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WHEN: Tuesday, October 23, 2012
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1316

DEPARTMENT OF JUSTICE

28 CFR Parts 8 and 9

[Docket No. OAG 127; AG Order No. 3343–2012]

RIN 1105–AA74

Consolidation of Seizure and Forfeiture Regulations

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final rule.

SUMMARY: Consistent with Executive Order 13563, by this rule the Department of Justice (the Department) revises, consolidates, and updates its regulations regarding the seizure, forfeiture, and remission of assets. The rule recognizes that as of 2002 the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is now part of the Department, and consolidates the regulations governing the seizure and administrative forfeiture of property by ATF with those of the Drug Enforcement Administration (DEA) and the Federal Bureau of Investigation (FBI). The rule also conforms the seizure and forfeiture regulations of ATF, DEA, FBI, and the Department's Criminal Division to address procedural changes necessitated by the Civil Asset Forfeiture Reform Act (CAFRA) of 2000. The rule allows ATF, DEA, and FBI to publish administrative forfeiture notices on an official Internet government Web site instead of in newspapers. Lastly, the rule updates the regulations to reflect current forfeiture practice and clarifies the existing regulations pertaining to the return of assets to victims through the remission process.

DATES: *Effective Date:* This rule is effective October 12, 2012.

FOR FURTHER INFORMATION CONTACT: Beliue Risher, Editor, 1400 New York Avenue NW., Bond Building, Washington, DC 20530. Telephone: (202) 514–1263.

SUPPLEMENTARY INFORMATION: On May 9, 2011, the Department of Justice (the Department) published for public comment proposed regulations implementing the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) (76 FR 26660). Before the comment period closed on July 8, 2011, the Department received comments from only two commenters. The comments and the Department's responses are discussed below in section III.

I. Executive Summary

This rule complies with the requirement under Section 6 of Executive Order 13563 (Jan. 18, 2011) to modify and streamline outmoded and burdensome regulations. First, this final rule recognizes that the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is now part of the Department of Justice. On November 25, 2002, the President signed into law the Homeland Security Act (HSA) of 2002, Public Law 107–296, 116 Stat. 2135. Section 1111 of the HSA established in the Department of Justice the "Bureau of Alcohol, Tobacco, Firearms, and Explosives" and generally transferred the law enforcement functions, and seizure and forfeiture authority, of the Bureau of Alcohol, Tobacco, and Firearms from the Department of the Treasury to the Department of Justice. This transfer became effective on January 24, 2003. By this rule, the Department consolidates its regulations governing the seizure and administrative forfeiture of property by ATF, DEA, and the FBI. Among other things, this rulemaking identifies the scope of these regulations, updates definitions, identifies the scope of authority available to each of those seizing agencies to seize property for forfeiture, and provides procedures governing practical issues regarding the seizure, custody, inventory, appraisal, settlement, and release of property subject to forfeiture. *See* §§ 8.1–8.7 of this rule.

Second, the rule conforms the seizure and forfeiture regulations of ATF, DEA, FBI, and the Department's Criminal Division to address procedural changes necessitated by the Civil Asset Forfeiture Reform Act (CAFRA) of 2000, Public Law 106–185, 114 Stat. 202. The rule also incorporates CAFRA's innocent owner defense into the remission regulations. Where CAFRA is silent or ambiguous on a subject relating to administrative forfeiture procedure, the rule interprets CAFRA based on case law and agency expertise and experience.

Third, the rule updates the regulations to conform to other authorities and current forfeiture practice. Thus, § 8.14 adds a provision to the Department's regulations allowing for the pre-forfeiture disposition of seized property when the property is liable to perish, or to waste, or to be greatly reduced in value while being held for forfeiture, or when the expense of holding the property is or will be disproportionate to its value. Section 8.11 clarifies that administrative and criminal judicial forfeiture proceedings are not mutually exclusive, and § 8.16 affirms that the United States is not liable for attorney fees in any administrative forfeiture proceeding. Section 8.23 adds a provision defining the allowable redelegations of authority under the regulations. Section 8.9(a)(1) updates the forfeiture regulations by adding the option of publishing notice for administrative forfeitures on an official government Internet site instead of in a newspaper.

Fourth, the rule amends the list of designated officials at 28 CFR part 9 governing petitions for remission or mitigation of forfeiture, clarifies the existing regulations pertaining to victims, and makes remission available to third parties who reimburse victims under an indemnification agreement.

II. Statement of Need

Consistent with Executive Order 13563, this rule is needed to ensure that the Department's seizure and forfeiture regulations accurately reflect the current composition of the Department, the current state of the law, and current practices and procedures relating to the seizure, forfeiture, and remission of assets. Specifically, the rule is necessary to recognize ATF as part of the Department and to bring clarity to the regulatory framework by consolidating the ATF, DEA, and FBI regulations governing the seizure and

administrative forfeiture of property. The rule is also needed to conform the regulations with the changes to seizure and forfeiture law included in CAFRA, which has rendered many of the existing regulations obsolete. Finally, this rule is necessary to reflect current forfeiture practice and to clarify the existing regulations pertaining to victims and the remission process.

III. Discussion

A. Consolidation of the Regulations Governing the Seizure and Forfeiture of Property by ATF, DEA, and FBI

Consolidating the forfeiture regulations used by ATF (formerly 27 CFR part 72), DEA (21 CFR part 1316, subparts E and F), and FBI (28 CFR part 8 and 21 CFR part 1316, subparts E and F) will achieve greater consistency within the Department and will promote overall fairness by helping ensure that the administrative forfeiture process is governed by uniform procedures.

The final rule removes 21 CFR part 1316, subparts E and F and replaces them by adding an amended 28 CFR part 8 governing the seizure and forfeiture of property by each agency. Part 8 is divided into subparts A, B, and C. Subpart A contains generally applicable provisions for seizures and forfeitures by ATF, DEA, and FBI. Subpart B contains expedited procedures for property seized by DEA and FBI for violations involving personal use quantities of a controlled substance. Subpart C includes the permitted redelegations of authority under these regulations.

However, this consolidation does not constitute the entirety of the Department's forfeiture regulations. ATF continues to enforce and administer the provisions of the National Firearms Act (NFA), ch. 757, 48 Stat. 1236 (1934) (codified at 26 U.S.C. ch. 53). Pursuant to 18 U.S.C. 983(i)(2), Internal Revenue Code forfeitures, including NFA forfeitures, are not subject to CAFRA's procedural requirements. NFA civil forfeiture procedure is governed, for the most part, by the Customs laws (19 U.S.C. 1602–1618), including the notice and cost bond requirements. In addition, pursuant to the Customs laws, the Government's initial burden of proof in an NFA civil forfeiture is to demonstrate probable cause to believe that the property is forfeitable. *See* 19 U.S.C. 1615. Further, there is no innocent ownership defense to forfeiture under the NFA. However, NFA forfeitures are subject to CAFRA's attorney fees requirement.

B. CAFRA Procedural Changes Incorporated in the Final Rule

The rule incorporates CAFRA's modifications to the general rules for civil forfeiture proceedings, *see* 18 U.S.C. 983, by making certain changes to the administrative forfeiture process, including the procedures relating to notice of seizure, filing of claims, hardship requests, and releases of property.

Notice of seizure. Section 983(a)(1) establishes deadlines and procedures for sending personal written notices of seizures to parties with a potential interest in the property. These deadlines and procedures are in addition to, and in some respects different from, the deadlines and procedures under the Customs laws. The forfeiture procedures under Customs laws (19 U.S.C. 1602–1618), which are incorporated by reference "insofar as applicable" in forfeiture statutes enforced by the Department of Justice (*e.g.*, 21 U.S.C. 881(d)), require that "[w]ritten notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article." 19 U.S.C. 1607(a). CAFRA, as codified at 18 U.S.C. 983(a)(1), requires that notice be sent within 60 days of seizure, or within 90 days of a seizure by a state or local agency, or within 60 days of establishing the interested party's identity if it is not known at the time of seizure. CAFRA also provides that a supervisory official of the seizing agency may grant a single 30-day extension if certain conditions are satisfied and that extensions thereafter may only be granted by a court. Section 8.9 of the rule incorporates these notice-related provisions of CAFRA.

Filing of administrative claims. Section 983(a)(2) of title 18 of the United States Code modifies the procedure for filing a claim to seized property and differs in several respects from Customs laws. Under the Customs laws applicable to Department of Justice forfeitures, a claimant to property subject to forfeiture has 20 days after the first published notice of seizure to contest the administrative forfeiture by filing with the seizing agency both a claim and a cost bond for $5,000 or 10 percent of the property's value, whichever is less, but not less than $250. *See* 19 U.S.C. 1608. Section 983(a)(2) eliminates the cost bond requirement for forfeitures covered by CAFRA. Section 983(a)(2) also changes the deadlines for filing claims to contest the forfeiture. Persons not receiving a notice letter must file a claim within 30 days after the date of the final published notice. Those who do receive a personal notice letter may file claims until the deadline provided in the letter, which must be at least 35 days after the date the letter was mailed. Section 983(a)(2) also adds provisions specifying the information required for a valid claim. It reflects the amendments to 18 U.S.C. 983(a)(2)(C)(ii) in the Paul Coverdell National Forensic Sciences Improvement Act of 2000, Public Law 106–561, 114 Stat. 2787, which retroactively deleted CAFRA's original requirements that claimants provide with their claims documentary evidence supporting their interest in the seized property and state that their claims are not frivolous. Consequently, pursuant to section 21 of CAFRA (establishing CAFRA's effective date), the amended section 983(a)(2)(C)(ii) applies to any forfeiture proceeding commenced on or after August 23, 2000. Section 8.10 of the rule incorporates these section 983(a)(2) changes to the claim procedures for an administrative forfeiture.

Release of seized property if forfeiture is not commenced. Section 8.13 of the rule provides procedures to implement 18 U.S.C. 983(a)(3). Section 983(a)(3) requires the release of seized property pursuant to regulations promulgated by the Attorney General and prohibits the United States from pursuing further action for civil forfeiture if the United States does not institute judicial forfeiture proceedings against the property within 90 days after an administrative claim has been filed and no extension of time has been obtained from a court.

Hardship request. Section 8.15 of the rule implements 18 U.S.C. 983(f), which provides procedures and criteria for the release of seized property (subject to certain exceptions) pending the completion of judicial forfeiture proceedings when a claimant's request for such release establishes that continued government custody will cause substantial hardship that outweighs the risk that the property will not remain available for forfeiture.

Expedited release of property. Subpart B (§§ 8.17 through 8.22) incorporates and amends, to the extent required by CAFRA, the pre-existing regulations for expedited forfeiture proceedings for certain property. The pre-existing regulations, 21 CFR part 1316, subpart F, provided expedited procedures for conveyances seized for drug-related offenses and property seized for violations involving personal use quantities of a controlled substance. By repealing 21 U.S.C. 888 (expedited procedures for seized conveyances), CAFRA eliminated the statutory basis

for the expedited procedure regulations pertaining to drug-related conveyance seizures. Accordingly, §§ 8.17 through 8.22 omit the 21 CFR part 1316, subpart F provisions applicable to drug-related conveyance seizures. The remaining provisions apply only where property is seized for administrative forfeiture involving controlled substances in personal use quantities.

Remissions and mitigations. For consistency with CAFRA's uniform innocent owner defense, 18 U.S.C. 983(d), the rule incorporates the innocent owner provisions of sections 983(d)(2)(A) and 983(d)(3)(A) in a new 28 CFR 9.5(a)(l).

Forfeitures affected by CAFRA and the final rule. CAFRA's changes apply to civil forfeiture proceedings commenced on or after August 23, 2000, with the exception of civil forfeitures under the following statutes listed in 18 U.S.C. 983(i): The Tariff Act of 1930 or any other provision of law codified in title 19; the Internal Revenue Code of 1986; the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*); the Trading with the Enemy Act (50 U.S.C. App. 1 *et seq.*) or the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*); or section 1 of title VI of the Act of June 15, 1917 (22 U.S.C. 401). The final rule similarly applies to all forfeitures administered by the Department with the exception of seizures and forfeitures under the statutes listed in 18 U.S.C. 983(i). The authority of seizing agencies to conduct administrative forfeitures derives from the procedural provisions of the Customs laws where those provisions are incorporated by reference in the substantive forfeiture statutes enforced by the agencies.

C. Changes to the Previous Regulations Governing the Seizure and Forfeiture of Property by ATF, DEA, and FBI

Pre-forfeiture disposition. The provision providing for the pre-forfeiture disposition of seized property, § 8.14, implements the authority of 19 U.S.C. 1612(b), which is one of the procedural Customs statutes incorporated by reference into the forfeiture statutes enforced by the Department. Section 1612(b) authorizes pre-forfeiture disposal of seized property, pursuant to regulations, when the property is liable to perish or to waste, or to be greatly reduced in value during its detention for forfeiture, or when the expense of keeping the property pending forfeiture is or will be disproportionate to the property's value. The rule enables the Department to use the authority of section 1612(b) in appropriate cases.

Internet publication. The rule updates the forfeiture regulations by adding, in § 8.9(a)(1)(ii), a provision for the publication of administrative forfeiture notices on an official government Internet site instead of in newspapers. The statute governing the publication of notice in administrative forfeiture proceedings, 19 U.S.C. 1607, does not require a specific means of publication. Section 8.9(a)(1)(ii) will provide ATF, DEA, and FBI with the choice to use the official Internet government forfeiture site, currently *www.forfeiture.gov,* to publish notice of administrative forfeiture proceedings for no cost as an alternative to the newspaper publication provided for in § 8.9(a)(1)(i). This grant of authority to the agencies parallels a similar grant of authority in Rule G(4)(a)(iv)(C) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

Pursuant to Rule G(4)(a)(iv)(C), in all civil judicial forfeitures, the Government may give public notice through the Internet rather than in a newspaper. Section 8.9(a)(1)(ii) will permit the Department of Justice agencies to likewise use the official government Web site, currently *www.forfeiture.gov,* to provide notice in administrative forfeitures, a cost savings that is particularly important as the volume of administrative forfeitures is much greater than judicial forfeitures. There is strong statistical proof that Internet access is now available to the vast majority of United States residents. Internet access continues to grow, while newspaper circulation is declining, and in some markets, the option to publish in a traditional newspaper may not be available in the future.

D. Regulations at 28 CFR Part 9 Governing the Remission or Mitigation of Forfeitures

The final rule includes modifications to the regulations governing the remission or mitigation of forfeiture at 28 CFR part 9. Section 9.3(e)(2) is revised by listing DEA's "Forfeiture Counsel" as the pertinent official in DEA forfeiture cases, by deleting references to ATF's "Special Agent in Charge, Asset Forfeiture and Seized Property Branch," and referring instead to ATF's "Office of Chief Counsel, Forfeiture Counsel," as the pertinent official in ATF forfeiture cases, and by updating the addresses for both DEA and ATF. Section 9.1 changes the designation of the official within ATF to whom authority to grant remission and mitigation has been delegated.

Second, the definition of "victim" in § 9.2 is modified to make remission available to qualified third parties who reimburse a victim pursuant to an indemnification agreement. In addition, § 9.8 is modified to specify the procedures applicable to persons seeking remission as victims.

E. Summary of the Impact of the Changes on the Public

CAFRA enacted additional due process protections for property owners in federal civil forfeiture proceedings. Section 2(a) of CAFRA, codified at 18 U.S.C. 983, requires prompt notification of administrative forfeiture proceedings. As a general rule, in any administrative forfeiture proceeding under a civil forfeiture statute, the Government must send written notice of the seizure and the Government's intent to forfeit the property to all persons known to the Government who might have an interest in the property within 60 days of a seizure (or 90 days of a seizure made by state or local law enforcement authorities and transferred for federal forfeiture).

CAFRA also changed the procedure for filing administrative claims. Section 983(a)(2)(B) dictates that when the agency both publishes and sends notice of the seizure and its intent to forfeit the property, an owner who receives notice by mail has at least 35 days from the date of mailing, and if the personal notice is sent but not received, an owner has 30 days from the date of final publication of notice of the seizure, to file a claim with the agency. In addition, the notice provision in § 8.9(a)(1)(ii) was updated to allow the agencies to publish administrative forfeiture notices on the Internet instead of in newspapers, consistent with the procedure for civil judicial forfeitures under Rule G(4)(a)(iv)(C).

The filing of a valid claim compels the agency to refer the matter to the U.S. Attorney. To preserve the option to seek civil judicial forfeiture, the U.S. Attorney must do one of the following within 90 days: (1) Commence a civil judicial forfeiture action against the seized property; (2) obtain an indictment alleging the property is subject to criminal forfeiture; (3) obtain a good cause extension of the deadline from the district court; or (4) return the property pending the filing of a complaint. If the Government fails to take any of these steps within the statutory deadline, it must promptly release the property and is barred from taking any further action to civilly forfeit the property in connection with the underlying offense.

Prior to CAFRA, claims in an administrative forfeiture required an accompanying bond of either $5,000 or 10 percent of the value of the seized

property, whichever was lower. Section 983(a)(2) eliminated the bond requirement, in forfeitures covered by CAFRA, to give the property owner greater access to federal court. However, to prevent frivolous claims, CAFRA requires the claimant to state the basis for his or her interest in the property in the claim under oath.

Under CAFRA, claimants also have a right to petition for immediate release of seized property on grounds of hardship with a 30-day deadline on judicial resolution of such petitions. Section 983(f)(7) provides that if the court grants a petition, it may also enter any order necessary to ensure that the value of the property is maintained during the pendency of the forfeiture action, including permitting inspection, photographing, and inventory of the property, fixing a bond pursuant to Rule E(5) of the Supplemental Rules for Certain Admiralty or Maritime Claims, or requiring the claimant to obtain or maintain insurance on the property. It also provides that the Government may place a lien or file a *lis pendens* on the property.

It is important to note that CAFRA's deadlines apply only to civil forfeiture actions initiated by commencement of an administrative proceeding under section 983(a) and do not apply to actions commenced solely as civil judicial forfeitures. However, the vast majority of civil forfeitures are handled administratively.

CAFRA changed the procedures for the expedited release of conveyances and property seized for drug offenses to apply only where property is seized for administrative forfeiture involving personal use quantities of a controlled substance.

Although CAFRA enacted a provision granting attorney fees to substantially prevailing parties in civil judicial forfeitures, the regulations make it clear that the United States is not liable for attorney fees or costs in administrative forfeiture proceedings, even if the matter is referred to the U.S. Attorney and the U.S. Attorney declines to initiate a judicial forfeiture on the property. *See* § 8.16.

In addition to implementing these CAFRA reforms, the new regulations authorize the destruction, sale, or other disposition of seized property prior to forfeiture whenever it appears that the property is liable to perish or to waste, or to be greatly reduced in value during its detention for forfeiture, or that the expense of keeping the property is or will be disproportionate to its value. *See* § 8.14. This disposition must be authorized by the appropriate official of the seizing agency. The regulations also specify that the seizing agency must promptly deposit any seized U.S. currency into the Seized Asset Deposit Fund pending forfeiture. *See* § 8.5. There is an exception for currency that must be retained because it has a significant, independent, tangible evidentiary purpose. *See* § 8.5(b).

The final rule also changes some of the procedures relating to crime victims in 28 CFR part 9. The definition of victim is modified to make remission available to qualified third parties who reimburse a victim pursuant to an insurance or other indemnification agreement. *See* § 9.2(w). In addition, § 9.8 is reorganized and a new paragraph (a) is added to specify the filing procedures applicable to persons seeking remission as victims. Section 9.8(i) clarifies that the amount of compensation available to a particular victim may not exceed the victim's share of the net proceeds of the forfeiture associated with the activity that caused the victim's loss. In other words, a victim is not entitled to full compensation, but only the amount of compensation available from the forfeited property. In addition, the new rule makes the statutory innocent owner provisions at 18 U.S.C. 983(d)(2)(A) and (d)(3)(A) applicable to all owner and lienholder petitions for remission.

IV. Public Comments

The Department received two comments on the rule. One comment was a general statement of support for the rule. The other comment came from a group of four organizations representing numerous American newspapers (collectively, "Newspaper Group"). The Newspaper Group objected to § 8.9 ("Notice of administrative forfeiture"), which consolidates seizure and forfeiture regulations for ATF, DEA, and FBI. Specifically, the Newspaper Group objected to § 8.9(a)(1), which permits the seizing agency to provide public notice of an administrative forfeiture proceeding by publishing notice either on an official government Internet site for at least 30 consecutive days, or once a week for at least three successive weeks in a newspaper of general circulation in the judicial district where the property was seized. The Newspaper Group maintained that "any Internet notice is an inadequate substitute for a printed, fixed newspaper notice" and therefore opposed authorizing agencies to publish notice of administrative forfeiture proceedings on an official government forfeiture Web site as an alternative to traditional newspaper publication.

The Department has reviewed and considered the Newspaper Group's comment and has decided not to make any changes to the proposed rule. The following is a summary of the Newspaper Group's points and the Department's response to each one.

Comment: The overarching theme of the Newspaper Group's comment is that giving the Department the option of publishing notice of administrative forfeiture proceedings on the Internet, as opposed to in newspapers, will disenfranchise property owners, particularly those who the Newspaper Group believes may not have ready Internet access.

Response: The Newspaper Group's comment makes passing mention of the fact that for several years the Department has been using the Internet to afford public notice of "other forfeiture notices from other federal agencies." This is, however, a point worthy of emphasis at the outset.

Civil judicial forfeitures have been governed, since December 1, 2006, by Rule G of the Supplemental Rule for Admiralty or Maritime Claims and Asset Forfeiture Actions, Federal Rule of Civil Procedure ("Supplemental Rule G"). Since its inception, Supplemental Rule G(4)(A)(iv)(C) has provided two alternative means of affording public notice of civil judicial forfeitures: (1) Publication once a week for three consecutive weeks in a newspaper of general circulation in the district in which the forfeiture action is filed or (2) posting notice of the forfeiture on an official government forfeiture Web site for at least 30 consecutive days. The official government Internet Web site for posting notices of civil judicial forfeitures, *www.forfeiture.gov*, became operational in December 2007.

In criminal forfeiture cases, post-conviction notices of forfeiture are published according to the provisions of Rule 32.2 of the Federal Rules of Criminal Procedure, in conjunction with section 853(n)(1) of title 21, United States Code. Rule 32.2 was amended effective December 1, 2009, to incorporate by reference the aforementioned notice provisions of Supplemental Rule G. *See* Fed. R. Crim. P. 32.2(b)(6)(C). Since then, criminal forfeiture notices also have been posted on *www.forfeiture.gov*, thereby providing free public access to notices of all judicial forfeitures, civil and criminal. The success of *www.forfeiture.gov* is confirmed by impressive levels of usage; from 2007 to July 2011, 72,007 individuals (based on unique IP addresses) visited the Web site, and the total number of visits was 158,086. For nearly five years, therefore,

the Internet has served as an effective and cost-efficient means of providing public notice of thousands of federal civil and criminal judicial forfeiture proceedings.

Comment: The Newspaper Group's comment asserts that "[t]he point of public notice is to put information where people not necessarily looking for it are likely to find it."

Response: The Supreme Court has held that, in providing public notice of administrative forfeiture proceedings, due process requires only that "the Government's effort be 'reasonably calculated' to apprise a party of the pendency of the action." *Dusenbery* v. *United States,* 534 U.S. 161, 170 (2002) (quoting *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 315 (1950)). Although *Dusenbery* involved direct notice of an administrative forfeiture, the same due process standard applies to published notice as well. *See, e.g., United States* v. *Young,* 421 Fed. Appx. 229, 231, 2011 WL 1206664 (3d Cir. Apr. 11, 2011).

The statute governing notices of administrative forfeiture requires only that "notice of the seizure * * * and the intention to forfeit * * * be published for at least three consecutive weeks in such manner as the [Attorney General] may direct." 19 U.S.C. 1607(a) (incorporated by reference and made applicable to the Attorney General in statutes such as 18 U.S.C. 981(d) and 21 U.S.C. 881(d)). The statute does not require a specific means of publication. The means historically selected by the Attorney General required that notices of administrative forfeiture be published "once a week for at least three successive weeks in a newspaper of general circulation in the judicial district in which the [proceeding] for forfeiture is brought." *See, e.g.,* 21 CFR 1316.75(a). This was, throughout most of the 20th century, a standard "reasonably calculated" to provide notice to interested parties, notwithstanding the fact that many interested parties might be far removed from the district in question, perhaps even in a foreign nation, and without ready access to American newspapers of general circulation.

The Department believes that in the Internet era, continued adherence to newspaper noticing alone places a burden on persons desirous of receiving notice, including, but certainly not limited to: members of our Armed Forces serving in foreign lands; other persons residing in foreign countries; incarcerated persons or those confined long-term to health care facilities wherever located; or anyone with Internet access but far removed from outlets carrying up-to-date American newspapers of general circulation. By contrast, Internet publication will allow for continuous access to administrative forfeiture notices for at least 30 days on a Web site that may easily be found by, for example, using the term "United States forfeiture" on a search engine. Given the current state of technology, the Department believes that this practice is far more "reasonably calculated" to provide public notice of forfeiture proceedings to all interested persons, whatever their circumstances and wherever they might be located.

Comment: The Newspaper Group's comment assumes that notice of administrative forfeitures will be posted only on the Web site of the law enforcement agency that seized the subject property. Based on this assumption, the comment highlights the alleged deficiencies of using a seizing agency Web site for such purposes, and concludes that "[n]ewspapers are a better choice for public notice given their much broader reach."

Response: The assumption that the Department will publish notices of administrative forfeiture proceedings on seizing agency Web sites is incorrect. The rule authorizes notice on "an official internet government forfeiture site," which mirrors the language that authorizes Internet notice under Supplemental Rule G, discussed *supra.* As with existing judicial forfeiture notices, administrative forfeiture notices will be posted on *www.forfeiture.gov,* the "official internet government forfeiture site" that is dedicated to providing notice of federal forfeiture proceedings. Therefore, the comment's line of argument about the alleged superiority of newspapers over individual seizing agency Web sites is inapposite. Nonetheless, the Department believes the comparative advantages of the Internet as opposed to newspapers in providing public notice of forfeiture proceedings should be addressed more broadly.

The Department, as noted, has had the option of publishing notice of civil judicial forfeitures through the Internet since Supplemental Rule G became effective in 2006. Supplemental Rule G was drafted by the Advisory Committee on Civil Rules ("Committee"), a group composed of federal and state judges, private and government attorneys, and law professors, that is responsible for considering and drafting amendments to the Federal Rules of Civil Procedure, including the Supplemental Rules.[1]

The Committee began work on Supplemental Rule G in 2003.[2] Even then, the limitations of newspaper publication and the promise of Internet publication were readily apparent to the Committee. In the Advisory Committee Note to Rule G, the Committee observed:

> Newspaper publication is not a particularly effective means of notice for most potential claimants. Its traditional use is best defended by want of affordable alternatives. Paragraph [(4)(a)](iv)(C) [of Supplemental Rule G] contemplates a government-created internet forfeiture site that would provide a single easily identified means of notice. Such a site would allow much more direct access to notice as to any specific property than publication provides.[3]

Ultimately, the Committee's proposed version of Supplemental Rule G(4)(a)(iv) authorizing use of the Internet for publishing public notice of civil judicial forfeiture proceedings, and the Advisory Committee Note pertaining thereto, were embodied *verbatim* in the official version that was approved by the Supreme Court and the Congress and became effective on December 1, 2006.

In devising Supplemental Rule G, the Committee acknowledged that the Internet, by its nature, offers far greater access to forfeiture notices than newspapers. Once an Internet connection is established, every single user anywhere in the world, at any time of day, has the ability to access federal forfeiture notices online. The same cannot be said of notice published through a single newspaper, the reach of which is limited numerically to the amount of people who read a given edition and geographically by circulation limitations. Indeed, the statistic cited in the Newspaper Group's comment that nearly 100 million adults read a newspaper on an average

[1] The Rules Enabling Act, 28 U.S.C. 2071–2077, authorizes the Supreme Court to prescribe general rules of practice and procedure for the federal courts. Under the Act, the Judicial Conference, a body of federal judges convened by the Chief Justice of the United States pursuant to 28 U.S.C. 331, must appoint a Standing Committee and may appoint advisory committees to recommend new and amended procedural rules. *See* 28 U.S.C. 2073(b). The Advisory Committees currently appointed consist of the Advisory Committees on the Rules of Appellate, Bankruptcy, Civil Procedure, Criminal Procedure, and Evidence. New and amended procedural rules recommended by the Advisory Committees are submitted through the Standing Committee to the United States Supreme Court and then from the Court to the Congress. *See* 28 U.S.C. 2074(a). If the Congress does not act on the proposed procedural rules, they become effective on December 1 of the year in which they were submitted. *Id.*

[2] *See* Report of Civil Rules Advisory Committee, 3 (Dec. 16, 2003), available at *http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2003.pdf.*

[3] *See* Report of Civil Rules Advisory Committee, 92 (May 17, 2004), available at *http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2004.pdf; see also* Fed. R. Civ. P. Supp. R. G Advisory Committe's Note.

weekday is irrelevant for present purposes, as it reflects the total readership of all newspapers combined, which is not the equivalent of 100 million people having access to notices published through a single newspaper.

Supplemental Rule G was also drafted against the backdrop of a dramatic rise in Internet usage coinciding with a precipitous decline in newspaper circulation. Since 2003, these trends have only accelerated. The most recent and comprehensive analysis of Internet penetration is *Digital Nation—Expanding Internet Usage*, published by the U.S. Department of Commerce, National Telecommunications & Information Administration, in February 2011.[4] Statistics from this report show that "an estimated 209 million Americans—about 72% of all adults and children aged three years and older—use the internet somewhere, whether at home, the workplace, schools, libraries, or a neighbor's house." *Digital Nation* at 28 (emphasis omitted). This represents an increase from 68.4% (197.9 million) in 2009. *Id.* at 17. Internet use through libraries is particularly important, as it provides the most widespread availability of free and regular Internet access to the general public. The American Library Association's Public Library Funds & Technology Access Study (2010–2011) reports that 99.3% of public libraries offer public access to computers and the Internet.[5] According to a study by the University of Washington, a third of Americans 14 and older, or about 77 million people, use public library computers.[6]

As Internet use has expanded, the circulation of printed newspapers has continued to decline. According to *The State of the News Media 2011*, a report issued by the Pew Research Center's Project for Excellence in Journalism, daily circulation of U.S. newspapers has declined 30% in the last 10 years, from 62.3 million in 1990 to 43.4 million in 2010.[7] This negative trend is reflected by national papers such as *USA Today*, which in just the past two years has seen its circulation decline by 460,000, and by big-city metro newspapers such as the *Newark Star Ledger* and the *San Francisco Chronicle*, each of which lost about a third of its daily circulation over the same period. *Id.* at 9.

In addition to enhanced accessibility and reach, another factor in favor of publishing forfeiture notices through the Internet is cost. The Advisory Committee that drafted Supplemental Rule G advised in the note pertaining to subpart (4)(a) that, in choosing between newspapers and the Internet as the means for providing public notice, the Government "should choose * * * a method that is reasonably likely to reach potential claimants *at a cost reasonable in the circumstances.*" Fed. R. Civ. P. Supp. R. G Advisory Committee's Note (2006) (emphasis added). Currently, according to the Department's Justice Management Division, the Department pays between $10,000 and $12,000 per day in noticing costs to newspapers. Alternatively, publishing those same notices on *www.forfeiture.gov*, a fully operational Web site, would be of little to no additional cost to the Government.

Comment: The Newspaper Group's comment predicts that transitioning from newspapers to the Internet as a means of providing public notice of administrative forfeiture proceedings will disenfranchise the following groups: key stakeholders, fractional property stakeholders, the poor, rural residents, minorities, senior citizens, the disabled, and the ill.

Response: The Department is sensitive to this concern but does not agree that using the Internet to provide public notice of administrative forfeiture proceedings will adversely affect these groups.

