persons may include, for example, traders with large position limits relative to the institution's overall risk tolerance and other individuals that have the authority to place at risk a substantial part of the capital of the covered financial institution. The Agencies propose that the compensation decisions applicable to such persons must be approved by the firm's board of directors or a committee of the board and that the covered BD or IA document the compensation decisions made by the board or its committee.

The Commission estimates that each covered BD and IA with assets of at least $50 billion would incur 20 hours of burden initially to comply with the proposed recordkeeping requirements associated with the proposed rule and 10 hours of burden on an ongoing basis. Therefore, the Commission estimates an initial collective recordkeeping burden in connection with the documentation requirement provided in § 248.205(b)(3)(ii)(B) is 600 hours for covered BDs and IAs with assets of at least $50 billion.[43] The Commission estimates the ongoing collective recordkeeping burden in connection with this requirement to be 300 hours for covered BDs and IAs with assets of at least $50 billion.[44]

(C) Required Policies and Procedures

Proposed § 248.206(a) would require covered financial institutions to adopt and maintain policies and procedures reasonably designed to ensure and monitor compliance with 12 U.S.C. 5641, commensurate with the size and complexity of the organization and the scope and nature of its use of incentive-based compensation. As described in further detail above, proposed § 248.206(b) would require that the policies and procedures, at a minimum, are consistent with the disclosure requirements and prohibitions in other parts of the proposed rule, ensure that risk management or oversight personnel have a role in designing and assessing incentive-based compensation arrangements, provide for independent monitoring of the incentive-based compensation awards, risks taken and actual outcomes, require that a covered financial institution's board receive data and analysis from management and other sources sufficient to enable the board to assess whether the incentive-based compensation arrangements are consistent with 12 U.S.C. 5641, and require sufficient documentation of the covered financial institution's incentive-based compensation arrangements to enable the Commission to determine the covered BDs or IAs compliance with 12 U.S.C. 5641. In addition, the proposal would require that the covered BDs' and IAs' policies and procedures include certain features when a firm uses deferral in connection with an incentive-based compensation arrangement, and that the policies and procedures subject incentive-based compensation arrangements to a corporate governance framework.

Many covered BDs and IAs are already conforming to the incentive-based compensation standards reflected in the *Guidance* because they are affiliated with banking organizations supervised by the FRB, OCC, OTS or FDIC that have already altered their incentive-based compensation arrangements and policies and procedures following the publication of the *Guidance*. The *Guidance* applies to all banking organizations supervised by the FRB, OCC, OTS or FDIC, including national banks, State member banks, State nonmember banks, savings associations, U.S. bank holding companies, savings and loan holding companies, the U.S. operations of foreign banks with a branch, agency or commercial lending company in the United States, and Edge and agreement corporations (collectively "banking organizations").[45] Based upon information filed with the Commission and the staff's discussions with a number of BDs and its review of the public filings of covered BDs, IAs and certain parent companies, the Commission believes that covered BDs and IAs affiliated with banking organizations ("covered bank BDs and IAs") have already altered their incentive-based compensation policies and procedures and corresponding arrangements in conjunction with their affiliated banking organizations that are subject to the *Guidance*. Based on public filings with the Commission, the SEC estimates that there are approximately 25 covered bank BDs and IAs with total consolidated assets of at least $50 billion and approximately 85 covered bank BDs and IAs with total consolidated assets between $1 billion and $50 billion.[46] Therefore, covered bank BDs and IAs should bear significantly less burden than those covered BDs and IAs not already subject to the *Guidance* ("covered non-bank BDs and IAs") to develop and maintain policies and procedures as required in the proposed rules. The Commission requests comment on its estimated number of covered bank BDs and IAs.

The Commission believes that the covered bank BDs and IAs would incur approximately the same recordkeeping burden as the banking organizations. Based on the initial estimates of recordkeeping burden provided by FRB, OCC, FDIC and OTS for proposed § 248.206, the Commission estimates an initial recordkeeping burden of 80 hours for each covered bank BD and IA with $50 billion or more in total consolidated assets and 40 hours of initial recordkeeping burden for each covered bank BD and IA with total consolidated assets between $1 billion and $50 billion. Based on the ongoing estimates of recordkeeping burden provided by FRB, OCC, FDIC and OTS, the Commission believes that each covered bank BD and IA respondent with total consolidated assets of at least $50 billion would incur approximately 30 hours of ongoing recordkeeping burden

(September 8, 2006) (S7–03–06). The Commission is rounding this number up to 100 for the instant proposed rule estimate.

[42] 200 covered BDs and IAs x 100 hours = 20,000 hours.

[43] 30 covered BDs and IAs with assets of at least $50 billion × 20 hours = 600 hours.

[44] 30 covered BDs and IAs with assets of at least $50 billion × 10 hours = 300 hours.

[45] *See Guidance* 75 FR at 36398.

[46] The Commission estimates that there are approximately 20 covered bank BDs with assets of at least $50 billion and 35 covered bank BDs with assets between $1 billion and $50 billion. The Commission bases the estimates for covered bank BDs upon data submitted to the Commission in FOCUS reports (*i.e.* Form X–17A–5 Part II). The Commission estimates that there are approximately 5 covered bank IAs with assets of at least $50 billion and 50 covered bank IAs with assets between $1 billion and $50 billion. The estimates for covered bank IAs are based upon data submitted to the Commission in Form ADV (*i.e.* Form ADV Part 1A, Items 6.A.(6) and 7.A.(5)).

and each covered bank BD and IA respondent with total consolidated assets between $1 billion and $50 billion would incur approximately 10 hours of recordkeeping burden on an ongoing basis.

For covered non-bank BDs and IAs, the Commission estimates a significantly higher burden, namely the amount of burden that the banking agencies originally estimated in the *Guidance* (480 hours of initial burden, rounded up to 500 in the instant proposal and 40 hours of ongoing burden)[47] in addition to the amounts that the FRB, OTS, FDIC and OCC estimated in connection with the instant proposed rule. The Commission estimates that there are approximately 75 covered non-bank BDs with assets between $1 billion and $50 billion, 10 covered non-bank IAs with assets between $1 billion and $50 billion and 5 covered non-bank IAs with assets of at least $50 billion.[48]

Therefore, for covered non-bank BDs and IAs, the Commission estimates an initial recordkeeping burden estimate of 580 hours[49] for covered BDs and IAs with $50 billion or more in total consolidated assets and 540 hours[50] of recordkeeping burden for covered BDs and IAs with total consolidated assets between $1 billion and $50 billion. The Commission estimates that covered non-bank BD and IA respondents with total consolidated assets of at least $50 billion would incur approximately 70 hours[51] of ongoing recordkeeping burden while those covered non-Bank BDs and IAs with total consolidated assets between $1 billion and $50 billion would incur approximately 50 hours[52] of ongoing recordkeeping burden.

Total SEC initial and annual recordkeeping and reporting burdens (from proposed Section 248.205(b)(iii)(2)(B) and proposed Section 248.206):

	Covered bank BDs and IAs ($50B +) (hours)	Covered bank BDs and IAs ($1B–$50B) (hours)	Covered non-bank BDs and IAs ($50B +) (hours)	Covered non-bank BDs and IAs ($1B–$50B) (hours)
Initial Reporting	[53] 2,500	[54] 8,500	[55] 500	[56] 8,500
Initial Recordkeeping	[57] 2,500	[58] 3,400	[59] 3,000	[60] 46,000
Ongoing Reporting	[61] 2,500	[62] 8,500	[63] 500	[64] 8,500
Ongoing Recordkeeping	[65] 1,000	[66] 1,000	[67] 400	[68] 4,300

D. External Costs

The Commission also believes that the proposed rules would likely generate external costs to the covered BDs and IAs, particularly at the stage of preparing the initial reports required by § 248.204 and initially developing and implementing the policies and procedures in compliance with § 248.206. Covered BDs and IAs may elect to hire various types of professionals, including attorneys, benefits consultants, and accountants. The Commission estimates that the covered BDs and IAs would hire professionals to prepare the necessary reports and develop and maintain the necessary policies and procedures at approximately the same hourly level as the covered BDs and IAs assume internally (*e.g.* covered bank BDs and IAs with at least $50 billion in assets would collectively use approximately the equivalent of 2,500 hours worth of professionals' time to prepare the required reports, in addition to the covered bank BDs' and IAs' internal burden to prepare them).

The Commission believes that there would be approximately an equal balance of attorneys,[69] benefits

[47] *See Guidance*, 75 FR at 36403.

[48] The Commission estimates that there are approximately 75 covered non-bank BDs with assets between $1 billion and $50 billion . The Commission estimates that there are approximately 5 covered non-bank IAs with assets of at least $50 billion and 10 covered non-bank IAs with assets between $1 billion and $50 billion. The Commission bases these estimates upon data submitted to the Commission in FOCUS reports (*i.e.* Form X–17A–5 Part II) and in Form ADV (*i.e.* Form ADV Part 1A, Items 6.A.(6) and 7.A.(5)). *See supra* note 46. It is difficult to determine whether any unregistered advisers are non-bank IAs that are not subject to the *Guidance*.

[49] 500 hours (from *Guidance*) + 80 hours (from the estimate provided by the Fed, OCC, FDIC and OTS in instant proposed rule) = 580 hours.

[50] 500 hours (from *Guidance*) + 40 hours (from the estimate provided by the Fed, OCC, FDIC and OTS in instant proposed rule) = 540 hours.

[51] 40 hours (from *Guidance*) + 30 hours (from the estimate provided by the Fed, OCC, FDIC and OTS in instant proposed rule) = 70 hours.

[52] 40 hours (from *Guidance*) + 10 hours (from the estimate provided by the Fed, OCC, FDIC and OTS in instant proposed rule) = 50 hours.

[53] (20 covered bank BDs with assets of at least $50B + 5 covered bank IAs with assets of at least $50B) × 100 hours = 2,500 hours.

[54] (35 covered bank BDs with assets between $1B and $50B + 50 covered bank IAs with assets between $1B and $50B) × 100 hours = 8,500 hours.

[55] 5 covered non-bank IAs with assets of at least $50B × 100 hours = 500 hours.

[56] (75 covered non-bank BDs with assets between $1B and $50B + 10 covered non-bank IAs with assets between $1B and $50B) × 100 hours = 8,500 hours.

[57] (20 covered bank BDs with assets of at least $50B + 5 covered bank IAs with assets of at least $50B) × 80 hours + ((20 covered bank BDs + 5 covered bank IAs) × 20 hours in connection with proposed Section 248.205(b)(3)(ii)(B)) = 2,500 hours.

[58] (35 covered bank BDs with assets between $1B and $50B + 50 covered bank IAs with assets between $1B and $50B) × 40 hours = 3,400 hours.

[59] 5 covered non-bank IAs with assets of at least $50B × 580 hours + ((5 covered non-bank IAs with assets of at least $50B) × 20 hours in connection with proposed Section 248.205(b)(3)(ii)(B)) = 3,000 hours.

[60] (75 covered non-bank BDs with assets between $1B and $50B + 10 covered non-bank IAs with assets between $1B and $50B) × 540 hours = 45,900 hours.

[61] (20 covered bank BDs with assets of at least $50B + 5 covered bank IAs with assets of at least $50B) × 100 hours = 2,500 hours.

[62] (35 covered bank BDs with assets between $1B and $50B + 50 covered bank IAs with assets between $1B and $50B) × 100 hours = 8,500 hours.

[63] 5 covered non-bank IAs with assets of at least $50B × 100 hours = 500 hours.

[64] (75 covered non-bank BDs with assets between $1B and $50B + 10 covered non-bank IAs with assets between $1B and $50B) × 100 hours = 8,500 hours.

[65] (20 covered bank BDs with assets of at least $50B + 5 covered bank IAs with assets of at least $50B) × 30 hours + ((20 covered bank BDs + 5 covered bank IAs) × 10 hours in connection with proposed Section 248.205(b)(3)(ii)(B)) = 900 hours.

[66] (35 covered bank BDs with assets between $1B and $50B + 50 covered bank IAs with assets between $1B and $50B) × 10 hours = 850 hours.

[67] 5 covered non-bank IAs with assets of at least $50B × 70 hours + ((5 covered non-bank IAs with assets of at least $50B) × 10 hours in connection with proposed Section 248.205(b)(3)(ii)(B)) = 400 hours.

[68] (75 covered non-bank BDs with assets between $1B and $50B + 10 covered non-bank IAs with assets between $1B and $50B) × 50 hours = 4,250 hours.

[69] An outside attorney's salary range is estimated at $400 an hour based on industry sources. See Securities Exchange Act Release No. 62174 (May 26, 2010) at note 510, 75 FR 32556 (June 8, 2010) (S7–15–09). The Commission requests comment on this estimate.

consultants,[70] actuaries [71] and accountants [72] that are hired at each covered BD or IA. The chart below summarizes the external costs that the Commission estimates covered BDs and IAs would assume collectively in connection with the proposed rule. The Commission requests comments on these external cost estimates, including the hourly rate that the Commission estimates for external attorneys, benefits consultants, actuaries and accountants.

Total SEC estimated external recordkeeping costs:

	Covered bank BDs and IAs ($50B +) (million)	Covered bank BDs and IAs ($1B–$50B) (million)	Covered non-bank BDs and IAs ($50B +) (million)	Covered non-bank BDs and IAs ($1B–$50B) (million)
Initial Reporting	[73] $1	[74] $3.4	[75] $200,000	[76] $3.4
Initial Recordkeeping	[77] 1	[78] 1.3	[79] 1.2	[80] 18
Ongoing Reporting	[81] 1	[82] 3.4	[83] 200,000	[84] 3.4
Ongoing Recordkeeping	[85] 400,000	[86] 400,000	[87] 150,000	[88] 1.7

Board

Number of respondents: 664 (59 institutions with total consolidated assets of $50 billion or more and 605 institutions with total consolidated assets between $1 billion and $50 billion).

Burden per respondent for initial set up: 180 hours for institutions with $50 billion or more in total consolidated assets (80 hours for reporting requirements and 100 hours for recordkeeping requirements) and 70 hours for institutions between $1 billion and $50 billion in total consolidated assets (30 hours for reporting requirements and 40 hours for recordkeeping requirements).

Burden per respondent for ongoing compliance: 70 hours for institutions with $50 billion or more in total consolidated assets (40 hours for reporting requirements and 30 hours for recordkeeping requirements) and 25 hours for institutions between $1 billion and $50 billion in total consolidated assets (15 hours for reporting requirements and 10 hours for recordkeeping requirements).

Total Board annual burden: 72,225 hours (52,970 hours for initial set-up and 19,255 hours for ongoing compliance).

C. OTS Executive Orders 12866 and 13563 Determination

Executive Order 13563, "Improving Regulation and Regulatory Review," affirms and supplements Executive Order 12866, "Regulatory Planning and Review," which requires Federal agencies to prepare a regulatory impact analysis for agency actions that are found to be "significant regulatory actions." Significant regulatory action means any regulatory action that is likely to result in a rule that may:

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

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

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

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order.[89]

Based on its initial assessment, OTS anticipates that the proposed rule (if the final rule is the same as the proposed rule) would not be economically significant. Nonetheless, OTS solicits comment on the economic impact.

OTS does not anticipate that the proposal would create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. OTS's proposal is essentially the same as the proposal of every other Federal agency regulating the financial services industry. Thus, rather than creating any inconsistency, by being part of this joint interagency proposal, OTS's portion adds to the consistency of regulations on incentive-based compensation that will encompass the financial services industry.

[70] An outside management consultant's salary range (national averages) is available from *http://www.payscale.com.* Using their data from the 75th percentile, adjusting it for an 1800-hour work year, and multiplying by the 5.35 factor which normally is used to include benefits but here is used as an approximation to offset the fact that New York salaries are typically higher than the rest of the country, the result is $596 per hour (rounded to $600). The Commission requests comment on this estimate.

[71] An outside actuary's salary range (national averages) is available from *http://www.payscale.com.* Using their data from the 75th percentile, adjusting it for an 1800-hour work year, and multiplying by the 5.35 factor which normally is used to include benefits but here is used as an approximation to offset the fact that New York salaries are typically higher than the rest of the country, the result is $330 per hour. The Commission requests comment on this estimate.

[72] An outside accountant's salary range is available from the U.S. Bureau of Labor Statistics, Occupational Employment Statistics Web site. Using their data for median salaries from New York State, which has the highest rates in the country, and multiplying by the 5.35 factor which is used to include benefits, the result is $250 per hour. The Commission requests comment on this estimate.

[73] 2,500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $987,500.

[74] 8,500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $3,357,500.

[75] 500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $197,500.

[76] 8,500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $3,357,500.

[77] 2,500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $987,500.

[78] 3,400 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $1,343,000.

[79] 3,000 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $1,185,000.

[80] 46,000 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $18,170,000.

[81] 2,500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $987,500.

[82] 8,500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $3,357,500.

[83] 500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $197,500.

[84] 8,500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $3,357,500.

[85] 1,000 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $395,000.

[86] 1,000 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $395,000.

[87] 400 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $158,000.

[88] 4,300 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $1,698,500.

[89] *See* 58 FR 51735 (Oct. 4, 1993), as amended.

OTS does not anticipate that the proposal would materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. The proposal does not have any provisions related to those subjects.

The Office of Management and Budget's Office of Information and Regulatory Affairs has designated this proposed rule to be a significant regulatory action that is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Orders 12866 and 13563. OTS notes that the proposal does raise some similar issues as were raised by the Banking Agency Guidance issued June 25, 2010, and the 1995 Federal banking agency guidelines implementing the compensation-related and other safety and soundness standards in section 39 of the FDIA (codified at 12 CFR pt. 570, App. A).

Need for Regulatory Action

The proposed rule is required by section 956 of the Dodd-Frank Act. Thus, the proposal is needed to fulfill the statutory mandate that OTS and the other agencies participating in this joint rulemaking prescribe regulations or guidelines that:

1. Prohibit incentive-based payment arrangements, or any feature of any such arrangement, at a covered financial institution that the Agencies determine encourage inappropriate risks by a financial institution by providing excessive compensation or that could lead to a material financial loss.

2. Require covered financial institutions to disclose to its appropriate Federal regulator the structure of its incentive-based compensation arrangements sufficient to determine whether the structure provides "excessive compensation, fees, or benefits" or "could lead to material financial loss" to the institution.

3. Are comparable to the existing compensation-related safety and soundness standards applicable to insured depository institutions under section 39 of the FDIA (12 U.S.C. 1831p–1(c)) (12 CFR pt. 570, App. A for OTS).

The legislative history of the Dodd-Frank Act describes the reasons Congress believed section 956 of the Dodd-Frank Act was needed.[90] Further information and analysis is contained in the *Final Report of the Financial Crisis Inquiry Commission*.[91] OTS's portion of the proposed rule is intended to enhance the regulatory oversight of incentive compensation schemes at larger OTS-regulated savings associations and savings and loan holding companies so as to help ensure that compensation at such institutions is neither excessive in itself nor encourages excessive risk taking.

Scope of Proposed Rule

Section 956 of the Dodd-Frank Act defines "covered financial institutions" to include depository institutions and depository institution holding companies, as defined in section 3 of the FDIA, with assets of $1 billion or more. OTS's portion of the proposed rule applies to savings associations and savings and loan holding companies with $1 billion or more in total consolidated assets that have incentive-based compensation programs.

With regard to savings associations, as of December 31, 2010, OTS supervised 731 savings associations with a combined total of $932 billion in assets. The largest savings association had assets of $88 billion. Only three other savings associations had assets greater than $50 billion. The smallest savings association had assets of $3.5 million. Of the 731 savings associations, 103 have more than a $1 billion each in total assets and thus are covered by the proposed rule (assuming they all have incentive-based compensation programs). Those 103 savings associations represent 85% of all thrift industry assets ($793 billion of the total $932 billion). To put this in context, however, the latest available data on commercial banks (dated September 30, 2010) show 508 commercial banks with assets of $1 billion or more, but with combined total assets of $11 trillion, more than eleven times the amount of assets compared to OTS supervised savings associations of $1 billion or more.

With regard to savings and loan holding companies, as of December 31, 2010, OTS supervised 102 savings and loan holding companies. Savings and loan holding companies are companies that own or control one or more savings associations. Excluding 42 shell holding companies that do not have incentive-based compensation programs, there are 60 savings and loan holding companies with aggregate consolidated assets of $3.1 trillion dollars that are covered by the proposed rule (assuming they all have incentive-based compensation programs). Individually, these companies have consolidated assets ranging from $1 billion to over $750 billion, and vary in complexity as well as size. They conduct a wide range of activities beyond those conducted by the saving association(s) they control. These range from activities closely related to banking, such as insurance and securities brokerage, to activities conducted by large, multinational corporations, such as retailing and manufacturing.

Therefore, altogether, OTS's portion of the proposed rule would affect a maximum of 163 OTS-supervised institutions (103 savings associations and 60 savings and loan holding companies).

OTS further notes that the Board, OCC, and FDIC will assume supervisory and rulemaking responsibility for entities currently supervised and regulated by OTS on the transfer date provided in Title III of the Dodd-Frank Act. That date is expected to be July 21, 2011. These agencies expect to adopt, or incorporate, as appropriate, any final rule adopted by OTS as part of this rulemaking for relevant covered financial institutions that come under their respective supervisory authority after the transfer date.

Types of Impact of Proposed Rule

OTS reviewed existing practices at a subset of these 163 institutions to determine how much the rule would add to the current cost of administering incentive-based compensation programs. A covered financial institution would have to:

1. Submit an annual report to OTS describing the structure of its incentive-based compensation program in sufficient detail for OTS to determine whether the program provides excessive compensation or compensation that could lead to material loss to the institution. The annual report would have to include an analysis of the characteristics of the incentive-based compensation program that prevent excessive compensation and/or mitigate risk of material financial loss.

2. Review and, if necessary, redesign its incentive-based compensation system to ensure it has the elements necessary to adequately manage the risks arising from incentive-based compensation. The rule would contain a list of the minimum elements to be included in the policies and procedures.

[90] *See* H.R. Rep. 111–236, Corporate and Financial Institution Compensation Fairness Act of 2009, at 6 (2009). For additional legislative history, *see Compensation Structure and Systemic Risk: Hearing Before the H. Comm. on Financial Services*, 111th Cong. (2009).

[91] *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, January 2011, available at *http://c0182732.cdn1.cloudfiles.rackspacecloud.com/fcic_final_report_full.pdf*. The report contains discussion of financial sector executive compensation practices, including on pages 61–65.

3. Conduct ongoing monitoring and, as appropriate, auditing of the incentive-based compensation program to ensure that it does, in fact, allocate incentive-based compensation in a way that is not excessive and does not encourage inappropriate risks.

In estimating the implementation costs to covered financial institutions, OTS assumed that costs would generally fall in four areas:

1. Initially reviewing incentive-based compensation programs to determine whether program modifications are needed;

2. Modifying incentive-based compensation programs, where needed;

3. Ongoing monitoring of incentive-based compensation programs to ensure continued compliance; and

4. Preparing and submitting required annual reports on the programs to OTS.

Almost all of the covered financial institutions have incentive-based compensation programs. Each covered financial institution, therefore, would need to perform an initial review to determine whether modifications would be needed. This initial review would also include the analysis necessary to prepare the first report to OTS.

Those institutions needing modifications would have to expend further resources to design and implement compliant systems that fit the institution's business strategy and internal structure. The complexity and length of this process would vary depending on the size of the institution, the scope of the institution's incentive-based compensation program, and the extent of necessary modifications.

The rule's burden would be minimized by granting covered financial institutions the latitude to employ a variety of means to mitigate the risks posed by their current incentive-based compensation programs. While institutions would have to develop policies and procedures that provide clear expectations, institutions could choose the incentive-based compensation risk balancing measures that best address their employees and their risks.[92]

OTS's provisional assessment is that most covered financial institutions would have to make minimal changes to their systems covering:

1. Compensation to executives;

2. The oversight exercised by the board and compensation committee;

3. The scope of risk management; and

4. The role of internal audit.

Some of the key restrictions in the proposed rule are restrictions that covered financial institutions are already observing. Section 563h.5(a) would provide that a covered financial institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered financial institution by providing a covered person with excessive compensation. Section 563h.5(b) would provide that a covered financial institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered financial institution, by providing incentive-based compensation to covered persons, either individually or as part of a group of persons who are subject to the same or similar incentive-based compensation arrangements, that could lead to material financial loss to the covered financial institution.

OTS and the other Federal banking regulators have long required depository institutions to conform their compensation practices to principles of safety and soundness.[93] Since 1995, OTS and the other Federal banking regulators have specifically prohibited depository institutions from paying compensation, fees, and benefits that are excessive or that could lead to material financial loss to the institutions.[94] Since 1995, OTS and the other Federal banking regulators have also specified that compensation that could lead to material financial loss to an institution is prohibited as an unsafe and unsound practice.[95] The standards specified in § 563h.5(a)(2) for determining whether an incentive-based compensation arrangement provides excessive compensation are taken directly from the existing 1995 guidelines.[96]

Since June 25, 2010, OTS and the other Federal banking regulators have maintained guidance designed to help ensure that incentive-based compensation policies at banking organizations do not encourage imprudent risk-taking and are consistent with the safety and soundness of the organization, including guidance on methods such as deferral that make compensation more sensitive to risk. The requirements specified in § 563h.5(b)(2) for avoiding incentive-based compensation arrangements that could lead to material financial loss are taken directly from the guidance.[97] Most covered financial institutions, therefore, already have the listed elements in place. Further, a recent report of the Basel Committee on Banking Supervision (BCBS) noted that most larger institutions already use management accounting to map company performance to business units, and largely employ risk-adjusted return to capital and other economic efficiency measures to assess performance when making incentive-based compensation allocation decisions.[98]

Even the reporting requirements of § 563h.4 of the proposed rule would not be completely new for many institutions. Publicly listed institutions already disclose their incentive-based compensation systems.[99]

As a group, covered financial institutions are likely to make more significant changes to incentive-based compensation programs for non-executive employees and, to some degree, principal shareholders. While institutions have in place most of the internal policies and procedures necessary to run an incentive-based compensation program for these two groups, modifications would likely be necessary to ensure full compliance.

Larger institutions, defined as having total consolidated assets of $50 billion or more, would have to defer at least 50 percent of the annual incentive-based compensation of executive officers for at least three years. These institutions would also apply special review and approval requirements for the incentive-based compensation arrangements for material risk takers. Among OTS-supervised institutions, 13 holding companies and 4 thrifts would be subject to this requirement. These 17 institutions would likely need to make changes to their compensation programs, as it appears that none of them currently defers the required percentage of incentive-based compensation for the required amount of time.

Finally, institutions have an ongoing requirement to prepare annual reports and administer their incentive-based compensation program in compliance with the rule. The administration of the program would include calculating the amount of compensation subject to risk-based adjustment (*e.g.*, deferral),

[92] The Federal Banking Agency Guidance presents and discusses these measures.

[93] *See* section 39(c) of FDIA, 12 U.S.C. 1831p–1(c).

[94] *See* 12 CFR part 570, App. A, paragraph II.I.

[95] *See* 12 CFR part 570, App. A, paragraph III.B.

[96] *See* 12 CFR part 570, App. A, paragraph III.A.

[97] 75 FR at 36405.

[98] BCBS Consultative paper: *Range of Methodologies for Risk and Performance Alignment of Remunerotion*, available at *http://www.bis.org/publ/bcbs178.pdf*.

[99] SEC regulation 17 CFR 229.402(a)(2) requires listed companies to disclose all elements of the compensation provided to "named executive officers" and "directors."

calculating the performance metrics upon which incentive compensation are based, ensuring that independent review of compensation awards is conducted, and assessing the effectiveness of risk-based adjustments to incentive-based compensation payouts. As previously mentioned, institutions generally take these actions to comply with existing safety and soundness regulations and guidance.

To assist the public in understanding how OTS's proposed rule (12 CFR part 563h) compares with Federal Banking Agency Guidelines from 1995 (12 CFR part 570, App. A), and the Federal Banking Agency Guidance from 2010 (75 FR 36395), OTS provides the following summary in bullet form:

1. *Applicability*

• Proposed Rule—Applies to those savings associations and savings and loan holding companies that have total consolidated assets of $1 billion or more and offer incentive-based compensation arrangements to covered persons (§§ 563h.2 and 563h.3).

• 1995 Guidelines—Applies to all savings associations (¶ I.i).

• 2010 Guidance—Applies to all savings associations (p. 36405 n.2).

2. *Reports*

• Proposed Rule—Requires annual reports to OTS describing the structure of incentive-based compensation arrangements; sets minimum standards for the reports. (§ 563h.4)

• 1995 Guidelines—No comparable provision.

• 2010 Guidance—No comparable provision.

3. *Excessive compensation*

• Proposed Rule—Prohibits establishing or maintaining any type of incentive-based compensation arrangement, or any feature of any such arrangement, for covered persons that encourages inappropriate risks by providing excessive compensation (§ 563h.5(a)(1)). Sets a standard that an incentive-based compensation arrangement provides excessive compensation when amounts paid are unreasonable or disproportionate to the services performed, taking into consideration seven factors listed in the proposed rule (§ 563h.5(a)(2)).

• 1995 Guidelines—Prohibits excessive compensation as an unsafe and unsound practice. Sets a standard that compensation is excessive when amounts paid are unreasonable or disproportionate to the services performed by taking into consideration seven factors listed in the guidelines. Covers the same categories of persons and lists the same seven factors as the proposed rule. (¶ III.A)

• 2010 Guidance—No comparable provision.

4. *Material financial loss*

Generally; Requirements for all covered financial institutions

• Proposed Rule—Prohibits establishing or maintaining any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered financial institution, by providing incentive-based compensation to covered persons, either individually or as part of a group of persons who are subject to the same or similar incentive-based compensation arrangements, that could lead to material financial loss to the covered financial institution (§ 563h.5(b)(1)). Specifies that an incentive-based compensation arrangement established or maintained by a covered financial institution for one or more covered persons must meet three criteria listed in the proposed rule (§ 563h.5(b)(2)).

• 1995 Guidelines—Prohibits compensation that could lead to material financial loss as an unsafe and unsound practice (¶ III.B).

• 2010 Guidance—Provides that incentive compensation arrangements, to be consistent with safety and soundness, should meet three criteria (p. 36405). The criteria listed are the same as in the proposed rule.

Specific requirements for covered financial institutions with $50 billion or more in total consolidated assets; Deferral required for executive officers

• Proposed Rule—Specifies that at least 50% of the incentive-based compensation for an executive officer at an institution with total consolidated assets of $50 billion or more must be deferred over a period of no less than three years, with the release of deferred amounts to occur no faster than on a pro rata basis, and with the adjustment of the deferred amount to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period (§ 563h.5(b)(3)(i)).

• 1995 Guidelines—No comparable provision.

• 2010 Guidance—No comparable provision.

Specific requirements for covered financial institutions with $50 billion or more in total consolidated assets; additional requirement for covered persons presenting particular loss exposure

• Proposed Rule—Contains special procedures and restrictions on the incentive-based compensation of covered persons (other than executive officers) who the institution's board identifies as having the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance (§ 563h.5(b)(3)(ii)).

• 1995 Guidelines—No comparable provision.

• 2010 Guidance—No comparable provision.

5. *Policies and procedures*

• Proposed Rule—Sets minimum standards for policies and procedures on incentive compensation (§ 563h.6).

• 1995 Guidelines—No comparable provision.

• 2010 Guidance—No comparable provision. But see discussion of other policy and procedure requirements (pp. 36403–05).

6. *Evasions*

• Proposed Rule—Anti-evasion provision prohibits, doing indirectly or through or by any other person, any act or thing that would be unlawful to do directly (§ 563h.7).

• 1995 Guidelines—No comparable provision.

• 2010 Guidance—No comparable provision.

Assessment of Impact of Proposed Rule

OTS believes that an institution would spend several hundred person hours conducting an initial review of its incentive-based compensation program and making any necessary modifications. All institutions of $1 billion in total consolidated assets or more would have to conduct the review, and most institutions would have to make some modification to their incentive-based compensation programs.

OTS estimates that smaller institutions (those with less than $50 billion in assets) would spend, at most, eight weeks (320 person hours) to perform the initial steps necessary to comply. Among the covered financial institutions, 146 fall into this category. Using $150 as an estimate of hourly cost,[100] the total cost to the smaller institutions as a group would be $7 million ($150 × 320 hours × 146 institutions). At larger institutions, these modifications would be more extensive because of the number of individuals involved and the amount the institution would have to expand and/or adjust risk sensitivity measures. The larger institutions may require as much as twice the time as smaller institutions to implement the rule, for an estimated cost of $1.6 million ($150 × 640 hours × 17 institutions). The total initial

[100] OTS estimates that legal and administrative expenses would average, at most, $150 per hour.

implementation costs, therefore, should come to approximately $8.6 million.

The subsequent ongoing costs associated with monitoring and managing incentive-based compensation programs, once established, are unlikely to be significantly greater than the costs associated with the administration of current incentive-based programs. OTS, therefore, believes that the ongoing annual costs of the rule would not exceed $100 million. As previously discussed, institutions already have in place most of the mechanisms necessary to implement the rule's requirements. Once the institution makes adjustments indicated by its initial analysis, these mechanisms would continue to function as they do now.

Any ongoing costs in addition to those already incurred would be for:

1. Production of an annual report;
2. Administration of incentive-based compensation for a broader range of employees;
3. Administration of a more complex deferral scheme at some institutions; and
4. More sophisticated risk sensitivity mechanisms.

With respect to item 1, OTS believes that the costs of the annual report would be minimal. Reports after the first submitted would only need to document significant changes to the incentive-based compensation program. Human resource departments maintain descriptions of their incentive-based compensation programs for internal administrative purposes; these descriptions could serve as the basis for regulatory reporting.

With respect to items 2, 3, and 4, OTS anticipates that institutions would use some additional human resources and risk management expertise to administer the programs. For the 17 larger institutions, OTS estimates that the cost of these additional resources would be about $24,000 per institution annually. For the 146 smaller institutions, the additional resources would entail additional personnel and other expenses of less than $12,000 per institution per year.[101] Therefore, OTS estimates the annual cost to be about $2.2 million (17 larger institutions × $24,000 = $0.4 million; 146 smaller institutions × $12,000 = $1.8 million).

In summary, OTS estimates the costs to the institutions of implementing the rule as proposed as follow:

First year: $8.6 million + $2.2 million = $10.8 million.

Second and subsequent years: $2.2 million.

Beyond the costs of implementation, OTS assumes that the broader economic impact of the rule would be negligible. The overall level of compensation, as set by the forces of supply and demand in the labor market, is unlikely to change. Any variations in compensation levels that may occur would be minimal and, given the small number of covered financial institutions, have no effect on overall demand in the economy.

If the rule has its desired effect, institutions will take a more measured approach in their assessment of risk and return. As a result, the amount of lending in some excessively risky business areas may be reduced, which in turn may have an economic impact on the areas served by the 163 OTS-supervised covered financial institutions. Incentive-based compensation programs that appropriately balance risk and reward will entail reductions only of economic activity that is unsound and which, ultimately, entails more cost than benefit to the economy as a whole. Any reduction in inappropriately risky lending brought about by the rule, therefore, would be a benefit of the rule.

The recent crisis in financial markets demonstrated the significant costs that can arise from financial instability; the purpose of the rule is to enhance the financial stability of the financial sector by diminishing incentives for inappropriate risk taking. Because the benefits of financial stability are largely intangible, OTS made no attempt to quantify them here.

Conclusion

OTS's preliminary estimates of the annualized cost of this rule to the 163 OTS-supervised covered financial institutions as a group would be substantially less than $100 million. Moreover, the overall annual economic impact would not be significant. OTS seeks comment on this economic impact assessment.

D. OCC Unfunded Mandates Reform Act of 1995 Determination

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532), requires the OCC to prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted annually for inflation). OCC has determined that this proposed rule will not result in expenditures by State, local, and tribal governments, or the private sector, of $100 million or more in any one year. Accordingly, OCC has not prepared a budgetary impact statement.

E. OTS Unfunded Mandates Reform Act of 1995 Determination

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. (The inflation adjusted threshold for 2011 is $142 million or more.) If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

OTS has determined that this proposed rule will not result in expenditures by State, local, and tribal governments, or the private sector, in excess of the threshold. Accordingly, OTS has not prepared a budgetary impact statement.