Before addressing the substance of this particular comment, it is important to note two critical points to place the Department's response in the appropriate context. First, the public notice authorized by § 8.9(a) will be in addition to the personal written direct notice that must be provided, generally by mail, directly to every person known to the Government who appears to have an interest in the property to be forfeited. *See* § 8.9(b); *see also* 19 U.S.C. 1607(a). Thus, the relevant category of people in the groups identified in the comment is limited only to those individuals who have an interest in the seized property unknown to the Government, or to those who have an interest known to the Government, but for whom the Government lacks accurate contact information. Only these individuals will have to rely on public notice. All other owners—those with known interests and contact information—will receive personal written notice of the forfeiture proceedings. Second, the proposed regulation affords the Government the option of using the Internet to provide public notice of administrative forfeiture proceedings. If the Government has reason to anticipate that Internet publication may not be effective in a given case, it retains the option of simultaneously publishing notice in a newspaper.

Key stakeholders

Comment: The comment identifies prisoners and frequent travelers as "key stakeholders" whose interests allegedly would not be served by Internet notice, instead of newspaper notice, of administrative forfeiture proceedings.

Response: Like anyone else, prisoners who are known by the Government to have an interest in any seized property are entitled to personal written notice from the Government of any federal forfeiture proceedings against the property. Moreover, if a prisoner's interest in property subject to forfeiture is not known to the Government, there is nothing to guarantee under the current regulations that the prisoner will have access to the few newspapers of general circulation that publish forfeiture notices. The Newspaper Group's comment acknowledges that prisoners lack access to newspapers, but maintains that news of the forfeiture could be provided to them through someone the prisoner knows who sees the notice in a local newspaper. The Department believes that it is unlikely that a significant number of prisoners currently receive forfeiture notices in this fashion, as it would require someone who knows of the prisoner's interest in the property to come across a forfeiture notice of personal property in the correct newspaper of general circulation, to recognize, from both the property description and the date and place of seizure, that the notice pertains to the prisoner's property, and then to convey this information to the prisoner. The Department does not believe that such a scenario will become significantly less likely to transpire if the notice of the forfeiture is published on the Internet.

For similar reasons, the Department does not believe that a traveling property stakeholder will be disadvantaged by this change in noticing practice. The accessibility of general circulation U.S. newspapers is quite limited outside the United States, whereas Internet access to the Federal Government's Internet forfeiture site is readily available in most parts of the world. If the Government is unaware of

[4] U.S. Department of Commerce, *Digital Nation—Expanding Internet Usage (Digital Nation)*, available at *http://www.ntia.doc.gov/files/ntia/publications/ntia_internet_use_repart_february_2011.pdf*.

[5] John Carlo Bertot, *et al.*, *Libraries Connect Communities: Public Library Funding & Technology Access Study 2010–2011 (Libraries Connect Communities)*, at 3, available at *http://viewer.zmags.com/publication/857ea9fd*.

[6] Samantha Becker, *et al.*, *Opportunity for All: How the American Public Benefits from Internet Access at U.S. Libraries (Opportunity for All)*, at 32, available at *http://impact.ischool.washington.edu/documents/OPP4ALL_FinalRepart.pdf*.

[7] Pew Research Center, *The State of the News Media 2011*, at 8, available at *http://stateofthemedia.org/2011/newspapers-essay/data-page-6*.

a stakeholder's interest in property and thus does not provide personal written notice to the stakeholder, the most likely source for conveying news of the seizure to the stakeholder would be an associate of the stakeholder who knows of both the seizure and the stakeholder's ownership interest. After being alerted of the seizure, it should be easier for the traveling stakeholder to find Internet access than to find and purchase the correct daily issue of a particular U.S. newspaper.

Fractional property stakeholders

Comment: The Newspaper Group's comment asserts that the "rights of a co-owner may not be clear to the seizing agency, and the malfeasance of the property holder may not be clear to minority owners, divorced spouses, unregistered lien holders and others who might not be reached by any personal notice."

Response: All persons, including fractional property stakeholders, whose interest in seized property is known to the Government, are entitled to personal notice of administrative forfeiture proceedings. In those cases in which a fractional property stakeholder is not known to the Government, the Newspaper Group contends that those individuals are more likely to learn of the forfeiture proceedings through newspaper rather than Internet notice. But even if such a contention could be verified, the Government is not required to provide the most effective notice, only one "reasonably calculated" to apprise a party of the pendency of the action. *See Dusenbery*, 534 U.S. at 170.

The Poor

Comment: The comment maintains that the proposed rule would require property stakeholders to have basic technical skills and access to a costly computer, thus adversely affecting the poor.

Response: As previously noted, Internet access is widely available even for those who do not own a computer. Also, the statistics cited above suggest that finding the right newspaper on the specific dates a particular notice is published may be even more difficult and unlikely to provide greater access to the notice for such property stakeholders, regardless of whether they own a computer or possess the required technical skills. According to a 2010 University of Washington study, those living below the poverty line had the highest use of library computers, with 44% having reported using public library computers for Internet access during the previous year. *Opportunity for All*, *supra* n.6, at 2. Further, it seems unreasonable to assume that individuals too poor to own a computer will nonetheless have the resources to subscribe to, or purchase at retail, a newspaper of general circulation, such as *The Wall Street Journal*, until they obtain an issue containing the forfeiture notice for the property in which they have an interest.

Comment: Newspapers may be written in time-honored basic news language, not legalese.

Response: Forfeiture notices currently posted on *www.forfeiture.gov* use the same language as those in newspapers.

Comment: Newspapers "may be written in Spanish or German or Swahili to address a specific non-English-speaking community."

Response: Non-English newspapers are not newspapers of "general circulation" in the United States and thus cannot be used to publish forfeiture notices.

Rural Areas

Comment: Statistics show that "many rural areas use dial-up connections because broadband is unavailable."

Response: Dial-up, though it may be slower than other means of connectivity, still provides access to the Internet. Furthermore, the *Digital Nation* study cited previously notes that the "urban-rural gap in Internet use anywhere receded from 4.4 percentage points (69.3% versus 64.9%) in 2009, to 3.6 percentage points (72.4% versus 68.8%) in 2010." *See Digital Nation*, *supra* n.4, at 17. There is reason to expect this trend to continue as rural areas lacking "meaningful internet service" should benefit from recent federal initiatives to expand broadband Internet access in rural areas, including over $3.5 billion in awards under the Broadband Initiatives Program (funded by the American Recovery and Reinvestment Act of 2009), as well as ongoing rural broadband loan programs administered by the U.S. Department of Agriculture's Rural Utilities Service.[8]

Minorities, Senior Citizens, the Disabled, the Ill

Comment: The Newspaper Group asserts that "[s]urvey after survey has shown that particular classes will be disenfranchised if notices are solely placed on internet sites because certain classes are less likely to have access to the internet."

Response: With respect to minorities, senior citizens, the disabled, and the ill, the same general themes apply: The Internet offers greater accessibility to public administrative forfeiture notices than newspapers of general circulation for such individuals and their associates and thus increases the likelihood that affected individuals in these groups will be notified of a seizure in which they have an interest. While average use of the Internet by these groups may be lower than it is by other groups, it does not follow that they will be "disenfranchised" if administrative forfeiture notices are published only through the Internet, and the comment does not point to information that says otherwise. But even if the Newspaper Group's conclusions could be verified, that would not alter the fact that the Government is not required to provide the most effective notice, only one "reasonably calculated" to apprise a party of the pendency of the action. *See Dusenbery*, 534 U.S. at 170.

Comment: According to the Newspaper Group's comment, "libraries and community centers have limited budgets and can only purchase and maintain a limited number of computers," and some even have "long lines and limited hours of operation."

Response: The Department acknowledges that libraries and community centers may have limited resources, but does not believe that the limitations of public Internet access are significant enough to warrant modification to the final rule. As noted previously, 99.3% of public libraries offer public access to computers and the Internet, enabling a large swath of the population to access online forfeiture notices. *See Libraries Connect Communities*, *supra* n.5, at 3.

Comment: The Newspaper Group's comment claims that government Internet posting of notice does not comport with a "long tradition" that public notice must include four elements: the notice must be published by an independent third party, the publication must be capable of being archived at a reasonable cost, the notice must be accessible, and the notice must be verifiable.

Response: The comment does not reference any statutory or case law to support the proposition that public notice must include these four elements. The Department notes that the applicable requirements for notice are encompassed in the constitutional due process standard governing notice of forfeiture proceedings discussed earlier.

The element referenced in the comment requiring that notice be published by an independent third party presumes that newspapers, being "independent of the government," provide the public with "an extra layer

[8] *See* Rural Utilities Service, *Satellite Awards, Broadband Initiatives Program*, available at *http://www.rurdev.usda.gov/Publications/BIPSatelliteFactSheet10-20-10.pdf.*

of confidence in the notice" than if the government published them itself. But this argument mistakes why newspapers were used in the past and the role they serve in the notice process. Newspapers were historically used to provide public notice because, until the Internet, there was no comparable alternative method that was "reasonably calculated" to apprise a party of the pendency of the forfeiture action. It had nothing to do with their status as an "independent and neutral third party." In fact, for these purposes, there is nothing inherently beneficial about newspapers being independent from the Government given that they merely act as a vehicle for publishing notices prepared and provided by the seizing agencies.

The comment suggests that records of Internet notices of federal forfeiture proceedings will be incomplete or inadequate, citing statistics about backlog and budget issues at the National Archives and Records Administration ("NARA"). The Department does not find this comment persuasive. As an initial matter, the statistics about NARA are irrelevant, as NARA is not charged with preserving forfeiture notices. Furthermore, all information concerning notices posted on *www.forfeiture.gov* is carefully maintained and archived, enabling the Government to provide appropriate verification of such information to courts as necessary. This verification, in the form of an affidavit to the court verifying the public notice that was given, has proven satisfactory to courts. The Department believes that this method for noticing judicial forfeitures will work as well with respect to public notices of administrative forfeitures posted on the same government Web site. Further, the process of providing legal verification of Internet notice is dramatically streamlined when it is the Government that can retrieve the required data from its own Web site, as opposed to seeking such verification from newspapers. Finally, the Department notes that this regulatory change should correspondingly decrease the burden on newspapers of having to provide such information.

Comment: Many newspapers have adopted a marketing strategy that publishes an issue in print and the identical publication issue is then posted on the newspaper's Internet site on a daily basis. The Government's Internet sites will not be as user-friendly as the newspaper's dual method of print and Internet notification.

Response: The Department does not agree that posting forfeiture notices on newspaper Web sites is superior to posting them on *www.forfeiture.gov*. Online posting is not part of the Government's contracts for publication of forfeiture notices, so newspapers are under no obligation to make them freely available to the public online. Moreover, some newspaper Web sites restrict access to the full online version of the newspaper to print subscribers or those who pay for full online access. A potential claimant searching for notice of seized property on such a Web site would either need a subscription to the newspaper that is publishing the forfeiture notice or have to pay a daily access fee. The potential claimant would then have to access the newspaper's Web site, go into the full online edition, search for the forfeiture notice regarding his or her property, and select the exact issue in which the once-a-week notice concerning the property is published. The Department believes it is unrealistic to assume that such a process would provide more effective notice than a freely available Web site dedicated only to forfeiture notices that posts the desired notice, 24 hours a day, for at least 30 consecutive days, in a searchable database.

Comment: The Newspaper Group's comment challenges the Department to support its contention that "internet sites are more cost effective and reach more people."

Response: The Department believes it has demonstrated above how providing public notice through the Internet can—and indeed already does—reach more people, more easily, and more directly, than newspaper notice. Meanwhile, the cost savings of Internet notice are significant. As noted, the Department currently pays approximately $10,000–$12,000 a day, or between $3.5 and $4.5 million a year, in noticing costs to newspapers. On the other hand, there is very little cost to the Government in adding public notices of administrative forfeiture proceedings to *www.forfeiture.gov*, an existing and fully operational Web site. Thus, the cost savings to the Government will be what the Department currently pays for publication of such forfeiture notices through newspapers.

Regulatory Certifications

Executive Order 12866 and Executive Order 13563—Regulatory Planning and Review

This rule complies with the requirement under Section 6 of Executive Order 13563 to modify and streamline outmoded and burdensome regulations. Specifically, in terms of updates, the rule recognizes that as of 2002 the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) became part of the Department, and consolidates the regulations governing the seizure and administrative forfeiture of property by ATF with those of DEA and the FBI. In terms of burden, the rule would add the option of publishing notices for administrative forfeitures on an official government Internet site instead of in a newspaper, potentially saving over $10,000 per day.

Further, this regulation has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this rule is a "significant regulatory action" under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget (OMB). The costs that this rule imposes (such as additional personnel and higher administrative overhead) fall upon the Department, not upon the general public. The benefits of this rule, however, are numerous. The rule increases the efficiency of forfeitures, requires that the agencies provide prompt due process and notice, requires that property be promptly returned to third parties if appropriate, eliminates the cost bond and its administrative burden, and requires more effective processing and handling of currency. Moreover, providing agencies with the option of publishing administrative forfeiture notices on the Government's dedicated forfeiture Web site will save the $10,000 to $12,000 a day agencies currently spend providing notice through newspapers. Such notice will be available through the Internet at no cost to the general public. For the reasons explained in its response to comments, the Department maintains the benefits of publishing notices on the newspapers in all circumstances, in addition to the Internet, do not justify the costs.

Executive Order 12630—Governmental Actions and Interference With Constitutionally Protected Property Rights

Executive Order 12630, section 2(a)(3) specifically exempts from the definition of "policies that have takings implications" the seizure and forfeiture of property for violations of law. Therefore, no actions were deemed necessary under the provisions of Executive Order 12630.

Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Executive Order 13132—Federalism

This rule will not have substantial direct effects on the states, on the relationship between the Federal Government and the states, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation, and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. Some owners of property subject to administrative or judicial forfeiture under laws enforced by ATF, DEA, FBI, and the Department's Criminal Division may be small businesses as defined under the Regulatory Flexibility Act, and under size standards established by the Small Business Administration. Although the regulations affect every administrative forfeiture initiated by ATF, DEA, and FBI, and every remission or mitigation decision by the agencies or the Department's Criminal Division, the rule will not change existing forfeiture laws. It will only revise and consolidate the seizure and forfeiture regulations of ATF, DEA, FBI, and the Criminal Division to conform to CAFRA, and to fill gaps and address ambiguities in CAFRA and other seizure and forfeiture laws. Accordingly, an initial regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100,000,000 or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–9, 44 U.S.C. 3518.

Paperwork Reduction Act of 1995

This final rule does not call for a "collection of information" that requires approval by OMB under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, because any information collected in connection with forfeiture proceedings would fall within the exceptions to the PRA listed in 44 U.S.C. 3518(c) and 5 CFR 1320.4.

The particular exception that applies to information collected in connection with a forfeiture action depends on the type of forfeiture proceeding that is occurring. Information collected in connection with an administrative forfeiture would fall within the section 3518(c)(1)(B)(ii) exception for the collection of information during an "administrative action * * * involving an agency against specific individuals or entities."

If a claim is properly filed in the administrative forfeiture, federal prosecutors must file a civil forfeiture complaint against the property, include it in a criminal indictment within the deadlines laid out by CAFRA, or return the property. Information collected in connection with a civil forfeiture would fall under the section 3518(c)(1)(B)(ii) exception for collection of information during "a civil action to which the United States * * * is a party." Alternatively, if the prosecutors include the property in a criminal indictment, any collection of information would occur "during the conduct of a Federal criminal investigation * * * or during the disposition of a particular criminal matter" and would fall under the exception of section 3518(c)(1)(A). Thus, because a claim or petition filed in forfeiture proceedings would fall within one of the exceptions to the PRA, the final rule does not call for a collection of information under that statute and accordingly does not require the prior approval of OMB.

List of Subjects

21 CFR Part 1316

Administrative practice and procedure, Authority delegations (Government agencies), Drug traffic control, Research, Seizures and forfeitures.

28 CFR Part 8

Administrative practice and procedure, Arms and munitions, Communications equipment, Copyright, Crime, Gambling, Infants and children, Motor vehicles, Prices, Seizures and forfeitures, Wiretapping and electronic surveillance.

28 CFR Part 9

Administrative practice and procedure, Crime, Seizures and forfeitures.

Accordingly, for the reasons set forth in the preamble, under the authority of 5 U.S.C. 301, Chapter II of Title 21 and Chapter I of Title 28 of the Code of Federal Regulations are amended as follows:

TITLE 21—FOOD AND DRUGS

PART 1316—ADMINISTRATIVE FUNCTIONS, PRACTICES, AND PROCEDURES

Subparts E and F [Removed]

■ 1. Remove 21 CFR part 1316, subparts E and F.

TITLE 28—JUDICIAL ADMINISTRATION

■ 2. Revise part 8 to read as follows:

PART 8—FORFEITURE AUTHORITY FOR CERTAIN STATUTES

Subpart A—Seizure and Forfeiture of Property

Sec.

Subpart B—Expedited Forfeiture Proceedings for Property Seizures Based on Violations Involving the Possession of Personal Use Quantities of a Controlled Substance

Authority: 5 U.S.C. 301; 8 U.S.C. 1103, 1324(b); 18 U.S.C. 981, 983, 3051; 19 U.S.C. 1606, 1607, 1608, 1610, 1612(b), 1613, 1618; 21 U.S.C. 822, 871, 872, 880, 881, 883, 958, 965; 28 U.S.C. 509, 510; Pub. L. 100–690, sec. 6079, 102 Stat. 4181.

Subpart A—Seizure and Forfeiture of Property

§ 8.1 Scope of regulations.

(a) This part applies to all forfeitures administered by the Department of Justice with the exception of seizures and forfeitures under the statutes listed in 18 U.S.C. 983(i)(2). The authority of seizing agencies to conduct administrative forfeitures derives from the procedural provisions of the Customs laws (19 U.S.C. 1602–1618) where those provisions are incorporated by reference in the substantive forfeiture statutes enforced by the agencies.

(b) The regulations in this part will apply to all forfeiture actions commenced on or after October 12, 2012.

§ 8.2 Definitions.

As used in this part, the following terms shall have the meanings specified:

Administrative forfeiture means the process by which property may be forfeited by a seizing agency rather than through a judicial proceeding. Administrative forfeiture has the same meaning as nonjudicial forfeiture, as that term is used in 18 U.S.C. 983.

Appraised value means the estimated market value of property at the time and place of seizure if such or similar property were freely offered for sale by a willing seller to a willing buyer.

Appropriate official means, in the case of the Drug Enforcement Administration (DEA), the Forfeiture Counsel, DEA. In the case of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), it means the Associate Chief Counsel, Office of Chief Counsel, ATF. In the case of the Federal Bureau of Investigation (FBI), it means the Unit Chief, Legal Forfeiture Unit, Office of the General Counsel, FBI, except as used in §§ 8.9(a)(2), 8.9(b)(2), 8.10, and 8.15, where the term appropriate official means the office or official identified in the published notice or personal written notice in accordance with § 8.9.

Civil forfeiture proceeding means a civil judicial forfeiture action as that term is used in 18 U.S.C. 983.

Contraband means—

(1) Any controlled substance, hazardous raw material, equipment or container, plants, or other property subject to summary forfeiture pursuant to sections 511(f) or (g) of the Controlled Substances Act (21 U.S.C. 881(f) or (g)); or

(2) Any controlled substance imported into the United States, or exported out of the United States, in violation of law.

Domestic value means the same as the term *appraised value* as defined in this section.

Expense means all costs incurred to detain, inventory, safeguard, maintain, advertise, sell, or dispose of property seized, detained, or forfeited pursuant to any law.

File or *filed* has the following meanings:

(1) A claim or any other document submitted in an administrative forfeiture proceeding is not deemed filed until actually received by the appropriate official identified in the personal written notice and the published notice specified in § 8.9. It is not considered filed if it is received by any other office or official, such as a court, U.S. Attorney, seizing agent, local ATF or DEA office, or FBI Headquarters. In addition, a claim in an administrative forfeiture proceeding is not considered filed if received only by an electronic or facsimile transmission.

(2) For purposes of computing the start of the 90-day period set forth in 18 U.S.C. 983(a)(3), an administrative forfeiture claim is filed on the date when the claim is received by the designated appropriate official, even if the claim is received from an incarcerated *pro se* prisoner.

Interested party means any person who reasonably appears to have an interest in the property based on the facts known to the seizing agency before a declaration of forfeiture is entered.

Mail includes regular or certified U.S. mail and mail and package transportation and delivery services provided by other private or commercial interstate carriers.

Nonjudicial forfeiture has the same meaning as administrative forfeiture as defined in this section.

Person means an individual, partnership, corporation, joint business enterprise, estate, or other legal entity capable of owning property.

Property subject to administrative forfeiture means any personal property of the kinds described in 19 U.S.C. 1607(a).

Property subject to forfeiture refers to all property that federal law authorizes to be forfeited to the United States of America in any administrative forfeiture proceeding, in any civil judicial forfeiture proceeding, or in any criminal forfeiture proceeding.

Seizing agency refers to ATF, DEA, or FBI.

§ 8.3 Seizing property subject to forfeiture.

(a) *Authority of seizing agents.* All special agents of any seizing agency may seize assets under any federal statute over which the agency has investigative or forfeiture jurisdiction.

(b) *Turnover of assets seized by state and local agencies.*

(1) Property that is seized by a state or local law enforcement agency and transferred to a seizing agency for administrative or civil forfeiture may be adopted for administrative forfeiture without the issuance of any federal seizure warrant or other federal judicial process.

(2) Where a state or local law enforcement agency maintains custody of property pursuant to process issued by a state or local judicial authority, and notifies a seizing agency of the impending release of such property, the seizing agency may seek and obtain a federal seizure warrant in anticipation of a state or local judicial authority releasing the asset from state process for purposes of federal seizure, and may execute such seizure warrant when the state or local law enforcement agency releases the property as allowed or directed by its judicial authority.

§ 8.4 Inventory.

The seizing agent shall prepare an inventory of any seized property.

§ 8.5 Custody.

(a) All property seized for forfeiture by ATF, DEA, or FBI shall be delivered to the custody of the U.S. Marshals Service (USMS), or a custodian approved by the USMS, as soon as practicable after seizure, unless it is retained as evidence by the seizing agency.

(b) Seized U.S. currency (and, to the extent practicable, seized foreign currency and negotiable instruments) must be deposited promptly in the Seized Asset Deposit Fund pending forfeiture. Provisional exceptions to this requirement may be granted as follows:

(1) If the seized currency has a value less than $5,000 and a supervisory official within a U.S. Attorney's Office determines in writing that the currency is reasonably likely to serve a significant, independent, tangible evidentiary purpose, or that retention is necessary while the potential evidentiary significance of the currency is being determined by scientific testing or otherwise; or

(2) If the seized currency has a value greater than $5,000 and the Chief of the Asset Forfeiture and Money Laundering

Section (AFMLS), Criminal Division, determines in writing that the currency is reasonably likely to serve a significant, independent, tangible evidentiary purpose, or that retention is necessary while the potential evidentiary significance of the currency is being determined by scientific testing or otherwise.

(c) Seized currency has a *significant independent, tangible evidentiary purpose* as those terms are used in § 8.5(b)(1) and (b)(2) if, for example, it bears fingerprint evidence, is packaged in an incriminating fashion, or contains a traceable amount of narcotic residue or some other substance of evidentiary significance. If only a portion of the seized currency has evidentiary value, only that portion should be retained; the balance should be deposited.

§ 8.6 Appraisal.

The seizing agency or its designee shall determine the domestic value of seized property as soon as practicable following seizure.

§ 8.7 Release before claim.

(a) After seizure for forfeiture and prior to the filing of any claim, ATF's Chief, Asset Forfeiture and Seized Property Branch, or designee, the appropriate DEA Special Agent in Charge, or designee, or the appropriate FBI Special Agent in Charge, or designee, whichever is applicable, is authorized to release property seized for forfeiture, provided:

(1) The property is not contraband, evidence of a violation of law, or any property, the possession of which by the claimant, petitioner, or the person from whom it was seized is prohibited by state or federal law, and does not have a design or other characteristic that particularly suits it for use in illegal activities; and

(2) The official designated in paragraph (a) of this section determines within 10 days of seizure that there is an innocent party with the right to immediate possession of the property or that the release would be in the best interest of justice or the Government.

(b) Further, at any time after seizure and before any claim is referred, such seized property may be released if the appropriate official of the seizing agency determines that there is an innocent party with the right to immediate possession of the property or that the release would be in the best interest of justice or the Government.

§ 8.8 Commencing the administrative forfeiture proceeding.

An administrative forfeiture proceeding begins when notice is first published in accordance with § 8.9(a), or the first personal written notice is sent in accordance with § 8.9(b), whichever occurs first.

§ 8.9 Notice of administrative forfeiture.

(a) *Notice by publication.* (1) After seizing property subject to administrative forfeiture, the appropriate official of the seizing agency shall select from the following options a means of publication reasonably calculated to notify potential claimants of the seizure and intent to forfeit and sell or otherwise dispose of the property:

(i) Publication once each week for at least three successive weeks in a newspaper generally circulated in the judicial district where the property was seized; or

(ii) Posting a notice on an official internet government forfeiture site for at least 30 consecutive days.

(2) The published notice shall:

(i) Describe the seized property;

(ii) State the date, statutory basis, and place of seizure;

(iii) State the deadline for filing a claim when personal written notice has not been received, at least 30 days after the date of final publication of the notice of seizure; and

(iv) State the identity of the appropriate official of the seizing agency and address where the claim must be filed.

(b) *Personal written notice.* (1) *Manner of providing notice.* After seizing property subject to administrative forfeiture, the seizing agency, in addition to publishing notice, shall send personal written notice of the seizure to each interested party in a manner reasonably calculated to reach such parties.

(2) *Content of personal written notice.* The personal written notice sent by the seizing agency shall:

(i) State the date when the personal written notice is sent;

(ii) State the deadline for filing a claim, at least 35 days after the personal written notice is sent;

(iii) State the date, statutory basis, and place of seizure;

(iv) State the identity of the appropriate official of the seizing agency and the address where the claim must be filed; and

(v) Describe the seized property.

(c) *Timing of notice.* (1) *Date of personal notice.* Personal written notice is sent on the date when the seizing agency causes it to be placed in the mail, delivered to a commercial carrier, or otherwise sent by means reasonably calculated to reach the interested party. The personal written notice required by § 8.9(b) shall be sent as soon as practicable, and in no case more than 60 days after the date of seizure (or 90 days after the date of seizure by a state or local law enforcement agency if the property was turned over to a federal law enforcement agency for the purpose of forfeiture under federal law).

(2) *Civil judicial forfeiture.* If, before the time period for sending notice expires, the Government files a civil judicial forfeiture action against the seized property and provides notice of such action as required by law, personal notice of administrative forfeiture is not required under paragraph (c)(1) of this section.

(3) *Criminal indictment.* If, before the time period for sending notice under paragraph (c)(1) of this section expires; no civil judicial forfeiture action is filed, but a criminal indictment or information is obtained containing an allegation that the property is subject to forfeiture, the seizing agency shall either:

(i) Send timely personal written notice and continue the administrative forfeiture proceeding; or

(ii) After consulting with the U.S. Attorney, terminate the administrative forfeiture proceeding and notify the custodian to return the property to the person having the right to immediate possession unless the U.S. Attorney takes the steps necessary to maintain custody of the property as provided in the applicable criminal forfeiture statute.

(4) *Subsequent federal seizure.* If property is seized by a state or local law enforcement agency, but personal written notice is not sent to the person from whom the property is seized within the time period for providing notice under paragraph (c)(1) of this section, then any administrative forfeiture proceeding against the property may commence if:

(i) The property is subsequently seized or restrained by the seizing agency pursuant to a federal seizure warrant or restraining order and the seizing agency sends notice as soon as practicable, and in no case more than 60 days after the date of the federal seizure; or

(ii) The owner of the property consents to forfeiture of the property.

(5) *Tolling.* (i) In states or localities where orders are obtained from a state court authorizing the turnover of seized assets to a federal seizing agency, the period from the date an application or motion is presented to the state court for the turnover order through the date when such order is issued by the court shall not be included in the time period

for providing notice under paragraph (c)(1) of this section.

(ii) If property is detained at an international border or port of entry for the purpose of examination, testing, inspection, obtaining documentation, or other investigation relating to the importation of the property into, or the exportation of the property from, the United States, such period of detention shall not be included in the period described in paragraph (c)(1) of this section. In such cases, the 60-day period shall begin to run when the period of detention ends, if a seizing agency seizes the property for the purpose of forfeiture to the United States.

(6) *Identity of interested party.* If a seizing agency determines the identity or interest of an interested party after the seizure or adoption of the property, but before entering a declaration of forfeiture, the agency shall send written notice to such interested party under paragraph (c)(1) of this section not later than 60 days after determining the identity of the interested party or the interested party's interest.

(7) *Extending deadline for notice.* The appropriate official of the seizing agency may extend the period for sending personal written notice under the regulations in this part in a particular case for a period not to exceed 30 days (which period may not be further extended except by a court pursuant to 18 U.S.C. 983(a)(1)(C) and (D)), if the appropriate official determines, and states in writing, that there is reason to believe that notice may have an adverse result, including: Endangering the life or physical safety of an individual; flight from prosecution; destruction of or tampering with evidence; intimidation of potential witnesses; or otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(8) *Certification.* The appropriate official of the seizing agency shall provide the written certification required under 18 U.S.C. 983(a)(1)(C) when the Government requests it and the conditions described in section 983(a)(1)(D) are present.

§ 8.10 Claims.

(a) *Filing.* In order to contest the forfeiture of seized property in federal court, any person asserting an interest in seized property subject to an administrative forfeiture proceeding under the regulations in this part must file a claim with the appropriate official, after the commencement of the administrative forfeiture proceeding as defined in § 8.8, and not later than the deadline set forth in a personal notice letter sent pursuant to § 8.9(b). If personal written notice is sent but not received, then the intended recipient must file a claim with the appropriate official not later than 30 days after the date of the final publication of the notice of seizure.

(b) *Contents of claim.* A claim shall:

(1) Identify the specific property being claimed;

(2) Identify the claimant and state the claimant's interest in the property; and

(3) Be made under oath by the claimant, not counsel for the claimant, and recite that it is made under penalty of perjury, consistent with the requirements of 28 U.S.C. 1746. An acknowledgment, attestation, or certification by a notary public alone is insufficient.

(c) *Availability of claim forms.* The claim need not be made in any particular form. However, each seizing agency conducting forfeitures under the regulations in this part must make claim forms generally available on request. Such forms shall be written in easily understandable language. A request for a claim form does not extend the deadline for filing a claim. Any person may obtain a claim form by requesting one in writing from the appropriate official.

(d) *Cost bond not required.* Any person may file a claim under § 8.10(a) without posting bond, except in forfeitures under statutes listed in 18 U.S.C. 983(i).

(e) *Referral of claim.* Upon receipt of a claim that meets the requirements of §§ 8.10(a) and (b), the seizing agency shall return the property or shall suspend the administrative forfeiture proceeding and promptly transmit the claim, together with a description of the property and a complete statement of the facts and circumstances surrounding the seizure, to the appropriate U.S. Attorney for commencement of judicial forfeiture proceedings. Upon making the determination that the seized property will be released, the agency shall promptly notify the person with a right to immediate possession of the property, informing that person to contact the property custodian within a specified period for release of the property, and further informing that person that failure to contact the property custodian within the specified period for release of the property will result in abandonment of the property pursuant to applicable regulations. The seizing agency shall notify the property custodian of the identity of the person to whom the property should be released. The property custodian shall have the right to require presentation of proper identification or to take other steps to verify the identity of the person who seeks the release of property, or both.

(f) *Premature filing.* If a claim is filed with the appropriate official after the seizure of property, but before the commencement of the administrative forfeiture proceeding as defined in § 8.8, the claim shall be deemed filed on the 30th day after the commencement of the administrative forfeiture proceeding. If such claim meets the requirements of § 8.10(b), the seizing agency shall suspend the administrative forfeiture proceedings and promptly transmit the claim, together with a description of the property and a complete statement of the facts and circumstances surrounding the seizure to the appropriate U.S. Attorney for commencement of judicial forfeiture proceedings.

(g) *Defective claims.* If the seizing agency determines that an otherwise timely claim does not meet the requirements of § 8.10(b), the seizing agency may notify the claimant of this determination and allow the claimant a reasonable time to cure the defect(s) in the claim. If, within the time allowed by the seizing agency, the requirements of § 8.10(b) are not met, the claim shall be void and the forfeiture proceedings shall proceed as if no claim had been submitted. If the claimant timely cures the deficiency, then the claim shall be deemed filed on the date when the appropriate official receives the cured claim.