F. NCUA Executive Order 13132 Determination

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5) voluntarily complies with the Executive Order. The Proposed Rule applies to credit unions with $1 billion in assets and over and would not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that the Proposed Rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

G. NCUA and FDIC: The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The NCUA and FDIC have determined that this Proposed Rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999,

[101] OTS estimates that for institutions with assets between $1 billion and $50 billion, the costs of managing the additional elements of the program would entail some personnel and Information Technology (IT) support. As institutions already have personnel management software systems in place, either in house or contracted out, the incremental costs of IT support would be negligible.

Public Law 105–277, 112 Stat. 2681 (1998).

H. SEC Economic Analysis

Economic Analysis

As discussed above, 12 U.S.C. 5641 requires the Commission, jointly with other appropriate Federal regulators, to prescribe regulations or guidelines to require covered financial institutions to disclose information about their incentive-based compensation arrangements sufficient for the Agencies to determine whether their compensation structure provides an executive officer, employee, director or principal shareholder with excessive compensation, fees or benefits or could lead to material financial loss to the firm.[102] 12 U.S.C. 5641 also requires the Agencies to prescribe joint regulations or guidelines that prohibit any type of incentive-based compensation arrangements that the Agencies determine encourages inappropriate risks by covered financial institutions by providing excessive compensation to officers, employees, directors, or principal shareholders ("covered persons") or that could lead to material financial loss to the covered financial institution.[103]

The Agencies have determined that it is appropriate to propose rules, instead of guidelines, as permitted under 12 U.S.C. 5641. The Commission believes that broker-dealers and investment advisers would benefit from the greater predictability afforded by rules. Such greater predictability would facilitate broker-dealers' and investment advisers' ability to design compliance policies and procedures. The rule being proposed by the Agencies consists of a reporting section, a prohibition section, and a policies and procedures section. The reporting section requires enhanced reporting of incentive-based compensation arrangements for covered persons by a covered financial institution to such institution's appropriate Federal regulator. The prohibition section forbids incentive-based compensation arrangements that encourage covered persons to expose the institution to inappropriate risks by providing the covered person excessive compensation and prohibits incentive-based compensation arrangements that encourage covered persons to expose the covered financial institutions to inappropriate risks that could lead to a material financial loss. The policies and procedures section requires that the covered financial institutions maintain policies and procedures to ensure compliance with these requirements and prohibitions. The Commission is sensitive to the costs and benefits imposed on broker-dealers registered with the Commission under section 15 of the Securities Exchange Act ("registered broker-dealers") and investment advisers, as defined in section 202(a)(11) of the Investment Advisers Act of 1940 ("investment advisers"). The discussion below focuses on the costs and benefits applicable to registered broker-dealers and investment advisers that meet the definition of "covered financial institution" under the proposed rule (collectively "covered BDs and IAs"). The discussion addresses the decisions made jointly by the Agencies to fulfill the mandates of the Dodd-Frank Act within the Agencies' permitted discretion, rather than the costs and benefits of the mandates of the Dodd-Frank-Act itself. However, to the extent that the Commission's discretion is exercised to realize the benefits intended by the Dodd-Frank Act or to impose the costs associated with the Dodd-Frank Act, the two types of benefits and costs are not entirely separable. Therefore, the Paperwork Reduction Act ("PRA") hourly burden estimates made in accordance with the requirements of the PRA, and their corresponding dollar cost estimates, are included in the calculations below.

A. Report of Incentive-Based Compensation Arrangements

In order to fulfill the requirement imposed by 12 U.S.C. 5641(a) relating to the disclosure of incentive-based compensation arrangements, the proposal would require a covered financial institution to submit a report annually to, and in the format directed by, its regulator, that describes the structure of the covered financial institution's incentive-based compensation arrangements for covered persons. Similar to the policies and procedures requirements under the proposed rule, the annual report would be commensurate with the size and complexity of the organization, as well as the scope and nature of its use of incentive-based compensation arrangements. As such, institutions with no incentive-based compensation arrangements or arrangements that affect only a few covered persons, would need to submit only limited information. The report would be required to contain:

- A clear narrative description of the components of the covered financial institution's incentive-based compensation arrangements applicable to covered persons, specifying the categories of covered persons to which they apply;
- A succinct description of the covered financial institution's policies and procedures governing its incentive-based compensation arrangements;
- For covered financial institutions with total consolidated assets of at least $50 billion, an additional succinct description of incentive-based compensation policies and procedures specific to the covered financial institution's executive officers and other covered persons who the institution's board of directors (or a committee of the board) has identified and determined have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance;
- A description of any material changes to the covered financial institution's incentive-based compensation arrangements and policies and procedures made since the covered financial institution's last report submitted this section; and
- The specific reasons the covered financial institution believes the structure of its incentive-based compensation arrangements does not provide covered persons incentives to engage in behavior that is likely to cause the covered financial institution to suffer a material financial loss and does not provide covered persons with excessive compensation.

1. Benefits

The Commission believes that the information that would be required to be reported to the Commission under proposed § 248.205 would assist Commission examiners to determine whether covered BDs and IAs are fulfilling the requirements of section 956 of the Dodd-Frank Act. The report is designed to elicit pointed, succinct explanations about issues that would likely be of high interest to an examiner, such as a clear narrative description of the firm's incentive-based compensation plan, a succinct description of the firm's incentive-based compensation policies and procedures and any changes thereto, and reasons that the compensation structure will not encourage behavior that violates the principles of 12 U.S.C. 5641. The Commission anticipates that examiners would find these descriptions a useful starting point in an examination to make a risk-assessment as to which areas of a firm's incentive-based compensation arrangements merit further examination. Persons within covered BDs and IAs responsible for determining compensation levels, as well as persons receiving incentive-based compensation

[102] 12 U.S.C. 5641(a).

[103] 12 U.S.C. 5641(b).

would be able to review the incentive-based compensation policies, which should promote the balance of the incentive-based compensation process at covered BDs and IAs. The Commission also believes that the reporting of incentive-based compensation information would foster a climate of accountability at covered BDs and IAs by raising the profile of incentive-based compensation at firms, and thereby improving the care with which the firms design their incentive-based compensation programs. By including persons who individually have the ability to expose a firm with total consolidated assets of at least $50 billion to possible losses that are substantial in relation to the firm's size, capital, or overall risk tolerance as persons whose compensation should be subject to the requirements of the statute (designated risk takers), the proposed rule should encourage executives to consider more carefully those compensation arrangements that could potentially lead to activities that could expose the covered institution to significant risks. Properly incentivizing designated risk takers could limit the risk exposure of covered financial institutions.

The reporting provisions of the proposed rule are designed to elicit qualitative statements from the covered financial institution, including covered BDs and IAs, regarding, among other things, the specific reasons the covered financial institution believes the structure of its incentive-based compensation plan does not provide covered persons incentives to engage in behavior that is likely to cause the covered financial institution to suffer a material financial loss and does not provide covered persons with excessive compensation. The proposed rule is designed to elicit a meaningful discussion of the firm's incentive-based compensation arrangements. In all cases, covered BDs and IAs should report to the Commission the comprehensive descriptions relating to each of the required disclosures described below.

2. Costs

The Commission is aware that requiring companies to file reports on the structure of their incentive-based compensation arrangements could impose costs on covered financial institutions. For example, by requiring covered financial institutions to report the information in the proposed rule, it is possible that this could serve as a disincentive for covered financial institutions to re-visit or otherwise revise their incentive-based compensation plans, because doing so would create additional regulatory burdens for the covered financial institution. Further, while the Commission intends to keep the reported information confidential to the full extent it is permitted to do so under the Freedom of Information Act ("FOIA"), the Commission understands that firms may nonetheless have concerns about potential disclosure of information that could be competitively sensitive, as incentive-based compensation plans and arrangements are. The Commission believes that not including information regarding the individual compensation levels of covered persons may mitigate some confidentiality concerns. Accordingly, the Commission is aware of these potential costs and seeks comment on them generally, as well as on any specific methods that could be used to minimize these costs and concerns.

The Commission is also aware that the proposed rule would generate compliance-related costs associated with, among other things, collecting the necessary information and preparing the reports, as well as hiring outside professionals, such as attorneys, compensation or benefits consultants, accountants and/or actuaries. In the charts below, the Commission estimates the internal and external costs associated with the proposed reporting requirements. In order to arrive at the internal cost estimates, the Commission multiplied the hourly burden estimates provided in the PRA Section by the estimated hourly rate for a securities attorney.[104] The Commission is using the same external cost estimates for the reporting requirement that it used in the PRA Section of this proposed rule. The Commission seeks comment on all these cost estimates.

INTERNAL COSTS

	Covered bank BDs and IAs ($50B +)	Covered bank BDs and IAs ($1B–$50B)	Covered non-bank BDs and IAs ($50B +)	Covered non-bank BDs and IAs ($1B–$50B)
Initial Reporting	$900,000 [105]	$3 million [106]	$175,000 [107]	$3 million.[108]
Ongoing Reporting	900,000 [109]	3 million [110]	175,000 [111]	3 million.[112]

[104] The Commission estimates $354 per hour for a securities attorney, based on SIFMA's *Management & Professional Earnings in the Securities Industry 2010*, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

EXTERNAL COSTS

	Covered bank BDs and IAs ($50B +)	Covered bank BDs and IAs ($1B–$50B)	Covered non-bank BDs and IAs ($50B +)	Covered non-bank BDs and IAs ($1B–$50B)
Initial Reporting	$1 million [113]	$3.4 million [114]	$200,000 [115]	$3.4 million.[116]
Ongoing Reporting	1 million [117]	3.4 million [118]	200,000 [119]	3.4 million.[120]

B. Prohibition on Certain Incentive-Based Compensation Arrangements

The proposed rule states that a covered financial institution may not establish or maintain any incentive-based compensation arrangement, or any feature of any such arrangement, that encourages a covered person to expose the institution to inappropriate risks by providing that person with excessive compensation. Under the proposed rule, compensation would be considered excessive when amounts paid are unreasonable or disproportionate to the services performed by a covered person. In determining whether incentive-based compensation is unreasonable or disproportionate to the services performed, the covered BDs and IAs would consider those factors set forth in the section 39(c) of the FDIA.[121]

To address the prohibition against arrangements that potentially encourage inappropriate risks that could lead to a material financial loss at the covered financial institution, the Agencies propose to deem incentive-based compensation arrangements for all covered persons to encourage inappropriate risks that could lead to material financial loss at the institution unless the arrangement or feature: (i) Balances risk and financial results, for example, by using deferral of payments, risk adjustment of awards, longer performance periods, or reduced sensitivity to short-term performance; (ii) is compatible with effective controls and risk management; and (iii) is supported by strong oversight by a covered BD's or IA's board of directors. These principles are substantially identical to the principles published in the *Guidance*.[122]

The proposed rule would require additional measures for certain covered persons working for covered financial institutions with total consolidated assets of $50 billion or more. For executive officers and heads of major business lines of such firms, at least 50% of their incentive-based compensation would be required to be deferred on a pro-rata basis over a period of at least three years. Such executive officers' and business line heads' deferred incentive-based compensation would be required to be adjusted downward to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period (the "look-back").

The Agencies also propose for a covered financial institution with $50 billion or more in assets that for certain classes of covered person whose activities, by their nature, expose the covered financial institution to a risk of significant loss (designated risk takers), that such firm's board of directors, or a committee thereof, perform individual review of each such person's incentive-based compensation against certain factors and that each such person's incentive-based compensation be approved by the board of directors, or committee thereof.

1. Benefits

The Commission believes that the proposed prohibitions related to the incentive-based compensation arrangements would help ensure that covered financial institutions avoid incentive-based compensation arrangements that would threaten the safety and soundness of the covered financial institution or otherwise have serious adverse effects on economic conditions or financial stability of covered BDs and IAs. In order to address the adverse effects that incentive-based compensation arrangements may have on covered financial institutions' financial condition, the proposed rules would mandate the application of the principles described in the *Guidance* (provide incentives that appropriately balance risk and reward, compatibility with effective controls and risk-management, and the support of strong corporate governance) to all covered financial institutions, including covered BDs and IAs. The Commission believes that applying these principles to covered BDs and IAs should promote sound incentive-based compensation practices and discourage incentive-based compensation arrangements that contributed to the recent financial crisis.

The proposed elements defining when an incentive-based compensation arrangement provides excessive compensation or could result in a material financial loss would benefit covered financial institutions by identifying specific factors to determine whether certain arrangements are prohibited. Abiding by the standards reflected in section 39(c) of the FDIA

[105] 2,500 hours × $354/hour = $885,000.

[106] 8,500 hours × $354/hour = $3,009,000.

[107] 500 hours × $354 = $177,000.

[108] 8,500 hours × $354/hour = $3,009,000.

[109] 2,500 hours × $354/hour = $885,000.

[110] 8,500 hours × $354/hour = $3,009,000.

[111] 500 hours × $354 = $177,000.

[112] 8,500 hours × $354/hour = $3,009,000.

[113] 2,500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $987,500.

[114] 8,500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $3,357,500.

[115] 500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $197,500.

[116] 8,500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $3,357,500.

[117] 2,500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $987,500.

[118] 8,500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $3,357,500.

[119] 500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $197,500.

[120] 8,500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $3,357,500.

[121] Under Section 248.205(a)(2) of the proposed rule, an incentive-based compensation arrangement provides excessive compensation when amounts paid are unreasonable or disproportionate to the services performed by a covered person, taking into consideration:

(i) The combined value of all cash and non-cash benefits provided to the covered person;

(ii) The compensation history of the covered person and other individuals with comparable expertise at the covered financial institution;

(iii) The financial condition of the covered financial institution;

(iv) Comparable compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the institution's operations and assets;

(v) For postemployment benefits, the projected total cost and benefit to the covered financial institution;

(vi) Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered financial institution; and

(vii) Any other factors the Commission determines to be relevant.

[122] *See Guidance on Sound Incentive Compensation Policies*, 75 FR 36395 (June 25, 2010) (jointly adopted by the OCC, the FRB, the FDIC and OTS).

and the principles described in the *Guidance*, which already apply to banking institutions, should help to promote the safety and soundness of the covered BD or IA and by extension protect investors and promote the public interest. The proposed rule also should give firms the discretion to reward the most productive employees because the definition of "excessive compensation" should be sufficiently broad so as to permit covered financial institutions the flexibility to reward productive employees.

Moreover, by not prescribing mandatory deferral for covered BDs and IAs with assets under $50 billion, but rather by requiring non-specific standards for these arrangements (*i.e.*, that they balance risk and return, are compatible with effective controls and risk management, etc.), the proposed rule would provide smaller covered BDs and IAs with significant flexibility to tailor their compensation packages to their covered persons. The proposed rule would permit covered BDs and IAs with assets below $50 billion to determine their respective incentive-based compensation arrangements within the parameters of meeting certain goals (*i.e.*, that the payments balance risk and return, are compatible with effective risk controls and risk management) set forth in the proposed rule.

The Commission believes that the proposed rule should curb excessive risk taking, which should lead to more effective capital allocation. The rule should discourage compensation incentives that encouraged capital flow into investments that were unprofitable on the whole. Hereafter, the flow of capital into less risky investments should result in capital being put to more effective use. More efficient capital allocation, in turn, should improve the quality of the firms' financial services and products, as firms employ capital to its most productive use. Since higher quality service and products are ordinarily associated with increased competition, it is possible that competition among covered BDs and IAs would be more robust.

By requiring that the incentive-based compensation arrangements of covered BDs and IAs with more than $50 billion in total assets defer at least 50% of the compensation of covered executives and chiefs of major business lines for at least three years, and requiring firms to adjust any amount deferred to reflect actual losses or other measures of performance that are realized or become better known only during the deferral period, the proposed rule should help align the interests of those covered persons with the greatest ability to influence the risk profile of the covered financial institution with the interests of the covered financial institution. The deferral requirement for executive officers and chiefs of major business lines at the largest covered financial institutions reflects the previously acknowledged benefit for deferral of certain high-level employees whose activities present broad, and potentially lengthy, risk exposure to an institution, and whose activities do not lend themselves as easily to risk quantification and assessment through ex ante or other predictive risk adjustment measures. Requiring deferral for this discrete group of individuals at particularly large institutions, where up-front or ex ante risk adjustment measures are less likely to be effective, is a useful risk adjustment tool. It permits time for risks not previously discerned or quantifiable to ultimately materialize and permits adjustment of unreleased deferral payments on the basis of observed consequences as opposed to mere predicted results. The Commission believes that the heightened standards for the largest covered BDs and IAs is particularly appropriate because decisions made at the largest covered BDs and IAs can greatly impact the fair and orderly operation of the financial markets. These deferral restrictions should weaken the incentive for executive officers and chiefs of major business lines to make decisions that create short term gain at the expense of increased long term risk. The Commission also expects that by example, an express deferral requirement for executive officers and heads of major business lines would have a broader beneficial impact on the structure of compensation used throughout a company.[123] The required look-back mechanism included in the proposed rule is a means by which the covered financial institution may reduce previously awarded compensation over the deferred period of time. Thus, the required look-back adds to the power of deferring compensation in that previously awarded compensation may actually not be awarded if the firm finds that such compensation does not reflect actual losses or other measures better realized during the deferral period.

As with the deferral requirement and the look-back mechanism, the Commission preliminarily believes that these provisions of the proposed rule relating to designated risk takers would help to strengthen board oversight of covered persons' incentive-based compensation. The Commission believes that promoting strong corporate governance oversight of a covered BD's or IA's incentive-based compensation arrangements would promote sound practices and foster a high quality process regarding incentive-based compensation decisions at a covered financial institution. Moreover, the additional oversight of designated risk takers' incentive-based compensation should help to provide proper incentives to these persons and thus limit the risk exposure of covered BDs and IAs. In addition, requiring the board of directors, or a committee of the board, to identify designated risk takers other than executive officers and to approve their incentive-based compensation should help to improve the board's understanding of the risk profile of certain firm activities or divisions that have the ability to expose the institution to possible substantial losses. It would also encourage the board to spend more time considering the compensation arrangements of important employees who are not executives but who have the ability to materially impact the risk profile of the firm. The proposed rule also provides covered financial institutions the flexibility to determine who the relevant potential excessive risk takers are.

2. Costs

a. All Covered BDs and IAs

The Commission also anticipates that the proposed rule may entail certain costs. For example, in a case where a firm elects to defer an excessive portion of covered persons' compensation, such deferral may reduce effort expended by covered persons and the willingness of covered persons to take even measured risks. The Commission understands that it is necessary for covered financial institutions to take a certain amount of risk in order to operate their businesses. Accordingly, the Commission desires to carefully balance the need for covered financial institutions to take risk against the possibility that if the wrong regulatory balance is struck, covered persons may have the incentive to actually take less risk than is optimal in order to ensure that, on a personal level, the covered employee has sufficient cash flow. In the event that employees

[123] Certain recent studies provide empirical evidence consistent with deferred compensation helping reduce the probability of corporate default. See *e.g.* Wei and Yermack (2010). In one study, the authors conclude that bank CEOs with large amounts of inside debt in the form of pensions and deferred compensation exposed their firms to less risk and obtained greater performance during the recent financial crisis. (*http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1519252*).

are induced to take less than optimal risk, then there might be a negative effect on the efficiency of capital allocation. The Commission preliminarily believes that the proposed rule strikes an appropriate balance in this regard but requests comment generally on this issue.

Based on its experience in the area, staff conversations with covered BDs and filings by publicly-traded covered BDs, IAs and certain parent companies, the Commission believes that the elements of the prohibition applicable to all covered BDs and IAs related to excessive compensation and material financial loss to the firms already generally represent the practices of many covered BDs and IAs. Therefore, the Commission believes that covered BDs and IAs generally already consider factors consistent with those referenced in section 39(c) of the FDIA and the principles in the *Guidance* in designing and administering their incentive-based compensation programs. Nonetheless, the Commission recognizes that some covered BDs and IAs may not conform to incentive-based compensation standards consistent with section 39(c) of the FDIA and the principles in the *Guidance*.

In addition, the Commission acknowledges the possibility that the proposed rules may reduce the incentive for certain covered persons to switch jobs because would-be new employers that are covered financial institutions would be bound to offer such covered persons compensation packages that comply with the proposed rules. If a lack of turnover results, it might adversely impact competitiveness among firms, but it may also promote institutional stability within firms. The Commission believes the proposed rule strikes an appropriate balance in this regard, but requests comment generally on this issue.

The Commission seeks comment on whether the proposed prohibitions applicable to covered BDs and IAs (which include only those broker-dealers and investment advisers with assets of more than $1 billion) may disadvantage covered financial institutions as compared to financial institutions not covered under the proposed rules because covered financial institutions would be required to assume costs in designing, implementing, monitoring and maintaining a regulatory program reasonably designed to address the requirements of the proposed rules, whereas broker-dealers and investment advisers with total consolidated assets less than $1 billion would not be subject to such costs. The Commission also seeks comment on whether it is possible that covered BDs and IAs would have more difficulty recruiting qualified individuals to work for their firms if such individuals fear that added scrutiny of their incentive-based compensation may lead to lower aggregate pay.

b. Covered BDs and IAs With Assets of $50 Billion or More

In addition to the costs imposed upon all covered BDs and IAs, described above, the proposed rule would impose additional costs on firms with assets of $50 billion or more. The Commission anticipates that it is possible that covered BDs and IAs with assets of $50 billion or more may have to pay more in base salary to compensate their executive officers and heads of a major business line for the uncertainty associated with the ultimate receipt of deferred compensation. However, it is also possible that increases in salaries would be offset by decreases in deferred incentive-based compensation. The Commission requests comment on whether covered BDs and IAs should expect to incur the cost of increased salaries that may result from the implementation of required deferred compensation and look-back policies for certain covered persons.

As stated above, the Commission also recognizes that the firms with assets of at least $50 billion may have more difficulty recruiting individuals for those positions than a firm not subject to the deferral requirement. In addition, such firms may have difficulty recruiting individuals who object to having their compensation specifically approved and monitored by the covered BD's or IA's board of directors or committee thereof. To the extent that this adversely affects the quality of employees that firms of that size are able to attract, it may negatively affect the business of larger covered financial institutions.

To the extent that the proposal relies on an assumption that a covered person understands the risks inherent in a particular business decision but chooses to disregard them because the covered person would not bear the costs associated with those risks being realized, the proposal may not be effective at promoting a more accurate or realistic assessment of a business decision as to which neither the executive officer nor the covered financial institution grasps the inherent risk. To the extent, however, that the proposal relies on an assumption that covered persons do not always fully understand the risks inherent in particular business decisions and have had inadequate incentives to ensure that they comprehend these risks, the proposal would be more effective. It is not clear what, if any, other regulatory steps could be taken to promote a better comprehension of risk, and mandatory deferral as provided in the proposed rule would at least provide some required measure of risk adjustment in cases where such risks are understood by executive officers at large covered financial institutions. If, however, the risks that covered persons take are very long term (*i.e.*, beyond 5 years), the proposed compensation deferral might not prove to be effective at deferring covered persons' taking on inappropriate risk for the firm.

As stated above, the Commission also believes there would be compliance-related costs associated with the proposed rule. Based upon experience of the Commission staff, the Commission understands that although mandatory deferral of a significant percentage of firms' incentive-based compensation to executive officers and chiefs of major business lines is the existing practice among many covered BDs and IAs, it would represent a new practice for some firms. Even for firms with existing deferral practices, there would be costs to conform their deferral practices to the requirements of proposed § 248.205(b)(3). For example, based on staff's discussions with the industry, its review of information in public filings, and its experience in the area, the Commission believes that the practice of adjusting deferred amounts of compensation to reflect actual losses or other measures that are realized or become known during the deferral period (administering a look-back) exists in comparatively fewer firms than does the practice of deferral itself. The Commission also believes that many firms may provide deferral or vesting periods of less than the three years under the proposed rule. The Commission believes, based upon its experience and the filings submitted by publicly-traded covered BDs, IAs and certain public companies, that some, but not all boards or board committees of covered BDs and IAs with assets of at least $50 billion already have a role in approving the compensation for highly-paid individuals, including most people that would be defined as designated risk takers under the proposed rule. Accordingly, the Commission anticipates that covered BDs and IAs would experience costs in implementing the deferral, look-back and designated risk takers components of the requirements for firms with assets of $50 billion or more.

The requirement under proposed § 248.205(b)(3)(ii)(B) to require the board of directors (or committee of the board) of covered financial institutions that have total consolidated assets of $50 billion or more to approve and document the identification of those covered persons that individually have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance would create new burden for such larger covered financial institutions. Based on staff experience and conversations with larger covered BDs and the filings submitted by publicly-traded covered IAs and certain parent companies, the Commission does not believe that the boards of larger covered BDs and IAs generally identify and approve the compensation of such designated risk takers.

The Commission believes that the most significant ongoing cost that covered BDs and IAs would assume to comply with proposed § 248.205(b)(3)(ii)(B) is the cost of having appropriate senior personnel administer the deferred compensation, look-back and designated risk takers provisions. As with all matters related to incentive-based compensation, covered BDs and IAs would be required to administer their incentive-based compensation arrangements in a manner that is compatible with effective controls and risk management and is supported by strong corporate governance, including active and effective oversight by the covered financial institution's board of directors. The Commission anticipates that firms would use an appropriate mix of senior risk management personnel along with the firms' board of directors, or committee thereof, to administer the identification of designated risk takers and approval of their compensation, as required under the proposed rule.

Larger covered financial institutions with total consolidated assets of at least $50 billion may experience a disadvantage relative to smaller financial institutions on account of the proposed required deferral for executive officers and board-level review of the incentive-based compensation of designated risk takers. In addition to the added costs that such larger financial institutions would incur to implement the deferral and board-level review of designated risk takers' compensation, the Commission believes that some executive officers may have disincentives from working for a covered financial institution whereby their compensation would be required to be deferred or in firms where their incentive-based compensation is subject to board-level scrutiny.

In order to help the Commission better understand all the costs associated with this aspect of the proposed rule, the Commission requests comment on them generally. The Commission is also soliciting comment on the following specific issues:

- Do commenters believe that requiring a minimum deferral period of three years for at least 50% of the compensation for executive officers and chiefs of major business lines at large covered financial institutions would place such financial institutions at an unjustified disadvantage in the hiring of and retaining qualified personnel as compared to smaller covered financial institutions? If commenters believe that this is the case, what would commenters do to modify the proposed rule while reasonably ensuring that there is useful and meaningful risk adjustment of incentive-based compensation for executives at large covered financial institutions? Do commenters believe that requiring a different minimum deferral period or minimum deferred percentage would promote better incentive-based compensation practices? Should the required minimum deferral provisions be extended to smaller covered financial institutions?
- Do commenters believe that there is a substantial risk that covered financial institutions would reconfigure their operations, structure, or assets in such a manner so as to circumvent being classified as a large covered financial institution?
- Do commenters believe that mandating deferral as a risk adjustment tool for executive officers at large covered financial institutions would inhibit the development of other potentially more effective risk adjustment tools? Are there other risk adjustment tools that are more effective than deferral, and why are those tools more effective?

C. Required Policies and Procedures and Documentation of the Compensation of Certain Covered Persons

The proposal would require covered financial institutions to adopt policies and procedures reasonably designed to ensure and monitor compliance with 12 U.S.C. 5641 commensurate with the size and complexity of the organization and the scope and nature of its use of incentive-based compensation. As described in further detail above, the proposed rule would require that the policies and procedures, at a minimum, be consistent with the disclosure requirements and prohibitions in other parts of the proposed rule, ensure that risk management or oversight personnel have a role in designing and assessing incentive-based compensation arrangements, provide for independent monitoring of the incentive-based compensation awards, risks taken and actual outcomes, require that a covered financial institution's board receive data and an analysis to enable the board to assess whether the incentive-based compensation arrangements are consistent with 12 U.S.C. 5641, and require sufficient documentation of the covered financial institution's incentive-based compensation arrangements to enable the Commission to determine the covered BDs' or IAs' compliance with 12 U.S.C. 5641. In addition, the proposal would require that the covered BDs' and IAs' policies and procedures include certain features for when a firm uses deferral in connection with an incentive-based compensation arrangement, and that the policies and procedures subject incentive-based compensation arrangements to an appropriate corporate governance framework.

In addition, for covered BDs and IAs with assets of at least $50 billion, proposed § 248.205(b)(3)(ii)(B) would require a firm's board of directors, or a committee thereof, to identify those covered persons (other than executive officers) that individually have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance. These covered persons may include, for example, traders with large position limits relative to the institution's overall risk tolerance and other individuals that have the authority to place at risk a substantial part of the capital of the covered financial institution. The Agencies propose that the compensation decisions applicable to such persons must be approved by the firm's board of directors or a committee of the board and that the covered BD or IA document the compensation decisions made by the board or its committee.

1. Benefits

The Commission believes that requiring covered financial institutions to adopt and enforce the policies and procedures described above would foster the Agencies' understanding of the covered financial institutions' incentive-based compensation practices and would promote compliance and accountability regarding the practices that the Agencies propose to prohibit. The rule is designed to ensure that covered BDs and IAs establish adequate

procedures and controls to ensure compliance with 12 U.S.C 5641. The Commission preliminarily believes that the policies and procedures section of the proposed rule would help to ensure that boards receive data to monitor incentive-based compensation arrangements. Further, the Commission believes that, at a minimum, the proposed rule should help to ensure that incentive-based compensation arrangements would be designed with more careful consideration of its effects on risk. The Commission also believes that the proposed rule would provide greater board of director and risk management/risk oversight personnel supervision of incentive-based compensation arrangements and practices at the covered financial institution because boards would receive data and analysis from management to support a finding that the incentive-based compensation arrangements are consistent with 12 U.S.C. 5641. Moreover, risk-management/risk-oversight personnel would help to design and assess the effectiveness of the covered BD's or IA's incentive-based compensation arrangement. The Commission believes that these provisions of the proposed rule would help to strengthen the supervision of covered persons' incentive-based compensation arrangements by the board of directors. The proposed rule would help increase the importance of the compensation-setting function at covered financial institutions, including covered BDs and IAs. The Commission preliminarily believes that this increased internal importance would result in a higher quality process regarding incentive-based compensation decisions at a covered financial institution. For example, the proposed rule would help to ensure that information is received by the relevant decision makers and other persons acting in an internal supervisory role within the covered financial institution. This development should strengthen the supervision of the board with respect to incentive-based compensation arrangements.

The recordkeeping requirement in proposed in § 248.206(b)(5) should ensure that Commission staff members are able to properly examine covered BDs' and IAs' incentive-based compensation practices in the context of an examination. The proposal also would require that a covered BD or IA have policies and procedures that provide that compensation payments are reduced to reflect adverse risk outcomes or high levels of risk taken. This should help ensure that the compensation contracts are accurately followed and diminish the adverse effect of deferred compensation that proves to be unwarranted once the risks associated with the covered person's activities are realized over time.

2. Costs

As described more fully in the PRA Section, the Commission believes that covered individual bank BDs and IAs would be subject to significantly less initial and ongoing costs than non-bank BDs and IAs because bank BDs and IAs are already subject to the *Guidance*. The Commission is also aware that the proposed rule would generate compliance-related costs associated with, among other things, collecting the necessary information and preparing the reports, as well as hiring outside professionals, such as attorneys, compensation or benefits consultants, accountants and/or actuaries. In the chart below, the Commission estimates the internal costs associated with the proposed recordkeeping requirements. In order to arrive at these internal cost estimates, the Commission multiplied the hourly burden estimates provided in the PRA Section by the estimated hourly rate for a securities attorney.[124] The Commission is using the same external cost estimates for the recordkeeping requirement that it used in the PRA Section of this proposed rule. The Commission seeks comment on all these cost estimates.

TOTAL INTERNAL RECORDKEEPING COST

	Covered bank BDs and IAs ($50B +)	Covered bank BDs and IAs ($1B–$50B)	Covered non-bank BDs and IAs ($50B +)	Covered non-bank BDs and IAs ($1B–$50B)
Initial Recordkeeping	$900,000[125]	$1.2 million[126]	$1.1 million[127]	$16 million.[128]
Ongoing Recordkeeping	$400,000[129]	$400,000[130]	$150,000[131]	$1.5 million.[132]

TOTAL EXTERNAL RECORDKEEPING COST

	Covered bank BDs and IAs ($50B +)	Covered bank BDs and IAs ($1B–$50B)	Covered non-bank BDs and IAs ($50B +)	Covered non-bank BDs and IAs ($1B–$50B)
Initial Recordkeeping	$1 million[133]	$1.3 million[134]	$1.2 million[135]	$18 million.[136]
Ongoing Recordkeeping	$400,000[137]	$400,000[138]	$250,000[139]	$1.7 million.[140]

Solicitation of Comment

In enacting this section of the Dodd-Frank Act, Congress has made the

[124] The Commission estimates $354 per hour for a securities attorney, based on SIFMA's *Management & Professional Earnings in the Securities Industry 2010*, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[125] 2,500 hours × $354 = $885,000.

[126] 3,400 hours × $354 = $1,203,600.

[127] 3,000 hours × $354 = $1,062,000.

[128] 46,000 hours × $354 = $16,284,000.

[129] 1,000 hours × $354 = $354,000.

[130] 1,000 hours × $354 = $354,000.

[131] 400 hours × $354 = $141,600.

[132] 4,300 hours × $354 = $1,522,200.

[133] 2,500 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $987,500.

[134] 3,400 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $1,343,000.

[135] 3,000 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $1,185,000.

[136] 46,000 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $18,170,000.

[137] 1,000 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $395,000.

judgment that regulation entailing potential burdens and impacts of the type discussed below is justified so as to prevent covered financial institutions from utilizing incentive-based compensation arrangements that could threaten the health of financial institutions or have serious effects on economic conditions or financial stability.[141] The Commission generally solicits comment on all the costs, benefits, and analyses set forth in this economic analysis. The Commission also specifically requests comment on the following issues:

- The Commission requests comments on the anticipated impact of the proposal on the competitiveness of covered financial institutions as compared to broker-dealers and investment advisers that do not meet the definition of covered financial institution as well as the impact of the proposal on the competitiveness of covered BDs and IAs with assets of at least $50 billion as compared to covered BDs and IAs with assets between $1 billion and $50 billion.
- Could the proposed rule be modified so as to implement the mandate of 12 U.S.C. 5641 in a manner that improves the efficiency of covered financial institution and imposes less of a burden on competition? If so, what specific changes would commenters suggest? Would the impact be improved with a different deferral threshold (currently 50% of incentive-based compensation) or deferral period (currently no faster than *pro rata* over 3 years)? Is there a better way to design or apply the "look-back" period?
- The Commission solicits public comment on the degree to which commenters believe that the proposal would encourage covered employees to take optimal risk and/or discourage covered employees from taking inappropriate levels of risk. If commenters believe the proposal would lead to covered employees undertaking less than optimal risk (*e.g.*, make decisions that are too conservative for the firm), then please elaborate why that is the case.
- If commenters believe a different approach is warranted, do commenters believe that a different approach would be equally effective at helping to ensure, particularly at large covered financial institutions, that incentive-based compensation arrangements do not result in excessive compensation or a material financial loss to the covered financial institution? What alternative would commenters propose and why do commenters believe that it would be as effective, or more effective?
- Does the proposed rule promote greater internal discipline and controls by covered financial institutions with respect to incentive-based compensation arrangements? Similarly, does the proposed rule help to promote that discipline upon a greater number of persons at the covered financial institution, including not only the executive officers (or comparable persons) at a covered financial institution, but also those persons whose activities subject the covered financial institution to significant risk?

[138] 1,000 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $395,000.

[139] 600 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $237,000.

[140] 4,300 hours × [(25% × $400/hour) + (25% × $600/hour) + (25% × $330/hour) + (25% × $250/hour)] = $1,698,500.

[141] *See* Joint Explanatory Statement of the committee of Conference Accompanying H.R. 4173, H.R. Rep. No. 111–517, at 873.

I. SEC Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA," [142] the Commission must advise OMB whether a proposed regulation constitutes a major rule. Under SBREFA, a rule is "major" if it has resulted in, or is likely to result in:

- An annual effect on the economy of $100 million or more
- a major increase in costs or prices for consumers or individual industries; or
- a significant adverse effect on competition, investment, or innovation.

If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review. The Commission requests comment on the potential impact of each of the proposed rules and rule amendments on the economy on an annual basis, on the costs or prices for consumers or individual industries, and on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

List of Subjects

12 CFR Part 42

Compensation, Banks, Banking, National banks, Reporting and recordkeeping requirements.

12 CFR Part 236

Compensation, Banks, Bank Holding Companies, Reporting and recordkeeping requirements.