§ 8.11 Interplay of administrative and criminal judicial forfeiture proceedings.

An administrative forfeiture proceeding pending against seized or restrained property does not bar the Government from alleging that the same property is forfeitable in a criminal case. Notwithstanding the fact that an allegation of forfeiture has been included in a criminal indictment or information, the property may be administratively forfeited in a parallel proceeding.

§ 8.12 Declaration of administrative forfeiture.

If the seizing agency commences a timely proceeding against property subject to administrative forfeiture, and no valid and timely claim is filed, the appropriate official of the seizing agency shall declare the property forfeited. The declaration of forfeiture shall have the same force and effect as a final decree and order of forfeiture in a federal judicial forfeiture proceeding.

§ 8.13 Return of property pursuant to 18 U.S.C. 983(a)(3)(B).

(a) If, under 18 U.S.C. 983(a)(3), the United States is required to return seized property, the U.S. Attorney in charge of the matter shall immediately notify the appropriate seizing agency

that the 90-day deadline was not met. Under this subsection, the United States is not required to return property for which it has an independent basis for continued custody, including but not limited to contraband or evidence of a violation of law.

(b) Upon becoming aware that the seized property must be released, the agency shall promptly notify the person with a right to immediate possession of the property, informing that person to contact the property custodian within a specified period for release of the property, and further informing that person that failure to contact the property custodian within the specified period for release of the property may result in initiation of abandonment proceedings against the property pursuant to 41 CFR part 128–48. The seizing agency shall notify the property custodian of the identity of the person to whom the property should be released.

(c) The property custodian shall have the right to require presentation of proper identification and to verify the identity of the person who seeks the release of property.

§ 8.14 Disposition of property before forfeiture.

(a) Whenever it appears to the seizing agency that any seized property is liable to perish or to waste, or to be greatly reduced in value during its detention for forfeiture, or that the expense of keeping the property is or will be disproportionate to its value, the appropriate official of the seizing agency may order destruction, sale, or other disposition of such property prior to forfeiture. In addition, the owner may obtain release of the property by posting a substitute monetary amount with the seizing agency to be held subject to forfeiture proceedings in place of the seized property to be released. Upon approval by the appropriate official of the seizing agency, the property will be released to the owner after the payment of an amount equal to the Government appraised value of the property if the property is not evidence of a violation of law, is not contraband, and has no design or other characteristics that particularly suit it for use in illegal activities. This payment must be in the form of a money order, an official bank check, or a cashier's check made payable to the United States Marshals Service. A bond in the form of a cashier's check or official bank check will be considered as paid once the check has been accepted for payment by the financial institution that issued the check. If a substitute amount is posted and the property is administratively forfeited, the seizing agency will forfeit the substitute amount in lieu of the property. The pre-forfeiture destruction, sale, or other disposition of seized property pursuant to this section shall not extinguish any person's rights to the value of the property under applicable law. The authority vested in the appropriate official under this subsection may not be delegated.

(b) The seizing agency shall commence forfeiture proceedings, regardless of the disposition of the property under § 8.14(a). A person with an interest in the property that was destroyed or otherwise disposed of under § 8.14(a) may file a claim to contest the forfeiture of the property or a petition for remission or mitigation of the forfeiture. No government agent or employee shall be liable for the destruction or other disposition of property made pursuant to § 8.14(a). The destruction or other disposition of the property pursuant to this section does not impair in rem jurisdiction.

§ 8.15 Requests for hardship release of seized property.

(a) Under certain circumstances a claimant may be entitled to immediate release of seized property on the basis of hardship.

(b) Any person filing a request for hardship release must also file a claim to the seized property pursuant to § 8.10 and as defined in 18 U.S.C. 983(a).

(c) The timely filing of a valid claim pursuant to § 8.10 does not entitle claimant to possession of the seized property, but a claimant may request immediate release of the property while the forfeiture is pending, based on hardship.

(d) A claimant seeking hardship release of property under 18 U.S.C. 983(f) and the regulations in this part must file a written request with the appropriate official. The request must establish that:

(1) The claimant has a possessory interest in the property;

(2) The claimant has sufficient ties to the community to provide assurance that the property will be available at the time of trial;

(3) The continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless;

(4) The claimant's likely hardship from the continued possession by the Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and

(5) The seized property is not:

(i) Contraband;

(ii) Any property, the possession of which by the claimant, petitioner, or the person from whom it was seized is prohibited by state or federal law;

(iii) Currency, or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business that has been seized;

(iv) Intended to be used as evidence of a violation of law;

(v) By reason of design or other characteristic, particularly suited for use in illegal activities; or

(vi) Likely to be used to commit additional criminal acts if returned to the claimant.

(e) A hardship release request pursuant to this section shall be deemed to have been made on the date when it is received by the appropriate official as defined in § 8.2(c) or the date the claim was deemed filed under § 8.10(f). If the request is ruled on and denied by the appropriate official or the property has not been released within the 15-day time period, the claimant may file a petition in federal district court pursuant to 18 U.S.C. 983(f)(3). If a petition is filed in federal district court, the claimant must send a copy of the petition to the agency to which the hardship petition was originally submitted and to the U.S. Attorney in the judicial district in which the judicial petition was filed.

(f) If a civil forfeiture complaint is filed on the property and the claimant files a claim with the court pursuant to 18 U.S.C. 983(a)(4)(A) and Rule G(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims, a hardship petition may be submitted to the individual identified in the public or personal notice of the civil judicial forfeiture action.

§ 8.16 Attorney fees and costs.

The United States is not liable for attorney fees or costs in any administrative forfeiture proceeding, including such proceedings in which a claim is filed, even if the matter is referred to the U.S. Attorney, and the U.S. Attorney declines to commence judicial forfeiture proceedings.

Subpart B—Expedited Forfeiture Proceedings for Property Seizures Based on Violations Involving the Possession of Personal Use Quantities of a Controlled Substance

§ 8.17 Purpose and scope.

(a) The following definitions, regulations, and criteria in this subpart are designed to establish and implement procedures required by section 6079 of the Anti-Drug Abuse Act of 1988, Public Law 100–690, 102 Stat. 4181. They are intended to supplement existing law and procedures relative to the forfeiture of property under the identified statutory authority. These regulations do not affect the existing legal and equitable rights and remedies of those with an interest in property seized for forfeiture, nor do these provisions relieve interested parties from their existing obligations and responsibilities in pursuing their interests through such courses of action. These regulations are intended to reflect the intent of Congress to minimize the adverse impact on those entitled to legal or equitable relief occasioned by the prolonged detention of property subject to forfeiture due to violations of law involving personal use quantities of controlled substances. The definition of *personal use quantities* of a controlled substance as contained herein is intended to distinguish between those small quantities that are generally considered to be possessed for personal consumption and not for further distribution, and those larger quantities generally considered to be intended for further distribution.

(b) In this regard, for violations involving the possession of personal use quantities of a controlled substance, section 6079(b)(2) requires either that administrative forfeiture be completed within 21 days of the seizure of the property, or alternatively, that procedures be established that provide a means by which an individual entitled to relief may initiate an expedited administrative review of the legal and factual basis of the seizure for forfeiture. Should an individual request relief pursuant to these regulations and be entitled to the return of the seized property, such property shall be returned immediately following that determination, and in no event later than 20 days after the filing of a petition for expedited release by an owner, and the administrative forfeiture process shall cease. Should the individual not be entitled to the return of the seized property, however, the administrative forfeiture of that property shall proceed. The owner may, in any event, obtain release of property pending the administrative forfeiture by submitting to the agency making the determination property sufficient to preserve the Government's vested interest for purposes of the administrative forfeiture.

§ 8.18 Definitions.

As used in this subpart, the following terms shall have the meanings specified:

Commercial fishing industry vessel means a vessel that:

(1) Commercially engages in the catching, taking, or harvesting of fish or an activity that can reasonably be expected to result in the catching, taking, or harvesting of fish;

(2) Commercially prepares fish or fish products other than by gutting, decapitating, gilling, skinning, shucking, icing, freezing, or brine chilling; or

(3) Commercially supplies, stores, refrigerates, or transports fish, fish products, or materials directly related to fishing or the preparation of fish to or from a fishing, fish processing, or fish tender vessel or fish processing facility.

Controlled substance has the meaning given in 21 U.S.C. 802(6).

Normal and customary manner means that inquiry suggested by particular facts and circumstances that would customarily be undertaken by a reasonably prudent individual in a like or similar situation. Actual knowledge of such facts and circumstances is unnecessary, and implied, imputed, or constructive knowledge is sufficient. An established norm, standard, or custom is persuasive but not conclusive or controlling in determining whether an owner acted in a normal and customary manner to ascertain how property would be used by another legally in possession of the property. The failure to act in a normal and customary manner as defined herein will result in the denial of a petition for expedited release of the property and is intended to have the desirable effect of inducing owners of the property to exercise greater care in transferring possession of their property.

Owner means one having a legal and possessory interest in the property seized for forfeiture. Even though one may hold primary and direct title to the property seized, such person may not have sufficient actual beneficial interest in the property to support a petition as owner if the facts indicate that another person had dominion and control over the property.

Personal use quantities means those amounts of controlled substances in possession in circumstances where there is no other evidence of an intent to distribute, or to facilitate the manufacturing, compounding, processing, delivering, importing, or exporting of any controlled substance.

(1) Evidence that possession of quantities of a controlled substance is for other than personal use may include, for example:

(i) Evidence, such as drug scales, drug distribution paraphernalia, drug records, drug packaging material, method of drug packaging, drug "cutting" agents and other equipment, that indicates an intent to process, package or distribute a controlled substance;

(ii) Information from reliable sources indicating possession of a controlled substance with intent to distribute;

(iii) The arrest or conviction record of the person or persons in actual or constructive possession of the controlled substance for offenses under federal, state or local law that indicates an intent to distribute a controlled substance;

(iv) Circumstances or reliable information indicating that the controlled substance is related to large amounts of cash or any amount of prerecorded government funds;

(v) Circumstances or reliable information indicating that the controlled substance is a sample intended for distribution in anticipation of a transaction involving large quantities, or is part of a larger delivery;

(vi) Statements by the possessor, or otherwise attributable to the possessor, including statements of conspirators, that indicate possession with intent to distribute; or

(vii) The fact that the controlled substance was recovered from sweepings.

(2) Possession of a controlled substance shall be presumed to be for personal use when there are no indicia of illicit drug trafficking or distribution—such as, but not limited to, the factors listed above—and the amounts do not exceed the following quantities:

(i) One gram of a mixture or substance containing a detectable amount of heroin;

(ii) One gram of a mixture or substance containing a detectable amount of—

(A) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivations of ecgonine or their salts have been removed;

(B) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(C) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(D) Any compound, mixture, or preparation that contains any quantity

of any of the substances referred to in paragraphs (2)(ii)(A) through (2)(ii)(C) of this definition;

(iii) 1/10th gram of a mixture or substance described in paragraph (e)(2)(ii) of this section which contains cocaine base;

(iv) 1/10th gram of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 500 micrograms of lysergic acid diethylamide (LSD);

(vi) One ounce of a mixture or substance containing a detectable amount of marihuana;

(vii) One gram of methamphetamine, its salts, isomers, and salts of its isomers, or one gram of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.

(3) The possession of a narcotic, a depressant, a stimulant, a hallucinogen, or a cannabis-controlled substance will be considered in excess of personal use quantities if the dosage unit amount possessed provides the same or greater equivalent efficacy as the quantities described in paragraph (e)(2) of this section.

Property means property subject to forfeiture under 21 U.S.C. 881(a) (4), (6), and (7); 19 U.S.C. 1595a; and 49 U.S.C. 80303.

Seizing agency means the federal agency that has seized the property or adopted the seizure of another agency and has the responsibility for administratively forfeiting the property;

Statutory rights or defenses to the forfeiture means all legal and equitable rights and remedies available to a claimant of property seized for forfeiture.

§ 8.19 Petition for expedited release in an administrative forfeiture proceeding.

(a) Where property is seized for administrative forfeiture involving controlled substances in personal use quantities the owner may petition the seizing agency for expedited release of the property.

(b) Where property described in § 8.19(a) is a commercial fishing industry vessel proceeding to or from a fishing area or intermediate port of call or actually engaged in fishing operations, which would be subject to seizure for administrative forfeiture for a violation of law involving controlled substances in personal use quantities, a summons to appear shall be issued in lieu of a physical seizure. The vessel shall report to the port designated in the summons. The seizing agency shall be authorized to effect administrative forfeiture as if the vessel had been physically seized. Upon answering the summons to appear on or prior to the last reporting date specified in the summons, the owner of the vessel may file a petition for expedited release pursuant to § 8.19(a), and the provisions of § 8.19(a) and other provisions in this section pertaining to a petition for expedited release shall apply as if the vessel had been physically seized.

(c) The owner filing the petition for expedited release shall establish the following:

(1) The owner has a valid, good faith interest in the seized property as owner or otherwise;

(2) The owner reasonably attempted to ascertain the use of the property in a normal and customary manner; and

(3) The owner did not know of or consent to the illegal use of the property, or in the event that the owner knew or should have known of the illegal use, the owner did what reasonably could be expected to prevent the violation.

(d) In addition to those factors listed in § 8.19(c), if an owner can demonstrate that the owner has other statutory rights or defenses that would cause the owner to prevail on the issue of forfeiture, such factors shall also be considered in ruling on the petition for expedited release.

(e) A petition for expedited release must be received by the appropriate seizing agency within 20 days from the date of the first publication of the notice of seizure in order to be considered by the seizing agency. The petition must be executed and sworn to by the owner and both the envelope and the request must be clearly marked "PETITION FOR EXPEDITED RELEASE." Such petition shall be filed with the appropriate office or official identified in the personal written notice and the publication notice.

(f) The petition shall include the following:

(1) A complete description of the property, including identification numbers, if any, and the date and place of seizure;

(2) The petitioner's interest in the property, which shall be supported by title documentation, bills of sale, contracts, mortgages, or other satisfactory documentary evidence; and

(3) A statement of the facts and circumstances, to be established by satisfactory proof, relied upon by the petitioner to justify expedited release of the seized property.

§ 8.20 Ruling on petition for expedited release in an administrative forfeiture proceeding.

(a) If a final administrative determination of the case, without regard to the provisions of this section, is made within 21 days of the seizure, the seizing agency need take no further action under this section on a petition for expedited release received pursuant to § 8.19(a).

(b) If no such final administrative determination is made within 21 days of the seizure, the following procedure shall apply. The seizing agency shall, within 20 days after the receipt of the petition for expedited release, determine whether the petition filed by the owner has established the factors listed in § 8.19(c) and:

(1) If the seizing agency determines that those factors have been established, it shall terminate the administrative proceedings and return the property to the owner (or in the case of a commercial fishing industry vessel for which a summons has been issued shall dismiss the summons), except where it is evidence of a violation of law; or

(2) If the seizing agency determines that those factors have not been established, the agency shall proceed with the administrative forfeiture.

§ 8.21 Posting of substitute monetary amount in an administrative forfeiture proceeding.

(a) Where property is seized for administrative forfeiture involving controlled substances in personal use quantities, the owner may obtain release of the property by posting a substitute monetary amount with the seizing agency to be held subject to forfeiture proceedings in place of the seized property to be released. The property will be released to the owner upon the payment of an amount equal to the government appraised value of the property if the property is not evidence of a violation of law and has no design or other characteristics that particularly suit it for use in illegal activities. This payment must be in the form of a traveler's check, a money order, a cashier's check, or an irrevocable letter of credit made payable to the seizing agency. A bond in the form of a cashier's check will be considered as paid once the check has been accepted for payment by the financial institution which issued the check.

(b) If a substitute amount is posted and the property is administratively forfeited, the seizing agency will forfeit the substitute amount in lieu of the property.

§ 8.22 Special notice provision.

At the time of seizure of property defined in § 8.18 for violations involving the possession of personal use quantities of a controlled substance, the seizing agency must provide written notice to the possessor of the property

specifying the procedures for the filing of a petition for expedited release and for the posting of a substitute monetary bond as set forth in section 6079 of the Anti-Drug Abuse Act of 1988 and implementing regulations.

Subpart C—Other Applicable Provisions

§ 8.23 Redelegation of authority.

(a) *Redelegation of authority permitted.*

(1) The powers and responsibilities delegated to the DEA Forfeiture Counsel by the regulations in this part may be redelegated to attorneys working under the direct supervision of the DEA Forfeiture Counsel.

(2) The powers and responsibilities delegated to the FBI Unit Chief, Legal Forfeiture Unit, by the regulations in this part may be redelegated to the attorneys working under the direct supervision of the FBI Unit Chief, Legal Forfeiture Unit.

(3) The powers and responsibilities delegated to the Associate Chief Counsel, Office of Chief Counsel, ATF may be redelegated to the attorneys working under the direct supervision of the Associate Chief Counsel, Office of Chief Counsel, ATF.

(b) *Redelegation of authority not permitted.*

(1) The powers and responsibilities delegated to the DEA Forfeiture Counsel, the FBI Unit Chief, Legal Forfeiture Unit, and the ATF Associate Chief Counsel, Office of Chief Counsel to make decisions regarding the disposition of property before forfeiture pursuant to § 8.14 may not be redelegated.

(2) The powers and responsibilities delegated to the DEA Forfeiture Counsel, the FBI Unit Chief, Legal Forfeiture Unit, and the ATF Associate Chief Counsel, Office of Chief Counsel to make decisions regarding the delay of notice of forfeiture pursuant to §§ 8.9(c)(7) and (8) and 18 U.S.C. 983(a)(1)(B) and (C) may not be redelegated.

■ 3. Revise part 9 to read as follows:

PART 9—REGULATIONS GOVERNING THE REMISSION OR MITIGATION OF ADMINISTRATIVE, CIVIL, AND CRIMINAL FORFEITURES

Sec.

Authority: 5 U.S.C. 301; 8 U.S.C. 1103, 1324(b); 18 U.S.C. 981, 983, 3051; 19 U.S.C. 1606, 1607, 1608, 1610, 1612(b), 1613, 1618; 21 U.S.C. 822, 871, 872, 880, 881, 883, 958, 965; 28 U.S.C. 509, 510; Pub. L. 100–690, sec. 6079.

§ 9.1 Purpose, authority, and scope.

(a) *Purpose.* This part sets forth the procedures for agency officials to follow when considering remission or mitigation of administrative forfeitures under the jurisdiction of the agency, and civil judicial and criminal judicial forfeitures under the jurisdiction of the Department of Justice's Criminal Division. The purpose of this part is to provide a basis for the partial or total remission of forfeiture for individuals who have an interest in the forfeited property but who did not participate in, or have knowledge of, the conduct that resulted in the property being subject to forfeiture and, where required, took all reasonable steps under the circumstances to ensure that such property would not be used, acquired, or disposed of contrary to law. Additionally, the regulations provide for partial or total mitigation of the forfeiture and imposition of alternative conditions in appropriate circumstances.

(b) *Authority to grant remission and mitigation.*

(1) Remission and mitigation functions in administrative forfeitures are performed by the agency seizing the property. Within the Federal Bureau of Investigation (FBI), authority to grant remission and mitigation is delegated to the Forfeiture Counsel, who is the Unit Chief, Legal Forfeiture Unit, Office of the General Counsel; within the Drug Enforcement Administration (DEA), authority to grant remission and mitigation is delegated to the Forfeiture Counsel, Office of Chief Counsel; and within the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), authority to grant remission and mitigation is delegated to the Associate Chief Counsel, Office of Chief Counsel.

(2) Remission and mitigation functions in judicial cases are performed by the Criminal Division of the Department of Justice. Within the Criminal Division, authority to grant remission and mitigation is delegated to the Chief, Asset Forfeiture and Money Laundering Section.

(3) The powers and responsibilities delegated by this part may be redelegated to attorneys or managers working under the supervision of the designated officials.

(c) *Scope.* This part governs any petition for remission filed with the Attorney General and supersedes any Department of Justice regulation governing petitions for remission, to the extent such regulation is inconsistent with this part.

(d) The time periods and internal requirements established in this part are designed to guide the orderly administration of the remission and mitigation process and are not intended to create rights or entitlements in favor of individuals seeking remission or mitigation. This part applies to all forfeiture actions commenced on or after October 12, 2012.

§ 9.2 Definitions.

As used in this part:

Administrative forfeiture means the process by which property may be forfeited by a seizing agency rather than through judicial proceedings. *Administrative forfeiture* has the same meaning as nonjudicial forfeiture, as that term is used in 18 U.S.C. 983.

Appraised value means the estimated market value of property at the time and place of seizure if such or similar property were freely offered for sale between a willing seller and a willing buyer.

Assets Forfeiture Fund means the Department of Justice Assets Forfeiture Fund or Department of the Treasury Forfeiture Fund, depending upon the identity of the seizing agency.

Attorney General means the Attorney General of the United States or his or her designee.

Beneficial owner means a person with actual use of, as well as an interest in, the property subject to forfeiture.

Chief, Asset Forfeiture and Money Laundering Section, and *Chief,* refer to the Chief of the Asset Forfeiture and Money Laundering Section, Criminal Division, United States Department of Justice.

General creditor means one whose claim or debt is not secured by a specific right to obtain satisfaction against the particular property subject to forfeiture.

Judgment creditor means one who has obtained a judgment against the debtor but has not yet received full satisfaction of the judgment.

Judicial forfeiture means either a civil or a criminal proceeding in a United States District Court that may result in a final judgment and order of forfeiture.

Lienholder means a creditor whose claim or debt is secured by a specific right to obtain satisfaction against the particular property subject to forfeiture. A lien creditor qualifies as a lienholder if the lien:

(1) Was established by operation of law or contract;

(2) Was created as a result of an exchange of money, goods, or services; and

(3) Is perfected against the specific property forfeited for which remission or mitigation is sought (*e.g.*, a real estate mortgage; a mechanic's lien).

Net equity means the amount of a lienholder's monetary interest in property subject to forfeiture. Net equity shall be computed by determining the amount of unpaid principal and unpaid interest at the time of seizure and by adding to that sum unpaid interest calculated from the date of seizure through the last full month prior to the date of the decision on the petition. Where a rate of interest is set forth in a security agreement, the rate of interest to be used in this computation will be the annual percentage rate so specified in the security agreement that is the basis of the lienholder's interest. In this computation, however, there shall be no allowances for attorney fees, accelerated or enhanced interest charges, amounts set by contract as damages, unearned extended warranty fees, insurance, service contract charges incurred after the date of seizure, allowances for dealer's reserve, or any other similar charges.

Nonjudicial forfeiture has the same meaning as administrative forfeiture as defined in this section.

Owner means the person in whom primary title is vested or whose interest is manifested by the actual and beneficial use of the property, even though the title is vested in another. A victim of an offense, as defined in this section, may also be an owner if he or she has a present legally cognizable ownership interest in the property forfeited. A nominal owner of property will not be treated as its true owner if he or she is not its beneficial owner.

Person means an individual, partnership, corporation, joint business enterprise, estate, or other legal entity capable of owning property.

Petition means a petition for remission or mitigation of forfeiture under the regulations in this part. This definition includes a petition for restoration of the proceeds of sale of forfeited property and a petition for the value of forfeited property placed into official use.

Petitioner means the person applying for remission, mitigation, or restoration of the proceeds of sale, or for the appraised value of forfeited property, under this part. A petitioner may be an owner as defined in this section, a lienholder as defined in this section, or a victim as defined in this section, subject to the limitations of § 9.8.

Property means real or personal property of any kind capable of being owned or possessed.

Record means two or more arrests for related crimes, unless the arrestee was acquitted or the charges were dismissed for lack of evidence, a conviction for a related crime or completion of sentence within ten years of the acquisition of the property subject to forfeiture, or two convictions for a related crime at any time in the past.

Related crime as used in this section and § 9.6(e) means any crime similar in nature to that which gives rise to the seizure of property for forfeiture. For example, where property is seized for a violation of the federal laws relating to drugs, a related crime would be any offense involving a violation of the federal laws relating to drugs or the laws of any state or political subdivision thereof relating to drugs.

Related offense as used in § 9.8 means:

(1) Any predicate offense charged in a federal Racketeer Influenced and Corrupt Organizations Act (RICO) count for which forfeiture was ordered; or

(2) An offense committed as part of the same scheme or design, or pursuant to the same conspiracy, as was involved in the offense for which forfeiture was ordered.

Ruling official means any official to whom decision-making authority has been delegated pursuant to § 9.1(b).

Seizing agency means the federal agency that seized the property or adopted the seizure of another agency for federal forfeiture.

Victim means a person who has incurred a pecuniary loss as a direct result of the commission of the offense underlying a forfeiture. A drug user is not considered a victim of a drug trafficking offense under this definition. A victim does not include one who acquires a right to sue the perpetrator of the criminal offense for any loss by assignment, subrogation, inheritance, or otherwise from the actual victim, unless that person has acquired an actual ownership interest in the forfeited property; provided however, that if a victim has received compensation from insurance or any other source with respect to a pecuniary loss, remission may be granted to the third party who provided the compensation, up to the amount of the victim's pecuniary loss as defined in § 9.8(c).

Violator means the person whose use or acquisition of the property in violation of the law subjected such property to seizure for forfeiture.

§ 9.3 Petitions in administrative forfeiture cases.

(a) *Notice of seizure.* The notice of seizure and intent to forfeit the property shall advise any persons who may have a present ownership interest in the property to submit their petitions for remission or mitigation within 30 days of the date they receive the notice in order to facilitate processing. Petitions shall be considered any time after notice until the property has been forfeited, except in cases involving petitions to restore the proceeds from the sale of forfeited property. A notice of seizure shall include the title of the seizing agency, the ruling official, the mailing and street address of the official to whom petitions should be sent, and an asset identifier number.

(b) *Persons who may file.*

(1) A petition for remission or mitigation must be filed by a petitioner as defined in § 9.2 or as prescribed in § 9.9(g) and (h). A person or person on their behalf may not file a petition if, after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution, the person:

(i) Purposely leaves the jurisdiction of the United States;

(ii) Declines to enter or reenter the United States to submit to its jurisdiction; or

(iii) Otherwise evades the jurisdiction of the court in which a criminal matter is pending against the person.

(2) Paragraph (b)(1) of this section applies to a petition filed by a corporation if any majority shareholder, or individual filing the claim on behalf of the corporation:

(i) Purposely leaves the jurisdiction of the United States;

(ii) Declines to enter or reenter the United States to submit to its jurisdiction; or

(iii) Otherwise evades the jurisdiction of the court in which a criminal matter is pending against the person.

(c) *Contents of petition.*

(1) All petitions must include the following information in clear and concise terms:

(i) The name, address, and social security or other taxpayer identification number of the person claiming an interest in the seized property who is seeking remission or mitigation;

(ii) The name of the seizing agency, the asset identifier number, and the date and place of seizure;

(iii) A complete description of the property, including make, model, and serial numbers, if any; and

(iv) A description of the petitioner's interest in the property as owner, lienholder, or otherwise, supported by

original or certified bills of sale, contracts, deeds, mortgages, or other documentary evidence. Such documentation includes evidence establishing the source of funds for seized currency or the source of funds used to purchase the seized asset.

(2) Any factual recitation or documentation of any type in a petition must be supported by a declaration under penalty of perjury that meets the requirements of 28 U.S.C. 1746.

(d) *Releases.* In addition to the contents of the petition for remission or mitigation set forth in paragraph (c) of this section, upon request of the agency, the petitioner shall also furnish the agency with an instrument executed by the titled or registered owner and any other known claimant of an interest in the property releasing interest in such property.

(e) *Filing petition with agency.*

(1) A petition for remission or mitigation subject to administrative forfeiture is to be sent to the official address provided in the notice of seizure and shall be sworn to by the petitioner or by the petitioner's attorney upon information and belief, supported by the client's sworn notice of representation pursuant to 28 U.S.C. 1746, as set out in § 9.9(g).

(2) If the notice of seizure does not provide an official address, the petition shall be addressed to the appropriate federal agency as follows:

(i)(A) DEA: All submissions must be filed with the Forfeiture Counsel, Asset Forfeiture Section, Office of Chief Counsel, Drug Enforcement Administration, HQS Forfeiture Response, P.O. Box 1475, Quantico, Virginia 22134–1475.

(B) Correspondence via private delivery must be filed with The Forfeiture Counsel, Asset Forfeiture Section (CCF), Office of Chief Counsel, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, Virginia 22152.

(C) Submission by facsimile or other electronic means will not be accepted.

(ii)(A) FBI: All submissions must be filed with the FBI Special Agent in Charge at the Field Office that seized the property.

(B) Submission by facsimile or other electronic means will not be accepted.

(iii)(A) ATF: All submissions must be filed with the Office of Chief Counsel, Attention: Forfeiture Counsel, 99 New York Avenue NE., Washington, DC 20226.

(B) Submission by facsimile or other electronic means will not be accepted.

(f) *Agency investigation.* Upon receipt of a petition, the seizing agency shall investigate the merits of the petition and may prepare a written report containing the results of that investigation. This report shall be submitted to the ruling official for review and consideration.

(g) *Ruling.* Upon receipt of the petition and the agency report, the ruling official for the seizing agency shall review the petition and the report, if any, and shall rule on the merits of the petition. No hearing shall be held.

(h) *Petitions granted.* If the ruling official grants a remission or mitigation of the forfeiture, a copy of the decision shall be mailed to the petitioner or, if represented by an attorney, to the petitioner's attorney. A copy shall also be sent to the United States Marshals Service (USMS) or other property custodian. The written decision shall include the terms and conditions, if any, upon which the remission or mitigation is granted and the procedures the petitioner must follow to obtain release of the property or the monetary interest therein.

(i) *Petitions denied.* If the ruling official denies a petition, a copy of the decision shall be mailed to the petitioner or, if represented by an attorney, to the petitioner's attorney of record. A copy of the decision shall also be sent to the USMS or other property custodian. The decision shall specify the reason that the petition was denied. The decision shall advise the petitioner that a request for reconsideration of the denial of the petition may be submitted to the ruling official in accordance with paragraph (j) of this section.

(j) *Request for reconsideration.*

(1) A request for reconsideration of the denial of the petition shall be considered if:

(i) It is postmarked or received by the office of the ruling official within 10 days from the receipt of the notice of denial of the petition by the petitioner; and

(ii) The request is based on information or evidence not previously considered that is material to the basis for the denial or presents a basis clearly demonstrating that the denial was erroneous.

(2) In no event shall a request for reconsideration be decided by the same ruling official who ruled on the original petition.

(3) Only one request for reconsideration of a denial of a petition shall be considered.

(k) *Restoration of proceeds from sale.*

(1) A petition for restoration of the proceeds from the sale of forfeited property, or for the appraised value of forfeited property when the forfeited property has been retained by or delivered to a government agency for official use, may be submitted by an owner or lienholder in cases in which the petitioner:

(i) Did not know of the seizure prior to the entry of a declaration of forfeiture; and

(ii) Could not reasonably have known of the seizure prior to the entry of a declaration of forfeiture.

(2) Such a petition shall be submitted pursuant to paragraphs (b) through (e) of this section within 90 days of the date the property is sold or otherwise disposed of.

§ 9.4 Petitions in judicial forfeiture cases.

(a) *Notice of seizure.* The notice of seizure and intent to forfeit the property shall advise any persons who may have a present ownership interest in the property to submit their petitions for remission or mitigation within 30 days of the date they receive the notice in order to facilitate processing. Petitions shall be considered any time after notice until such time as the forfeited property is placed in official use, sold, or otherwise disposed of according to law, except in cases involving petitions to restore property. A notice of seizure shall include the title of the ruling official and the mailing and street address of the official to whom petitions should be sent, the name of the agency seizing the property, an asset identifier number, and the district court docket number.

(b) *Persons who may file.* A petition for remission or mitigation must be filed by a petitioner as defined in § 9.2 or as prescribed in § 9.9(g) and (h).

(c) *Contents of petition.*

(1) All petitions must include the following information in clear and concise terms:

(i) The name, address, and social security or other taxpayer identification number of the person claiming an interest in the seized property who is seeking remission or mitigation;

(ii) The name of the seizing agency, the asset identifier number, and the date and place of seizure;

(iii) The district court docket number;

(iv) A complete description of the property, including the address or legal description of real property, and make, model, and serial numbers of personal property, if any; and

(v) A description of the petitioner's interest in the property as owner, lienholder, or otherwise, supported by original or certified bills of sale, contracts, mortgages, deeds, or other documentary evidence.

(2) Any factual recitation or documentation of any type in a petition must be supported by a declaration under penalty of perjury that meets the requirements of 28 U.S.C. 1746.

(d) *Releases.* In addition to the content of the petition for remission or mitigation set forth in paragraph (c) of this section, the petitioner, upon request, also shall furnish the agency with an instrument executed by the titled or registered owner and any other known claimant of an interest in the property releasing the interest in such property.

(e) *Filing petition with Department of Justice.* A petition for remission or mitigation of a judicial forfeiture shall be addressed to the Attorney General; shall be sworn to by the petitioner or by the petitioner's attorney upon information and belief, supported by the client's sworn notice of representation pursuant to 28 U.S.C. 1746, as set forth in § 9.9(g); and shall be submitted to the U.S. Attorney for the district in which the judicial forfeiture proceedings are brought.

(f) *Agency investigation and recommendation; U.S. Attorney's recommendation.* Upon receipt of a petition, the U.S. Attorney shall direct the seizing agency to investigate the merits of the petition based on the information provided by the petitioner and the totality of the agency's investigation of the underlying basis for forfeiture. The agency shall submit to the U.S. Attorney a report of its investigation and its recommendation on whether the petition should be granted or denied. Upon receipt of the agency's report and recommendation, the U.S. Attorney shall forward to the Chief, Asset Forfeiture and Money Laundering Section, the petition, the seizing agency's report and recommendation, and the U.S. Attorney's recommendation on whether the petition should be granted or denied.

(g) *Ruling.* The Chief shall rule on the petition. No hearing shall be held. The Chief shall not rule on any petition for remission if such remission was previously denied by the agency pursuant to § 9.3.

(h) *Petitions under Internal Revenue Service liquor laws.* The Chief shall accept and consider petitions submitted in judicial forfeiture proceedings under the Internal Revenue Service liquor laws only prior to the time a decree of forfeiture is entered. Thereafter, the district court has exclusive jurisdiction.

(i) *Petitions granted.* If the Chief grants a remission or mitigates the forfeiture, the Chief shall mail a copy of the decision to the petitioner (or, if represented by an attorney, to the petitioner's attorney) and shall mail or transmit electronically a copy of the decision to the appropriate U.S. Attorney, the USMS or other property custodian, and the seizing agency. The written decision shall include the terms and conditions, if any, upon which the remission or mitigation is granted and the procedures the petitioner must follow to obtain release of the property or the monetary interest therein. The Chief shall advise the petitioner or the petitioner's attorney to consult with the U.S. Attorney as to such terms and conditions. The U.S. Attorney shall confer with the seizing agency regarding the release and shall coordinate disposition of the property with that office and the USMS or other property custodian.

(j) *Petitions denied.* If the Chief denies a petition, a copy of that decision shall be mailed to the petitioner (or, if represented by an attorney, to the petitioner's attorney of record) and mailed or transmitted electronically to the appropriate U.S. Attorney, the USMS or other property custodian, and to the seizing agency. The decision shall specify the reason that the petition was denied. The decision shall advise the petitioner that a request for reconsideration of the denial of the petition may be submitted to the Chief at the address provided in the decision, in accordance with paragraph (k) of this section.

(k) *Request for reconsideration.*

(1) A request for reconsideration of the denial shall be considered if:

(i) It is postmarked or received by the Asset Forfeiture and Money Laundering Section at the address contained in the decision denying the petition within 10 days from the receipt of the notice of denial of the petition by the petitioner;

(ii) A copy of the request is also received by the appropriate U.S. Attorney within 10 days of the receipt of the denial by the petitioner; and

(iii) The request is based on information or evidence not previously considered that is material to the basis for the denial or presents a basis clearly demonstrating that the denial was erroneous.

(2) In no event shall a request for reconsideration be decided by the ruling official who ruled on the original petition.

(3) Only one request for reconsideration of a denial of a petition shall be considered.

(4) Upon receipt of the request for reconsideration of the denial of a petition, disposition of the property will be delayed pending notice of the decision at the request of the Chief. If the request for reconsideration is not received within the prescribed period, the USMS or other property custodian may dispose of the property.

(l) *Restoration of proceeds from sale.*

(1) A petition for restoration of the proceeds from the sale of forfeited property, or for the appraised value of forfeited property when the forfeited property has been retained by or delivered to a government agency for official use, may be submitted by an owner or lienholder in cases in which the petitioner:

(i) Did not know of the seizure prior to the entry of a final order of forfeiture; and

(ii) Could not reasonably have known of the seizure prior to the entry of a final order of forfeiture.

(2) Such a petition must be submitted pursuant to paragraphs (b) through (e) of this section within 90 days of the date the property was sold or otherwise disposed of.

§ 9.5 Criteria governing administrative and judicial remission and mitigation.

(a) *Remission.*

(1) The ruling official shall not grant remission of a forfeiture unless the petitioner establishes that the petitioner has a valid, good faith, and legally cognizable interest in the seized property as owner or lienholder as defined in this part and is an innocent owner within the meaning of 18 U.S.C. 983(d)(2)(A) or 983(d)(3)(A).

(2) For purposes of paragraph (a)(1) of this section, the knowledge and responsibilities of a petitioner's representative, agent, or employee are imputed to the petitioner where the representative, agent, or employee was acting in the course of his or her employment and in furtherance of the petitioner's business.

(3) The petitioner has the burden of establishing the basis for granting a petition for remission or mitigation of forfeited property, a restoration of proceeds of sale or appraised value of forfeited property, or a reconsideration of a denial of such a petition. Failure to provide information or documents and to submit to interviews, as requested, may result in a denial of the petition.

(4) The ruling official shall presume a valid forfeiture and shall not consider whether the evidence is sufficient to support the forfeiture.

(5) Willful, materially false statements or information made or furnished by the petitioner in support of a petition for remission or mitigation of forfeited property, the restoration of proceeds or appraised value of forfeited property, or the reconsideration of a denial of any such petition, shall be grounds for denial of such petition and possible prosecution for the filing of false statements.

(b) *Mitigation.*

(1) The ruling official may grant mitigation to a party not involved in the commission of the offense underlying forfeiture:

(i) Where the petitioner has not met the minimum conditions for remission, but the ruling official finds that some relief should be granted to avoid extreme hardship, and that return of the property combined with imposition of monetary or other conditions of mitigation in lieu of a complete forfeiture will promote the interest of justice and will not diminish the deterrent effect of the law. Extenuating circumstances justifying such a finding include those circumstances that reduce the responsibility of the petitioner for knowledge of the illegal activity, knowledge of the criminal record of a user of the property, or failure to take reasonable steps to prevent the illegal use or acquisition by another for some reason, such as a reasonable fear of reprisal; or

(ii) Where the minimum standards for remission have been satisfied but the overall circumstances are such that, in the opinion of the ruling official, complete relief is not warranted.

(2) The ruling official may in his or her discretion grant mitigation to a party involved in the commission of the offense underlying the forfeiture where certain mitigating factors exist, including, but not limited to: the lack of a prior record or evidence of similar criminal conduct; if the violation does not include drug distribution, manufacturing, or importation, the fact that the violator has taken steps, such as drug treatment, to prevent further criminal conduct; the fact that the violation was minimal and was not part of a larger criminal scheme; the fact that the violator has cooperated with federal, state, or local investigations relating to the criminal conduct underlying the forfeiture; or the fact that complete forfeiture of an asset is not necessary to achieve the legitimate purposes of forfeiture.

(3) Mitigation may take the form of a monetary condition or the imposition of other conditions relating to the continued use of the property, and the return of the property, in addition to the imposition of any other costs that would be chargeable as a condition to remission. This monetary condition is considered as an item of cost payable by the petitioner, and shall be deposited into the Assets Forfeiture Fund as an amount realized from forfeiture in accordance with the applicable statute. If the petitioner fails to accept the ruling official's mitigation decision or any of its conditions, or fails to pay the monetary amount within 20 days of the receipt of the decision, the property shall be sold, and the monetary amount imposed and other costs chargeable as a condition to mitigation shall be subtracted from the proceeds of the sale before transmitting the remainder to the petitioner.

§ 9.6 Special rules for specific petitioners.

(a) *General creditors.* A general creditor may not be granted remission or mitigation of forfeiture unless he or she otherwise qualifies as petitioner under this part.

(b) *Rival claimants.* If the beneficial owner of the forfeited property and the owner of a security interest in the same property each file a petition, and if both petitions are found to be meritorious, the claims of the beneficial owner shall take precedence.

(c) *Voluntary bailments.* A petitioner who allows another to use his or her property without cost, and who is not in the business of lending money secured by property or of leasing or renting property for profit, shall be granted remission or mitigation of forfeiture in accordance with the provisions of § 9.5.

(d) *Lessors.* A person engaged in the business of leasing or renting real or personal property on a long-term basis with the right to sublease shall not be entitled to remission or mitigation of a forfeiture of such property unless the lessor can demonstrate compliance with all the requirements of § 9.5.

(e) *Straw owners.* A petition by any person who has acquired a property interest recognizable under this part, and who knew or had reason to believe that the interest was conveyed by the previous owner for the purpose of circumventing seizure, forfeiture, or the regulations in this part, shall be denied. A petition by a person who purchases or owns property for another who has a record for related crimes as defined in § 9.2, or a petition by a lienholder who knows or has reason to believe that the purchaser or owner of record is not the real purchaser or owner, shall be denied unless both the purchaser of record and the real purchaser or owner meet the requirements of § 9.5.

(f) *Judgment creditors.*

(1) A judgment creditor will be recognized as a lienholder if:

(i) The judgment was duly recorded before the seizure of the property for forfeiture;

(ii) Under applicable state or local law, the judgment constitutes a valid lien on the property that attached to it before the seizure of the property for forfeiture; and

(iii) The petitioner had no knowledge of the commission of any act or acts giving rise to the forfeiture at the time the judgment became a lien on the forfeited property.

(2) A judgment creditor will not be recognized as a lienholder if the property in question is not property of which the judgment debtor is entitled to claim ownership under applicable state or local law (*e.g.*, stolen property). A judgment creditor is entitled under this part to no more than the amount of the judgment, exclusive of any interest, costs, or other fees including attorney fees associated with the action that led to the judgment or its collection.

(3) A judgment creditor's lien must be registered in the district where the property is located if the judgment was obtained outside the district.

§ 9.7 Terms and conditions of remission and mitigation.

(a) *Owners.*

(1) An owner's interest in property that has been forfeited is represented by the property itself or by a monetary interest equivalent to that interest at the time of seizure. Whether the property or a monetary equivalent will be remitted to an owner shall be determined at the discretion of the ruling official.

(2) If a civil judicial forfeiture action against the property is pending, release of the property must await an appropriate court order.

(3) Where the Government sells or disposes of the property prior to the grant of the remission, the owner shall receive the proceeds of that sale, less any costs incurred by the Government in the sale. The ruling official, at his or her discretion, may waive the deduction of costs and expenses incident to the forfeiture.

(4) Where the owner does not comply with the conditions imposed upon release of the property by the ruling official, the property shall be sold. Following the sale, the proceeds shall be used to pay all costs of the forfeiture and disposition of the property, in addition to any monetary conditions imposed. The remaining balance shall be paid to the owner.

(b) *Lienholders.*

(1) When the forfeited property is to be retained for official use or transferred to a state or local law enforcement agency or foreign government pursuant to law, and remission or mitigation has been granted to a lienholder, the recipient of the property shall assure that:

(i) In the case of remission, the lien is satisfied as determined through the petition process; or

(ii) In the case of mitigation, an amount equal to the net equity, less any monetary conditions imposed, is paid to the lienholder prior to the release of the

property to the recipient agency or foreign government.

(2) When the forfeited property is not retained for official use or transferred to another agency or foreign government pursuant to law, the lienholder shall be notified by the ruling official of the right to select either of the following alternatives:

(i) *Return of property.* The lienholder may obtain possession of the property after paying the United States, through the ruling official, the costs and expenses incident to the forfeiture, the amount, if any, by which the appraised value of the property exceeds the lienholder's net equity in the property, and any amount specified in the ruling official's decision as a condition to remit the property. The ruling official, at his or her discretion, may waive costs and expenses incident to the forfeiture. The ruling official shall forward a copy of the decision, a memorandum of disposition, and the original releases to the USMS or other property custodian who shall thereafter release the property to the lienholder; or

(ii) *Sale of property and payment to lienholder.* Subject to § 9.9(a), upon sale of the property, the lienholder may receive the payment of a monetary amount up to the sum of the lienholder's net equity, less the expenses and costs incident to the forfeiture and sale of the property, and any other monetary conditions imposed. The ruling official, at his or her discretion, may waive costs and expenses incident to the forfeiture.

(3) If the lienholder does not notify the ruling official of the selection of one of the two options set forth in paragraph (b)(2) of this section within 20 days of the receipt of notification, the ruling official shall direct the USMS or other property custodian to sell the property and pay the lienholder an amount up to the net equity, less the costs and expenses incurred incident to the forfeiture and sale, and any monetary conditions imposed. In the event a lienholder subsequently receives a payment of any kind on the debt owed for which he or she received payment as a result of the granting of remission or mitigation, the lienholder shall reimburse the Assets Forfeiture Fund to the extent of the payment received.

(4) Where the lienholder does not comply with the conditions imposed upon the release of the property, the property shall be sold after forfeiture. From the proceeds of the sale, all costs incident to the forfeiture and sale shall first be deducted, and the balance up to the net equity, less any monetary conditions, shall be paid to the lienholder.

§ 9.8 Remission procedures for victims.

This section applies to victims of an offense underlying the forfeiture of property, or of a related offense, who do not have a present ownership interest in the forfeited property (or, in the case of multiple victims of an offense, who do not have a present ownership interest in the forfeited property that is clearly superior to that of other petitioner victims). This section applies only with respect to property forfeited pursuant to statutes that explicitly authorize restoration or remission of forfeited property to victims. A victim requesting remission under this section may concurrently request remission as an owner, pursuant to the regulations set forth in §§ 9.3, 9.4, and 9.7. The claims of victims granted remission as both an owner and victim shall, like claims of other owners, have priority over the claims of any non-owner victims whose claims are recognized under this section.

(a) *Remission procedure for victims.*

(1) *Where to file.* Persons seeking remission as victims shall file petitions for remission with the appropriate deciding official as described in §§ 9.3(e) (administrative forfeiture) or 9.4(e) (judicial forfeiture).

(2) *Time of decision.* The deciding official or his designee as described in § 9.1(b) may consider petitions filed by persons claiming eligibility for remission as victims at any time prior to the disposal of the forfeited property in accordance with law.

(3) *Request for reconsideration.* Persons denied remission under this section may request reconsideration of the denial, in accordance with §§ 9.3(j) (administrative forfeiture) or 9.4(k) (judicial forfeiture).

(b) *Qualification to file.* A victim, as defined in § 9.2, may be granted remission, if in addition to complying with the other applicable provisions of § 9.8, the victim satisfactorily demonstrates that:

(1) A pecuniary loss of a specific amount has been directly caused by the criminal offense, or related offense, that was the underlying basis for the forfeiture, and that the loss is supported by documentary evidence including invoices and receipts;

(2) The pecuniary loss is the direct result of the illegal acts and is not the result of otherwise lawful acts that were committed in the course of a criminal offense;

(3) The victim did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner towards the commission of the offense, or related offense, that was the underlying basis of the forfeiture;

(4) The victim has not in fact been compensated for the wrongful loss of the property by the perpetrator or others; and

(5) The victim does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property.

(c) *Pecuniary loss.* The amount of the pecuniary loss suffered by a victim for which remission may be granted is limited to the fair market value of the property of which the victim was deprived as of the date of the occurrence of the loss. No allowance shall be made for interest forgone or for collateral expenses incurred to recover lost property or to seek other recompense.

(d) *Torts.* A tort associated with illegal activity that formed the basis for the forfeiture shall not be a basis for remission, unless it constitutes the illegal activity itself, nor shall remission be granted for physical injuries to a petitioner or for damage to a petitioner's property.

(e) *Denial of petition.* In the exercise of his or her discretion, the ruling official may decline to grant remission where:

(1) There is substantial difficulty in calculating the pecuniary loss incurred by the victim or victims;

(2) The amount of the remission, if granted, would be small compared with the amount of expenses incurred by the Government in determining whether to grant remission; or

(3) The total number of victims is large and the monetary amount of the remission so small as to make its granting impractical.

(f) *Pro rata basis.* In granting remission to multiple victims pursuant to this section, the ruling official should generally grant remission on a pro rata basis to recognized victims when petitions cannot be granted in full due to the limited value of the forfeited property. However, the ruling official may consider the following factors, among others, in establishing appropriate priorities in individual cases:

(1) The specificity and reliability of the evidence establishing a loss;

(2) The fact that a particular victim is suffering an extreme financial hardship;

(3) The fact that a particular victim has cooperated with the Government in the investigation related to the forfeiture or to a related prosecution or civil action; and

(4) In the case of petitions filed by multiple victims of related offenses, the fact that a particular victim is a victim of the offense underlying the forfeiture.

(g) *Reimbursement.* Any petitioner granted remission pursuant to this part

shall reimburse the Assets Forfeiture Fund for the amount received to the extent the individual later receives compensation for the loss of the property from any other source. The petitioner shall surrender the reimbursement upon payment from any secondary source.

(h) *Claims of financial institution regulatory agencies.* In cases involving property forfeitable under 18 U.S.C. 981(a)(1)(C) or (a)(1)(D), the ruling official may decline to grant a petition filed by a petitioner in whole or in part due to the lack of sufficient forfeitable funds to satisfy both the petition and claims of the financial institution regulatory agencies pursuant to 18 U.S.C. 981(e)(3) or (7). Generally, claims of financial institution regulatory agencies pursuant to 18 U.S.C. 981(e)(3) or (7) shall take priority over claims of victims.

(i) *Amount of remission.* Consistent with the Assets Forfeiture Fund statute (28 U.S.C. 524(c)), the amount of remission shall not exceed the victim's share of the net proceeds of the forfeitures associated with the activity that caused the victim's loss. The calculation of net proceeds includes, but is not limited to, the deduction of allowable government expenses and valid third-party claims.

§ 9.9 Miscellaneous provisions.

(a) *Priority of payment.* Except where otherwise provided in this part, costs incurred by the USMS and other agencies participating in the forfeiture that were incident to the forfeiture, sale, or other disposition of the property shall be deducted from the amount available for remission or mitigation. Such costs include, but are not limited to, court costs, storage costs, brokerage and other sales-related costs, the amount of any liens and associated costs paid by the Government on the property, costs incurred in paying the ordinary and necessary expenses of a business seized for forfeiture, awards for information as authorized by statute, expenses of trustees or other assistants pursuant to paragraph (c) of this section, investigative or prosecutive costs specially incurred incident to the particular forfeiture, and costs incurred incident to the processing of the petition(s) for remission or mitigation. The remaining balance shall be available for remission or mitigation. The ruling official shall direct the distribution of the remaining balance in the following order of priority, except that the ruling official may exercise discretion in determining the priority between petitioners belonging to classes described in paragraphs (a)(3) and (4) of this section in exceptional circumstances:

(1) Owners;

(2) Lienholders;

(3) Federal financial institution regulatory agencies (pursuant to paragraph (e) of this section), not constituting owners or lienholders; and

(4) Victims not constituting owners or lienholders (pursuant to § 9.8).

(b) *Sale or disposition of property prior to ruling.* If forfeited property has been sold or otherwise disposed of prior to a ruling, the ruling official may grant relief in the form of a monetary amount. The amount realized by the sale of the property is presumed to be the value of the property. Monetary relief shall not be greater than the appraised value of the property at the time of seizure and shall not exceed the amount realized from the sale or other disposition. The proceeds of the sale shall be distributed as follows:

(1) Payment of the Government's expenses incurred incident to the forfeiture and sale, including court costs and storage charges, if any;

(2) Payment to the petitioner of an amount up to his or her interest in the property;

(3) Payment to the Assets Forfeiture Fund of all other costs and expenses incident to the forfeiture;

(4) In the case of victims, payment of any amount up to the amount of his or her loss; and

(5) Payment of the balance remaining, if any, to the Assets Forfeiture Fund.

(c) *Trustees and other assistants.* In the exercise of his or her discretion, the ruling official, with the approval of the Asset Forfeiture and Money Laundering Section, may use the services of a trustee, other government official, or appointed contractors to notify potential petitioners, process petitions, and make recommendations to the ruling official on the distribution of property to petitioners. The expense for such assistance shall be paid out of the forfeited funds.

(d) *Other agencies of the United States.* Where another agency of the United States is entitled to remission or mitigation of forfeited assets because of an interest that is recognizable under this part or is eligible for such transfer pursuant to 18 U.S.C. 981(e)(6), such agency shall request the transfer in writing, in addition to complying with any applicable provisions of §§ 9.3 through 9.5. The decision to make such transfer shall be made in writing by the ruling official.

(e) *Financial institution regulatory agencies.* A ruling official may direct the transfer of property under 18 U.S.C. 981(e) to certain federal financial institution regulatory agencies or an entity acting on their behalf, upon receipt of a written request, in lieu of ruling on a petition for remission or mitigation.

(f) *Transfers to foreign governments.* A ruling official may decline to grant remission to any petitioner other than an owner or lienholder so that forfeited assets may be transferred to a foreign government pursuant to 18 U.S.C. 981(i)(1), 19 U.S.C. 1616a(c)(2), or 21 U.S.C. 881(e)(1)(E).

(g) *Filing by attorneys.*

(1) A petition for remission or mitigation may be filed by a petitioner or by his or her attorney or legal guardian. If an attorney files on behalf of the petitioner, the petition must include a signed and sworn statement by the client-petitioner stating that:

(i) The attorney has the authority to represent the petitioner in this proceeding;

(ii) The petitioner has fully reviewed the petition; and

(iii) The petition is truthful and accurate in every respect.

(2) Verbal notification of representation is not acceptable. Responses and notification of rulings shall not be sent to an attorney claiming to represent a petitioner unless a written notice of representation is filed. No extensions of time shall be granted due to delays in submission of the notice of representation.

(h) *Consolidated petitions.* At the discretion of the ruling official in individual cases, a petition may be filed by one petitioner on behalf of other petitioners, provided the petitions are based on similar underlying facts, and the petitioner who files the petition has written authority to do so on behalf of the other petitioners. This authority must be either expressed in documents giving the petitioner the authority to file petitions for remission, or reasonably implied from documents giving the petitioner express authority to file claims or lawsuits related to the course of conduct in question on behalf of these petitioners. An insurer or an administrator of an employee benefit plan, for example, which itself has standing to file a petition as a "victim" within the meaning of § 9.2, may also file a petition on behalf of its insured or plan beneficiaries for any claims they may have based on co-payments made to the perpetrator of the offense underlying the forfeiture or the perpetrator of a "related offense" within the meaning of § 9.2, if the authority to file claims or lawsuits is contained in the document or documents establishing the plan. Where such a petition is filed, any amounts granted as a remission

must be transferred to the other petitioners, not the party filing the petition; although, in his or her discretion, the ruling official may use the actual petitioner as an intermediary for transferring the amounts authorized as a remission to the other petitioners.

Dated: August 23, 2012.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2012–21943 Filed 9–11–12; 8:45 am]

BILLING CODE 4410–09– 4410–02; 4410–FY; 4410–14; P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2012–0815]

Drawbridge Operation Regulations; Fort Point Channel, Boston, MA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Northern Avenue Bridge, mile 0.1, across the Fort Point Channel, at Boston, Massachusetts. Under this temporary deviation a six-hour advance notice for bridge opening shall be required at the bridge to facilitate bridge repairs.

DATES: This deviation is effective from 11 p.m. on September 16, 2012 through 9 a.m. on September 20, 2012.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2012–0815 and are available online at *www.regulations.gov,* inserting USCG–2012–0815 in the "Keyword" 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 email Mr. John McDonald *john.w.mcdonald@uscg.mil,* Project Officer, First Coast Guard District, telephone (617) 223–8364. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Northern Avenue Bridge, across the Fort Point Channel, mile 0.1, has a vertical clearance in the closed position of 7 feet at mean high water and 17 feet at mean low water. The existing drawbridge operation regulations are listed at 33 CFR 117.599.

The waterway has seasonal recreational vessels of various sizes.

The owner of the bridge, the City of Boston, requested a temporary deviation to facilitate the replacement of deck support. The bridge cannot open while the stringers are unsecured. A six-hour advance notice for bridge openings was requested to allow sufficient time to safely open the bridge.

Under this temporary deviation the Northern Avenue Bridge, mile 0.1, across the Fort Point Channel may require a six-hour advance notice for bridge openings between 11 p.m. and 9 a.m. from September 16, 2012 through September 20, 2012. Vessels that can pass under the bridge without a bridge opening may do so at all times. There are no alternate routes available for navigation. The bridge cannot open for an emergency while any steel remains unsecured.

In accordance with 33 CFR 117.35(e), the bridge 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: August 31, 2012.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2012–22485 Filed 9–11–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–0818]

RIN 1625–AA00

Safety Zone for Fireworks Display, Potomac River, National Harbor Access Channel; Oxon Hill, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone upon specified waters of the Potomac River. This action is necessary to provide for the safety of life on navigable waters during a fireworks display launched from a floating platform located within the National Harbor Access Channel at Oxon Hill in Prince Georges County, Maryland. This safety zone is intended to protect the maritime public in a portion of the Potomac River.

DATES: This rule is effective from 8:30 p.m. on September 12, 2012, through 11 p.m. on September 13, 2012.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG–2012–0818. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Ronald L. Houck, Sector Baltimore Waterways Management Division, U.S. Coast Guard; telephone 410–576–2674, email *Ronald.L.Houck@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a Notice of Proposed Rulemaking (NPRM) with respect to this rule because publishing an NPRM would be impracticable. The Coast Guard received the information about the event on August 6, 2012; delaying the effective date by first publishing an NPRM would be contrary to the safety zone's intended objectives as well as to the public interest because immediate action is

needed to protect persons and vessels against the hazards associated with a fireworks display on navigable waters. Such hazards include premature detonations, dangerous projectiles and falling or burning debris.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Due to the need for immediate action, the restriction of vessel traffic is necessary to protect life, property and the environment; therefore, a 30-day notice is impracticable. Delaying the effective date would be impracticable for the reasons described above.

B. Basis and Purpose

Kuoni Destination Management, of Alexandria, Virginia, will conduct a fireworks display launched from a floating platform located on the Potomac River, adjacent to the Gaylord National Resort Hotel, at Oxon Hill in Prince Georges County, Maryland, scheduled on September 12, 2012 at approximately 9:50 p.m. If necessary, due to inclement weather, the fireworks display may be re-scheduled to take place on September 13, 2012 at approximately 9:50 p.m.

Fireworks displays are frequently held from locations on or near the navigable waters of the United States. The potential hazards associated with fireworks displays are a safety concern during such events. A safety zone is needed to promote public and maritime safety during a fireworks display, and to protect mariners transiting the area from the potential hazards associated with a fireworks display, such as the accidental discharge of fireworks, dangerous projectiles, and falling hot embers or other debris.

C. Discussion of the Final Rule

The Coast Guard is establishing a temporary safety zone on certain waters of the Potomac River, National Harbor Access Channel, within a 150 yards radius of a fireworks discharge platform in approximate position latitude 38°47'01" N, longitude 077°01'17" W, located at Oxon Hill in Prince Georges County, Maryland (NAD 1983). The temporary safety zone will be enforced from 8:30 p.m. through 11:00 p.m. on September 12, 2012 and, if necessary due to inclement weather, from 8:30 p.m. through 11:00 p.m. on September 13, 2012. The effect of this temporary safety zone will be to restrict navigation in the regulated area during, as well as the set up and take down of, the fireworks display. No person or vessel may enter or remain in the safety zone. Vessels will be allowed to transit the waters of the Potomac River outside the safety zone. Notification of the temporary safety zone will be provided to the public via marine information broadcasts.

D. 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.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. Although this safety zone will restrict some vessel traffic, there is little vessel traffic associated with commercial fishing in the area, and recreational boating in the area can transit waters outside the safety zone. In addition, the effect of this rule will not be significant because the safety zone is of limited duration and limited size. For the above reasons, the Coast Guard does not anticipate any significant economic impact.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to operate, transit, or anchor in a portion of the Potomac River, National Harbor Access Channel, located at Oxon Hill in Prince Georges County, Maryland from 8:30 p.m. through 11:00 p.m. on September 12, 2012 and, if necessary due to inclement weather, from 8:30 p.m. through 11:00 p.m. on September 13, 2012. This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. The safety zone is of limited size; this safety zone would be activated, and thus subject to enforcement, for only 2–1/2 hours in the evening when vessel traffic is low; and vessel traffic could pass safely around the safety zone. In addition, before the activation of the zone, we will issue maritime advisories widely available to users of the waterway to allow mariners to make alternative plans for transiting the affected area.

3. Assistance for Small Entities

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

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

4. Collection of Information

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

5. Federalism

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

6. Protest Activities

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

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

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

13. Technical Standards

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

14. Environment

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

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

■ 2. Add § 165.T05–0818 to read as follows:

§ 165.T05–0818 Safety Zone for Fireworks Display, Potomac River, National Harbor Access Channel; Oxon Hill, MD.

(a) *Regulated area.* The following area is a safety zone: All waters of the Potomac River, National Harbor Access Channel, within a 150 yards radius of a fireworks discharge platform in approximate position latitude 38°47′01″ N, longitude 077°01′17″ W, located at Oxon Hill in Prince Georges County, Maryland (NAD 1983).

(b) *Regulations.* The general safety zone regulations found in 33 CFR 165.23 apply to the safety zone created by this temporary § 165.T05–0818.

(1) All vessels and persons are prohibited from entering this zone, except as authorized by the Coast Guard Captain of the Port Baltimore.

(2) Persons or vessels requiring entry into or passage within the zone must request authorization from the Captain of the Port or his designated representative by telephone at 410–576–2693 or on VHF–FM marine band radio channel 16.

(3) All Coast Guard assets enforcing this safety zone can be contacted on VHF–FM marine band radio channels 13 and 16.

(4) The operator of any vessel within or in the immediate vicinity of this safety zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard Ensign, and

(ii) Proceed as directed by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard Ensign.

(c) *Definitions. Captain of the Port Baltimore* means the Commander, Coast Guard Sector Baltimore or any Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port to act on his behalf.

Designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Baltimore to assist in enforcing the safety zone described in paragraph (a) of this section.

(d) *Enforcement.* The U.S. Coast Guard may be assisted by Federal, State and local agencies in the patrol and enforcement of the zone.

(e) *Enforcement period.* This section will be enforced from 8:30 p.m. through 11:00 p.m. on September 12, 2012 and, if necessary due to inclement weather, from 8:30 p.m. through 11 p.m. on September 13, 2012.

Dated: August 27, 2012.

Kevin C. Kiefer,

Captain, U.S. Coast Guard, Captain of the Port Baltimore.

[FR Doc. 2012–22570 Filed 9–10–12; 4:15 pm]

BILLING CODE 9110–04–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

[NPS–MACA–10037; 5531–SZM]

RIN 1024–AD80

Special Regulations, Areas of the National Park System; Mammoth Cave National Park, Bicycle Routes

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: This rule designates four bicycle routes within Mammoth Cave National Park to address the interest and demand of the visiting public for bicycling opportunities without compromising the National Park Service's mandate "to conserve the scenery and the natural and historic objects and the wild life" in the park. This rule will implement portions of the park's Comprehensive Trail Management Plan and satisfy the requirement of National Park Service general regulations that a special regulation be promulgated to allow off-road bicycle use on routes outside of developed areas. This rule allows bicycle use on a new Connector Trail in the vicinity of Maple Springs; a new Big Hollow Trail in the hilly country of the park north of the Green River; the Mammoth Cave Railroad Bike & Hike Trail; and the White Oak Trail.

DATES: The rule is effective October 12, 2012.