[142] Pub. L. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

12 CFR Part 372

Banks, Banking, Compensation, Foreign Banking.

12 CFR Part 563h

Compensation, Holding companies, Reporting and recordkeeping requirements, Savings associations.

12 CFR Parts 741 and 751

Compensation, Credit Unions, Reporting and recording requirements.

12 CFR Part 1232

Administrative practice and procedure, Banks, Compensation, Confidential business information, Government-sponsored enterprises, Reporting and recordkeeping requirements.

17 CFR Part 248

Incentive-based Compensation Arrangements, Reporting and recordkeeping requirements; Securities.

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For the reasons set forth in the joint preamble, the OCC proposes to amend 12 CFR Chapter I of the Code of Federal Regulations as follows:

1. Add part 42 to read as follows:

PART 42—INCENTIVE-BASED COMPENSATION ARRANGEMENTS

Sec.
42.1 Authority.
42.2 Scope and purpose.
42.3 Definitions.
42.4 Required reports to regulators.
42.5 Prohibitions.
42.6 Policies and procedures.
42.7 Evasion.

Authority: 12 U.S.C. 1 *et seq.* 1, 93a, and 5641.

§ 42.1 Authority.

This part is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5641).

§ 42.2 Scope and purpose.

This part applies to a covered financial institution that has total consolidated assets of $1 billion or more and offers incentive-based compensation arrangements to covered persons. Nothing in this part in any way limits the authority of the OCC under other provisions of applicable law and regulations.

§ 42.3 Definitions.

For purposes of this part, the following definitions apply unless otherwise specified:

(a) *Board of directors* means the governing body of any covered financial institution performing functions similar to a board of directors. For Federal branches and agencies, "board of directors" means parent foreign bank senior management.

(b) *Compensation* means all direct and indirect payments, fees or benefits, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to the covered financial institution, including, but not limited to, payments or benefits pursuant to an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement.

(c) *Covered financial institution* means a national bank or a Federal branch or agency of a foreign bank that has total consolidated assets of $1 billion or more.

(d) *Covered person* means any executive officer, employee, director, or principal shareholder of a covered financial institution.

(e) *Director* of a covered financial institution means a member of the board of directors of the covered financial institution, or of a board or committee performing a similar function to a board of directors.

(f) *Executive officer* of a covered financial institution means a person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions: president, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, or head of a major business line.

(g) *Incentive-based compensation* means any variable compensation that serves as an incentive for performance.

(h) *Principal shareholder* means an individual who directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10 percent or more of any class of voting securities of a covered financial institution.

(i) *Total consolidated assets* means:

(1) For a national bank, calculating the average of the total assets reported in the bank's four most recent Consolidated Reports of Condition and Income ("Call Report"); and

(2) For a Federal branch and agency, calculating the average of the total assets reported in the Federal branch or agency's four most recent Reports of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks—FFIEC 002.

§ 42.4 Required reports to regulators.

(a) *In general.* A covered financial institution must submit a report annually to, and in the format directed by, the OCC, that describes the structure of the covered financial institution's incentive-based compensation arrangements for covered persons and that is sufficient to allow an assessment of whether the structure or features of those arrangements provide or are likely to provide covered persons with excessive compensation, fees, or benefits to covered persons or could lead to material financial loss to the covered financial institution.

(b) *Individual compensation.* A covered financial institution is not required to report the actual compensation of particular covered persons as part of the report required by paragraph (a) of this section.

(c) *Minimum standards.* The information submitted by the covered financial institution pursuant to paragraph (a) of this section must include the following:

(1) A clear narrative description of the components of the covered financial institution's incentive-based compensation arrangements applicable to covered persons and specifying the types of covered persons to which they apply;

(2) A succinct description of the covered financial institution's policies and procedures governing its incentive-based compensation arrangements for covered persons;

(3) If the covered financial institution has total consolidated assets of $50 billion or more, an additional succinct description of incentive-based compensation policies and procedures specific to the covered financial institution's:

(i) Executive officers; and

(ii) Other covered persons who the board of directors, or a committee thereof, of the covered financial institution has identified and determined under § 42.5(b)(3)(ii) of this part individually have the ability to expose the covered financial institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance;

(4) Any material changes to the covered financial institution's incentive-based compensation arrangements and policies and procedures made since the covered financial institution's last report submitted under paragraph (a) of this section; and

(5) The specific reasons why the covered financial institution believes the structure of its incentive-based compensation plan does not encourage inappropriate risks by the covered financial institution by providing covered persons with:

(i) Excessive compensation; or

(ii) Incentive-based compensation that could lead to a material financial loss to the covered financial institution.

§ 42.5 Prohibitions.

(a) *Excessive compensation prohibition.* (1) *In general.* A covered financial institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered financial institution by providing a covered person with excessive compensation.

(2) *Standards.* An incentive-based compensation arrangement provides excessive compensation when amounts paid are unreasonable or disproportionate to the services performed by a covered person, taking into consideration:

(i) The combined value of all cash and non-cash benefits provided to the covered person;

(ii) The compensation history of the covered person and other individuals with comparable expertise at the covered financial institution;

(iii) The financial condition of the covered financial institution;

(iv) Comparable compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the covered financial institution's operations and assets;

(v) For postemployment benefits, the projected total cost and benefit to the covered financial institution;

(vi) Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered financial institution; and

(vii) Any other factors the OCC determines to be relevant.

(b) *Material financial loss prohibition.* (1) *Generally.* A covered financial institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered financial institution, by providing incentive-based compensation to covered persons, either individually or as part of a group of persons who are subject to the same or

similar incentive-based compensation arrangements, that could lead to material financial loss to the covered financial institution.

(2) *Requirements for all covered financial institutions.* An incentive-based compensation arrangement established or maintained by a covered financial institution for one or more covered persons does not comply with paragraph (b)(1) of this section unless it:

(i) Balances risk and financial rewards, for example by using deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods;

(ii) Is compatible with effective controls and risk management; and

(iii) Is supported by strong corporate governance, including active and effective oversight by the covered financial institution's board of directors or a committee thereof.

(3) *Specific requirements for covered financial institutions with $50 billion or more in total consolidated assets.* (i) *Deferral required for executive officers.* As part of appropriately balancing risk and financial rewards pursuant to paragraph (b)(2)(i) of this section, any incentive-based compensation arrangement for any executive officer established or maintained by a covered financial institution that has total consolidated assets of $50 billion or more must provide for:

(A) At least 50 percent of the annual incentive-based compensation of the executive officer to be deferred over a period of no less than three years, with the release of deferred amounts to occur no faster than on a pro rata basis; and

(B) The adjustment of the amount required to be deferred under paragraph (b)(3)(i)(A) of this section to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period.

(ii) *Additional requirement for covered persons presenting particular loss exposure.* As part of appropriately balancing risk and financial rewards pursuant to paragraph (b)(2)(i) of this section, if a covered financial institution has total consolidated assets of $50 billion or more—

(A) The board of directors, or a committee thereof, of the covered financial institution shall identify those covered persons (other than executive officers) who individually have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance. These covered persons may include, for example, traders with large position limits relative to the institution's overall risk tolerance and other individuals who have the authority to place at risk a substantial part of the capital of the covered financial institution;

(B) The incentive-based compensation arrangement for any covered person identified pursuant to paragraph (b)(3)(ii)(A) of this section must be approved by the board of directors, or a committee thereof, of the covered financial institution and such approval must be documented;

(C) The board of directors, or committee thereof, may not approve the incentive-based compensation arrangement for any covered person identified pursuant to paragraph (b)(3)(ii)(A) of this section unless the board or committee determines that the arrangement, including the method of paying compensation under the arrangement, effectively balances the financial rewards to the covered person and the range and time horizon of risks associated with the covered person's activities, employing appropriate methods for ensuring risk sensitivity such as deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods; and

(D) In fulfilling its duties under paragraph (b)(3)(ii)(C) of this section, the board of directors or committee thereof must evaluate the overall effectiveness of the balancing methods used in the identified covered person's incentive-based compensation arrangements in reducing incentives for inappropriate risk taking by the identified covered person considering the methods' suitability for balancing the full range of risks presented by that covered person's activities, and the methods' ability to make payments sensitive to all the risks arising from the covered person's activities, including those that may be difficult to predict, measure or model.

§ 42.6 Policies and procedures.

(a) *In general.* Any incentive-based compensation arrangement, or any feature of any such arrangement, is prohibited under § 42.5 of this part, unless adopted pursuant to policies and procedures developed and maintained by each covered financial institution and approved by its board of directors, or a committee thereof, reasonably designed to ensure and monitor compliance with the requirements set forth in 12 U.S.C. 5641 and this part and commensurate with the size and complexity of the organization, as well as the scope and nature of its use of incentive-based compensation.

(b) *Standards.* The policies and procedures must, at a minimum:

(1) Be consistent with the reporting requirements in § 42.4 of this part and prohibitions in § 42.5 of this part;

(2) Ensure that risk-management, risk-oversight, and internal control personnel have an appropriate role in the covered financial institution's processes for designing incentive-based compensation arrangements and for assessing their effectiveness in restraining inappropriate risk-taking;

(3) Provide for the monitoring by a group or person independent of the covered person, where practicable in light of the covered financial institution's size and complexity, of incentive-based compensation awards and payments, risks taken, and actual risk outcomes to determine whether incentive-based compensation payments for covered persons, or groups of covered persons, are reduced to reflect adverse risk outcomes or high levels of risk taken;

(4) Provide for the covered financial institution's board of directors, or committee thereof, to receive data and analysis from management and other sources sufficient to allow the board, or committee thereof, to assess whether the overall design and performance of the institution's incentive-based compensation arrangements are consistent with 12 U.S.C. 5641;

(5) Ensure that documentation of the covered financial institution's processes for establishing, implementing, modifying, and monitoring incentive-based compensation arrangements is maintained that is sufficient to enable the OCC to determine the institution's compliance with 12 U.S.C. 5641 and this part;

(6) Consistent with § 42.5(b)(3) of this part, where deferral is used in connection with an incentive-based compensation arrangement, provide for deferral of incentive-based compensation awards in amounts and for periods of time appropriate to the duties and responsibilities of the covered financial institution's covered persons, the risks associated with those duties and responsibilities, and the size and complexity of the covered financial institution and provide that the deferral amounts paid are adjusted to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period; and

(7) Subject any incentive-based compensation arrangement to a corporate governance framework that provides for ongoing oversight by the board of directors or a committee thereof, including the approval by the

board of directors or a committee thereof of incentive-based compensation to executive officers.

§ 42.7 Evasion.

A covered financial institution is prohibited, for the purpose of evading the restrictions of this part, from doing indirectly or through or by any other person, any act or thing that it would be unlawful for such covered financial institution to do directly under this part.

Federal Reserve Board

12 CFR Chapter II

Authority and Issuance

For the reasons set forth in the joint preamble, the Board proposes to amend 12 CFR Chapter II as follows:

2. Add new part 236 to read as follows:

PART 236—Incentive-Based Compensation Arrangements (Regulation JJ)

Sec.

Authority: 12 U.S.C. 24, 321–338a, 1818, 1844(b), 3108 and 5641.

§ 236.1 Authority.

This part is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5641).

§ 236.2 Scope and purpose.

This part applies to a covered financial institution that has total consolidated assets of $1 billion or more and offers incentive-based compensation arrangements to covered persons. Nothing in this part in any way limits the authority of the Board under other provisions of applicable law and regulations.

§ 236.3 Definitions.

For purposes of this part, the following definitions apply unless otherwise specified:

(a) *Board of directors* means the governing body of any covered financial institution performing functions similar to a board of directors. For a foreign banking organization, "board of directors" refers to the relevant oversight body for the firm's U.S. branch, agency or operations, consistent with the foreign banking organization's overall corporate and management structure.

(b) *Compensation* means all direct and indirect payments, fees or benefits, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to the covered financial institution, including, but not limited to, payments or benefits pursuant to an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement.

(c) *Covered financial institution* (1) *In general.* The term "covered financial institution" means:

(i) A state member bank, as defined in 12 CFR 208.2(g), that has total consolidated assets of $1 billion or more;

(ii) A bank holding company, as defined in 12 CFR 225.2(c), that has total consolidated assets of $1 billion or more;

(iii) A state-licensed uninsured branch or agency of a foreign bank, as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 USC 1813), that has total consolidated assets of $1 billion or more; and

(iv) The U.S. operations of a foreign bank that is treated as a bank holding company pursuant to section 8(a) of the International Banking Act of 1978 (12 USC 3106(a)) that has total consolidated U.S. assets of $1 billion or more.

(2) *Scope of term.* A covered financial institution includes the subsidiaries of the institution.

(d) *Covered person* means any executive officer, employee, director, or principal shareholder of a covered financial institution.

(e) *Director* of a covered financial institution means a member of the board of directors of the covered financial institution, or of a board or committee performing a similar function to a board of directors.

(f) *Executive officer* of a covered financial institution means a person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions: president, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, or head of a major business line.

(g) *Incentive-based compensation* means any variable compensation that serves as an incentive for performance.

(h) *Principal shareholder* means an individual who directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10 percent or more of any class of voting securities of a covered financial institution.

(i) *Total consolidated assets* means:

(1) For a state member bank, total consolidated assets as determined based on the average of the bank's four most recent Consolidated Reports of Condition and Income ("Call Report");

(2) For a bank holding company, total consolidated assets as determined based on the average of the company's four most recent Consolidated Financial Statements for Bank Holding Companies ("FR Y–9C");

(3) For a state-licensed uninsured branch or agency of a foreign bank, total consolidated assets as determined based on the average of the branch or agency's four most recent Call Reports; and

(4) For the U.S. operations of a foreign bank total consolidated U.S. assets as determined by the Board.

§ 236.4 Required reports to regulators.

(a) *In general.* A covered financial institution must submit a report annually to, and in the format directed by, the Board, that describes the structure of the covered financial institution's incentive-based compensation arrangements for covered persons and that is sufficient to allow an assessment of whether the structure or features of those arrangements provide or are likely to provide covered persons with excessive compensation, fees, or benefits to covered persons or could lead to material financial loss to the covered financial institution.

(b) *Individual compensation.* A covered financial institution is not required to report the actual compensation of particular covered persons as part of the report required by paragraph (a) of this section.

(c) *Minimum standards.* The information submitted by the covered financial institution pursuant to paragraph (a) of this section must include the following:

(1) A clear narrative description of the components of the covered financial institution's incentive-based compensation arrangements applicable to covered persons and specifying the types of covered persons to which they apply;

(2) A succinct description of the covered financial institution's policies and procedures governing its incentive-based compensation arrangements for covered persons;

(3) If the covered financial institution has total consolidated assets of $50 billion or more, an additional succinct description of incentive-based compensation policies and procedures specific to the covered financial institution's:

(i) Executive officers; and

(ii) Other covered persons who the board of directors, or a committee thereof, of the covered financial institution has identified and determined under § 236.5(b)(3)(ii) of this part individually have the ability to expose the covered financial institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance;

(4) Any material changes to the covered financial institution's incentive-based compensation arrangements and policies and procedures made since the covered financial institution's last report submitted under paragraph (a) of this section; and

(5) The specific reasons why the covered financial institution believes the structure of its incentive-based compensation plan does not encourage inappropriate risks by the covered financial institution by providing covered persons with:

(i) Excessive compensation; or

(ii) Incentive-based compensation that could lead to a material financial loss to the covered financial institution.

§ 236.5 Prohibitions.

(a) *Excessive compensation prohibition.* (1) *In general.* A covered financial institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered financial institution by providing a covered person with excessive compensation.

(2) *Standards.* An incentive-based compensation arrangement provides excessive compensation when amounts paid are unreasonable or disproportionate to the services performed by a covered person, taking into consideration:

(i) The combined value of all cash and non-cash benefits provided to the covered person;

(ii) The compensation history of the covered person and other individuals with comparable expertise at the covered financial institution;

(iii) The financial condition of the covered financial institution;

(iv) Comparable compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the covered financial institution's operations and assets;

(v) For postemployment benefits, the projected total cost and benefit to the covered financial institution;

(vi) Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered financial institution; and

(vii) Any other factors the Board determines to be relevant.

(b) *Material financial loss prohibition.* (1) *Generally.* A covered financial institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered financial institution, by providing incentive-based compensation to covered persons, either individually or as part of a group of persons who are subject to the same or similar incentive-based compensation arrangements, that could lead to material financial loss to the covered financial institution.

(2) *Requirements for all covered financial institutions.* An incentive-based compensation arrangement established or maintained by a covered financial institution for one or more covered persons does not comply with paragraph (b)(1) of this section unless it:

(i) Balances risk and financial rewards, for example by using deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods;

(ii) Is compatible with effective controls and risk management; and

(iii) Is supported by strong corporate governance, including active and effective oversight by the covered financial institution's board of directors or a committee thereof.

(3) *Specific requirements for covered financial institutions with $50 billion or more in total consolidated assets.* (i) *Deferral required for executive officers.* As part of appropriately balancing risk and financial rewards pursuant to paragraph (b)(2)(i) of this section, any incentive-based compensation arrangement for any executive officer established or maintained by a covered financial institution that has total consolidated assets of $50 billion or more must provide for:

(A) At least 50 percent of the annual incentive-based compensation of the executive officer to be deferred over a period of no less than three years, with the release of deferred amounts to occur no faster than on a pro rata basis; and

(B) The adjustment of the amount required to be deferred under paragraph (b)(3)(i)(A) of this section to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period.

(ii) *Additional requirement for covered persons presenting particular loss exposure.* As part of appropriately balancing risk and financial rewards pursuant to paragraph (b)(2)(i) of this section, if a covered financial institution has total consolidated assets of $50 billion or more—

(A) The board of directors, or a committee thereof, of the covered financial institution shall identify those covered persons (other than executive officers) who individually have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance. These covered persons may include, for example, traders with large position limits relative to the institution's overall risk tolerance and other individuals who have the authority to place at risk a substantial part of the capital of the covered financial institution;

(B) The incentive-based compensation arrangement for any covered person identified pursuant to paragraph (b)(3)(ii)(A) of this section must be approved by the board of directors, or a committee thereof, of the covered financial institution and such approval must be documented;

(C) The board of directors, or committee thereof, may not approve the incentive-based compensation arrangement for any covered person identified pursuant to paragraph (b)(3)(ii)(A) of this section unless the board or committee determines that the arrangement, including the method of paying compensation under the arrangement, effectively balances the financial rewards to the covered person and the range and time horizon of risks associated with the covered person's activities, employing appropriate methods for ensuring risk sensitivity such as deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods; and

(D) In fulfilling its duties under paragraph (b)(3)(ii)(C) of this section, the board of directors or committee thereof must evaluate the overall effectiveness of the balancing methods used in the identified covered person's incentive-based compensation arrangements in reducing incentives for inappropriate risk taking by the identified covered person considering the methods' suitability for balancing the full range of risks presented by that covered person's activities, and the methods' ability to make payments sensitive to all the risks arising from the covered person's activities, including those that may be difficult to predict, measure or model.