FOR FURTHER INFOBMATION CONTACT: Ken Kern, Management Assistant, Mammoth Cave National Park, National Park Service, P.O. Box 7, Mammoth Cave, Kentucky 42259; phone: (270) 758–2187; email: *Ken_Kern@nps.gov*

SUPPLEMENTARY INFORMATION:

Background

Mammoth Cave National Park (MACA or park) is the core of the largest, most complex, and best known karst area in the world. Karst is a geologic term which refers to areas of irregular limestone in which erosion has produced features such as fissures, sinkholes, underground streams, sinking springs, and caverns. The many types of geologic features present within the extensive cave system are the product of a unique set of conditions found nowhere else. The 365 miles of passageways that have been surveyed and mapped define Mammoth Cave as the longest cave system in the world.

The mission of MACA is to protect and preserve the extensive limestone caverns and associated karst topography, scenic river-ways, original forests, other biological resources, and evidence of past and contemporary ways of life. MACA also strives to educate and enrich the public through scientific study and to provide for the development and sustainable use of recreational resources and opportunities within the park.

Legislation and Purpose of the Park

As early as 1905, Members of the Kentucky Congressional delegation suggested Mammoth Cave as a national park. In its April 18, 1926, report to the Secretary of the Interior, the Southern Appalachian National Park Commission recommended national park status for the Mammoth Cave region for, among other reasons, the:

> beautiful and wonderful formations * * * great underground labyrinth * * * of remarkable geological and recreational interest perhaps unparalleled elsewhere * * * [and] thousands of curious sinkholes of varying sizes through which much of the drainage is carried to underground streams, there being few surface brooks or creeks * * *.

The Commission also recommended lands above ground in the region of the cave for inclusion in the National Park System because of the:

> exceptional opportunity for developing a great national recreational park of outstanding service in the very heart of our Nation's densest population and at a time when the need is increasingly urgent and most inadequately provided for.

The United States Congress saw the value of including surface lands as part of the park. The Senate Committee on Public Lands and Surveys (Report No. 823, May 10, 1926) and the House of Representatives Committee on the Public Lands (Report No. 1178, May 12, 1926) said the park would:

> insure a great recreational ground * * * where * * * thousands of our people may find...the most delightful outdoor recreation in * * * traversing the picturesque and rugged hills and valleys and great forests of the region included in the proposed park area.

On May 25, 1926, Congress authorized the establishment of MACA (44 Stat. 635), and on July 1, 1941, MACA was established as a national park. Subsequently, the Great Onyx Cave and Crystal Cave properties were purchased and added to the park on April 7, 1961. The park now comprises 52,830 acres.

History of Trail Development

Public interest in outdoor recreation at the Mammoth Cave area has not diminished since the Southern Appalachian National Park Commission issued its report in 1926. Through the years, park managers have responded to changing trends in recreation. The Wild Cave tour began in 1969, and a system of backcountry trails was initiated in the 1970s. In the 1980s, a horse livery on the park boundary began offering guided rides on park trails and canoe and kayak liveries began shuttle services on the Green and Nolin rivers. In 2007, the Mammoth Cave Railroad Bike & Hike Trail was completed, connecting the heart of the park with one of the gateway communities (two other gateway communities have expressed interest in constructing similar trails); and the 2007 Comprehensive Trail Management Plan calls for bicycle use on certain trails in the park.

The park currently has approximately 85 miles of open trail. All trails are open to hiking, approximately 55 miles of trail are open to horses, approximately 17 miles of trail are open to bicycles, and approximately 2.4 miles of trail accommodate both horses and bicycles.

Shortly after the park was designated in 1941, several short trails were developed in the vicinity of the Mammoth Cave Hotel and Historic cave entrance. Over the years, these trails were improved and expanded into a series of loops which compose the first 6.5 miles of the front-country trail system in the vicinity of the park's visitor center and nearby Green River. Other trails, including trails at Sloans Pond, Turnhole Bend, Sand Cave, and Cedar Sink, were developed as short hikes to park features.

In the early 1970s, the park planned a series of trails in the more than 20,000 acres north of the Green River. In 1974, those trails were officially opened to hiking and horseback riding. The main trails of that 55-mile system followed old and pre-existing dirt roads, with the remaining trails built as connections between those dirt roads to create loops.

In 1999, a local biking club asked park management about the possibility of permitting bicycling on one or more trails in the park. After consideration by the park, approximately 13 miles of trails were opened to bicycling on an experimental basis, while continuing to allow hiking and horseback riding on the same trails.

In February 2005, park officials organized the first Backcountry Summit meeting between MACA, the Bowling Green League of Bicyclists, the Sierra Club, and the Mammoth Cave Equestrian Trail Riders Association. The purpose of this meeting was to provide an avenue of communication between park officials and all user groups regarding improving and maintaining backcountry trails and other backcountry issues.

Comprehensive Trail Management Plan and Environmental Assessment

The park developed a Comprehensive Trail Management Plan (CTMP) and Environmental Assessment (EA) in 2007 to ensure protection of park resources and address increasing demand for public use of trails. The purpose of the CTMP was to develop and implement objectives and strategies for the protection, management, and use of trails park-wide for a period of 10 years. The plan identifies designated trails and access points as well as the type of

activity (hiking, biking, horseback riding, or a combination of those activities) for which each trail could be used.

The park staff utilized NPS Management Policies 2006 and the purposes for which the park was established by Congress to develop objectives and ensure the appropriateness of designating trails and the uses allowed for each trail within MACA.

One of the most important concepts incorporated into the CTMP is sustainability. Under the plan, the park will use sustainable material and techniques for trail maintenance, future trail design, and construction projects. The park will use techniques such as maximum grade limits, water bars, and large dips in the trail called grade reversals to minimize or slow erosion from water and use. The park will build bridges and utilize materials such as gravel, landscape timbers, and geotextile to create a more durable trail surface and protect potentially vulnerable trail features.

Because the CTMP proposed actions, such as constructing trails and changing trail alignments, that could have environmental consequences, NPS was required by the National Environmental Policy Act to evaluate the potential environmental impacts of those actions. The associated EA evaluated several alternative proposed actions or variations for a trail plan, including a "no action" alternative that would not change the way the trails were then managed. The draft plan and accompanying EA were prepared after a public meeting on June 29, 2006, and after a public scoping period from June 29, 2006, to July 14, 2006. After the draft plan and accompanying EA were prepared and published, NPS held a second public meeting on February 7, 2008, in conjunction with a 60-day comment period from January 24, 2008, to March 24, 2008.

Selected Alternative

On November 14, 2008, the park selected Alternative 4 described in the EA. A Finding of No Significant Impact (FONSI) for the selected alternative was approved on December 17, 2008. The NPS has determined bicycle use to be appropriate for certain trails in MACA, with the incorporation of sustainable design, construction, and maintenance standards and materials. Minimizing trail damage and deterioration and environmental impacts is an essential element of Alternative 4. Under Alternative 4, the Big Hollow Trail will be constructed for bicycle use but will not be open to horses. Bicycle use will be eliminated on the Sal Hollow, Buffalo, and portions of the Turnhole Bend Trails, which will revert to hiking and horse use only.

Public comment was overwhelmingly in support of Alternative 4 and opposed to the park's preferred alternative, Alternative 5. The primary difference between these two alternatives is that under Alternative 4, the NPS will construct a new trail primarily for bicycle use whereas Alternative 5 called for removal of horses from the existing First Creek Trail in order to allow bicycles on that trail. Creating a new trail for bicycle use and reverting some trails to hiking and horse use only will enhance recreational opportunities for a variety of park users.

The EA is available online at *http://www.nps.gov/maca/parkmgmt/planning.htm*, and the CTMP and FONSI are available online at *http://parkplanning.nps.gov/projectHome.cfm?projectID=17179*, then clicking on the link entitled "Document List."

Trails Designated for Bicycle Use

Connector Trail

A new Connector Trail will be designed and constructed for the purpose of connecting access points and other areas with trails, including the Maple Springs Group Campground, Maple Springs Trailhead, Mammoth Cave International Center for Science and Learning, Big Hollow Trailhead, and the Raymer-Hollow Trailhead. This approximately 1.5 mile Connector Trail will run from the Maple Springs Trailhead to the Raymer Hollow Trailhead, and will be a wide, hardened-gravel trail to withstand heavy, two-way traffic of hikers, bicyclists, and horseback riders. The section of the Connector Trail between Maple Springs Trailhead and the Big Hollow Trailhead will be designated as multiple-use, and the section from the Big Hollow Trailhead to the Raymer Hollow will be restricted to hikers and horses. As part of the Connector Trail development, the existing parking lot at the Maple Springs Trailhead will be improved and expanded. This lot will add parking capacity for the trail system and allow bicyclists, hikers and equestrian access to the horse and hiking trails or Big Hollow Trail without using park roads.

When the Connector Trail is complete, the trailhead and trails at the Good Spring Baptist Church will be eliminated, as access will no longer be needed to the Raymer Hollow Trail. Elimination of these trails and the trailhead will greatly reduce the impact on and degradation of the Good Spring Baptist Church cultural site.

Currently, the only way for equestrians, bicyclists, and hikers to access trailheads is by using the Maple Springs Loop Road and the Good Spring Church Road, which can be congested with large pickup trucks, horse trailers, and other passenger vehicles. Use of these roadways creates a potential hazard for trail users. The Connector Trail will provide an alternative to using these roads and increase public safety by getting these trail users away from the roads and the potential for collision with vehicles.

Big Hollow Trail

The selected alternative (Alternative 4) includes the development of the six-mile-long Big Hollow Trail, which will be constructed east of the Green River Ferry Road-North and on the ridge west of Big Hollow. Bicycling and hiking will be allowed on the Big Hollow Trail, but the trail will be closed to horse use. Public comments on the EA substantially supported construction of this trail for bicycle use.

This new trail increases opportunities for bicycle use without reducing the number of trails accessible to horse use, while maintaining separation of horse and bicycle users. Separation of these activities should improve the recreational experience for user groups and offer bicyclists access to backcountry scenery.

Since the trail will involve new construction, the selected alternative will have more impact on park resources than other alternatives, but we concluded it will not have a significant effect on the environment. Vegetation will be removed on the trail surface, and cleared along the trail margins, and sustainable materials and construction techniques will be used to build the trail, which will help control and minimize surface degradation, erosion, and other effects on surrounding park resources. The Big Hollow Trail will not pass through floodplains, cross streams, or be located near wetlands, and therefore is expected to have no new impacts on water resources.

Vegetation and tree removal identified in the selected alternative will be completed in accordance with the "Biological Opinion for the Effects of the Hazard Tree Removal and Vegetation Management Program to the Indiana Bat at Mammoth Cave National Park, Kentucky" to ensure the activities will be considered "not likely to adversely affect" the species.

To minimize any effect on archeological resources, the park has surveyed areas where ground

disturbance will take place and adjusted trail alignment to avoid adverse impacts.

Mammoth Cave Railroad Bike & Hike Trail

An environmental assessment for the Mammoth Cave Railroad Bike & Hike Trail was completed in 1999 and amended in 2004. Between 2004 and 2007, the NPS constructed this approximately nine-mile-long, graveled hiking and biking trail. The Mammoth Cave Railroad Bike & Hike Trail follows the general route of a historic railroad bed leading from the visitor center to the park boundary at Park City and receives significant daily use. The trail passes close enough to the campground area to provide hiking and bicycling opportunities for those camping at the park. The trail continues past the campground, through valleys and higher elevations on the ridge-tops, providing the user with a varied ecological view of the park. Several wayside exhibits along the trail recount historic facts regarding the old railroad route, including past events and structures that played a significant role in the history of the area. The Mammoth Cave Railroad Bike & Hike Trail was designed and constructed utilizing modern technology and sustainable design. The eight-foot-wide graveled surface was designed to offer a comparatively easy, family-style bicycle trail as opposed to the single-track, mountain-biking type of experience.

The Mammoth Cave Railroad Bike & Hike Trail will connect to historic Bell's Tavern upon completion of Park City's bike trail. The park has received expressions of interest from the communities of Cave City and Brownsville to construct similar bike trails that could connect with the Mammoth Cave Railroad Bike & Hike Trail. These improvements would provide opportunities for the use of the park and contribute to the "Connecting People to Parks" initiative of the NPS and the President's "America's Great Outdoors" initiative.

White Oak Trail

The CTMP also identified the 2.4-mile-long White Oak Trail as a multiple-use trail, and this rule will designate it as a trail for bicycle use in addition to hiking and horseback riding. The trail is on an old roadbed and is wide, fairly level, and currently has a relatively low level of use. The flat and wide nature of the trail provides conditions that will tend to minimize user conflicts and support the multiple-use designation. The NPS will continue to occasionally use the White Oak Trail for administrative vehicle access to backcountry sites for emergency response and to conduct maintenance and monitoring activities.

Notice of Proposed Rulemaking

On May 17, 2011, NPS published a Notice of Proposed Rulemaking for the designation of bicycle trails at MACA (76 FR 28388). The proposed rule for bicycle use was based upon the selected action (Alternative 4) described in the EA and FONSI. The proposed rule was available for public comment from May 17, 2011, through July 18, 2011.

Summary of and Responses to Public Comments

Comments were accepted through the mail, hand delivery, and through the Federal eRulemaking Portal: *http://www.regulations.gov*. A total of 21 public comment documents were received during the comment period, two from organizations and the rest from individuals. A summary of comments and NPS responses is provided below.

1. *Comment:* The White Oak Trail needs to remain open to horses in the future.

Response: Under the final rule, the NPS will not close the White Oak Trail to equestrians. The White Oak Trail will be a multiple/shared use trail for all backcountry users.

2. *Comment:* Shared use of the White Oak Trail is acceptable due to the low level of trail use. It has been proven that bicyclists can successfully share trails with hikers.

Response: The White Oak Trail consists of an administrative road that has a wide, relatively level surface and that receives comparatively little traffic by any users and therefore was determined appropriate for shared use by hikers, bikers, and equestrians.

3. *Comment:* There is no need to open up any new trails in the park's backcountry area north of the river or to allow bicycles on the Big Hollow Trail since there are ample recreation opportunities for families and visitors in the park and for bicyclists to ride.

Response: The NPS does not agree with this comment, but does recognize that individuals have a variety of opinions regarding the management and regulation of activities within units of the National Park System. The park undertook a diligent planning process involving the park's trail user groups and stakeholders, obtaining their input in developing the CTMP and the alternatives described in the CTMP. The CTMP identified management objectives and strategies to guide the protection, management, maintenance, and use of the trails in the park, including the development of new trails such as the Big Hollow Trail. The CTMP identified appropriate types of trail use and determined that bicycle use on designated trails is appropriate. The public interest in this planning process was high, and public input was considered and incorporated into the plan as part of the decision-making process.

4. *Comment:* The park needs to rehabilitate and maintain the existing trails before building any new trails. The money spent on new trails would be better spent maintaining the established trails.

Response: To improve trail conditions, the park is implementing other elements of the CTMP that address trail maintenance and sustainability. The park believes it can accomplish these goals concurrently with building the new Big Hollow Trail and Connector Trail.

5. *Comment:* Mountain bicycling is an activity that is in keeping with the mission of the NPS.

Response: The NPS has a goal of providing high quality bicycling opportunities for visitors in appropriate areas and in a manner consistent with our stewardship responsibilities. The NPS is committed to identifying and providing opportunities for the public to participate in outdoor recreation to promote health and wellness. NPS Director Jonathan Jarvis unveiled the "Healthy Parks Healthy People US" initiative to highlight the unique role that our nation's national parks play in promoting health and wellness through outdoor recreation activities such as bicycling. The President introduced the "America's Great Outdoors" initiative to reconnect people to the outdoors and promote activities that enhance health and wellness. A key goal of this initiative for federal agencies is to increase and improve recreational access and opportunities. During the CTMP planning process, the park received 2,905 public comments on the plan and only one of those comments stated a concern that the use of mountain bikes on trails in MACA was inconsistent with the mission of the NPS.

6. *Comment:* Significant health benefits can be derived from bicycling and trail users at the park would benefit from enhanced outdoor recreational opportunities and access. Bicycling is a low impact, healthy, safe activity which should be encouraged in our parks. Biking fights obesity and nature deficit disorder, providing additional opportunities to exercise and better quality of life. The First Lady's "Let's

Move!" campaign specifically addresses these problems and biking is a significant part of the solution. Bicycle routes create another method of exercise and opportunity to enjoy the park, create high quality recreational experiences, and add significant value to park resources. Providing biking opportunities will make the Mammoth Cave area more attractive to people who appreciate active types of recreation. Adding mountain bicycling to trails at MACA is the type of action contemplated by the President's "America's Great Outdoors" initiative to connect Americans to their natural surroundings through outdoor recreation.

Response: The NPS is engaged in a wide-ranging effort to bring the outdoors into the public discussion about public health and to expand opportunities for people seeking a more active lifestyle. As part of this effort, NPS Director Jarvis initiated the "Healthy Parks Healthy People U.S." program to highlight the unique role that our nation's national parks play in promoting health and wellness. Studies have shown being in the outdoors and participating in outdoor activities can reduce stress and anxiety, foster mental and physical health, and promote learning and personal growth. The health benefits derived from outdoor physical activities such as bicycling are well documented. Recently, the media has reported that doctors have been writing "Park Prescriptions" which prescribe park visits to get patients outside to exercise and receive the benefits of sun and fresh air. Implementing the final rule will increase and improve recreational opportunities for all trail users and high quality backcountry experiences. Equestrians have access to the Sal Hollow Trail as they requested. Hikers will have access to a backcountry trail which is free of horse impacts and manure. Bicyclists will be able to enjoy the Big Hollow Trail, the White Oak Trail, the Mammoth Cave Railroad Bike & Hike Trail, and the Connector Trail. Providing these recreational opportunities to the public will directly support the First Lady's "Let's Move" campaign to specifically address the public health crisis of obesity.

7. *Comment:* Mountain biking has been managed successfully at other NPS units with minimal environmental impact. Other land managing agencies have found ways to manage mountain bicycling on their lands.

Response: Several NPS units offer biking on single track trails, and many more allow riding on unpaved or dirt roads, providing numerous examples of successful, well-planned cycling venues in the National Park System. Scientific studies have shown that the environmental impacts of mountain biking are similar to those of hiking and less than those of other uses. Under the final rule, NPS will manage appropriate use of bicycles on identified trails in accordance with applicable laws, regulations, and policies. Such management will assure protection of the park's natural, cultural, scenic, wildlife, and aesthetic values while promoting visitor connections with the park, increasing appreciation of park resources, and providing healthy outdoor recreation opportunities.

8. *Comment:* Local bicycle clubs and cyclists provide volunteer support to the park, making an important contribution to maintaining park trails. Local bicycling groups have adopted trails they ride providing volunteer backcountry patrols and maintenance to ensure the trails are environmentally sustainable. Members of the biking community have demonstrated their commitment to preserving and maintaining the resources at MACA. The Sal Hollow Trail is currently the best trail in the park because the local bicycle clubs and cyclists have volunteered over 200 hours of trail maintenance work per year for several years to keep the trail in this condition. Volunteer trail work provides service opportunities for people interested in helping maintain and create sustainable trails.

Response: Local bicycling organizations have been participating in volunteer trail projects at the park for many years, thereby demonstrating their commitment to trail stewardship. The conditions of the trails they have been working on are among the best in the park. Park management will continue to work with the Mammoth Cave Backcountry Summit Council as an umbrella organization to coordinate and promote trail-related volunteer activities. Encouraging and supporting continued volunteer participation in trail maintenance activities by all user groups is a key management objective that is vital to establishing sustainable trails and protecting park resources.

9. *Comment:* The CTMP for the park should be fully implemented, as it was developed through sound procedures analyzing a variety of alternatives and included a comprehensive analysis of the impacts of allowing bicycles on the identified trails and examined the potential long term, short term and cumulative impacts of its implementation, following both the letter and spirit of the law. The proposed rule is in keeping with the decisions reached through the CTMP process. The plan was developed with significant public input drawing on the expertise and desire of a wide array of trail users. The CTMP is environmentally and socially responsible. The plan reflects careful attention to preservation of the park's historical and natural resources. The park solicited public comment on the options before deciding which option would be best for the park and all user groups. During the CTMP process, the park received only two substantive comments indicating any negative perceptions regarding biking at MACA. Those arguments were founded on the lack of a special regulation, not on the use of bicycles on trails. The exceptionally low comment total and lack of opposition to the actual bicycle use indicates that the substance of the CTMP is relatively non-controversial, requiring only this final procedure to garner broad community support.

Response: The park undertook a diligent planning process involving the park's trail user groups and stakeholders, obtaining their input in developing the CTMP and its alternatives. The plan identified management objectives and strategies to guide the protection, management, maintenance, and use of the trails in the park, including the development of new trails such as the Big Hollow Trail. This plan identified appropriate types of trail use and included the determination that bicycle use on designated trails is appropriate. During civic engagement, the public interest in this planning process was high, and the public's input was considered and incorporated into the plan as part of the decision making process. This has resulted in broad local support for the CTMP. The CTMP, along with the accompanying EA and FONSI, were completed and approved in December 2008. Completion of this rule-making process will address the concerns that the park does not have a special regulation designating the trails outside of developed areas that were selected in the CTMP for bicycle use.

10. *Comment:* The Organic Act directs the NPS to provide for "enjoyment" of the scenery, wildlife and natural and historic objects conserved by the NPS. The NPS Organic Act does not authorize any and all forms of outdoor recreation under the rubric of "enjoyment." Mountain bicycling on single-track trails in park backcountry is a highly suspect form of "enjoyment" which may not be consistent with the purpose of national parks and of MACA.

Response: The park completed the CTMP, EA, and FONSI in 2008. The CTMP and EA were published for a 60-day review and comment period. During

this civic engagement, the public interest in this planning process was high. The park received 2,905 public comments on the plan and only one of those comments stated a concern that the use of bikes on backcountry trails in MACA was inconsistent with the mission of the NPS. Through the park's planning and monitoring efforts, coupled with the input received from the public, the park determined that bicycling (recreational and mountain biking) is an appropriate use on certain park trails. This final rule specifically designates which trails in the park are open to bicycle use. Big Hollow Trail will be the only single-track trail open to bicycle use in the park. The limitations on bicycle use in 36 CFR 4.30 and this rule allow NPS to manage appropriate use of bicycles on the trails in accordance with applicable laws, regulations, and policies to ensure that the park is protecting natural, cultural, scenic, and wildlife resources while also preserving the aesthetic values of a backcountry experience for all users. The NPS has determined that implementing this special rule at MACA does not constitute a violation of the Organic Act or MACA's enabling legislation.

11. *Comment:* The NPS has decided to construct a mountain bicycle trail in a roadless and undeveloped area of MACA and the unprecedented nature of that decision has created an impact of great significance for the National Park System and the park. This is the first time that the NPS has undertaken construction of a mountain bike trail in any area of the National Park System.

Response: The Big Hollow Trail will be located in the area north of the Green River and east of the Green River Ferry Road. This area is not roadless and undeveloped, but rather contains many signs of past human use of the land, including sunken wagon and road traces, fence lines, power line corridors, old fields, reforestation plots, gullies and erosion control check dams, wells, chimneys, and building foundations. The Big Hollow Trail is not exclusively a mountain bike trail. It will be a shared use trail designated for use by hikers and bikers. This trail was designed and will be constructed to sustainable standards to support these uses. The park will be managing the appropriate use of bicycles on the designated trails, including the Big Hollow Trail, in accordance with applicable laws, regulations, and policies to assure the protection of the park's natural, cultural, scenic, wildlife, and aesthetic values. This trail is not the first mountain bike trail constructed in a park area of the National Park System. Currently, there are several NPS units that have constructed mountain bike trails for riding and many more which allow mountain bike riding on unpaved roads. These trails are excellent examples of providing new opportunities for enjoying park areas in the National Park System. Some of these NPS units have constructed trails with bicycling and hiking as the primary intended uses. Several park units have completed a public process establishing special regulations which designated specific trails as open for bicycle use. Additional park units are currently working through the special regulation process to designate specific trails outside of developed areas for bicycle use. The requirements of 36 CFR 4.30 will still apply to any NPS unit which proposes to designate specific trails outside of developed areas for bicycle use.

12. *Comment:* This rulemaking would establish bicycle use within a natural area that was previously studied for wilderness suitability in the park's Wilderness Study of 1974. The NPS should reassess the roadless tracts of MACA for suitability as wilderness. The special regulation would establish a use which would be required to be displaced (since bicycles are banned in wilderness) should Congress ever designate wilderness in this area.

Response: The final rule is consistent with the requirements of the Wilderness Act. A Wilderness Study of the park was completed and a recommendation made that no lands in MACA be added to the National Wilderness Preservation System. There is no statutory requirement that the park reassess the roadless tracts for suitability as wilderness. Although more than 70 years have passed since the establishment of the park, the NPS continues to believe that the area is not suitable for wilderness because numerous signs of past human use of the land (e.g., sunken wagon/road traces, fence lines, power line corridors, old fields, reforestation plots, gullies and erosion control check dams, wells, chimneys, and building foundations) are still apparent in the area where trail development will occur.

13. *Comment:* The Big Hollow Trail would be an asset to the park as well as the Commonwealth of Kentucky. Big Hollow Trail would be a great use of this public land. Big Hollow Trail is definitely a great idea to bring more international attention to the area and to highlight a piece of natural beauty that our country has to offer.

Response: We agree that providing these recreational opportunities to the public will broaden the park's appeal with visitors looking for outdoor recreation activities and high quality backcountry experiences.

Changes from the Proposed Rule

Paragraph (c)(2)(ii) of the proposed rule has been deleted because it is duplicative with 36 CFR 4.30(d)(2). Paragraph (c)(2)(iii) of the proposed rule (now paragraph (c)(2)(ii) of the final rule) has been revised to make the speed limit 15 miles per hour or as posted in the park. This gives MACA the flexibility to adjust the speed limit to address visitor safety, health, or resource management concerns. Paragraph (c)(3) has been revised to grant the Superintendent of MACA the authority to open or close designated bicycle routes, or to impose conditions or restrictions for bicycle use after taking into consideration public health and safety, natural and cultural resource protection, and other management activities and objectives. This authority may be exercised independent of the Superintendent's authority under 36 CFR 1.5 and will provide the park with greater flexibility to respond to the impacts of bicycle use on designated routes. Public notice of any action taken under paragraph (c)(3)(i) must be given pursuant to one or more of the methods set forth in 36 CFR 1.7. Paragraph (c)(3)(ii) was added to clarify that violating a closure, condition, or restriction established by the Superintendent under paragraph (c)(3) is prohibited. After consideration of the public comments, the park has decided that no other changes are necessary to the proposed rule.

Compliance With Other Laws and Executive Orders

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available

science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (RFA)

This rule will not have a significant economic effect on a substantial number of small entities under the RFA (5 U.S.C. 601 *et seq.*). This conclusion is based on the results of an NPS economic analysis of the effects of the rule, dated November 17, 2009, available for review at: http://www.nps.gov/maca/parkmgmt/planning.htm, which incorporated a regulatory flexibility threshold analysis. The rule will reasonably increase park visitation and thereby generate benefits for businesses, including small entities, through increased visitor spending.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the SBREFA. This rule:

(a) Does not have an annual effect on the economy of $100 million or more. There are no businesses in the surrounding area economically dependent on continued bicycle use on these trails. The November 2009 NPS economic analysis estimated that the rule will add a benefit to local business in the form of new visitors attracted to the area to use the trails.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions. The rule will not impose restrictions on local businesses in the form of fees, training, record keeping, or other measures that would increase costs. The economic analysis projected a net benefit for the Federal government and a consumer surplus of $24.02/day for new visitors and $12.01/day for current visitors.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign based enterprises. The rule is internal to NPS operations.

Unfunded Mandates Reform Act (UMRA)

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. This rulemaking addresses only actions that will be taken by the NPS. It will not require any State, local or tribal government to take any action that is not funded. It is an NPS-specific rule and imposes no requirements on small governments. A statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630)

Under the criteria in section 2 of Executive Order 12630, this rule does not have significant takings implications. This rule designates park trails inside the park, and though the trails may connect with trails external to the park, the rule does not require the taking of private land outside the park. A takings implication assessment is not required.

Federalism (Executive Order 13132)

Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. This rule only effects use of NPS administered lands. It has no effect on other areas. A Federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation With Indian Tribes (Executive Order 13175 and Department Policy)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on federally recognized Indian tribes and that consultation under the Department's tribal consultation policy is not required. The question was considered as part of the EA, and trails were configured to avoid areas identified as archeological sites, specifically any with known burials. In addition to the EA, past consultation with the tribes has been important in the identification of concerns or issues of cultural interest.

Paperwork Reduction Act (PRA)

This rule does not contain information collection requirements, and a submission under the PRA is not required.

National Environmental Policy Act of 1969 (NEPA)

We have prepared environmental assessments to determine whether this rule would have a significant impact on the quality of the human environment under the NEPA. This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the NEPA is not required because we reached a finding of no significant impact (FONSI) for the Mammoth Cave Railroad Bike & Hike Trail and also for the other designated bicycle routes. The environmental assessment and FONSI for the Mammoth Cave Railroad Bike & Hike Trail and the EA for the Comprehensive Trail Management Plan (CTMP) may be reviewed at *http://www.nps.gov/maca/parkmgmt/planning.htm.* The FONSI for the CTMP may be reviewed at *http://parkplanning.nps.gov/projectHome.cfm?projectID=17179.* and then clicking on the link entitled "Document List."

Effects on the Energy Supply (Executive Order 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

List of Subjects in 36 CFR Part 7

National parks, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the National Park Service amends 36 CFR part 7 as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

■ 1. The authority citation for Part 7 is revised to read as follows:

Authority: 16 U.S.C. 1, 3, 9a, 462(k); Sec. 7.96 also issued under 36 U.S.C. 501–511, DC Code 10–137 (2001) and DC Code 50–2201.07 (2001).

■ 2. In § 7.36 add paragraph (c) to read as follows:

§ 7.36 Mammoth Cave National Park.

* * * * *

(c) *Bicycles.* (1) The following trails are designated as routes open to bicycle use:

(i) Connector Trail from the Big Hollow Trailhead to the Maple Springs Trailhead;

(ii) Big Hollow Trail;

(iii) Mammoth Cave Railroad Bike & Hike Trail; and

(iv) White Oak Trail.

(2) The following are prohibited:

(i) Possessing a bicycle on routes or trails not designated as open to bicycle use;

(ii) Unless posted otherwise, operating a bicycle in excess of 15 miles per hour on designated routes; and

(iii) Failing to yield the right of way to horses or hikers.

(3) The Superintendent may open or close designated bicycle routes, or portions thereof, or impose conditions or restrictions for bicycle use after taking into consideration public health and safety, natural and cultural resource protection, and other management activities and objectives.

(i) The Superintendent will provide public notice of all such actions through one or more of the methods listed in § 1.7 of this chapter.

(ii) Violating a closure, condition, or restriction is prohibited.

Dated: August 30, 2012.

Rachael Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–22438 Filed 9–11–12; 8:45 am]

BILLING CODE 4310–T3–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2011–0826; FRL–9725–6]

Approval and Promulgation of Air Quality Implementation Plans; Michigan; PSD and NSR Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving specified revisions to Michigan's State Implementation Plan (SIP) that EPA has determined are consistent with the Federal requirements of the prevention of significant deterioration (PSD) construction permit program for the purpose of meeting the requirements of the Clean Air Act (CAA) with regard to new source review (NSR) in Class I areas attaining the National Ambient Air Quality Standards.

DATES: This final rule is effective on October 12, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2011–0826. All documents in the docket are listed on the *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 through *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 Constantine Blathras, Environmental Engineer, at (312) 886–0671 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Constantine Blathras, Environmental Engineer, Air Permits Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–0671, *Blathras.Constantine@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 action is EPA taking?

II. Statutory and Executive Order Reviews

I. What action is EPA taking?

EPA is approving Michigan's request to revise its SIP to add rule R. 336.2816 to be consistent with Federal PSD regulations in 40 CFR 51.166(p), that require state PSD programs to have a mechanism in place to coordinate and consult with Federal land managers of Class I PSD areas. On January 9, 2008, EPA proposed to disapprove R. 336.2816 from Michigan's SIP submittal because it did not provide for such a mechanism. Michigan has now revised R. 336.2816 to be consistent with the Federal requirement.

On March 25, 2010, EPA published a direct final approval to convert a conditional approval of the Michigan PSD SIP to full approval under section 110 of the CAA. In that action, EPA stated that we would be taking a separate action on rule R. 336.2816(2) through (4), (requirements relating to Class I areas). Michigan has now revised R. 336.2816 to be consistent with the Federal requirement.