§ 236.6 Policies and procedures.

(a) *In general.* Any incentive-based compensation arrangement, or any feature of any such arrangement, is prohibited under § 236.5 of this part, unless adopted pursuant to policies and procedures developed and maintained by each covered financial institution and approved by its board of directors, or a committee thereof, reasonably designed to ensure and monitor compliance with the requirements set forth in 12 U.S.C. 5641 and this part and commensurate with the size and complexity of the organization, as well as the scope and nature of its use of incentive-based compensation.

(b) *Standards.* The policies and procedures must, at a minimum:

(1) Be consistent with the reporting requirements in § 236.4 of this part and prohibitions in § 236.5 of this part;

(2) Ensure that risk-management, risk-oversight, and internal control personnel have an appropriate role in the covered financial institution's processes for designing incentive-based compensation arrangements and for assessing their effectiveness in restraining inappropriate risk-taking;

(3) Provide for the monitoring by a group or person independent of the covered person, where practicable in light of the covered financial institution's size and complexity, of incentive-based compensation awards and payments, risks taken, and actual risk outcomes to determine whether incentive compensation payments for covered persons, or groups of covered persons, are reduced to reflect adverse risk outcomes or high levels of risk taken;

(4) Provide for the covered financial institution's board of directors, or committee thereof, to receive data and analysis from management and other sources sufficient to allow the board, or committee thereof, to assess whether the overall design and performance of the institution's incentive-based compensation arrangements are consistent with 12 U.S.C. 5641;

(5) Ensure that documentation of the covered financial institution's processes for establishing, implementing, modifying, and monitoring incentive-based compensation arrangements is maintained that is sufficient to enable the Board to determine the institution's compliance with 12 U.S.C. 5641 and this part;

(6) Consistent with § 236.5(b)(3) of this part, where deferral is used in connection with an incentive-based compensation arrangement, provide for deferral of incentive-based compensation awards in amounts and for periods of time appropriate to the duties and responsibilities of the covered financial institution's covered persons, the risks associated with those duties and responsibilities, and the size and complexity of the covered financial institution and provide that the deferral amounts paid are adjusted to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period; and

(7) Subject any incentive-based compensation arrangement to a corporate governance framework that provides for ongoing oversight by the board of directors or a committee thereof, including the approval by the board of directors or a committee thereof of incentive-based compensation to executive officers.

§ 236.7 Evasion.

A covered financial institution is prohibited, for the purpose of evading the restrictions of this part, from doing indirectly or through or by any other person, any act or thing that it would be unlawful for such covered financial institution to do directly under this part.

Federal Deposit Insurance Corporation

12 CFR CHAPTER III

Authority and Issuance

For the reasons set forth in the preamble, the Federal Deposit Insurance Corporation proposes to amend chapter III of title 12 of the Code of Federal Regulations as follows:

3. Add new part 372 to read as follows:

PART 372—INCENTIVE-BASED COMPENSATION ARRANGEMENTS

Sec.

Authority: 12 U.S.C. 1819 Tenth, 12 U.S.C. 5641.

§ 372.1 Authority.

This part is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5641).

§ 372.2 Scope and purpose.

This part applies to a covered financial institution that has total consolidated assets of $1 billion or more and offers incentive-based compensation arrangements to covered persons. Nothing in this part in any way limits the authority of the Corporation under other provisions of applicable law and regulations.

§ 372.3 Definitions.

For purposes of this part, the following definitions apply unless otherwise specified:

(a) *Board of directors* means the governing body of any covered financial institution performing functions similar to a board of directors. For an insured U.S. branch of a foreign bank, "board of directors" means the senior management of its parent foreign bank.

(b) *Compensation* means all direct and indirect payments, fees or benefits, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to the covered financial institution, including, but not limited to, payments or benefits pursuant to an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement.

(c) *Covered financial institution* means a state nonmember bank and an insured U.S. branch of a foreign bank that has total consolidated assets of $1 billion or more.

(d) *Covered person* means any executive officer, employee, director, or principal shareholder of a covered financial institution.

(e) *Director* of a covered financial institution means a member of the board of directors of the covered financial institution, or of a board or committee performing a similar function to a board of directors.

(f) *Executive officer* of a covered financial institution means a person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions: President, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, or head of a major business line.

(g) *Incentive-based compensation* means any variable compensation that serves as an incentive for performance.

(h) *Principal shareholder* means an individual who directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10 percent or more of any class of voting securities of a covered financial institution.

(i) *Total consolidated assets* means:

(1) For a state nonmember bank, the average of the total assets reported in the bank's four most recent

Consolidated Reports of Condition and Income; and

(2) For an insured U.S. branch of a foreign bank, the average of the total assets reported in the branch's four most recent Reports of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks.

§ 372.4 Required reports to regulators.

(a) *In general.* A covered financial institution must submit a report annually to, and in the format directed by, the Corporation, that describes the structure of the covered financial institution's incentive-based compensation arrangements for covered persons and that is sufficient to allow an assessment of whether the structure or features of those arrangements provide or are likely to provide covered persons with excessive compensation, fees, or benefits to covered persons or could lead to material financial loss to the covered financial institution.

(b) *Individual compensation.* A covered financial institution is not required to report the actual compensation of particular covered persons as part of the report required by paragraph (a) of this section.

(c) *Minimum standards.* The information submitted by the covered financial institution pursuant to paragraph (a) of this section must include the following:

(1) A clear narrative description of the components of the covered financial institution's incentive-based compensation arrangements applicable to covered persons and specifying the types of covered persons to which they apply;

(2) A succinct description of the covered financial institution's policies and procedures governing its incentive-based compensation arrangements for covered persons;

(3) If the covered financial institution has total consolidated assets of $50 billion or more, an additional succinct description of incentive-based compensation policies and procedures specific to the covered financial institution's:

(i) Executive officers; and

(ii) Other covered persons who the board of directors, or a committee thereof, of the covered financial institution has identified and determined under § 372.5(b)(3)(ii) of this part individually have the ability to expose the covered financial institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance;

(4) Any material changes to the covered financial institution's incentive-based compensation arrangements and policies and procedures made since the covered financial institution's last report submitted under paragraph (a) of this section; and

(5) The specific reasons why the covered financial institution believes the structure of its incentive-based compensation plan does not encourage inappropriate risks by the covered financial institution by providing covered persons with:

(i) Excessive compensation; or

(ii) Incentive-based compensation that could lead to a material financial loss to the covered financial institution.

§ 372.5 Prohibitions.

(a) *Excessive compensation prohibition.* (1) *In general.* A covered financial institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered financial institution by providing a covered person with excessive compensation.

(2) *Standards.* An incentive-based compensation arrangement provides excessive compensation when amounts paid are unreasonable or disproportionate to the services performed by a covered person, taking into consideration:

(i) The combined value of all cash and non-cash benefits provided to the covered person;

(ii) The compensation history of the covered person and other individuals with comparable expertise at the covered financial institution;

(iii) The financial condition of the covered financial institution;

(iv) Comparable compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the covered financial institution's operations and assets;

(v) For postemployment benefits, the projected total cost and benefit to the covered financial institution;

(vi) Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered financial institution; and

(vii) Any other factors the Corporation determines to be relevant.

(b) *Material financial loss prohibition.* (1) *Generally.* A covered financial institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered financial institution, by providing incentive-based compensation to covered persons, either individually or as part of a group of persons who are subject to the same or similar incentive-based compensation arrangements, that could lead to material financial loss to the covered financial institution.

(2) *Requirements for all covered financial institutions.* An incentive-based compensation arrangement established or maintained by a covered financial institution for one or more covered persons does not comply with paragraph (b)(1) of this section unless it:

(i) Balances risk and financial rewards, for example by using deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods;

(ii) Is compatible with effective controls and risk management; and

(iii) Is supported by strong corporate governance, including active and effective oversight by the covered financial institution's board of directors or a committee thereof.

(3) *Specific requirements for covered financial institutions with $50 billion or more in total consolidated assets.* (i) *Deferral required for executive officers.* As part of appropriately balancing risk and financial rewards pursuant to paragraph (b)(2)(i) of this section, any incentive-based compensation arrangement for any executive officer established or maintained by a covered financial institution that has total consolidated assets of $50 billion or more must provide for:

(A) At least 50 percent of the annual incentive-based compensation of the executive officer to be deferred over a period of no less than three years, with the release of deferred amounts to occur no faster than on a pro rata basis; and

(B) The adjustment of the amount required to be deferred under paragraph (b)(3)(i)(A) of this section to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period.

(ii) *Additional requirement for covered persons presenting particular loss exposure.* As part of appropriately balancing risk and financial rewards pursuant to paragraph (b)(2)(i) of this section, if a covered financial institution has total consolidated assets of $50 billion or more—

(A) The board of directors, or a committee thereof, of the covered financial institution shall identify those covered persons (other than executive officers) who individually have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance. These covered

persons may include, for example, traders with large position limits relative to the institution's overall risk tolerance and other individuals who have the authority to place at risk a substantial part of the capital of the covered financial institution;

(B) The incentive-based compensation arrangement for any covered person identified pursuant to paragraph (b)(3)(ii)(A) of this section must be approved by the board of directors, or a committee thereof, of the covered financial institution and such approval must be documented;

(C) The board of directors, or committee thereof, may not approve the incentive-based compensation arrangement for any covered person identified pursuant to paragraph (b)(3)(ii)(A) of this section unless the board or committee determines that the arrangement, including the method of paying compensation under the arrangement, effectively balances the financial rewards to the covered person and the range and time horizon of risks associated with the covered person's activities, employing appropriate methods for ensuring risk sensitivity such as deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods; and

(D) In fulfilling its duties under paragraph (b)(3)(ii)(C) of this section, the board of directors or committee thereof must evaluate the overall effectiveness of the balancing methods used in the identified covered person's incentive compensation arrangements in reducing incentives for inappropriate risk taking by the identified covered person considering the methods' suitability for balancing the full range of risks presented by that covered person's activities, and the methods' ability to make payments sensitive to all the risks arising from the covered person's activities, including those that may be difficult to predict, measure or model.

§ 372.6 Policies and procedures.

(a) *In general.* Any incentive-based compensation arrangement, or any feature of any such arrangement, is prohibited under § 372.5 of this part, unless adopted pursuant to policies and procedures developed and maintained by each covered financial institution and approved by its board of directors, or a committee thereof, reasonably designed to ensure and monitor compliance with the requirements set forth in 12 U.S.C. 5641 and this part and commensurate with the size and complexity of the organization, as well as the scope and nature of its use of incentive-based compensation.

(b) *Standards.* The policies and procedures must, at a minimum:

(1) Be consistent with the reporting requirements in § 372.4 of this part and prohibitions in § 372.5 of this part;

(2) Ensure that risk-management, risk-oversight, and internal control personnel have an appropriate role in the covered financial institution's processes for designing incentive-based compensation arrangements and for assessing their effectiveness in restraining inappropriate risk-taking;

(3) Provide for the monitoring by a group or person independent of the covered person, where practicable in light of the covered financial institution's size and complexity, of incentive-based compensation awards and payments, risks taken, and actual risk outcomes to determine whether incentive compensation payments for covered persons, or groups of covered persons, are reduced to reflect adverse risk outcomes or high levels of risk taken;

(4) Provide for the covered financial institution's board of directors, or committee thereof, to receive data and analysis from management and other sources sufficient to allow the board, or committee thereof, to assess whether the overall design and performance of the covered financial institution's incentive-based compensation arrangements are consistent with 12 U.S.C. 5641;

(5) Ensure that documentation of the covered financial institution's processes for establishing, implementing, modifying, and monitoring incentive-based compensation arrangements is maintained that is sufficient to enable the Corporation to determine the institution's compliance with 12 U.S.C. 5641 and this part;

(6) Consistent with § 372.5(b)(3) of this part, where deferral is used in connection with an incentive-based compensation arrangement, provide for deferral of incentive-based compensation awards in amounts and for periods of time appropriate to the duties and responsibilities of the covered financial institution's covered persons, the risks associated with those duties and responsibilities, and the size and complexity of the covered financial institution and provide that the deferral amounts paid are adjusted to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period; and

(7) Subject any incentive-based compensation arrangement to a corporate governance framework that provides for ongoing oversight by the board of directors or a committee thereof, including the approval by the board of directors or a committee thereof of incentive-based compensation to executive officers.

§ 372.7 Evasion.

A covered financial institution is prohibited, for the purpose of evading the restrictions of this part, from doing indirectly or through or by any other person, any act or thing that it would be unlawful for such covered financial institution to do directly under this part.

Department of the Treasury

12 CFR Chapter V

For the reasons set forth in the joint preamble, the Office of Thrift Supervision proposes to amend chapter V of title 12 of the Code of Federal Regulations as follows:

4. Add part 563h to read as follows:

PART 563h—INCENTIVE-BASED COMPENSATION ARRANGEMENTS

Sec.

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467a, and 5641.

§ 563h.1 Authority.

This part is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5641).

§ 563h.2 Scope and purpose.

This part applies to a covered financial institution that has total consolidated assets of $1 billion or more and offers incentive-based compensation arrangements to covered persons. Nothing in this part in any way limits the authority of the OTS under other provisions of applicable law and regulations.

§ 563h.3 Definitions.

For purposes of this part, the following definitions apply unless otherwise specified:

(a) *Board of directors* means the governing body of any covered financial institution performing functions similar to a board of directors.

(b) *Compensation* means all direct and indirect payments, fees or benefits, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to the covered financial institution, including, but not limited to, payments or benefits pursuant to an employment contract,

compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement.

(c) *Covered financial institution* means a savings association as defined in 12 U.S.C. 1813(b) and a savings and loan holding company as defined in 12 U.S.C. 1467a(a), that has total consolidated assets of $1 billion or more.

(d) *Covered person* means any executive officer, employee, director, or principal shareholder of a covered financial institution.

(e) *Director* of a covered financial institution means a member of the board of directors of the covered financial institution, or of a board or committee performing a similar function to a board of directors.

(f) *Executive officer* of a covered financial institution means a person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions: president, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, or head of a major business line.

(g) *Incentive-based compensation* means any variable compensation that serves as an incentive for performance.

(h) *Principal shareholder* means an individual who directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10 percent or more of any class of voting securities of a covered financial institution.

(i) *Total consolidated assets* means total consolidated assets determined based on the average of the covered financial institution's four most recent Thrift Financial Reports.

§ 563h.4 Required reports to regulators.

(a) *In general.* A covered financial institution must submit a report annually to, and in the format directed by, the OTS, that describes the structure of the covered financial institution's incentive-based compensation arrangements for covered persons and that is sufficient to allow an assessment of whether the structure or features of those arrangements provide or are likely to provide covered persons with excessive compensation, fees, or benefits to covered persons or could lead to material financial loss to the covered financial institution.

(b) *Individual compensation.* A covered financial institution is not required to report the actual compensation of particular covered persons as part of the report required by paragraph (a) of this section.

(c) *Minimum standards.* The information submitted by the covered financial institution pursuant to paragraph (a) of this section must include the following:

(1) A clear narrative description of the components of the covered financial institution's incentive-based compensation arrangements applicable to covered persons and specifying the types of covered persons to which they apply;

(2) A succinct description of the covered financial institution's policies and procedures governing its incentive-based compensation arrangements for covered persons;

(3) If the covered financial institution has total consolidated assets of $50 billion or more, an additional succinct description of incentive-based compensation policies and procedures specific to the covered financial institution's:

(i) Executive officers; and

(ii) Other covered persons who the board of directors, or a committee thereof, of the covered financial institution has identified and determined under § 563h.5(b)(3)(ii) of this part individually have the ability to expose the covered financial institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance;

(4) Any material changes to the covered financial institution's incentive-based compensation arrangements and policies and procedures made since the covered financial institution's last report submitted under paragraph (a) of this section; and

(5) The specific reasons why the covered financial institution believes the structure of its incentive-based compensation plan does not encourage inappropriate risks by the covered financial institution by providing covered persons with:

(i) Excessive compensation; or

(ii) Incentive-based compensation that could lead to material financial loss to the covered financial institution.

§ 563h.5 Prohibitions.

(a) *Excessive compensation prohibition.* (1) *In general.* A covered financial institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered financial institution by providing a covered person with excessive compensation.

(2) *Standards.* An incentive-based compensation arrangement provides excessive compensation when amounts paid are unreasonable or disproportionate to the services performed by a covered person, taking into consideration:

(i) The combined value of all cash and non-cash benefits provided to the covered person;

(ii) The compensation history of the covered person and other individuals with comparable expertise at the covered financial institution;

(iii) The financial condition of the covered financial institution;

(iv) Comparable compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the covered financial institution's operations and assets;

(v) For postemployment benefits, the projected total cost and benefit to the covered financial institution;

(vi) Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered financial institution; and

(vii) Any other factors the OTS determines to be relevant.

(b) *Material financial loss prohibition.* (1) *Generally.* A covered financial institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered financial institution, by providing incentive-based compensation to covered persons, either individually or as part of a group of persons who are subject to the same or similar incentive-based compensation arrangements, that could lead to material financial loss to the covered financial institution.

(2) *Requirements for all covered financial institutions.* An incentive-based compensation arrangement established or maintained by a covered financial institution for one or more covered persons does not comply with paragraph (b)(1) of this section unless it:

(i) Balances risk and financial rewards, for example by using deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods;

(ii) Is compatible with effective controls and risk management; and

(iii) Is supported by strong corporate governance, including active and effective oversight by the covered financial institution's board of directors or a committee thereof.