EPA is not acting on Michigan's request to revise its SIP by adding a significance level for particulate matter less than 2.5 microns ($PM_{2.5}$). EPA has established a significance threshold to limit the applicability of PSD and NSR regulations to sources with emissions above the significance level. To be consistent with the Federal requirements, Michigan amended R. 336.2801 and R. 336.2901 to add the significance threshold for $PM_{2.5}$. Because Michigan is planning to submit additional state rules as revisions to its SIP for precursors of $PM_{2.5}$, EPA will defer action on this matter.

II. 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. 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.

In May 2011, EPA issued its policy on consultation and coordination with Indian tribes. EPA explained that its policy is to consult on a government to government basis with Federally recognized tribal governments when EPA actions and decisions may affect tribal interests. Accordingly, EPA sent an invitation to consult with potentially interested tribes, and subsequently engaged in consultation with representatives of the Forest County Potawatomi Community (FCPC) regarding the Michigan proposed SIP revisions.

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 November 13, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: August 29, 2012.

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.*

■ 2. In § 52.1170, the table in paragraph (c) entitled "EPA—Approved Michigan Regulations" is amended by adding a new entry in numerical order for Part 18 to read as follows:

§ 52.1170 Identification of plan.

* * * * *

(c) * * *

EPA—APPROVED MICHIGAN REGULATIONS

Michigan citation	Title	State effective date	EPA approval date	Comments
*	*	*	*	*
Part 18. Prevention of Significant Deterioration of Air Quality				
*	*	*	*	*
R 336.2816	Sources impacting federal class I areas; additional requirements.	June 30, 2011 ..	September 12, 2012, [Insert page number where the document begins].	
*	*	*	*	*

* * * * *

[FR Doc. 2012–22328 Filed 9–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2011–0958; FRL–9725–4]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Amendments to West Virginia's Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving the State Implementation Plan (SIP) revision submitted by the State of West Virginia (West Virginia) on July 8, 2011. This revision pertains to amendments of West Virginia's Legislative Rule regarding ambient air quality standards (45 CSR 8—Ambient Air Quality Standards). These amendments incorporate by reference the National Ambient Air Quality Standards (NAAQS) in effect on June 1, 2010 for sulfur dioxide (SO_2), particulate matter (PM), carbon monoxide (CO), ozone, nitrogen dioxide (NO_2), and lead. This action is being taken under the Clean Air Act (CAA).

DATES: This final rule is effective on October 12, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2011–0958. All documents in the docket are listed in the *www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE., Charleston, West Virginia 25304.

FOR FURTHER INFORMATION CONTACT: Asrah Khadr, (215) 814–2071, or by email at *khadr.asrah@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On February 22, 2012, EPA published a notice of proposed rulemaking (NPR) for West Virginia. 77 FR 10423. The

NPR proposed approval of the revised regulation, 45 CSR 8—Ambient Air Quality Standards, submitted by West Virginia for inclusion in the West Virginia SIP, which also included the removal of sections 45–8–2 (Anti-Degradation Policy), 45–8–4 (Ambient Air Quality Standards), 45–8–5 (Methods of Measurement), and 45–8–6 (Reference Conditions). The revised regulation, 45 CSR 8, incorporates by reference the NAAQS for SO_2, PM, CO, ozone, NO_2, and lead. Additional background information is discussed in detail in the NPR. Three adverse comments were submitted in response to EPA's NPR. Summaries of the comments and EPA's responses are provided in section II of this document.

II. Summary of Public Comments and EPA Response

Comment: EPA received comments on the proposed rulemaking from Mr. Robert Ukeile for Sierra Club (hereafter referred to as "commenter"). The commenter expressed concern for the approval of the West Virginia SIP revision. The commenter perceives West Virginia's incorporation by reference of 40 CFR parts 50 and 53 effective June 1, 2010 to be out of date upon EPA approval of the SIP revision. The commenter suggested that EPA conditionally approve the SIP revision contingent upon West Virginia submitting the legislative rule with the current versions of 40 CFR parts 50 and 53.

Response: EPA disagrees with the commenter's statement that a conditional approval is warranted here. EPA is approving into the West Virginia SIP a revised version of 45 CSR 8 which adopts as state air quality standards the NAAQS for SO_2, PM, CO, ozone, NO_2, and lead by incorporating by reference 40 CFR parts 50 and 53, effective June 1, 2010, into 45 CSR 8. This proposed SIP revision was submitted to EPA on July 8, 2011.

It is important to note that 45 CSR 8 adopts those national ambient standards promulgated by EPA as ambient air quality standards for the State of West Virginia. *See* section 45–8–1. Neither the rule, nor its approval into the SIP, has any effect on the NAAQS promulgated by EPA, or on SIP requirements to attain and maintain the NAAQS in West Virginia. In particular, the West Virginia Prevention of Significant Deterioration (PSD) program, which is contained in a separate regulation, continues to require compliance with the NAAQS as promulgated by EPA. *See* section 45–14–9.

The State of West Virginia's legislative rulemaking is a lengthy annual process. The legislature meets from January to March, at which time an agency approved rule is reviewed by the appropriate legislative committees. An agency approved rule is approved in a legislative bill and is then sent to the governor for signature in April and most often becomes effective a month later in May. This makes West Virginia's rulemaking process an ongoing task that is most often a year behind. Because of this yearly process, any rules published by EPA after April cannot be accommodated in the rulemaking process of that respective year. Therefore, the revisions to 45 CSR 8 which are relevant here were approved in the West Virginia legislative process in the spring of 2011, but reflect the June 1, 2010 versions of 40 CFR parts 50 and 53 because that is the latest annual edition of the federal regulations which were available at the time of the West Virginia legislative approval process in the spring of 2011. EPA notes, however, that West Virginia has a practice of regularly revising its regulations to adopt any changes in applicable NAAQS. EPA is approving these regulation changes into the West Virginia SIP as a SIP strengthening measure.

Comment: The commenter expressed concern about EPA's approval of the removal of the Anti-Degradation Policy in section 2 of 45 CSR 8. The commenter perceived the removal of the Anti-Degradation Policy to relieve West Virginia from obtaining and maintaining the best possible air quality. The commenter stated that removal of this policy would no longer require the Secretary of the West Virginia Department of Environmental Protection (WVDEP) to produce plans to protect the air quality in attainment areas. The commenter expressed concern that the removal of this policy would allow air quality to degrade in attainment areas. Specifically, the commenter was concerned that the removal of this provision would cause West Virginia's minor source program to no longer comply with 42 U.S.C. 7410(a)(2)(A) and (C). The commenter perceived the removal of the Anti-Degradation Policy to be a relaxing of regulations in the West Virginia SIP and that EPA did not perform the appropriate anti-backsliding analysis required under 42 U.S.C. 7410(l). The commenter suggested that EPA disapprove the removal of the Anti-Degradation Policy from the West Virginia SIP.

Response: EPA disagrees that removal of the Anti-Degradation Policy will allow air quality to degrade in attainment areas in West Virginia. EPA notes that, as stated in the Environmental Protection Advisory Council meeting minutes included in the SIP submission, the Anti-Degradation Policy was added to 45 CSR 8 in the early 1970s as "a placeholder in anticipation of the future PSD program and its provisions for best available control technology." Minutes of Environmental Protection Advisory Council Meeting (June 3, 2010) at 2. Subsequently, statutory requirements for a PSD program were added to the CAA, EPA promulgated regulations, the State of West Virginia adopted a PSD program under 45 CSR 14, and the program became part of the West Virginia SIP. *See* 51 FR 12517 (April 11, 1986) (effective May 12, 1986). Similarly, West Virginia's minor source permitting program at 45 CSR 13 was approved into the West Virginia SIP on February 8, 2007. West Virginia's SIP-approved permitting programs provide the means by which West Virginia ensures maintenance of air quality and the requirement for best available control technology (BACT), consistent with the Anti-Degradation Policy. The Anti-Degradation Policy does not impose any additional requirements on sources, nor does its removal from the SIP excuse sources from having to comply with West Virginia's PSD, non-attainment NSR, or minor source programs. Accordingly, EPA has concluded that removal of the Anti-Degradation Policy will not interfere with attainment and maintenance of the NAAQS, or with any other applicable requirement of the CAA, and the SIP revision satisfies CAA section 110(l).

Comment: The commenter expressed concern that WVDEP did not provide "reasonable notice" required under CAA Section 110(a)(1) because WVDEP did not mention that changes to 45 CSR 8 included the removal of the Anti-Degradation Policy during the public hearing.

Response: EPA disagrees with the commenter and believes West Virginia provided adequate public notice and an adequate opportunity for a public hearing. The requirements for public hearings for SIP revisions are in 40 CFR 51.102 which requires states to provide notice of the hearing, the opportunity to submit written comments, and the opportunity for the public to request a public hearing. The notice required by 40 CFR 51.102 is notice of the date, place and time of the public hearing. In addition, 40 CFR 51.102 also requires, *inter alia*, notice in a prominent advertisement and availability of the proposed SIP revision for public inspection in at least one location. The

commenter does not challenge the content of the notice, and indeed West Virginia's public notice for this SIP revision provided the location, Web site and contact phone number to obtain copies of the proposed rules at the time. All interested parties and persons had the ability to obtain more details about the proposed revision in at least one location. All notices for the public hearing were made at least 30 days prior to the date of the public hearing. West Virginia included in its submittal the affidavit of publication of the hearing notice in the Charleston newspapers and a copy of the West Virginia Register which contains a notice for the public hearing, as well as a transcript of the public hearing with a certification from the court reporter. Therefore, West Virginia has met the requirements for public hearings in 40 CFR 51.102. Furthermore, EPA notes that in opening of the public hearing, the representative of WVDEP clearly and accurately stated that the purpose of the public hearing was to accept comment on revisions to 45 CSR 8. Any person wishing to make comments on any aspect of the revisions was free to do so.[1]

III. Final Action

EPA is approving the updated version of 45 CSR 8 into the West Virginia SIP. This revision is being approved as a SIP strengthening measure for the West Virginia SIP.

IV. Statutory and Executive Order Reviews

A. General Requirements

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

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

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

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. 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).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 13, 2012. 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 pertaining to the ambient air quality standards may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

Dated: August 23, 2012.

W.C. Early,

Acting, Regional Administrator, Region III.

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 XX—West Virginia

■ 2. In § 52.2520, the table in paragraph (c) is amended by:

■ a. Revising the title for 45 CSR Series 8.

■ b. Revising the entries for Sections 45–8–1 through 45–8–4.

■ c. Removing the entries for Sections 45–8–5, 45–8–6, and 45–8–7.

The amendments read as follows:

§ 52.2520 Identification of plan.

* * * * *

(c) * * *

[1] According to the transcript, neither this commenter, nor any other commenter, submitted comments to West Virginia at the public hearing.

EPA-APPROVED REGULATIONS IN THE WEST VIRGINIA SIP

State citation [Chapter 16–20 or 45 CSR]	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.2565
		[45 CSR] Series 8 Ambient Air Quality Standards		
Section 45–8–1	General	6/16/11	9/12/12 [*Insert page number where the document begins*].	Incorporation by reference of the National Ambient Air Quality Standards.
Section 45–8–2	Definitions	6/16/11	9/12/12 [*Insert page number where the document begins*].	Revised section moved from 45–8–3 to 45–8–2.
Section 45–8–3	Adoption of Standards	6/16/11	9/12/12 [*Insert page number where the document begins*].	Section was revised to read new title and content.
Section 45–8–4	Inconsistency Between Rules	6/16/11	9/12/12 [*Insert page number where the document begins*].	Revised section moved from 45–8–7 to 45–8–4.

* * * * *

[FR Doc. 2012–22338 Filed 9–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2011–1028; FRL–9360–6]

RIN 2070

Polyoxin D Zinc Salt; Amendment to an Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation amends the existing exemption from the requirement of a tolerance for residues of polyoxin D zinc salt when used as a fungicide on almonds, cucurbit vegetables, fruiting vegetables, ginseng, grapes, pistachios, pome fruits, potatoes, and strawberries by expanding the current exemption to include all food commodities. This regulation establishes an exemption from the requirement of a tolerance for residues of polyoxin D zinc salt in or on all food commodities when applied as a fungicide and used in accordance with good agricultural practices. On behalf of Kaken Pharmaceutical Co., Ltd., Conn & Smith, Inc. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting that EPA amend the existing exemption from the requirement of a tolerance for polyoxin D zinc salt. This regulation eliminates the need to establish a maximum permissible level for residues of polyoxin D zinc salt under the FFDCA.

DATES: This regulation is effective September 12, 2012. Objections and requests for hearings must be received on or before November 13, 2012, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2011–1028, is available at http://www.regulations.gov or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at http://www.epa.gov/dockets .

FOR FURTHER INFORMATION CONTACT: Colin G. Walsh, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–0298; email address: *walsh.colin@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

To access the OCSPP test guidelines referenced in this document electronically, please go to *http://www.epa.gov/ocspp* and select "Test Methods and Guidelines."

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection

or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2011–1028 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before November 13, 2012. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2011–1028, by one of the following methods:

- *Federal eRulemaking Portal : http://www.regulations.gov* . Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Background and Statutory Findings

In the **Federal Register** of March 14, 2012 (77 FR 15012) (FRL–9335–9), EPA issued a notice pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 1F7940) by Conn & Smith, Inc., Agent, 6713 Catskill Road, Lorton, VA 22079, on behalf of Kaken Pharmaceutical Co., Ltd. The petition requested that 40 CFR 180.1285 be amended by expanding the current exemption to include all food commodities, thus establishing an exemption from the requirement of a tolerance for residues of polyoxin D zinc salt in or on all food commodities. This notice referenced a summary of the petition prepared by the petitioner Conn & Smith, Inc., on behalf of Kaken Pharmaceutical Co., Ltd., which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is "safe." Section 408(c)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Pursuant to FFDCA section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in FFDCA section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. * * *" Additionally, FFDCA section 408(b)(2)(D) requires that the Agency consider" available information concerning the cumulative effects of such residues and other substances that have a common mechanism of toxicity."

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

III. Toxicological Profile

Consistent with FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability, and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

EPA established a tolerance exemption for polyoxin D zinc salt in a final rule published in the **Federal Register** on November 19, 2008, (73 FR 69559) (FRL–8389–5), which supported the uses as a fungicide on almonds, cucurbit vegetables, fruiting vegetables, ginseng, grapes, pistachios, pome fruits, potatoes, and strawberries. The toxicological data submitted to support the previous tolerance exemption included the following: Acute (six-pack) toxicity, mutagenicity, subchronic (90-day oral), developmental, and chronic/oncogenicity studies. All of the studies/information submitted to support the previous tolerance exemption indicated a lack of toxicity hazards for mammals, and EPA concluded that there is a reasonable certainty of no harm to humans, including infants and children, from the proposed food uses of polyoxin D zinc salt. This amendment proposes to expand the tolerance exemption to include all food commodities when applied as a fungicide and used in accordance with good agricultural practices. In support of this expansion of the tolerance exemption, new data have been generated by the petitioner and reviewed by EPA to further address the developmental toxicity (OCSPP Guideline No. 870.3700) and mutagenicity (OCSPP Guideline Nos. 870.5100 and 870.5375) data requirements. The data are required when the use of the substance under widespread and commonly recognized practices may reasonably be expected to result in significant exposure to humans, specifically females of child-bearing age for the developmental toxicity data requirement. The rest of the toxicological profile as stated in the **Federal Register** of November 19, 2008, and referenced herein, has not changed. A copy of the November 19, 2008 final rule document (73 FR 69559) is located under docket ID number EPA–HQ–OPP–2008–0417. A copy of the risk assessment cited herein (See Ref.) is located under docket ID number EPA–HQ–OPP–2011–1028.

As discussed in the **Federal Register** of November 19, 2008 polyoxin D zinc salt is a brown musty smelling powder derived through the fermentation of the microbe *Streptomyces cacaoi var. asoensis* , which was isolated from a soil sample collected from Japan. This biochemical active ingredient has a non-toxic mode of action, which acts against fungi by inhibiting chitin growth in the cell walls, thus precluding the development of fungal colonies. Its effects are considered fungi-exclusive in that it has no mode of action relative to mammals and passes through mammalian digestive systems. Polyoxin D zinc salt does not persist in the

environment and has a well understood low toxicity profile.

As stated previously in this Unit (III), new toxicity data have been submitted in support of the request by the petitioner to expand the current tolerance exemption to cover all food commodities. These data include:

1. A prenatal developmental toxicity study; and

2. Two mutagenicity studies.

All new data, coupled with the data submitted to support the previous tolerance exemption (73 FR 69561), confirm a lack of human health hazard, as noted and reported in the original assessment of the tolerance exemption, associated with dietary exposures of polyoxin D zinc salt and fully demonstrate the lack of acute, subchronic, and chronic toxicity. Summaries of the new toxicological data submitted in support of the expansion of the tolerance exemption follow.

A. Mutagenicity

Two new mutagenicity studies were performed for polyoxin D zinc salt to support the expansion of the tolerance exemption. The mutagenicity studies as described herein, along with the mutagenicity studies submitted to support the previous tolerance exemption (73 FR 69561), confirm that polyoxin D zinc salt is not a mutagen and that consumption of food commodities that have been treated with this substance when used as a pesticide is safe and will not result in any harm to human health from dietary exposure.

1. A reverse gene mutation assay in bacteria Master Record Identification Number ((MRID) 48653313) using the technical grade of polyoxin D zinc salt, dissolved in dimethyl sulfoxide (DMSO), with and without metabolic S9 activation, showed no mutagenic effects or evidence of cytotoxicity or insolubility even at the limiting dose of 5,000 ug/plate (See Ref.). Therefore, polyoxin D zinc salt is considered to be non-mutagenic under the conditions of this assay.

2. An *in vitro* mammalian chromosome aberration test (MRID 48653314) using the technical grade of polyoxin D zinc salt, dissolved in DMSO, with and without metabolic S9 activation, showed clastogenic potential in Chinese hamster lung cells (CHL/IU) with and without activation (See Ref.). In Experiment I, polyoxin D zinc salt was tested up to dose levels that caused >50% cell lethality without activation (260 µg/mL) and with activation (1,600 µg/mL). Without activation, the frequencies of the metaphases with structural chromosome aberrations (excluding gaps) were 14.5% and 7.5% at test article concentrations of 186 and 260µg/mL, respectively. With activation, the frequency of metaphase cells with structural chromosome aberrations (excluding gaps) was 9.5% at a test article concentration of 1,600 µg/mL. The frequency of polyploid metaphase cells showed no increases either without or with activation. In Experiment II, a 24-hour continuous treatment without activation resulted in a 8.0% frequency of metaphases with structural chromosome aberrations (excluding gaps) at the concentration of 133 µg/mL. There were no increases in the frequency of polyploid metaphases.

Although the submitted *in vitro* mammalian chromosome aberration test showed clastogenic potential, the results were not reproducible at the dose levels reported in the experiment. In addition, the mutagenicity data submitted to support the previous tolerance exemption (73 FR 69562), which included three complimentary Tier I mutagenicity tests and a Tier II mammalian erythrocyte micronucleus *in vivo* test, showed no mutagenic effects, including no clastogenic potential (no chromosomal aberrations). Furthermore, the lack of systemic toxicity noted in the following developmental toxicity section (Unit III.B) and the fact that no effects were reported in the Tier III 2-generation reproduction study submitted for the previous tolerance exemption (73 FR 69562), indicate that polyoxin D zinc salt is not mutagenic or clastogenic. Therefore, based on the weight of evidence of the mutagenicity data submitted to support this expansion of the tolerance exemption and the previous tolerance exemption (73 FR 69561), the mutagenicity data and information are sufficient to confirm that polyoxin D zinc salt is not a mutagen, and that consumption of food commodities that have been treated with this substance when used as a pesticide is safe and will not result in any harm to human health from dietary exposure.

B. Developmental Toxicity

A new developmental study (MRID 48653315) was performed for polyoxin D zinc salt to support the expansion of the tolerance exemption. No treatment-related effects were observed in general appearance, body weight, adjusted for gravid uterine weight, weight gain, or food consumption in maternal rats at the doses tested (0, 100, 300, and 1,000 milligrams/kilograms bodyweight/day (mg/kg bw/day) (See Ref.). Necropsy observations showed that almost all rats (20/24) in the 1,000 mg/kg/day group highest dose tested (HDT) had thickening of the limiting ridge. Therefore, the lowest observed adverse effect level (LOAEL) for maternal toxicity of polyoxin D zinc salt in rats is 1,000 mg/kg bw/day based on gross lesions in the stomach (thickening of the limiting ridge). The no observed adverse effect level (NOAEL) for maternal toxicity is 300 mg/kg bw/day based on no effects observed at this dose. Although an effect of gross lesions in the stomach was found in maternal rats at the limit dose tested (1,000 mg/kg bw/day), there were no reported systemic effects in maternal rats at this dose. The effect in the stomach lining was limited to a localized gastric irritation due to the route of entry (oral gavage) at the limit dose tested (1,000 mg/kg bw/day), which is typical of the nature of the test substance.

For developmental toxicity, no treatment-related effects were observed on developmental parameters including gravid uterine weight, placental weight, mean numbers of corpora lutea and implantation sites, numbers of early and later resorptions (dead or resorbed embryos or fetuses), number of live fetuses per dam, implantation index, viability index, sex ratio, and male and female body weight. The incidence of external, visceral, and skeletal variations and anomalies were not affected by treatment of polyoxin D zinc salt. Based on no effects observed for developmental toxicity at any doses tested, the NOAEL for developmental toxicity is greater than 1,000 mg/kg bw/day HDT. The LOAEL was not identified for developmental toxicity, suggesting that the test animals could have tolerated a higher dose.

Based on the developmental toxicity data submitted for this expansion to the tolerance exemption, and the Tier III 2-generation reproduction study submitted for the previous tolerance exemption (73 FR 69562), which showed no reproductive effects at the limit dose tested, there are sufficient data and information to confirm that polyoxin D zinc salt is not a developmental toxicant, and that consumption of food commodities that have been treated with this substance when used as a pesticide is safe and will not result in any harm to human health from dietary exposure.

IV. Aggregate Exposures

In examining aggregate exposure, FFDCA section 408 directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or

surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

A. Dietary Exposure

Dietary risks to humans are considered negligible based on the lack of dietary toxicological endpoints for polyoxin D zinc salt and its non-toxic mode of action as a fungi-specific chitin synthetase inhibitor that passes through mammalian digestive systems. No significant acute, subchronic, mutagenic, immunotoxic, developmental, or chronic dietary toxicity hazards were identified in the studies submitted to support this expansion of the tolerance exemption or the previous tolerance exemption (73 FR 69562). Based on polyoxin D zinc salt's lack of dietary toxicity hazards for mammals, no aggregate dietary exposure concerns are expected.

1. *Food* . The petitioner submitted three nature of residue studies (MRIDs 486533–09 through –11) in plants (grapes, tomatoes, and lettuce) to support this expansion of the tolerance exemption. The three nature of residue studies represent EPA Crop Groups 13 (grapes), 08 (tomatoes), and 04 (lettuce). The total radioactive residue (TRR) levels measured were 0.520 parts per million (ppm) at day 1; 0.538 ppm at day 14; and 0.495 ppm at day 30 after the final application for the grape plant (See Ref.). For tomato plants, 0.073 ppm of polyoxin D was found 14 days after the last treatment on the tomato fruit. For lettuce, 0.025 ppm at day 7 and 0.107 ppm at day 14 were detected in the head of lettuce after final application.

In addition, a terrestrial exposure model (T-Rex) was performed for the previous tolerance exemption (73 FR 69562), which indicated that it is highly unlikely that there will be adverse effects resulting from the use of polyoxin D zinc salt via the oral route of exposure. EPA's T-Rex calculations delimit aggregate dietary consumption of residues to no more than 40 ppm, a level that is far below the HDT in any of the toxicity testing.

Based on the residue data submitted for this expansion of the tolerance exemption, and the T-Rex residue modeling data from the previous tolerance exemption (73 FR 69562), any residues found are far below any toxicological endpoints identified in this expansion of the tolerance exemption (developmental toxicity NOAEL greater than 1,000 mg/kg bw/day; maternal toxicity NOAEL of 300 mg/kg/day) or in the previous tolerance exemption (73 FR 69561). The previous tolerance exemption showed an acute oral toxicity median lethal dose (LD_{50}) greater than 10,000 mg/kg; a subchronic oral toxicity NOAEL of greater than 1,333 mg/kg/day and 119 mg/kg/day in female and male rats, respectively; a subchronic oral toxicity LOAEL of 1,166 mg/kg/day in male rats based on decreased body weight gain, food consumption, and food efficiency; and a chronic oral toxicity NOAEL 2,058.7 mg/kg bw/day in male rats and 2,469.8 mg/kg bw/day in female rats.

In summary, the residue and toxicity data demonstrate a lack of aggregate dietary risk that is sufficient to support this expansion of the tolerance exemption.

2. *Drinking water exposure* . As stated in the previous tolerance exemption (73 FR 69562), there is a small potential for trace amounts of polyoxin D zinc salt to enter drinking water sources after a significant rainfall, via surface water runoff, and/or via incidental spray drift. The petitioner submitted a photodegradation in water study (MRID 48653305) to support this tolerance exemption. The results of the study show that polyoxin D zinc salt has a net photolytic half-life of 0.4 days in sterile natural water (See Ref.) . Even if residues of polyoxin D zinc salt enter water sources, residues are expected to degrade and be so diluted as to be negligible. The data and information demonstrate a lack of aggregate dietary risk via drinking water and is sufficient to support this expansion of the tolerance exemption.

B. Other Non-Occupational Exposure

No new non-occupational exposure is expected to result from the new food uses of polyoxin D zinc salt. No health risks are expected from any non-occupational exposure to polyoxin D zinc salt based on the data submitted for the previous tolerance exemption (73 FR 69562) and for this expansion of the tolerance exemption.

1. *Dermal exposure* . No new non-occupational dermal exposures are expected to result from the new food uses of polyoxin D zinc salt resulting from this expansion of the tolerance exemption. Any new dermal exposure associated with this expansion of the tolerance exemption is expected to be occupational in nature.

2. *Inhalation exposure* . No new non-occupational inhalation exposures are expected to result from the new food uses of polyoxin D zinc salt resulting from this expansion of the tolerance exemption. Any new inhalation exposure associated with this expansion of the tolerance exemption is expected to be occupational in nature.

V. Cumulative Effects From Substances With a Common Mechanism of Toxicity

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

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

VI. Determination of Safety for U.S. Population, Infants and Children

FFDCA section 408(b)(2)(C) provides that EPA shall assess the available information about consumption patterns among infants and children, special susceptibility of infants and children to pesticide chemical residues, and the cumulative effects on infants and children of the residues and other substances with a common mechanism of toxicity. In addition, FFDCA section 408(b)(2)(C) provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of exposure safety, which are often referred to as uncertainty factors, are incorporated into EPA risk assessments either directly or through the use of a margin of exposure analysis, or by using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk.

Relevant data and information submitted for the previous tolerance exemption (73 FR 69560) and for this expansion of the tolerance exemption indicate that polyoxin D zinc salt has negligible acute, subchronic, chronic, and developmental toxicity. Moreover, polyoxin D zinc salt is defined by its fungistatic non-toxic mode of action, and demonstrates no significant mammalian effect. Therefore, the

Agency concludes that there is a reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to the residues of polyoxin D zinc salt. This includes all anticipated dietary exposures and all other exposures for which there is reliable information. EPA has arrived at this conclusion because the data and information available on polyoxin D zinc salt do not demonstrate toxic potential to mammals. Thus, there are no threshold effects of concern and, as a result, an additional margin of safety is not necessary.

VII. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes for the reasons stated above, and because EPA is establishing an exemption from the requirement of a tolerance without any numerical limitation.

B. International Residue Limits

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

The Codex has not established a MRL for polyoxin D zinc salt.

VIII. Conclusions

EPA concludes that there is a reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of polyoxin D zinc salt. Therefore, the existing exemption from the requirement of a tolerance for residues of polyoxin D zinc salt when used as a fungicide on almonds, cucurbit vegetables, fruiting vegetables, ginseng, grapes, pistachios, pome fruits, potatoes, and strawberries is amended by establishing an exemption from the requirement of a tolerance for residues of polyoxin D zinc salt in or on all food commodities when applied as a fungicide and used in accordance with good agricultural practices.

IX. References

The reference used in this document is in the OPP docket listed under docket ID EPA–HQ–OPP–2011–1028 and may be seen by accessing the *www.regulations.gov* Web site. A copy of the previous final rule published in the **Federal Register** on November 19, 2008, is in the OPP docket listed under docket ID EPA–HQ–OPP–2008–0417.

U.S. EPA. 2011. Memorandum from Manying Xue to Colin Walsh. Polyoxin D zinc salt (EPA Reg. #: 68173–1), Containing 23.8% of Polyoxin D Zinc Salt (Active Ingredient). Science Review of Product Chemistry, Residue Chemistry, Non-Target Organism and Toxicity Data in Support of label Amendment. U.S. Environmental Protection Agency Office of Pesticide Programs. May 11, 2012.

X. Statutory and Executive Order Reviews

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

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

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

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

XI. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: August 29, 2012.

Keith A. Matthews,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.1285 is revised to read as follows:

§ 180.1285 Polyoxin D zinc salt; exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for the residues of polyoxin D zinc salt in or on all food commodities when applied as a fungicide and used in accordance with good agricultural practices.

[FR Doc. 2012–22315 Filed 9–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2011–0433; FRL–9359–6]

Dinotefuran; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of dinotefuran in or on multiple commodities which are identified and discussed later in this document. Also, due to the tolerances established by this document, the Agency is removing the existing tolerances for grape and potato as unnecessary. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective September 12, 2012. Objections and requests for hearings must be received on or before November 13, 2012, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2011–0433, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Andrew Ertman, Registration Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9367; email address: *ertman.andrew@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2011–0433 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before November 13, 2012. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2011–0433, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of September 7, 2011 (76 FR 55329) (FRL–8886–7), EPA issued a notice pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 1E7863) by IR–4, 500 College Rd. East, Suite 201 W, Princeton, NJ 08540. The petition requested that 40 CFR 180.603 be amended by establishing tolerances for residues of the insecticide dinotefuran, (*RS*)-1-methyl-2-nitro-3-((tetrahydro-3-furyl)methyl)guanidine, including its metabolites and degradates, in or on berry, low growing, except strawberry, subgroup 13–07H at 0.2 parts per million (ppm); watercress at 5.0 ppm; onion, green, subgroup 3–07B at 6.0 ppm; onion, bulb, subgroup 3–07A at 0.07 ppm; peach at 0.9 ppm; vegetable, tuberous and corm, subgroup 1C at 0.05 ppm; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 0.9 ppm; and tea, plucked leaves at 25.0 ppm. That notice referenced a summary of the petition prepared by Mitsui Chemicals Agro, Inc., the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Also, due to the tolerances established by this document, the following existing tolerances are being removed as unnecessary: Grape and potato.

Based upon review of the data supporting the petition, EPA has

modified the levels for which tolerances are being established for the bulb onion subgroup 3–07A, the green onion subgroup 3–07B, peach, tea, and watercress. The reason for these changes is explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

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

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

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Dinotefuran has low acute toxicity by oral, dermal, and inhalation exposure routes. It is not a dermal sensitizer, but causes a low level of skin irritation. The main target of toxicity is the nervous system but effects on the nervous system were only observed at high doses. Nervous system toxicity was manifested as clinical signs and decreased motor activity seen after acute dosing (in both rats and rabbits) and changes in motor activity which are consistent with effects on the nicotinic cholinergic nervous system seen after repeated dosing. Typically, low to moderate levels of neonicotinoids, such as dinotefuran, activate the nicotinic acetylcholine receptors causing stimulation of the peripheral nervous system (PNS). High levels of neonicotinoids can over stimulate the PNS, maintaining cation channels in the open state which blocks the action potential and leads to paralysis.

Dinotefuran was well tolerated at high doses following dietary administration for ninety days to mice, rats, and dogs. The most sensitive effects were decreases in body weight and/or body weight gain but even these effects occurred at or near the limit dose. Changes in spleen and thymus weights were seen in mice, rats and dogs following subchronic and chronic dietary exposures. However, these weight changes were not corroborated with alterations in hematology parameters, histopathological lesions in these organs, or toxicity to the hematopoietic system. Furthermore, the toxicology data base contains immunotoxicity studies in mice and rats and a developmental immunotoxicity study in rats. In the immunotoxicity studies there were no effect on T-cell dependent antibody response (TDAR) when tested up to the limit dose in male and female mice and in male and female rats. There were no changes in spleen and thymus weight and there were no histopathological lesions in these organs in those studies. In the developmental immunotoxicity study, there was no evidence of an effect on the functionality of the immune system in rats that were exposed to dinotefuran at the limit dose during the prenatal, postnatal, and post-weaning periods. Consequently, the thymus weight changes seen in dogs and the spleen weight changes seen in mice and rats were not considered to be toxicologically relevant.

No systemic or neurotoxicity was seen following repeated dermal applications at the limit dose to rats for 28 days. No systemic or portal of entry effects were seen following repeated inhalation exposure at the maximum obtainable concentrations to rats for 28 days.

In the pre-natal studies, no maternal or developmental toxicity was seen at the limit dose in rats. In rabbits, maternal toxicity manifested as clinical signs of neurotoxicity but no developmental toxicity was seen. In the reproduction study, parental, offspring, and reproductive toxicity was seen at the limit dose. Parental toxicity included decreased body weight gain, transient decrease in food consumption, and decreased thyroid weights. Offspring toxicity was characterized as decreased forelimb grip strength or hindlimb grip strength in the F1 pups. There was no adverse effect on reproductive performance at any dose. In the developmental neurotoxicity study, no maternal or offspring toxicity was seen at any dose including the limit dose.

There was no evidence of carcinogenicity in male and female mice and in male and female rats fed diets containing dinotefuran at the limit dose for 78 weeks to mice and 104 weeks to rats. Dinotefuran was non-mutagenic in both *in vivo* and *in vitro* assays.

Specific information on the studies received and the nature of the adverse effects caused by dinotefuran as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* on pages 39–44 of the document titled "Revised: Dinotefuran: Human Health Risk Assessment for Proposed Section 3 Uses on Tuberous and Corm Vegetables Subgroup 1C, Onion Subgroup 3–07A, Onion Subgroup 3–07B, Small Fruit Subgroup 13–07F, Berry Subgroup 13–07H, Peach, and Watercress, And a Tolerance on Imported Tea" in docket ID number EPA–HQ–OPP–2011–0433.

B. Toxicological Points of Departure/Levels of Concern

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

EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for dinotefuran used for human risk assessment is shown in the Table of this unit. EPA notes that in the last final rule for dinotefuran, published in the **Federal Register** of December 18, 2009 (74 FR 67098) (FRL–8803–1), the points of departure for many exposure scenarios differ than what is reported in this document. Since the last risk assessment, the Agency has re-evaluated the dinotefuran toxicological database and updated the hazard characterization and dose response assessment. This toxicology database reevaluation has resulted in changes to the toxicity endpoints, points of departure, and safety factors for several routes of exposure from those presented in previous EPA risk assessments for dinotefuran. For a more detailed discussion of the endpoint selection and reasons for the changes, refer to Appendix A.3 on pages 44–47 in the document titled "Dinotefuran: Human Health Risk Assessment for Proposed Section 3 Uses on Tuberous and Corm Vegetables Subgroup 1C, Onion Subgroup 3–07A, Onion Subgroup 3–07B, Small Fruit Subgroup 13–07F, Berry Subgroup 13–07H, Peach, and Watercress, And a Tolerance on Imported Tea" in docket ID number EPA–HQ–OPP–2011–0433.

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

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (General population including infants and children).	NOAEL = 125 mg/kg/day. UF_A = 10X UF_H = 10X FQPA SF = 1X	Acute RfD = 1.25 mg/kg/day. aPAD = 1.25 mg/kg/day	Developmental Toxicity Study in Rabbits LOAEL = 300 mg/kg/day based on clinical signs in does (prone position, panting, tremor and erythema) seen following the first dose on Gestation Day 6.
Chronic dietary (All populations)	NOAEL= 99.7 mg/kg/day. UF_A = 10X UF_H = 10X FQPA SF = 1X	Chronic RfD = 1.0 mg/kg/day. cPAD = 1.0 mg/kg/day	Chronic Toxicity/Carcinogenicity Study in Rats LOAEL = 991 mg/kg/day based on decreased body weight gain and nephrotoxicity.
Incidental Oral Short-Term (1–30 days).	NOAEL= 99.7 mg/kg/day. UF_A = 10X UF_H = 10X FQPA SF = 1X	LOC for MOE = 100	Chronic Toxicity/Carcinogenicity Study in Rats LOAEL = 991 mg/kg/day based on decreased body weight gain and nephrotoxicity.

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

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to dinotefuran, EPA considered exposure under the petitioned-for tolerances as well as all existing dinotefuran tolerances in 40 CFR 180.603. EPA assessed dietary exposures from dinotefuran in food as follows:

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

Such effects were identified for dinotefuran. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA assumed 100 percent crop treated (PCT) and tolerance-level residues for all current and proposed crops.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA assumed 100 PCT and tolerance-level residues for all current and proposed crops.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that dinotefuran does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and PCT information.* EPA did not use anticipated residue or PCT information in the dietary assessment for dinotefuran. Tolerance level residues and 100 PCT were assumed for all food commodities.

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

Based on the First Index Reservoir Screening Tool (FIRST), and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of dinotefuran for acute exposures are estimated to be 91.31 parts per billion (ppb) for surface water and 3.5 ppb for ground water and for chronic exposures for non-cancer assessments are estimated to be 25.16 ppb for surface water and 3.5 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 91.31 ppb was used to assess the contribution to drinking water. For chronic dietary risk

assessment, the water concentration of value 25.16 ppb was used to assess the contribution to drinking water.

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

Dinotefuran is currently registered for the following uses that could result in residential exposures: Turf, ornamentals, vegetable gardens, pets, indoor aerosol sprays, and crack and crevice sprays. EPA assessed residential exposure using the following assumptions: Residential handler exposures were not assessed because no dermal or inhalation hazards were identified. For this same reason, post-application residential dermal and inhalation exposure scenarios were not assessed. The Agency only considered post-application scenarios in which incidental oral exposures to children are expected. The oral exposures assessed included incidental oral exposures from turf, ant bait, ready to use garden trigger sprayers, dog and cat spot on treatment, indoor broadcast, and indoor crack and crevice uses. Of all these scenarios, treated turf was determined to result in the highest levels of exposure.

In assessing risks from residential exposures, EPA combines different residential sources of exposure that could reasonably be expected to occur on the same day. While it is possible for children to be exposed to indoor broadcast sprays on hard surfaces/carpets and to spot-on treatment to cats or dogs on the same day, these exposures have not been combined in this assessment because incidental oral hand-to-mouth exposure from treated turf is higher and still results in an MOE that does not exceed the Agency's LOC.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

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

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

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* In the pre-natal studies, no maternal or developmental toxicity was seen at the limit dose in rats. In rabbits, maternal toxicity manifested as clinical signs of neurotoxicity but no developmental toxicity was seen. In the reproduction study, parental, offspring, and reproductive toxicity was seen at the limit dose. Parental toxicity included decreased body weight gain, transient decrease in food consumption, and decreased thyroid weights. Offspring toxicity was characterized as decreased forelimb grip strength or hindlimb grip strength in the F1 pups. There was no adverse effect on reproductive performance at any dose. In the developmental neurotoxicity study, no maternal or offspring toxicity was seen at any dose including the limit dose.

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

i. The toxicity database for dinotefuran is complete.

ii. The neurotoxic potential of dinotefuran has been adequately considered. Dinotefuran is a neonicotinoid and has a neurotoxic mode of pesticidal action. Consistent with the mode of action, changes in motor activity were seen in repeat-dose studies, including the subchronic neurotoxicity study. Additionally, decreased grip strength and brain weight was observed in the offspring of a multi-generation reproduction study albeit at doses close to the limit dose. For these reasons, a developmental neurotoxicity study was required. Upon review of the developmental neurotoxicity study, it was concluded that there is no evidence of a unique sensitivity to the developing nervous system since no effects on neurobehavioral parameters were seen in the offspring at doses that approached or exceeded the limit dose.

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

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to dinotefuran in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children for incidental oral exposures. These assessments will not underestimate the exposure and risks posed by dinotefuran.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to dinotefuran will occupy 5.8% of the aPAD for children 1–2 years old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to dinotefuran from food and water will utilize 2.6% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. Based on the explanation in

Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of dinotefuran is not expected.

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

Dinotefuran is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to dinotefuran.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in an aggregate MOE of 3,000 for children 1–2 years old from hand to mouth exposure from treated turf, the scenario with the highest exposure. Because EPA's level of concern for dinotefuran is a MOE of 100 or below, this MOE is not of concern.

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

Intermediate-term exposure is not expected for the adult residential exposure pathway. Therefore, the intermediate-term aggregate risk would be equivalent to the chronic dietary exposure estimate. For children, intermediate-term incidental oral exposures could potentially occur from indoor uses. However, while it is possible for children to be exposed for longer durations, the magnitude of residues is expected to be lower due to dissipation or other activities. Since incidental oral short- and intermediate-term toxicity endpoints and points of departure are the same, the short-term aggregate risk estimate, which includes the highest residential exposure estimate (from turf), is protective of any intermediate-term exposures.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, dinotefuran is not expected to pose a cancer risk to humans.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (a high performance liquid chromatography/tandem mass spectrometry (HPLC/MS/MS) method for the determination of residues of dinotefuran, and the metabolites DN, and UF; an HPLC/ultraviolet (UV) detection method for the determination of residues of dinotefuran; and HPLC/MS and HPLC/MS/MS methods for the determination of DN and UF) is available to enforce the tolerance expression.

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

B. International Residue Limits

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

The Codex has not established a MRL for dinotefuran for any of the commodities in this Notice.

C. Revisions to Petitioned-For Tolerances

Use of the Organization of Economic and Cooperation and Development tolerance calculation procedures indicates that the tolerances for residues in/on the onion subgroup 3–07A, onion subgroup 3–07B, peach, tea, and watercress should be established at 0.15 ppm, 5.0 ppm, 1.0 ppm, 50 ppm, and 8.0 ppm, respectively, instead of those values proposed.

V. Conclusion

Therefore, tolerances are established for residues of dinotefuran, (*RS*)-1-methyl-2-nitro-3-((tetrahydro-3-furyl)methyl)guanidine, including its metabolites and degradates, in or on berry, low growing, except strawberry, subgroup 13–07H at 0.2 ppm; watercress at 8.0 ppm; onion, green, subgroup 3–07B at 5.0 ppm; onion, bulb, subgroup 3–07A at 0.15 ppm; peach at 1.0 ppm; vegetable, tuberous and corm, subgroup 1C at 0.05 ppm; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 0.9 ppm; and tea, dried at 50 ppm.

Also, the following existing tolerances are removed as unnecessary: Grape and potato. These commodities are covered by the new crop group tolerances for fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F, and vegetable, tuberous and corm, subgroup 1C.

VI. Statutory and Executive Order Reviews

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

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

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions

of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: August 28, 2012.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section § 180.603 is amended by removing the entries for "Grape" and "Potato" and alphabetically adding the following entries and a footnote to the table in paragraph (a)(1) to read as follows:

§ 180.603 Dinotefuran; tolerances for residues.

(a) * * *

(1) * * *

Commodity	Parts per million
Berry, low growing, except strawberry, subgroup 13–07H	0.2
* * * * *	
Fruit, small vine climbing, except fuzzy kiwifruit, subgroup 13–07F	0.9
* * * * *	
Onion, bulb, subgroup 3–07A	0.15
Onion, green, subgroup 3–07B	5.0
Peach	1.0
* * * * *	
Tea, dried[1]	50
* * * * *	
Vegetable, tuberous and corm, subgroup 1C	0.05
Watercress	8.0

[1] There are no U.S. registrations for tea.

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[FR Doc. 2012–22205 Filed 9–11–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Docket No. CDC–2012–0007; NIOSH–257]

42 CFR Part 88

RIN 0920–AA49

World Trade Center Health Program; Addition of Certain Types of Cancer to the List of WTC-Related Health Conditions

AGENCY: Centers for Disease Control and Prevention, HHS.

ACTION: Final rule.

SUMMARY: Title I of the James Zadroga 9/11 Health and Compensation Act of 2010 amended the Public Health Service Act (PHS Act) to establish the World Trade Center (WTC) Health Program. The WTC Health Program, which is administered by the Director of the National Institute for Occupational Safety and Health (NIOSH), within the Centers for Disease Control and Prevention (CDC), provides medical monitoring and treatment to eligible firefighters and related personnel, law enforcement officers, and rescue, recovery, and cleanup workers who responded to the September 11, 2001, terrorist attacks in New York City, at the Pentagon, and in Shanksville, Pennsylvania, and to eligible survivors of the New York City attacks. In accordance with WTC Health Program regulations, which establish procedures for adding a new condition to the list of covered health conditions, this final rule adds to the List of WTC-Related Health Conditions the types of cancer proposed for inclusion by the notice of proposed rulemaking.

DATES: This final rule is effective October 12, 2012.

FOR FURTHER INFORMATION CONTACT: Frank J. Hearl, PE, Chief of Staff, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, Patriots Plaza, Suite 9200, 395 E St. SW., Washington, DC 20201. Telephone: (202) 245–0625 (this is not a toll-free number). Email: *WTCpublicinput@cdc.gov.*

SUPPLEMENTARY INFORMATION: This notice of final rulemaking is organized as follows:

I. Executive Summary

A. Purpose of Regulatory Action

Title I of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111–347), amended the Public Health Service Act (PHS Act) to establish the World Trade Center (WTC) Health Program within the Department of Health and Human Services (HHS). The PHS Act requires the WTC Program Administrator (Administrator) to conduct rulemaking to propose the addition of a health condition to the List of WTC-Related Health Conditions (List) codified in 42 CFR 88.1 regardless of whether the Administrator proposes to add a health condition based on the findings from periodic reviews of cancer,[1] a request from a petition, or a determination made at the Administrator's discretion that a proposed rule adding a condition should be initiated. Following a petition to add cancer or certain types of cancer to the List and a recommendation by the WTC Health Program's Scientific/Technical Advisory Committee (STAC), the Administrator is following the procedures established in 42 CFR 88.17 to add the types of cancer recommended by the STAC to the List in § 88.1.

B. Summary of Major Provisions

This rule modifies the List of WTC-Related Health Conditions in 42 CFR 88.1 to add the following conditions (types of cancer identified by ICD–10 code are specified in the discussion below):

- Malignant neoplasms of the lip, tongue, salivary gland, floor of mouth, gum and other mouth, tonsil, oropharynx, hypopharynx, and other oral cavity and pharynx
- Malignant neoplasm of the nasopharynx
- Malignant neoplasms of the nose, nasal cavity, middle ear, and accessory sinuses
- Malignant neoplasm of the larynx
- Malignant neoplasm of the esophagus
- Malignant neoplasm of the stomach
- Malignant neoplasm of the colon and rectum
- Malignant neoplasm of the liver and intrahepatic bile duct
- Malignant neoplasms of the retroperitoneum and peritoneum, omentum, and mesentery
- Malignant neoplasms of the trachea; bronchus and lung; heart, mediastinum and pleura; and other ill-defined sites in the respiratory system and intrathoracic organs
- Mesothelioma
- Malignant neoplasms of the soft tissues (sarcomas)
- Malignant neoplasms of the skin (melanoma and non-melanoma), including scrotal cancer
- Malignant neoplasm of the breast
- Malignant neoplasm of the ovary
- Malignant neoplasm of the urinary bladder
- Malignant neoplasm of the kidney
- Malignant neoplasms of renal pelvis, ureter and other urinary organs
- Malignant neoplasms of the eye and orbit
- Malignant neoplasm of the thyroid
- Malignant neoplasms of the blood and lymphoid tissues (including, but not limited to, lymphoma, leukemia, and myeloma)
- Childhood cancers
- Rare cancers

The Administrator developed a hierarchy of methods (detailed in Section IV of this preamble) for determining which cancers to propose for inclusion on the List of WTC-Related Health Conditions.

C. Costs and Benefits

Annual costs, benefits, and transfers of this rule are listed in the table below. This analysis estimates the impact on WTC Health Program costs using the number of persons currently enrolled in the Program as responders and survivors and assumes that the rate of cancer in the population will be equal to the U.S. population average rate. An alternative analysis considers the impact on costs if the Program enrolls additional persons up to the Program's statutory limits, and that the expanded population experiences a 21 percent higher rate of cancer than the U.S. population average. The basis for these assumptions is explained in detail in the preamble of this rulemaking (see Section VII.A., below)..

Although we cannot quantify the benefits associated with the WTC Health Program, enrollees with cancer are expected to experience a higher quality of care than they would in the absence of the Program. Mortality and morbidity improvements for cancer patients expected to enroll in the WTC Health Program are anticipated because barriers may exist to access and delivery of quality health care services for cancer patients in the absence of the services provided by the WTC Health Program. HHS anticipates benefits to cancer patients treated through the WTC Health Program, who may otherwise not have access to health care services, to accrue in 2013. Starting in 2014, continued implementation of the Affordable Care Act will result in increased access to health insurance and improved health care services for the general responder and survivor population that currently is uninsured.

ESTIMATED ANNUAL WTC HEALTH PROGRAM COSTS, TRANSFERS, AND BENEFITS, 55,000 RESPONDERS AND 5,000 SURVIVORS AT U.S. POPULATION CANCER RATE, AND 80,000 RESPONDERS AND 30,000 SURVIVORS AT U.S. POPULATION CANCER RATE + 21 PERCENT, 2013–2016, 2011$

	Societal Costs for 2013, 2011$		Annualized Transfers for 2013–2016, 2011$	
	Based on the 16.3 percent of general responders and survivors who are expected to be uninsured		Discounted at 7 percent	Discounted at 3 percent
	Cancer Rate		Cancer Rate	
	U.S. Average	U.S. + 21%	U.S. Average	U.S. + 21%
55,000 Responders	$1,648,706		$10,172,308	
5,000 Survivors	271,427		1,572,907	
Colorectal and Breast Screening	204,491		713,321	
60,000 Total	2,124,624		12,458,535	

[1] See PHS Act, Title XXXIII sec. 3312(a)(5).

ESTIMATED ANNUAL WTC HEALTH PROGRAM COSTS, TRANSFERS, AND BENEFITS, 55,000 RESPONDERS AND 5,000 SURVIVORS AT U.S. POPULATION CANCER RATE, AND 80,000 RESPONDERS AND 30,000 SURVIVORS AT U.S. POPULATION CANCER RATE + 21 PERCENT, 2013–2016, 2011$—Continued

80,000 Responders		2,631,100		19,912,464
30,000 Survivors		1,970,560		12,124,118
Colorectal and Breast Screening		417,521		1,271,478
110,000 Total		5,019,182		33,308,060

Qualitative benefits

Although we cannot quantify the benefits associated with the WTC Health Program, enrollees with cancer are expected to experience a higher quality of care than they would in the absence of the Program. Mortality and morbidity improvements for cancer patients expected to enroll in the WTC Health Program are anticipated because barriers may exist to access and delivery of quality health care services for cancer patients in the absence of the services provided by the WTC Health Program. HHS anticipates benefits to cancer patients treated through the WTC Health Program, who may otherwise not have access to health care services, to accrue in 2013. Starting in 2014, continued implementation of the Affordable Care Act will result in increased access to health insurance and improved health care services for the general responder and survivor population that currently is uninsured.

II. Public Participation

On June 13, 2012 HHS published a notice of proposed rulemaking (77 FR 35574) proposing to add certain cancers to the List of WTC-Related Health Conditions. HHS invited interested persons or organizations to submit written views, opinions, recommendations, and data on any topic related to the proposed rule. The Administrator specifically sought comments on the methodology proposed to evaluate evidence for the addition of types of cancer to the List of WTC-Related Health Conditions; the proposed cost estimates; information or published studies about the type of welding and/or metal cutting that occurred at any of the disaster sites and information about exposure to ultraviolet light; and information or published studies about the scheduling of work hours or shiftwork occurring at any of the disaster sites.

HHS received 27 substantive submissions to the docket for this rulemaking. Commenters included labor unions that represent WTC responders, including police department members and others who conducted rescue, recovery, and clean-up; private citizens, including WTC responders; the spouse of a responder; survivors; relatives of victims and survivors; physicians who have treated WTC responders; health care professionals with no stated experience treating 9/11-exposed patients; health and research organizations: the WTC Health Program Survivors Steering Committee; a chemical supplier; and an elected official. Additionally, one private citizen submitted a comment that was outside the scope of this rulemaking. The substantive comments are described below, followed by the Administrator's response to each (see Section V., below).

III. Background

A. WTC Health Program Statutory Authority

Title I of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111–347), amended the PHS Act to add Title XXXIII [2] establishing the WTC Health Program within HHS. The WTC Health Program provides medical monitoring and treatment benefits to eligible firefighters and related personnel, law enforcement officers, and rescue, recovery, and cleanup workers who responded to the September 11, 2001, terrorist attacks in New York City, at the Pentagon, and in Shanksville, Pennsylvania, and to eligible survivors of the New York City attacks.

All references to the Administrator in this notice mean the NIOSH Director or his or her designee. Section 3312(a)(6) of the PHS Act requires the Administrator to conduct rulemaking to propose the addition of a health condition to the List of WTC-Related Health Conditions codified in 42 CFR 88.1.

B. Need for Rulemaking

The PHS Act requires the Administrator to conduct rulemaking to propose the addition of a health condition to the List of WTC-Related Health Conditions codified in 42 CFR 88.1 regardless of whether the Administrator proposes to add a health condition based on the findings from periodic reviews of cancer,[3] a request from a petition, or a determination made at the Administrator's discretion that a proposed rule adding a condition should be initiated. On September 7, 2011, the Administrator received a written petition to add a health condition to the List of WTC-Related Health Conditions (Petition 001). Petition 001 requested that the Administrator "consider adding coverage for cancer" to the List in § 88.1.[4]

On October 5, 2011, the Administrator formally exercised his option to request a recommendation from the STAC regarding the petition (PHS Act, sec. 3312(a)(6)(B)(i); 42 CFR 88.17(a)(2)(i)). The Administrator requested that the STAC "review the available information on cancer outcomes associated with the exposures resulting from the September 11, 2001, terrorist attacks, and provide advice on whether to add cancer, or a certain type of cancer, to the List specified in the Zadroga Act." [5] In response, the STAC submitted its recommendation on April 2, 2012, and the Administrator issued a notice of proposed rulemaking on June 13, 2012. The background to this rulemaking and a discussion of the STAC's recommendation are provided in the notice of proposed rulemaking published on June 13, 2012 (77 FR 35574).

C. Review of Scientific Evidence

As reviewed in detail in the June 13, 2012 notice of proposed rulemaking, the

[2] Title XXXIII of the PHS Act is codified at 42 U.S.C. 300mm to 300mm–61. Those portions of the Zadroga Act found in Titles II and III of Public Law 111–347 do not pertain to the WTC Health Program and are codified elsewhere.

[3] See PHS Act, sec. 3312(a)(5).

[4] Maloney CB, Nadler J, King PT, Schumer CE, Gillibrand KE, Rangel CB, Velazquez NM, Grimm MG, Clarke YD. [2011]. Letter from Congress to John Howard, MD, Director, National Institute for Occupational Safety and Health (NIOSH). WTC Health Program Petition 001. Petition 001 is included in the docket for this rulemaking. See *http:www.regulations.gov* and *http://www.cdc.gov/niosh/docket/archive/docket257.html.*

[5] Howard J [2011]. October 5, 2011 Letter from John Howard, MD, Director, National Institute for Occupational Safety and Health (NIOSH) to the WTC Health Program Scientific/Technical Advisory Committee. This letter is included in the docket for this rulemaking. See *http:www.regulations.gov and http://www.cdc.gov/niosh/docket/orchive/docket257.html.*

Administrator considered data from five information sources to decide whether to propose the addition of cancers to the List of WTC-Related Health Conditions: (1) Peer-reviewed studies published in the scientific literature, including environmental sampling data, epidemiologic studies on the 9/11-exposed populations, and studies providing evidence of a causal relationship between a type of cancer and a condition already on the List of WTC-Related Health Conditions; [6] (2) findings and recommendations solicited from the WTC Clinical Centers of Excellence and Data Centers, the WTC Health Registry at the New York City Department of Health and Mental Hygiene, and the New York State Department of Health; (3) information from the public solicited through a request for information published in the **Federal Register** on March 8, 2011 and March 29, 2011; (4) the findings of the National Toxicology Program (NTP) in the National Institute of Environmental Health Sciences, HHS,[7] as well as the World Health Organization's International Agency for Research on Cancer (IARC); [8] and (5) findings from other sources of information relevant to 9/11 exposures, including the expert judgment and personal experiences of STAC members, and comments from the public.

In September 2011, an epidemiologic study by Rachel Zeig-Owens and colleagues (hereafter, "Zeig-Owens"), "identified a modest effect of WTC exposure for all cancers combined by comparing the ratios in the exposed group [of Fire Department of New York City firefighters] to those in the non-exposed group." [9] This publication led to the submission of Petition 001. The Administrator requested that the STAC provide a recommendation on Petition 001. The STAC established evidentiary criteria and assessed the weight of the available scientific evidence provided by information sources (1), (4), and (5), described above. The STAC found support for including a number of types of cancer based in part on evidence of increased risk reported in Zeig-Owens. The STAC also included a number of types of cancer based on the professional judgment of STAC members with scientific expertise, on the personal experience of some of the STAC members who were themselves WTC responders or survivors, and on comments made by members of the public.

Following review of the STAC recommendation, the Administrator agreed with the STAC that individual exposure assessment information arising from the terrorist attacks is extremely limited and that its absence impairs definitive scientific analysis of the relationship between exposures arising from the attacks and the occurrence of any specific type of cancer. The Administrator also found that multiple epidemiologic studies of cancer in exposed responders and survivors which definitively support an association between 9/11 exposures and specific types of cancer that would meet generally well-accepted criteria indicating that the association is a causal one are not currently available.

After considering various approaches to evaluate the available scientific evidence (see discussion in the June 13, 2012 notice of proposed rulemaking), the Administrator has adopted the methodology outlined in the proposed rule and set out in Section IV below. This methodology follows on criteria used by the STAC in its recommendation. Using the methodology, the Administrator adds the types of cancer, identified in Section V below, to the List of WTC-Related Health Conditions.

D. Physician Determination and Program Certification of WTC-Related Health Conditions Including Types of Cancer

In order for an individual enrolled as a WTC responder or survivor to obtain coverage for treatment of any health condition on the List of WTC-Related Health Conditions, including any type of cancer added to the List, a two-step process must be satisfied. First, a physician at a Clinical Center of Excellence (CCE) or in the nationwide provider network must make a determination that the particular type of cancer for which the responder or survivor seeks treatment coverage is both on the List of WTC-Related Health Conditions and that exposure to airborne toxins, other hazards, or adverse conditions resulting from the September 11, 2001, terrorist attacks is substantially likely to be a significant factor in aggravating, contributing to, or causing the type of cancer for which the responder or survivor seeks treatment coverage.[10] Pursuant to 42 CFR 88.12(a), the physician's determination must be based on the following: (1) An assessment of the individual's exposure to airborne toxins, any other hazard, or any other adverse condition resulting from the September 11, 2001, attacks; and (2) the type of symptoms reported and the temporal sequence of those symptoms. In addition, the statute requires that all physician determinations are reviewed by the Administrator and are certified for treatment coverage unless the Administrator determines that the condition is not a health condition on the List of WTC-Related Health Conditions or that the exposure resulting from the September 1, 2001, terrorist attacks is not substantially likely to be a significant factor in aggravating, contributing to, or causing the condition. Thus, the inclusion of a condition on the List of WTC-Related Health Conditions, in and of itself, does not guarantee that a particular individual's condition will be certified as eligible for treatment. Responders and survivors denied certification have a right to appeal the denial of certification.

E. Effects of Rulemaking on Federal Agencies

Title II of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111–347) reactivated the September 11, 2001 Victim Compensation Fund (VCF). Administered by the U.S. Department of

[6] The July 2011, First Periodic Review of the Scientific and Medical Evidence Related to Cancer for the World Trade Center Health Program (First Periodic Review), requested by the Administrator, was included among the information considered. NIOSH [2011]. First Periodic Review of Scientific and Medical Evidence Related to Cancer for the World Trade Center Health Program. NIOSH Publication No. 2011–197. *http://www.cdc.gov/niosh/docs/2011–197/pdfs/2011–197.pdf/.* Accessed April 18, 2012. As required by sec.3312(a)(5)(A) of the PHS Act, the review considered "all available scientific and medical evidence, including findings and recommendations of Clinical Centers of Excellence, published in peer-reviewed journals to determine if, based on such evidence, cancer or a certain type of cancer should be added to the applicable list of WTC-related health conditions." At the time of publication, the First Periodic Review identified only one peer-reviewed article addressing the association of exposures arising from the September 11, 2001, terrorist attacks and cancer in responders and survivors, and two publications that used models to estimate the risk of cancer among residents in Lower Manhattan. Unlike the explicit standard prescribed for periodic reviews of cancer under sec. 3312(a)(5)(A), sec. 3312(a)(6) of the PHS Act does not specify the sources upon which the Administrator may base his or her determination to propose the addition of cancer or types of cancer to the List of WTC-Related Health Conditions.

[7] NTP Report on Carcinogens (RoC). *http://ntp.niehs.nih.gov/?objectid=72016262–BDB7-CEBA-FA60E922B18C2540.* Accessed May 9, 2012.

[8] WHO International Agency for Research on Cancer (IARC). *http://monographs.iorc.fr/.* Accessed May 8, 2012.

[9] Zeig-Owens R, Webber MP, Hall CB, Schwartz T, Jaber N, Weakley J, Rohan TE, Cohen HW, Derman O, Aldrich TK, Kelly K, Prezant DJ [2011]. Early Assessment of Cancer Outcomes in New York City Firefighters After the 9/11 Attacks: An Observational Cohort Study. Lancet. 378(9794):898–905.

[10] See PHS Act, sec.3312(a)(1); 42 U.S.C. 300mm–22(a)(1).

Justice (DOJ), the VCF provides compensation to any individual or representative of a deceased individual who was physically injured or killed as a result of the September 11, 2001, terrorist attacks or during the debris removal. Eligibility criteria for compensation by the VCF include a list of presumptively covered health conditions, which are physical injuries determined to be WTC-related health conditions by the WTC Health Program. Pursuant to DOJ regulations, the VCF Special Master is required to update the list of presumptively covered conditions when the List of WTC-Related Health Conditions in 42 CFR 88.1 is updated.[11] (See also Section VII.A., Effects on Other Agency Programs, below.)

IV. Methods Used by the Administrator To Determine Whether To Add Cancer or Types of Cancer to the List of WTC-Related Health Conditions

For the reasons discussed above and detailed in the notice of proposed rulemaking published in the **Federal Register** on June 13, 2012, the Administrator developed the following hierarchy of methods for determining whether to add cancer or types of cancer to the List of WTC-Related Health Conditions in 42 CFR 88.1. In determining whether to propose that a type of cancer be included on the List, a review of the evidence must demonstrate fulfillment of at least one of the following four methods:

- *Method 1. Epidemiologic Studies of September 11, 2001 Exposed Populations.* A type of cancer may be added to the List if published, peer-reviewed epidemiologic evidence supports a causal association between 9/11 exposures and the cancer type. The following criteria extrapolated from the Bradford Hill criteria will be used to evaluate the evidence of the exposure-cancer relationship:

Strength of the association between a 9/11 exposure and a health effect (including the magnitude of the effect and statistical significance);

consistency of the findings across multiple studies;

biological gradient, or dose-response relationships between 9/11 exposures and the cancer type; and

plausibility and *coherence* with known facts about the biology of the cancer type.

If only a single published epidemiologic study is available for review, the consistency of findings cannot be evaluated and strength of association will necessarily place greater emphasis on statistical significance than on the magnitude of the effect.

- *Method 2. Established Causal Associations.* A type of cancer may be added to the List if there is well-established scientific support published in multiple epidemiologic studies for a causal association between that cancer and a condition already on the List of WTC-Related Health Conditions.