(3) *Specific requirements for covered financial institutions with $50 billion or more in total consolidated assets.* (i)

Deferral required for executive officers. As part of appropriately balancing risk and financial rewards pursuant to paragraph (b)(2)(i) of this section, any incentive-based compensation arrangement for any executive officer established or maintained by a covered financial institution that has total consolidated assets of $50 billion or more must provide for:

(A) At least 50 percent of the annual incentive-based compensation of the executive officer to be deferred over a period of no less than three years, with the release of deferred amounts to occur no faster than on a pro rata basis; and

(B) The adjustment of the amount required to be deferred under paragraph (b)(3)(i)(A) of this section to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period.

(ii) *Additional requirement for covered persons presenting particular loss exposure.* As part of appropriately balancing risk and financial rewards pursuant to paragraph (b)(2)(i) of this section, if a covered financial institution has total consolidated assets of $50 billion or more—

(A) The board of directors, or a committee thereof, of the covered financial institution shall identify those covered persons (other than executive officers) who individually have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance. These covered persons may include, for example, traders with large position limits relative to the institution's overall risk tolerance and other individuals who have the authority to place at risk a substantial part of the capital of the covered financial institution;

(B) The incentive-based compensation arrangement for any covered person identified pursuant to paragraph (b)(3)(ii)(A) of this section must be approved by the board of directors, or a committee thereof, of the covered financial institution and such approval must be documented;

(C) The board of directors, or committee thereof, may not approve the incentive-based compensation arrangement for any covered person identified pursuant to paragraph (b)(3)(ii)(A) of this section unless the board or committee determines that the arrangement, including the method of paying compensation under the arrangement, effectively balances the financial rewards to the covered person and the range and time horizon of risks associated with the covered person's activities, employing appropriate methods for ensuring risk sensitivity such as deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods; and

(D) In fulfilling its duties under paragraph (b)(3)(ii)(C) of this section, the board of directors, or committee thereof, must evaluate the overall effectiveness of the balancing methods used in the identified covered person's incentive-based compensation arrangements in reducing incentives for inappropriate risk taking by the identified covered person considering the methods' suitability for balancing the full range of risks presented by that covered person's activities, and the methods' ability to make payments sensitive to all the risks arising from the covered person's activities, including those that may be difficult to predict, measure, or model.

§ 563h.6 Policies and procedures.

(a) *In general.* Any incentive-based compensation arrangement, or any feature of any such arrangement, is prohibited under § 563h.5 of this part, unless adopted pursuant to policies and procedures developed and maintained by each covered financial institution and approved by its board of directors, or a committee thereof, reasonably designed to ensure and monitor compliance with the requirements set forth in 12 U.S.C. 5641 and this part and commensurate with the size and complexity of the organization, as well as the scope and nature of its use of incentive-based compensation.

(b) *Standards.* The policies and procedures must, at a minimum:

(1) Be consistent with the reporting requirements in § 563h.4 of this part and prohibitions in § 563h.5 of this part;

(2) Ensure that risk-management, risk-oversight, and internal control personnel have an appropriate role in the covered financial institution's processes for designing incentive-based compensation arrangements and for assessing their effectiveness in restraining inappropriate risk-taking;

(3) Provide for the monitoring by a group or person independent of the covered person, where practicable in light of the covered financial institution's size and complexity, of incentive-based compensation awards and payments, risks taken, and actual risk outcomes to determine whether incentive compensation payments for covered persons, or groups of covered persons, are reduced to reflect adverse risk outcomes or high levels of risk taken;

(4) Provide for the covered financial institution's board of directors, or committee thereof, to receive data and analysis from management and other sources sufficient to allow the board, or committee thereof, to assess whether the overall design and performance of the institution's incentive-based compensation arrangements are consistent with 12 U.S.C. 5641;

(5) Ensure that documentation of the covered financial institution's processes for establishing, implementing, modifying, and monitoring incentive-based compensation arrangements is maintained that is sufficient to enable the OTS to determine the institution's compliance with 12 U.S.C. 5641 and this part;

(6) Consistent with § 563h.5(b)(3) of this part, where deferral is used in connection with an incentive-based compensation arrangement, provide for deferral of incentive-based compensation awards in amounts and for periods of time appropriate to the duties and responsibilities of the covered financial institution's covered persons, the risks associated with those duties and responsibilities, and the size and complexity of the covered financial institution and provide that the deferral amounts paid are adjusted to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period; and

(7) Subject any incentive-based compensation arrangement to a corporate governance framework that provides for ongoing oversight by the board of directors or a committee thereof, including the approval by the board of directors or a committee thereof of incentive-based compensation to executive officers.

§ 563h.7 Evasion.

A covered financial institution is prohibited, for the purpose of evading the restrictions of this part, from doing indirectly or through or by any other person, any act or thing that it would be unlawful for such covered financial institution to do directly under this part.

National Credit Union Administration

12 CFR Chapter VII

Authority and Issuance

For the reasons stated in the preamble, the National Credit Union Administration proposes to amend chapter VII of title 12 of the Code of Federal Regulations as follows:

PART 741—REQUIREMENTS FOR INSURANCE

5. The authority citation for part 741 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766, 1781–1790, and 1790d.

6. Add a new § 741.225 to read as follows:

§ 741.225 Incentive-based compensation arrangements.

Any credit union which is insured pursuant to Title II of the Act must adhere to the requirements stated in part 751 of this chapter.

7. Add a new part 751 to subchapter A to read as follows:

Part 751 Incentive-Based Compensation Arrangements

Sec.

Authority: 12 U.S.C. 1751 *et seq.* and 5641.

§ 751.1 Authority.

This part is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5641).

§ 751.2 Scope and purpose.

This part applies to any federally insured credit union, or credit union eligible to make application to become an insured credit union under 12 U.S.C. 1781, with total consolidated assets of $1 billion or more, and offers incentive-based compensation arrangements to covered persons. Nothing in this part in any way limits the authority of the NCUA under other provisions of applicable law and regulations.

§ 751.3 Definitions.

For purposes of this part, the following definitions apply unless otherwise specified:

(a) *Board of directors* means the governing body of any credit union.

(b) *Compensation* means all direct and indirect payments, fees or benefits, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to the credit union, including, but not limited to, payments or benefits pursuant to an employment contract, compensation or benefit agreement, fee arrangement, perquisite, post-employment benefit, or other compensatory arrangement. Consistent with § 701.33 of this chapter, the term compensation specifically excludes reimbursement for reasonable and proper costs incurred by covered persons in carrying out official credit union business; provision of reasonable health, accident and related types of personal insurance protection; and indemnification.

(c) [Reserved]

(d) *Covered person* means any executive officer, employee, or director of a credit union.

(e) [Reserved]

(f) *Executive officer* of a credit union means a person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions: president, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, or head of a major business line.

(g) *Incentive-based compensation* means any variable compensation that serves as an incentive for performance.

(h) [Reserved]

(i) *Total consolidated assets* means calculating the average of the total assets reported in the credit union's four most recent 5300 Call Reports.

§ 751.4 Required reports to regulators.

(a) *In general.* A credit union must submit a report annually to, and in the format directed by, the NCUA, that describes the structure of the credit union's incentive-based compensation arrangements for covered persons and that is sufficient to allow an assessment of whether the structure or features of those arrangements provide or are likely to provide covered persons with excessive compensation, fees, or benefits to covered persons or could lead to material financial loss to the credit union.

(b) *Individual compensation.* A credit union is not required to report the actual compensation of particular covered persons as part of the report required by paragraph (a) of this section.

(c) *Minimum standards.* The information submitted by the credit union pursuant to paragraph (a) of this section must include the following:

(1) A clear narrative description of the components of the credit union's incentive-based compensation arrangements applicable to covered persons and specifying the types of covered persons to which they apply;

(2) A succinct description of the credit union's policies and procedures governing its incentive-based compensation arrangements for covered persons;

(3) If the credit union has total consolidated assets of $10 billion or more, an additional succinct description of incentive-based compensation policies and procedures specific to the credit union's:

(i) Executive officers; and

(ii) Other covered persons who the board of directors, or a committee thereof, of the credit union has identified and determined under § 751.5(b)(3)(ii) of this part individually have the ability to expose the credit union to possible losses that are substantial in relation to the credit union's size, capital, or overall risk tolerance;

(4) Any material changes to the credit union's incentive-based compensation arrangements and policies and procedures made since the credit union's last report submitted under paragraph (a) of this section; and

(5) The specific reasons why the credit union believes the structure of its incentive-based compensation plan does not encourage inappropriate risks by the credit union by providing covered persons with:

(i) Excessive compensation; or

(ii) Incentive-based compensation that could lead to material financial loss to the credit union.

§ 751.5 Prohibitions.

(a) *Excessive compensation prohibition.* (1) *In general.* A credit union must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the credit union by providing a covered person with excessive compensation.

(2) *Standards.* An incentive-based compensation arrangement provides excessive compensation when amounts paid are unreasonable or disproportionate to the services performed by a covered person, taking into consideration:

(i) The combined value of all cash and non-cash benefits provided to the covered person;

(ii) The compensation history of the covered person and other individuals with comparable expertise at the credit union;

(iii) The financial condition of the credit union;

(iv) Comparable compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the credit union's operations and assets;

(v) For postemployment benefits, the projected total cost and benefit to the credit union;

(vi) Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the credit union; and

(vii) Any other factors the NCUA determines to be relevant.

(b) *Material financial loss prohibition.* (1) *Generally.* A credit union must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the credit union, by providing incentive-based compensation to covered persons, either individually or as part of a group of persons who are subject to the same or similar incentive-based compensation arrangements, that could lead to material financial loss to the credit union.

(2) *Requirements for all credit unions.* An incentive-based compensation arrangement established or maintained by a credit union for one or more covered persons does not comply with paragraph (b)(1) of this section unless it:

(i) Balances risk and financial rewards, for example by using deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods;

(ii) Is compatible with effective controls and risk management; and

(iii) Is supported by strong corporate governance, including active and effective oversight by the credit union's board of directors or a committee thereof.

(3) *Specific requirements for credit unions with $10 billion or more in total consolidated assets.*

(i) *Deferral required for executive officers.* As part of appropriately balancing risk and financial rewards pursuant to paragraph (b)(2)(i) of this section, any incentive-based compensation arrangement for any executive officer, established or maintained by a credit union that has total consolidated assets of $10 billion or more, must provide for:

(A) At least 50 percent of the annual incentive-based compensation of the executive officer to be deferred over a period of no less than three years, with the release of deferred amounts to occur no faster than on a pro rata basis; and

(B) The adjustment of the amount required to be deferred under paragraph (b)(3)(i)(A) of this section to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period.

(ii) *Additional requirement for covered persons presenting particular loss exposure.* As part of appropriately balancing risk and financial rewards pursuant to paragraph (b)(2)(i) of this section, if a credit union has total consolidated assets of $10 billion or more—

(A) The board of directors, or a committee thereof, of the credit union shall identify those covered persons (other than executive officers) who individually have the ability to expose the credit union to possible losses that are substantial in relation to the credit union's size, capital, or overall risk tolerance. These covered persons may include, for example, individuals who have the authority to place at risk a substantial part of the credit union's capital;

(B) The incentive-based compensation arrangement for any covered person identified pursuant to paragraph (b)(3)(ii)(A) of this section must be approved by the board of directors, or a committee thereof, of the credit union and such approval must be documented;

(C) The board of directors, or committee thereof, may not approve the incentive-based compensation arrangement for any covered person identified pursuant to paragraph (b)(3)(ii)(A) of this section unless the board or committee determines that the arrangement, including the method of paying compensation under the arrangement, effectively balances the financial rewards to the covered person and the range and time horizon of risks associated with the covered person's activities, employing appropriate methods for ensuring risk sensitivity, such as deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods; and

(D) In fulfilling its duties under paragraph (b)(3)(ii)(C) of this section, the board of directors, or committee thereof, must evaluate the overall effectiveness of the balancing methods used in the identified covered person's incentive-based compensation arrangements in reducing incentives for inappropriate risk taking by the identified covered person considering the methods' suitability for balancing the full range of risks presented by that covered person's activities, and the methods' ability to make payments sensitive to all the risks arising from the covered person's activities, including those that may be difficult to predict, measure, or model.

§ 751.6 Policies and procedures.

(a) *In general.* Any incentive-based compensation arrangement, or any feature of any such arrangement, is prohibited under § 751.5 of this part, unless adopted pursuant to policies and procedures developed and maintained by each credit union and approved by its board of directors, or a committee thereof, reasonably designed to ensure and monitor compliance with the requirements set forth in 12 U.S.C. 5641 and this part and commensurate with the size and complexity of the credit union, as well as the scope and nature of its use of incentive-based compensation.

(b) *Standards.* The policies and procedures must, at a minimum:

(1) Be consistent with the reporting requirements in § 751.4 of this part and prohibitions in § 751.5 of this part;

(2) Ensure that risk-management, risk-oversight, and internal control personnel have an appropriate role in the credit union's processes for designing incentive-based compensation arrangements and for assessing their effectiveness in restraining inappropriate risk-taking;

(3) Provide for the monitoring by a group or person independent of the covered person, where practicable in light of the credit union's size and complexity, of incentive-based compensation awards and payments, risks taken, and actual risk outcomes to determine whether incentive compensation payments for covered persons, or groups of covered persons, are reduced to reflect adverse risk outcomes or high levels of risk taken;

(4) Provide for the credit union's board of directors, or committee thereof, to receive data and analysis from management and other sources sufficient to allow the board, or committee thereof, to assess whether the overall design and performance of the credit union's incentive-based compensation arrangements are consistent with 12 U.S.C. 5641;

(5) Ensure that documentation of the credit union's processes for establishing, implementing, modifying, and monitoring incentive-based compensation arrangements is maintained that is sufficient to enable the NCUA to determine the credit union's compliance with 12 U.S.C. 5641 and this part;

(6) Consistent with § 751.5(b)(3) of this part, where deferral is used in connection with an incentive-based compensation arrangement, provide for deferral of incentive-based compensation awards in amounts and for periods of time appropriate to the duties and responsibilities of the credit union's covered persons, the risks associated with those duties and responsibilities, and the size and complexity of the credit union, and provide that the deferral amounts paid are adjusted to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period; and

(7) Subject any incentive-based compensation arrangement to a corporate governance framework that provides for ongoing oversight by the board of directors or a committee thereof, including the approval by the board of directors or a committee thereof of incentive-based compensation to executive officers.

§ 751.7 Evasion.

A credit union is prohibited, for the purpose of evading the restrictions of this part, from doing indirectly or through or by any other person, any act or thing that it would be unlawful for such credit union to do directly under this part.

Securities and Exchange Commission

Authority and Issuance

For the reasons set forth in the preamble, the Commission proposes to amend Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 248—REGULATION S–P, REGULATION S–AM, AND INCENTIVE-BASED COMPENSATION ARRANGEMENTS

8. The authority citation for part 248 is revised to read as follows:

Authority: 15 U.S.C. 78q, 78q–1, 78w, 78mm, 80a–30, 80a–37, 80b–4, 80b–11, 1681s–3 and note, 1681w(a)(1), 6801–6809, and 6825, and 12 U.S.C. 5641.

9. Add a new subpart C (consisting of §§ 248.201 through § 248.207) to read as follows:

Subpart C—Incentive-based Compensation Arrangements

Sec.

Subpart C—Incentive-based Compensation Arrangements

§ 248.201 Authority.

This subpart is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5641).

§ 248.202 Scope and purpose.

This subpart applies to a covered financial institution that has total consolidated assets of $1 billion or more and offers incentive-based compensation arrangements to covered persons. Nothing in this subpart in any way limits the authority of the Commission under other provisions of applicable law and regulations.

§ 248.203 Definitions.

For purposes of this subpart, the following definitions apply unless otherwise specified:

(a) *Board of directors* means the governing body of any covered financial institution performing functions similar to a board of directors.

(b) *Compensation* means all direct and indirect payments, fees or benefits, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to the covered financial institution, including, but not limited to, payments or benefits pursuant to an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement.

(c) *Covered financial institution* means: a broker or dealer registered under Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) and an investment adviser as such term is defined in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)) that has total consolidated assets of $1 billion or more.

(d) *Covered person* means any executive officer, employee, director, or principal shareholder of a covered financial institution.

(e) *Director* of a covered financial institution means a member of the board of directors of the covered financial institution, or of a board or committee performing a similar function to a board of directors.

(f) *Executive officer* of a covered financial institution means a person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions: president, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, or head of a major business line.

(g) *Incentive-based compensation* means any variable compensation that serves as an incentive for performance.

(h) *Principal shareholder* means an individual who directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10 percent or more of any class of voting securities of a covered financial institution.

(i) *Total consolidated assets* means:

(1) For a broker or dealer registered under Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) total assets reported in the firm's most recent year-end audited Consolidated Statement of Financial Condition filed pursuant to Rule 17a–5 under the Securities Exchange Act of 1934; and

(2) For an investment adviser, as such term is defined in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)) the adviser's total assets shown on the balance sheet for the adviser's most recent fiscal year end.

§ 248.204 Required reports to the Commission.

(a) *In general.* A covered financial institution must submit a report annually to, and in the format directed by, the Commission, that describes the structure of the covered financial institution's incentive-based compensation arrangements for covered persons and that is sufficient to allow an assessment of whether the structure or features of those arrangements provide or are likely to provide covered persons with excessive compensation, fees, or benefits to covered persons or could lead to material financial loss to the covered financial institution.

(b) *Individual compensation.* A covered financial institution is not required to report the actual compensation of particular covered persons as part of the report required by paragraph (a) of this section.

(c) *Minimum standards.* The information submitted by the covered financial institution pursuant to paragraph (a) of this section must include the following:

(1) A clear narrative description of the components of the covered financial institution's incentive-based compensation arrangements applicable to covered persons and specifying the types of covered persons to which they apply;

(2) A succinct description of the covered financial institution's policies and procedures governing its incentive-based compensation arrangements for covered persons;

(3) If the covered financial institution has total consolidated assets of $50 billion or more, an additional succinct description of incentive-based compensation policies and procedures specific to the covered financial institution's:

(i) Executive officers; and

(ii) Other covered persons who the board of directors, or a committee thereof, of the covered financial institution has identified and determined under § 248.205(b)(3)(ii) of subpart C of this part individually have the ability to expose the covered financial institution to possible losses

that are substantial in relation to the covered financial institution's size, capital, or overall risk tolerance;

(4) Any material changes to the covered financial institution's incentive-based compensation arrangements and policies and procedures made since the covered financial institution's last report submitted under paragraph (a) of this section; and

(5) The specific reasons why the covered financial institution believes the structure of its incentive-based compensation plan does not encourage inappropriate risks by the covered financial institution by providing covered persons with:

(i) Excessive compensation; or

(ii) Incentive-based compensation that could lead to a material financial loss to the covered financial institution.

§ 248.205 Prohibitions.

(a) *Excessive compensation prohibition.*

(1) *In general.* A covered financial institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered financial institution by providing a covered person with excessive compensation.

(2) *Standards.* An incentive-based compensation arrangement provides excessive compensation when amounts paid are unreasonable or disproportionate to the services performed by a covered person, taking into consideration:

(i) The combined value of all cash and non-cash benefits provided to the covered person;

(ii) The compensation history of the covered person and other individuals with comparable expertise at the covered financial institution;

(iii) The financial condition of the covered financial institution;

(iv) Comparable compensation practices at comparable covered financial institutions, based upon such factors as asset size, geographic location, and the complexity of the covered financial institution's operations and assets;

(v) For postemployment benefits, the projected total cost and benefit to the covered financial institution;

(vi) Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered financial institution; and

(vii) Any other factors the Commission determines to be relevant.

(b) *Material financial loss prohibition.*

(1) *Generally.* A covered financial institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered financial institution, by providing incentive-based compensation to covered persons, either individually or as part of a group of persons who are subject to the same or similar incentive-based compensation arrangements, that could lead to material financial loss to the covered financial institution.

(2) *Requirements for all covered financial institutions.* An incentive-based compensation arrangement established or maintained by a covered financial institution for one or more covered persons does not comply with paragraph (b)(1) of this section unless it:

(i) Balances risk and financial rewards, for example by using deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods;

(ii) Is compatible with effective controls and risk management; and

(iii) Is supported by strong corporate governance, including active and effective oversight by the covered financial institution's board of directors or a committee thereof.

(3) *Specific requirements for covered financial institutions with $50 billion or more in total consolidated assets.*

(i) *Deferral required for executive officers.* As part of appropriately balancing risk and financial rewards pursuant to paragraph (b)(2)(i) of this section, any incentive-based compensation arrangement for any executive officer established or maintained by a covered financial institution that has total consolidated assets of $50 billion or more must provide for:

(A) At least 50 percent of the annual incentive-based compensation of the executive officer to be deferred over a period of no less than three years, with the release of deferred amounts to occur no faster than on a pro rata basis; and

(B) The adjustment of the amount required to be deferred under paragraph (b)(3)(i)(A) of this section to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period.

(ii) *Additional requirement for covered persons presenting particular loss exposure.* As part of appropriately balancing risk and financial rewards pursuant to paragraph (b)(2)(i) of this section, if a covered financial institution has total consolidated assets of $50 billion or more—

(A) The board of directors, or a committee thereof, of the covered financial institution shall identify those covered persons (other than executive officers) who individually have the ability to expose the covered financial institution to possible losses that are substantial in relation to the covered financial institution's size, capital, or overall risk tolerance. These covered persons may include, for example, traders with large position limits relative to the covered financial institution's overall risk tolerance and other individuals who have the authority to place at risk a substantial part of the capital of the covered financial institution;

(B) The incentive-based compensation arrangement for any covered person identified pursuant to paragraph (b)(3)(ii)(A) of this section must be approved by the board of directors, or a committee thereof, of the covered financial institution and such approval must be documented;

(C) The board of directors, or committee thereof, may not approve the incentive-based compensation arrangement for any covered person identified pursuant to paragraph (b)(3)(ii)(A) of this section unless the board or committee determines that the arrangement, including the method of paying compensation under the arrangement, effectively balances the financial rewards to the covered person and the range and time horizon of risks associated with the covered person's activities, employing appropriate methods for ensuring risk sensitivity such as deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods; and

(D) In fulfilling its duties under paragraph (b)(3)(ii)(C) of this section, the board of directors or committee thereof must evaluate the overall effectiveness of the balancing methods used in the identified covered person's incentive-based compensation arrangements in reducing incentives for inappropriate risk taking by the identified covered person considering the methods' suitability for balancing the full range of risks presented by that covered person's activities, and the methods' ability to make payments sensitive to all the risks arising from the covered person's activities, including those that may be difficult to predict, measure or model.

§ 248.206 Policies and procedures.

(a) *In general.* Any incentive-based compensation arrangement, or any feature of any such arrangement, is prohibited under § 248.205 of this

subpart, unless adopted pursuant to policies and procedures developed and maintained by each covered financial institution and approved by its board of directors, or a committee thereof, reasonably designed to ensure and monitor compliance with the requirements set forth in 12 U.S.C. 5641 and subpart C of this part and commensurate with the size and complexity of the organization, as well as the scope and nature of its use of incentive-based compensation.

(b) *Standards.* The policies and procedures must, at a minimum:

(1) Be consistent with the reporting requirements in § 248.204 of subpart C of this part and prohibitions in § 248.205 of subpart C of this part;

(2) Ensure that risk-management, risk-oversight, and internal control personnel have an appropriate role in the covered financial institution's processes for designing incentive-based compensation arrangements and for assessing their effectiveness in restraining inappropriate risk-taking;

(3) Provide for the monitoring by a group or person independent of the covered person, where practicable in light of the covered financial institution's size and complexity, of incentive-based compensation awards and payments, risks taken, and actual risk outcomes to determine whether incentive-based compensation payments for covered persons, or groups of covered persons, are reduced to reflect adverse risk outcomes or high levels of risk taken;

(4) Provide for the covered financial institution's board of directors, or committee thereof, to receive data and analysis from management and other sources sufficient to allow the board, or committee thereof, to assess whether the overall design and performance of the covered financial institution's incentive-based compensation arrangements are consistent with 12 U.S.C. 5641;

(5) Ensure that documentation of the covered financial institution's processes for establishing, implementing, modifying, and monitoring incentive-based compensation arrangements is maintained that is sufficient to enable the Commission to determine the covered financial institution's compliance with 12 U.S.C. 5641 and subpart C of this part;

(6) Consistent with § 248.205(b)(3) of subpart C, where deferral is used in connection with an incentive-based compensation arrangement, provide for deferral of incentive-based compensation awards in amounts and for periods of time appropriate to the duties and responsibilities of the covered financial institution's covered persons, the risks associated with those duties and responsibilities, and the size and complexity of the covered financial institution and provide that the deferral amounts paid are adjusted to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period; and

(7) Subject any incentive-based compensation arrangement to a corporate governance framework that provides for ongoing oversight by the board of directors or a committee thereof, including the approval by the board of directors or a committee thereof of incentive-based compensation to executive officers.

§ 248.207 Evasion.

A covered financial institution is prohibited, for the purpose of evading the restrictions of this subpart, from doing indirectly or through or by any other person, any act or thing that it would be unlawful for such covered financial institution to do directly under this subpart.

Federal Housing Finance Agency

Authority and Issuance

Accordingly, for the reasons stated in the preamble, under the authority of 12 U.S.C. 4526 and 5641, FHFA proposes to amend Chapter XII of title 12 of the Code of Federal Regulations as follows:

10. Add part 1232 to read as follows:

PART 1232—INCENTIVE-BASED COMPENSATION AGREEMENTS

Sec.

Authority: 12 U.S.C. 4511(b), 4513, 4514, 4526, and 5641.

§ 1232.1 Authority.

This part is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5641), and, with respect to the Office of Finance, under section 1311(b)(2) of the Federal Housing Enterprises Financial Safety and Soundness Act (12 U.S.C. 4511(b)(2)).

§ 1232.2 Scope and purpose.

This part applies to a covered entity that offers incentive-based compensation arrangements to covered persons. Nothing in this part in any way limits the authority of the Federal Housing Finance Agency under other provisions of applicable law and regulations.

§ 1232.3 Definitions.

For purposes of this part, the following definitions apply unless otherwise specified:

Board of directors means the governing body of any covered entity performing functions similar to a board of directors.

Compensation means all direct and indirect payments, fees or benefits, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to the covered entity, including, but not limited to, payments or benefits pursuant to an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement.

Covered entity means the Federal National Mortgage Association (Fannie Mae); the Federal Home Loan Mortgage Corporation (Freddie Mac); any Federal Home Loan Bank (Bank); and the Federal Home Loan Bank System's Office of Finance.

Covered person means any executive officer, employee, director, or principal shareholder of a covered entity.

Director of a covered entity means a member of the board of directors of the covered entity, or of a board or committee performing a similar function to a board of directors.

Executive officer of a covered entity means:

(1) With respect to Fannie Mae or Freddie Mac:

(i) The chairman of the board of directors, chief executive officer, chief financial officer, chief operating officer, president, vice chairman, any executive vice president, any senior vice president in charge of a principal business unit, division, or function and any individual who performs functions similar to such positions whether or not the individual has an official title; and

(ii) Any other officer as identified by the Director.

(2) With respect to a Bank:

(i) The president, the chief financial officer, and the three other most highly compensated officers; and

(ii) Any other officer as identified by the Director.

(3) With respect to the Office of Finance:

(i) The chief executive officer, chief financial officer, and chief operating officer; and

(ii) Any other officer identified by the Director.

Incentive-based compensation means any variable compensation that serves as an incentive for performance.

Principal shareholder means an individual who directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10 percent or more of any class of voting securities of a covered entity.

§ 1232.4 Required reports to regulators.

(a) *In general.* A covered entity must submit a report annually to, and in the format directed by, the Federal Housing Finance Agency that describes the structure of the covered entity's incentive-based compensation arrangements for covered persons and that is sufficient to allow an assessment of whether the structure or features of those arrangements provide or are likely to provide covered persons with excessive compensation, fees, or benefits to covered persons or could lead to material financial loss to the covered entity.

(b) *Individual compensation.* A covered entity is not required to report the actual compensation of particular covered persons as part of the report required by paragraph (a) of this section.

(c) *Minimum standards.* The information submitted by the covered entity pursuant to paragraph (a) of this section must include the following:

(1) A clear narrative description of the components of the covered entity's incentive-based compensation arrangements applicable to covered persons specifying the types of covered persons to which they apply;

(2) A succinct description of the covered entity's policies and procedures governing its incentive-based compensation arrangements for covered persons;

(3) A succinct description of incentive-based compensation policies and procedures specific to the covered entity's:

(i) Executive officers; and

(ii) Other covered persons who the board of directors, or a committee thereof, of the entity has identified and determined under § 1232.5(b)(3)(ii) of this part individually have the ability to expose the entity to possible losses that are substantial in relation to the entity's size, capital, or overall risk tolerance;

(4) Any material changes to the covered entity's incentive-based compensation arrangements and policies and procedures made since the covered entity's last report submitted under paragraph (a) of this section; and

(5) The specific reasons why the covered entity believes the structure of its incentive-based compensation plan does not encourage inappropriate risks by the covered entity by providing covered persons with:

(i) Excessive compensation; or

(ii) Incentive-based compensation that could lead to material financial loss to the covered entity.

§ 1232.5 Prohibitions.

(a) *Excessive compensation prohibition.* (1) *In general.* A covered entity must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered entity by providing a covered person with excessive compensation.

(2) *Standards.* An incentive-based compensation arrangement provides excessive compensation when amounts paid are unreasonable or disproportionate to the services performed by a covered person, taking into consideration:

(i) The combined value of all cash and non-cash benefits provided to the covered person;

(ii) The compensation history of the covered person and other individuals with comparable expertise at the covered entity;

(iii) The financial condition of the covered entity;

(iv) Comparable compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the institution's operations and assets;

(v) For postemployment benefits, the projected total cost and benefit to the covered entity;

(vi) Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered entity; and

(vii) Any other factors that the Federal Housing Finance Agency determines to be relevant.

(b) *Material financial loss prohibition.* (1) *Generally.* A covered entity must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered entity, by providing incentive-based compensation to covered persons, either indivídually, or as part of a group of persons who are subject to the same or similar incentive-based compensation arrangements, that could lead to material financial loss to the covered entity.

(2) *Requirements for all incentive-based compensation arrangements.* An incentive-based compensation arrangement established or maintained by a covered entity for one or more covered persons does not comply with paragraph (b)(1) of this section unless it:

(i) Balances risk and financial rewards, for example by using deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods;

(ii) Is compatible with effective controls and risk management; and

(iii) Is supported by strong corporate governance, including active and effective oversight by the covered entity's board of directors, or a committee thereof.

(3) *Requirements for executive officers and covered persons presenting particular loss exposure.*

(i) *Deferral required for executive officers.* As part of appropriately balancing risk and financial rewards pursuant to paragraph (b)(2)(i) of this section, any incentive-based compensation arrangement for any executive officer established or maintained by a covered entity (except for covered entities in conservatorship or receivership, and limited-life regulated entities) must provide for:

(A) At least 50 percent of the annual incentive-based compensation of the executive officer to be deferred over a period of no less than three years, with the release of deferred amounts to occur no faster than on a pro rata basis; and

(B) The adjustment of the amount required to be deferred under paragraph (b)(3)(i)(A) of this section to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period.

(ii) *Additional requirement for covered persons presenting particular loss exposure.* As part of appropriately balancing risk and financial rewards pursuant to paragraph (b)(2)(i) of this section:

(A) The board of directors, or a committee thereof, of the covered entity shall identify those covered persons (other than executive officers) who individually have the ability to expose the entity to possible losses that are substantial in relation to the entity's size, capital, or overall risk tolerance. These covered persons may include, for example, traders with large position limits relative to the entity's overall risk tolerance and other individuals who have the authority to place at risk a substantial part of the capital of the covered entity;

(B) The incentive-based compensation arrangement for any covered person identified pursuant to paragraph (b)(3)(ii)(A) of this section must be

approved by the board of directors, or a committee thereof, of the covered entity and such approval must be documented;

(C) The board of directors, or a committee thereof, may not approve the incentive-based compensation arrangement for any covered person identified pursuant to paragraph (b)(3)(ii)(A) of this section unless the board or committee determines that the arrangement, including the method of paying compensation under the arrangement, effectively balances the financial rewards to the covered person and the range and time horizon of risks associated with the covered person's activities, employing appropriate methods for ensuring risk sensitivity such as deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or longer performance periods; and

(D) In fulfilling its duties under paragraph (b)(3)(ii)(C) of this section, the board of directors, or a committee thereof, must evaluate the overall effectiveness of the balancing methods used in the identified covered person's incentive compensation arrangements in reducing incentives for inappropriate risk taking by the identified covered person considering the methods' suitability for balancing the full range of risks presented by that covered person's activities, and the methods' ability to make payments sensitive to all the risks arising from the covered person's activities, including those that may be difficult to predict, measure or model.

§ 1232.6 Policies and procedures.

(a) *In general.* Any incentive-based compensation arrangement, or any feature of any such arrangement, is prohibited under § 1232.5 of this part, unless adopted pursuant to policies and procedures developed and maintained by each covered entity and approved by its board of directors, or a committee thereof, reasonably designed to ensure and monitor compliance with the requirements set forth in 12 U.S.C. 5641 and this part and commensurate with the size and complexity of the organization, as well as the scope and nature of its use of incentive-based compensation.

(b) *Standards.* The policies and procedures must, at a minimum:

(1) Be consistent with the reporting requirements in § 1232.4 of this part and prohibitions in § 1232.5 of this part;

(2) Ensure that risk-management, risk-oversight, and internal control personnel have an appropriate role in the covered entity's processes for designing incentive-based compensation arrangements and for assessing their effectiveness in restraining inappropriate risk-taking;

(3) Provide for the monitoring by a group or person independent of the covered person, where practicable in light of the covered entity's size and complexity, of incentive-based compensation awards and payments, risks taken, and actual risk outcomes to determine whether incentive compensation payments for covered persons, or groups of covered persons, are reduced to reflect adverse risk outcomes or high levels of risk taken;

(4) Provide for the covered entity's board of directors, or committee thereof, to receive data and analysis from management and other sources sufficient to allow the board, or committee thereof, to assess whether the overall design and performance of the entity's incentive-based compensation arrangements are consistent with 12 U.S.C. 5641;

(5) Ensure that documentation of the entity's processes for establishing, implementing, modifying, and monitoring incentive-based compensation arrangements is maintained that is sufficient to enable the Federal Housing Finance Agency to determine the entity's compliance with 12 U.S.C. 5641 and this part;

(6) Consistent with § 1232.5(b)(3) of this part, where deferral is used in connection with an incentive-based compensation arrangement, provide for deferral of incentive-based compensation awards in amounts and for periods of time appropriate to the duties and responsibilities of the covered entity's covered persons, the risks associated with those duties and responsibilities, and the size and complexity of the covered entity and provide that the deferral amounts paid are adjusted to reflect actual losses or other measures or aspects of performance that are realized or become better known during the deferral period; and

(7) Subject any incentive-based compensation arrangement to a corporate governance framework that provides for ongoing oversight by the board of directors, or a committee thereof, including the approval by the board of directors, or a committee thereof, of incentive-based compensation to executive officers.

§ 1232.7 Evasion.

A covered entity is prohibited, for the purpose of evading the restrictions of this part, from doing indirectly or through or by any other person, any act or thing that it would be unlawful for such covered entity to do directly under this part.

Dated:

John Walsh,

Acting Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, March 30, 2011.

Jennifer J. Johnson,

Secretary of the Board.

Dated at Washington, DC, this 7th day of February 2011.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

Dated: February 18, 2011.

By the Office of Thrift Supervision,

John E. Bowman,

Acting Director.

By the National Credit Union Administration Board on February 17, 2011.

Mary F. Rupp,

Secretary of the Board.

By the Securities and Exchange Commission.

Dated: March 29, 2011.

Elizabeth M. Murphy,

Secretary.

Edward J. Demarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2011–7937 Filed 4–13–11; 8:45 am]

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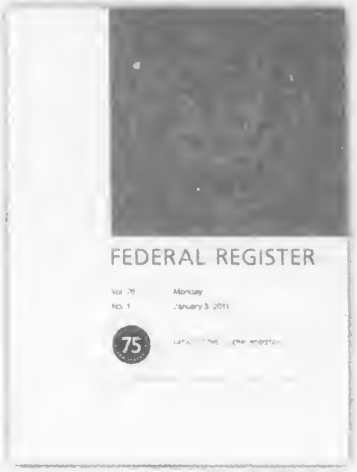

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