- *Method 3. Review of Evaluations of Carcinogenicity in Humans.* A type of cancer may be added to the List only if *both* of the following criteria for Method 3 are satisfied:

3A. Published Exposure Assessment Information. 9/11 agents were *reported* in a published, peer-reviewed exposure assessment study of responders or survivors who were present in either the New York City disaster area as defined in 42 CFR 88.1, or at the Pentagon, or in Shanksville, Pennsylvania; and

3B. Evaluation of Carcinogenicity in Humans from Scientific Studies. NTP has determined that the 9/11 agent is *known to be a human carcinogen* or is *reasonably anticipated to be a human carcinogen*, and IARC has determined there is *sufficient* or *limited* evidence that the 9/11 agent causes a type of cancer.

- *Method 4. Review of Information Provided by the WTC Health Program Scientific/Technical Advisory Committee.* A type of cancer may be added to the List if the STAC has provided a reasonable basis for adding a type of cancer and the basis for inclusion does not meet the criteria for Method 1, Method 2, or Method 3.

The following schematic illustrates the methodology proposed in the notice of proposed rulemaking and established in this final rule.

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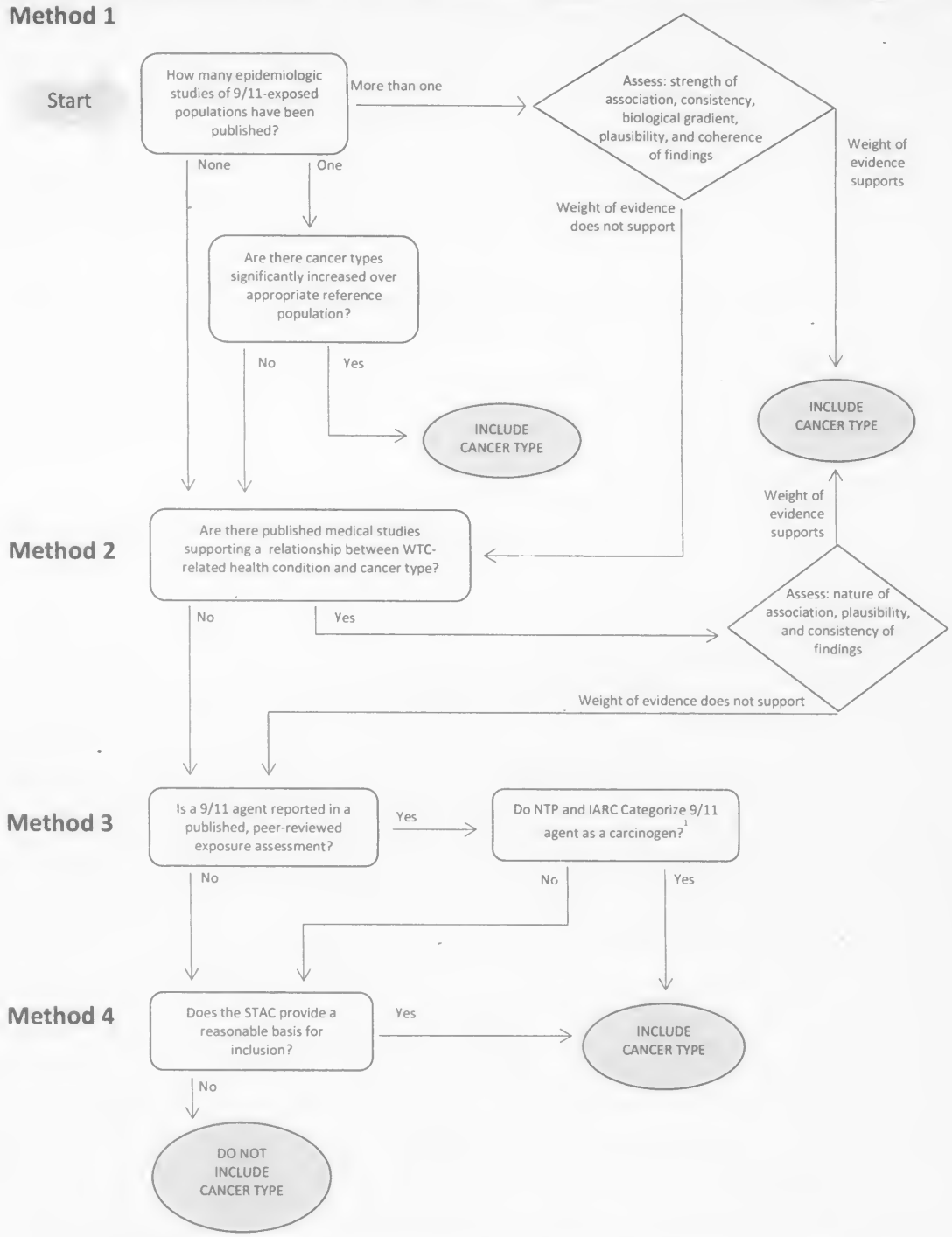
[11] 28 CFR 104.21.



[1] NTP has determined that the 9/11 agent is *known to be a human carcinogen* or *reasonably anticipated to be a human carcinogen*, and IARC has determined there is *sufficient* or *limited* evidence that the 9/11 agent causes a type of cancer.

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V. Administrator's Determination Concerning Petition 001: Addition of Cancers to the List of WTC-Related Health Conditions, 42 CFR 88.1

Using the evidentiary standards established above for inclusion of a cancer on the List of WTC-Related Health Conditions in 42 CFR 88.1, and in accordance with the review of evidence discussed in the notice of proposed rulemaking published in the **Federal Register** on June 13, 2012, the Administrator adds the specific types of cancers in the list below to the List of WTC-Related Health Conditions in 42 CFR 88.1. In the list below, the name of the cancer is followed by its ICD–10 code [12] as well as the method used to include the cancer. A more detailed list, including sub-codes, is included in Table 1 in the regulatory text below.

- Malignant neoplasms of the lip [C00], tongue [C01, C02], salivary gland [C07, C08], floor of mouth [C04], gum and other mouth [C03, C05, C06], tonsil [C09], oropharynx [C10], hypopharynx [C12, C13], other oral cavity and pharynx [C14] (Method 3)
- Malignant neoplasm of the nasopharynx [C11] (Method 3)
- Malignant neoplasms of the nasal cavity [C30] and accessory sinuses [C31] (Method 3)
- Malignant neoplasm of the larynx [C32] (Method 3)
- Malignant neoplasms of the esophagus [C15] (Method 2)
- Malignant neoplasm of the stomach [C16] (Method 3)
- Malignant neoplasms of the colon (and rectum) [C18, C19, C20, C26.0] (Method 3)
- Malignant neoplasms of the liver and intrahepatic bile duct [C22] (Method 3)
- Malignant neoplasms of the retroperitoneum and peritoneum [C48] (Method 3)
- Malignant neoplasms of the trachea [C33]; bronchus and lung [C34]; heart, mediastinum and pleura [C38]; and other ill-defined sites in the respiratory system and intrathoracic organs [C39] (Method 3)
- Mesothelioma [C45] (Method 3)
- Malignant neoplasm of peripheral nerves and autonomic nervous system [C47) and malignant neoplasm of other connective and soft tissue [C49] (Method 3)
- Other malignant neoplasms of skin (non-melanoma) [C44] (Method 3), malignant melanoma of skin [C43] (Method 4), and malignant neoplasm of scrotum [C63.2] (Methods 3)
- Malignant neoplasm of the breast [C50] (Method 4)
- Malignant neoplasm of the ovary [C56] (Method 3)
- Malignant neoplasm of the urinary bladder [C67] (Method 3)
- Malignant neoplasm of the kidney [C64] (Method 3)
- Malignant neoplasm of the renal pelvis, ureter and other urinary organs [C65, C66 and C68] (Method 3)
- Malignant neoplasm of the eye and orbit [C69] (Method 4)
- Malignant neoplasm of thyroid gland [C73] (Method 3)
- Hodgkin's disease [C81]; follicular [nodular] non-Hodgkin lymphoma [C82]; diffuse non-Hodgkin lymphoma [C83]; peripheral and cutaneous T-cell lymphomas [C84]; other and unspecified types of non-Hodgkin lymphoma [C85]; malignant immunoproliferative diseases [C88]; multiple myeloma and malignant plasma cell neoplasms [C90]; lymphoid leukemia [C91]; myeloid leukemia [C92]; monocytic leukemia [C93]; other leukemias of specified cell type [C94]; leukemia of unspecified cell type [C95]; other and unspecified malignant neoplasms of lymphoid, hematopoietic and related tissue [C96] (Method 3)
- Childhood Cancers [any type of cancer occurring in a person less than 20 years of age] (Method 4)
- Rare Cancers [any type of cancer affecting populations smaller than 200,000 individuals in the United States, *i.e.*, occurring at an incidence rate less than 0.08 percent of the U.S. population] (Method 4)

VI. Summary of Final Rule and Response to Public Comments

The final rule amends the definition of "List of WTC-Related Health Conditions" in 42 CFR 88.1, to include the types of cancer referenced above in Section V, which are the cancers proposed in the June 13, 2012, notice of proposed rulemaking (77 FR 35574). Table 1 in the regulatory text describes types of cancers included in 42 CFR 88.1 and identifies each by ICD–10 code. Because the ICD–10 modification will not be used by the U.S. healthcare system until October 1, 2014, the corresponding ICD–9 codes for the included cancer types are also provided in Table 1 in the regulatory text.

The effect of this amendment is that, for the types of cancers added, an enrolled WTC responder, certified-eligible survivor, or screening-eligible survivor may seek certification of a physician's determination that the September 11, 2001, terrorist attacks were substantially likely to be a significant factor in aggravating, contributing to, or causing the individual's cancer. As discussed above, if the condition is certified by the Administrator, the individual may seek treatment and monitoring of this condition under the WTC Health Program.

As described in the Public Participation section, above, the Administrator received 27 substantive submissions from the public on the methodology and the types of cancers proposed in the June 13, 2012 **Federal Register** notice (77 FR 35574). Upon consideration of the public comments, the Administrator has determined not to amend the methodology or the list of cancers in Table 1 of the regulatory text proposed in the June 13, 2012 notice of proposed rulemaking (77 FR 35574). The comments are summarized below, followed by the Administrator's response to each.

Comment: The Administrator received 12 comments in support of adding the proposed types of cancer to the List of WTC-Related Health Conditions. Some commenters expressed support for the specific methodologies proposed by the Administrator, including the use of the NTP and the IARC designations (Method 3). Commenters noted that requiring conclusive epidemiological evidence to add cancers to the List may not be fair to responders and survivors who are ill now, given the time required to collect sufficient data and publish studies in peer-reviewed journals. Some commenters correctly pointed out that an individual's diagnosis must be determined to be related to 9/11 exposure by a WTC Health Program physician and then certified by the Administrator in order for that individual to receive treatment through the Program. Some commenters wrote in support of specific types of cancer for inclusion.

Response: The Administrator agrees that establishing a broad continuum of decision-making methods is important to ensure that WTC responders and survivors receive care for health conditions associated with the September 11, 2001, terrorist attacks.

Comment: The Administrator received three comments opposing the addition of the proposed types of cancer to the List of WTC-Related Health Conditions using the methodology established in this final rule. One commenter concurred with the use of

[12] WHO (World Health Organization) [1997]. International Classification of Diseases, Tenth Revision. Geneva: World Health Organization. The International Classification of Diseases (ICD) is used to code and classify injuries and diseases and their signs, symptoms, and external causes for statistical presentation, disease analysis, hospital records indexing, and medical billing reimbursement.

Methods 1 and 2, but stated that Methods 3 and 4 "leave the door open for speculation and anecdotal evidence to influence the decision process." Two commenters questioned the use of the Zeig-Owens [13] study by the STAC to recommend the addition of types of cancer to the List, *e.g.*, thyroid and melanoma, mentioning the preliminary nature of the results and that the recommended types of cancer do not meet the traditional level of statistical significance. One commenter expressed opposition to Methods 3 and 4 as being overly broad, thus allowing into the Program those individuals who do not truly merit Program benefits.

Response: The Administrator appreciates the comments provided on the four methods proposed for listing types of cancer as WTC-related health conditions. The final rule adopts the methods outlined in the proposed rule. Under sec. 3312(a)(6) of the PHS Act, the Administrator is permitted to consider a wide range of approaches in adding conditions to the List.

The Administrator agrees with the commenter that Methods 1 and 2, which rely on epidemiologic evidence (Method 1) and established medical relationships between a WTC-related health condition and the development of a type of cancer (Method 2), provide traditional methods for associating exposure and health effects as a means of adding conditions to the List of WTC-Related Health Conditions. However, the Administrator also recognizes that there is a continuum of methods that can be used to establish relationships between exposure and disease: some methods are more definitive and provide a higher level of certainty when establishing an association between exposure and disease outcomes. Adding cancers to the List by Methods 1 and 2 fall in that portion of the continuum of methods that provide greater certainty.

However, Methods 1 and 2 are substantially limited in their ability to provide timely guidance on which types of cancer should be added to the List of WTC-Related Health Conditions to allow the WTC Health Program to provide services to the responders and survivors currently suffering from cancers following exposure to 9/11 agents. Due to the long latency period between exposure and cancer diagnosis for most types of cancer, many epidemiological studies of cancer associated with particular exposures are produced years after a given exposure event. Waiting for definitive, scientifically-unassailable epidemiologic results before adding types of cancer to the List would prevent treatment of currently-enrolled WTC responders and survivors.

In addition, other factors make it difficult to establish definitive associations using traditional epidemiologic methods within *any* timeframe. The number of potentially exposed individuals is small, so the statistical power of any study will be substantially limited. Many of the cancers anticipated in the exposed population are uncommon. Thus, because of the anticipated small numbers of these cancers, detecting statistically significant increases will be difficult and may only be definitively established through a retrospective cohort study conducted decades from now. Upon thorough review of all available information, including peer-reviewed studies, expert opinion, the STAC recommendation, and comments from the public, the Administrator has determined that it is reasonable to acknowledge the limitations of traditional epidemiologic methods and to recognize other methods that incorporate additional sources of information.

Because of the limitations of using epidemiologic studies to establish relationships between exposure and health effects, and the WTC Health Program's responsibility to provide services to affected individuals during their lifetime, the Administrator finds that this unique exposure situation merits the use of methods, in addition to Methods 1 and 2, that provide valuable information about the relationship between exposure and health effects. The Administrator acknowledges that Methods 3 and 4 provide less certainty about the relationship between exposure and cancer than do Methods 1 and 2.

Method 3 relies on identifying those agents categorized by the NTP as *known* or *reasonably anticipated* to be human carcinogens and by IARC as being known, probable, or possible human carcinogens and having *sufficient* or *limited* evidence for causing specific types of cancer in humans. IARC and NTP findings, including IARC's identification of agents associated with specific cancer types, have undergone substantial peer review and/or scientific scrutiny in their development.

Method 4 relies on findings from other sources of information relevant to 9/11 exposures and the potential occurrence of cancer, including the expert judgment and personal experiences of STAC members and comments from the public. The statute allows the Administrator to request a recommendation from the STAC. In this case, the Administrator requested a recommendation from the STAC as well as descriptions of the scientific and/or technical evidence members relied on, the quality of data supporting the evidence, and the methods used. The Administrator found the STAC recommendations and their bases to be reasonable.

Two comments correctly pointed out that the Zeig-Owens study, which was cited as evidence by the STAC, was viewed by the Administrator as not meeting the statistical significance threshold for Method 1. However, the Administrator made the determination to include certain cancers (e.g. thyroid and melanoma) using Method 4 based on a reasonable recommendation from the STAC. The interpretation of statistical significance can vary between knowledgeable observers. The STAC interpreted the Zeig-Owens results as a sound basis for recommending the addition of some types of cancer to the List when the reported statistical significance of findings in the study was near the traditional 95 percent confidence level. The Administrator has determined that the STAC's interpretation is reasonable.

The evidence cited by the STAC for including thyroid cancer and melanoma in their recommendation was that the Standardized Incidence Ratios (SIR) were substantially greater than 1.0 and approached the 95 percent confidence level traditionally used for statistical significance. The STAC also considered other types of cancer that had an elevated SIR in the Zeig-Owens study, such as prostate cancer, and did not recommend them for addition after considering additional information on potential surveillance bias. Thus, the STAC made reasonable arguments for the addition or exclusion of certain types of cancer. The STAC did not limit the basis of its recommendations to a level of statistical significance that would be recognized by all knowledgeable observers of epidemiologic studies.

Finally, the Administrator notes that listing a cancer as a WTC-related health condition does not necessarily mean that a cancer in an individual WTC responder or survivor will be determined to be WTC-related. Each WTC responder and survivor enrolled in the Program will go through a physician's determination and Program certification process to assess whether their individual cancer meets the

[13] Zeig-Owens R, Webber MP, Hall CB, Schwartz T, Jaber N, Weakley J, Rohan TE, Cohen HW, Derman O, Aldrich TK, Kelly K, Prezant DJ (2011). Early Assessment of Cancer Outcomes in New York City Firefighters After the 9/11 Attacks: An Observational Cohort Study. Lancet. 378(9794):898–905.

statutory definition of a WTC-related health condition. When determining whether an individual's cancer has been contributed to, aggravated by, or caused by their exposures at the 9/11 sites, individual medical history and exposure assessment are used as part of the determination and certification process. Guidelines for physician determinations regarding WTC-related health conditions are jointly developed by the CCEs and the WTC Health Program for all conditions currently on the List. The CCEs and WTC Health Program will develop additional assessment information for use by physicians in making determinations regarding whether an individual's 9/11 exposure may have contributed to, aggravated, or caused their cancer.

Comment: One commenter stated that the STAC's recommendations do not merit the same decision-making weight as Methods 1 and 2 because most of the committee is not rigorously trained in epidemiology and biostatistics.

Response: The Administrator acknowledges the diverse background of the STAC members, but notes that the composition of the STAC was established in sec. 3302(a) of the PHS Act to provide a broad spectrum of backgrounds and expertise to the Administrator. The inclusion of non-scientists on the STAC adds value, knowledge, and perspective to the STAC that might not otherwise be available to the Administrator.

Comment: One commenter was concerned about the potential impact of adding the proposed types of cancer to the List of WTC-Related Health Conditions on the VCF administered by the Department of Justice, and believes that the use of Methods 3 and 4 will overextend the WTC Health Program and the VCF and leave them open to abuse.

Response: The Administrator notes that individuals who are not currently enrolled in the WTC Health Program must first be found to be eligible and qualified to enroll. As discussed above, physician determination and Program certification are two additional steps that must be completed before an individual can receive treatment and monitoring benefits from the Program. Similarly, the VCF employs rigorous standards used to determine individual compensation awards. The Administrator acknowledges the issue of resource limits on the VCF, which is a capped-benefit program. This issue is discussed in Section VII.A below. Further consideration of the potential impact on the VCF is outside the scope of this rulemaking.

Comment: One comment stated that asbestos-related cancers generally have latencies far beyond the 10 years that have passed since September 11, 2001, and that there is great uncertainty in designating asbestos as a cause of stomach or colorectal cancers.

Response: The methodology established in this final rule for adding types of cancer to the List includes identifying those agents categorized by IARC as being known, probable, or possible human carcinogens and having *sufficient* or *limited* evidence for causing specific types of cancer in humans, and by the NTP as being *known* or *reasonably anticipated* to be human carcinogens. IARC and NTP findings have undergone substantial peer review and/or other scientific scrutiny in their development. These authoritative bodies have categorized all forms of asbestos as known human carcinogens, and IARC has determined there is limited evidence that they cause cancer of the stomach and colon.

When determining whether an individual's cancer has been contributed to, aggravated by, or caused by their exposures at the 9/11 sites, an individual medical history and exposure assessment is used as part of the physician determination and Program certification process. Guidelines for physician determinations regarding WTC-related health conditions are jointly developed by the CCEs and the WTC Health Program for conditions on the List. The CCEs and WTC Health Program will develop additional assessment information for use by physicians in making determinations regarding whether an individual's 9/11 exposure may have contributed to, aggravated, or caused their cancer.

Comment: One comment stated that beryllium and beryllium compounds should be removed as an identified exposure agent for all respiratory cancers listed in Table A. Among other reasons, the commenter indicated that the collapse of the World Trade Center was unlikely to have resulted in emissions of beryllium metal and beryllium compounds above levels found in the natural environment.

Response: The quantitative exposures of individuals at the WTC, particularly during the collapse of the towers and for several days afterward, will likely never be fully known. While the concentrations of beryllium dust in settled dust samples collected from around the WTC sites approximate the concentrations in "background" samples, the exposure conditions that have been described (including thick dust clouds, individuals being coated with dust, and large deposits of dust in homes) result in very different exposures than would be expected to be found in industrial settings or in windblown dirt. The Administrator finds that such conditions are likely to result in large, short-term exposures.

The methodology established in this final rule for adding types of cancer to the List includes identifying those agents categorized by IARC as being known, probable, or possible human carcinogens and having *sufficient* or *limited* evidence of carcinogenicity in humans, and by NTP as being *known* or *reasonably anticipated* to be human carcinogens. IARC and NTP findings have undergone substantial peer review and/or other scientific scrutiny in their development. These authoritative bodies have categorized beryllium and beryllium compounds as known human carcinogens, and IARC has determined there is sufficient evidence that they cause cancer of the lung.

Comment: Several commenters recognized the important distinction between a cancer being included on the List of WTC-Related Health Conditions and the physician determination and Program certification of a specific cancer in an individual responder or survivor. One comment noted that physicians will need guidance to make a determination that a type of cancer is related to the September 11, 2001, terrorist attacks.

Response: The Administrator recognizes the difficulty inherent in determining whether an individual's cancer can be considered WTC-related. Guidelines for physician determinations regarding WTC-related health conditions are jointly developed by the CCEs and the WTC Health Program for all conditions on the List. The CCEs and WTC Health Program will develop additional assessment information for use by physicians in making determinations regarding whether an individual's 9/11 exposure may have contributed to, aggravated, or caused their cancer.

Comment: One commenter asked that the Administrator exercise authority under the PHS Act to "cover a specific type of cancer in individual cases, notwithstanding the review and determination of when to generally add a type of cancer to the list of covered WTC conditions."

Response: The Administrator will use his authority under sec. 3312 of the Act and as detailed in 42 CFR 88.13 to cover a condition medically-associated with a condition on the List of WTC-Related Health conditions, as appropriate.

Comment: The Administrator received a number of comments

requesting the addition of one or more types of cancer. Six commenters asked that cancer of the prostate be added to the List. One commenter asked that cancers of the brain and pancreas also be added to the List. Another commenter asked for the addition of melanoma, thyroid, and non-Hodgkin lymphoma to the List. One of the commenters stated that the Administrator did not address a STAC recommendation to add pre-malignant and myelodysplastic diseases.

Response: The issue of whether to recommend the addition of cancers of the prostate, brain, and pancreas to the List of WTC-Related Health Conditions was considered and discussed by the STAC in the open meeting on March 28, 2012. In those discussions, the STAC considered the available evidence for recommending the addition of cancers of the prostate, brain, and pancreas, including the epidemiologic evidence and the NTP and IARC reviews. Following its deliberation on the matter, the STAC voted not to include prostate, brain, or pancreatic cancer in its recommendation.[14] The Administrator concurs with the decision of the STAC and is not adding these cancers to the List of WTC-Related Health Conditions at this time. The addition of these cancers may be reconsidered if additional information on the association of 9/11 exposures and those cancer outcomes becomes available. Regarding the request to add melanoma, thyroid cancer, and non-Hodgkin lymphoma, this final rule specifically includes the addition of melanoma, thyroid cancer, and non-Hodgkin lymphoma to the List of WTC-Related Health Conditions. Finally, the Administrator acknowledges that the STAC's recommendation to add pre-malignant and myelodysplastic diseases was not adopted. This final rule only addresses adding types of cancer to the List. The inclusion of pre-malignant or non-malignant conditions, such as myelodysplastic diseases, may be considered at a later time.

Comment: The Administrator received three comments expressing concern that gaps in data preclude the Administrator from considering cancers and other possible WTC-related health conditions that may affect WTC responders and survivors. Two of the comments expressed concern that the study of female responders and survivors has been lacking. Another commenter also expressed concern for those whose cancer has not been adequately studied or studied at all.

Response: The Administrator is aware of the limitations on the availability of data on cancers and other possible WTC-related health conditions, including the limited information on female responders and survivors. The inclusion of additional types of cancer will be considered at an appropriate time if additional information on the association of 9/11 exposures and cancer outcomes becomes available. The limitations on the availability of data on female responders and survivors will be addressed to the extent possible through analysis of clinical data from medical monitoring examination of responders and survivors; as well as through research studies. The issue of gaps in data regarding non-cancer WTC-related health conditions is outside the scope of this rulemaking.

Comment: Two commenters offered general thoughts about the uncertainty associated with attributing 9/11 exposures to types of cancer, stating that it is not possible to determine which WTC responders and survivors would have been diagnosed with cancer in the absence of 9/11 exposures. These commenters asserted that NYC responders are overcompensated.

Response: For the reasons discussed above, the Administrator has determined that it is appropriate to add the types of cancer in this final rule to the List of WTC-Related Health Conditions in 42 CFR 88.1. While Congress did not include cancers in the statute, the PHS Act directs the Administrator to review all available scientific and medical evidence to determine if cancer or types of cancer should be added to the List and creates various mechanisms for the addition of cancers.[15] The Administrator recognizes the inherent difficulty in determining whether an individual's cancer can be considered WTC-related. Guidelines for physician determinations regarding WTC-related health conditions are jointly developed by the CCEs and the WTC Health Program for all conditions on the List. The CCEs and WTC Health Program will develop additional assessment information for use by physicians in making determinations regarding whether an individual's 9/11 exposure may have contributed to, aggravated, or caused their cancer.

VII. Regulatory Assessment Requirements

A. Executive Order 12866 and Executive Order 13563

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

This rule has been determined to be a "significant regulatory action," under sec. 3(f) of E.O. 12866. Accordingly, this rule has been reviewed by the Office of Management and Budget. The addition of specific types of cancer to the List of WTC-Related Health Conditions by this rule is estimated to cost the WTC Health Program between $2,124,624[16] and $5,019,182[17] (see Table I) for the first year (2013). Because a portion of responders and survivors are also covered by private health insurance, employer-provided insurance (such as FDNY), or Medicare or Medicaid, only a portion of the costs, those costs representing the uninsured, are societal costs. All other costs to the WTC Health Program are transfers. After the implementation of provisions of the Patient Protection and Affordable Care Act (ACA)(Pub. L. 111–148) on January 1, 2014, all of the costs to the WTC Health Program will be transfers. Transfers from FY 2013 through FY 2016 are expected to be between $12,458,535 and $33,308,060 per annum. The final rule does not interfere with State, local, and Tribal governments in the exercise of their governmental functions.

Cost Estimates

The WTC Health Program has, to date, enrolled approximately 55,000 New York City responders and approximately 5,000 survivors, or approximately 60,000 individuals in total. Of that total population, approximately 59,000 individuals were participants in previous WTC medical programs and were 'grandfathered' into the WTC Health Program established by Title XXXIII. These grandfathered members were enrolled without having to

[14] See STAC (World Trade Center Health Program Scientific/Technical Advisory Committee) Letter from Elizabeth Ward, Chair, to John Howard, MD, Administrator [2012]. This letter is included in the docket for this rulemaking. See *http://www.regulations.gov* and *http://www.cdc.gov/niosh/docket/archive/docket257.html.*

[15] See PHS Act, sec. 3312(a)(5) and (6).

[16] Based on a population of 60,000 at the U.S. cancer rate and discounted at 7 percent.

[17] Based on a population of 110,000 at 21 percent above the U.S. cancer rate and discounted at 3 percent.

complete a new member application when the WTC Health Program started on July 1, 2011 and are referred to in the WTC Health Program regulations in 42 CFR part 88 as "currently identified responders" and "currently identified survivors." In addition to those currently identified WTC responders and survivors already enrolled, the PHS Act [18] sets a numerical limitation on the number of eligible members who can enroll in the WTC Health Program beginning July 1, 2011 at 25,000 new WTC responders and 25,000 new certified-eligible WTC survivors [19] (*i.e.*, the statute restricts new enrollment). Since July 1, 2011, a total of approximately 1,000 new WTC responders and new WTC survivors have enrolled in the WTC Health Program, resulting in only a minor impact on the statutory enrollment limits for new members. For the purpose of calculating a baseline estimate of cancer prevalence only, HHS assumed that this gradual rate of enrollment would continue, and that the currently enrolled population numbers would remain around 55,000 WTC responders and 5,000 WTC survivors. The estimate is further based on the average U.S. cancer prevalence rate and 7 percent discount rate.

As it is not possible to identify an upper bound estimate, HHS has modeled another possible point on the continuum. For the purpose of calculating the impact of an increased rate of cancer on the WTC Health Program, this analysis assumes that the entire statutory cap for new WTC responders (25,000) and WTC survivors (25,000) will be filled. Accordingly, this estimate is based on a population of 80,000 responders (55,000 currently identified + 25,000 new) and 30,000 survivors (5,000 currently identified + 25,000 new). The upper cost estimate also assumes an overall increase in population cancer rates of 21 percent due to 9/11 exposure,[20] and costs were discounted at 3 percent. The choice of a 21 percent increase in the risk of cancer of the rate found in the unexposed population is based on findings presented in the only published epidemiologic study of September 11, 2001 exposed populations to date.[21] Given the challenges associated with interpreting the Zeig-Owens findings,[22] we simply characterize 21 percent as a possible outcome rather than asserting the probability that 21 percent is a "likely" outcome.

HHS acknowledges that some cancer cases are not likely to have been caused by exposure to 9/11 agents. The certification of individual cancer diagnoses will be conducted on a case-by-case basis. However, for the purpose of this analysis, HHS has estimated that all diagnosed cancers added to the List will be certified for treatment by the WTC Health Program. Finally, because there are no existing data on cancer rates related to exposure to 9/11 agents at either the Pentagon or in Shanksville, Pennsylvania, HHS has used only data from studies of individuals who were responders or survivors in the New York City disaster area.

Costs of Cancer Treatment

HHS estimated the treatment costs associated with covering the types of cancer in this rulemaking using the methods described below. In the following discussion, the category of "Head and Neck" includes all cancer cases from nasal cavity, nasopharynx, accessory sinuses, and larynx. The survival rates for all cancers in the "Head and Neck" category were approximated using survival rates for cancer of the larynx. The category described as "Lung" in this discussion includes cancer of the trachea, bronchus and lung, heart, mediastinum and pleura, and other sites in the respiratory system and intrathoracic organs. Treatment costs for all respiratory system cancers including "mesothelioma" were approximated by treatment costs for lung cancer. Costs of treatment for the "digestive system" were approximated using the costs of gastric cancer; costs for cancer of the "skin" were approximated using costs for melanoma of the skin; "female reproductive organs" were approximated using costs for cancer of the ovary; "urinary system" cancer was approximated by costs of urinary bladder cancer; and "blood and lymphoid tissue" cancers were approximated using leukemia and lymphoma. The costs for cancer identified with the "endocrine system," the "soft tissue sarcomas," and "eye/orbit" were approximated using costs for treatment of "other" tumors. The "other" category includes treatments costs from the following: salivary gland, nasopharynx, tonsil, small intestine, anus, intrahepatic bile duct, gallbladder, other biliary, retroperitoneum, peritoneum, other digestive organs, nose, nasal cavity, middle ear, larynx, pleura, trachea, mediastinum and other respiratory organs, bones and joints, soft tissue, other nonepithelial skin, vagina, vulva, other female genital organs, penis, other male genital organs, ureter, other urinary organs, eye and orbit, thyroid, other endocrine multiple myeloma, and miscellaneous.

The WTC Health Program obtained data for the cost of providing medical treatment for each cancer type. The costs of treatment for each type of cancer are described in Table A. The costs of treatment are divided into three phases: the costs for the first year following diagnosis, the costs of intervening years or continuing treatment after the first year, and the costs of treatment for the last year of life. The first year costs of cancer treatment are higher due to the initial need for aggressive medical (*e.g.*, radiation, chemotherapy) and surgical care. The costs during last year of life are often dominated by increased hospitalization costs.[23] Therefore, we used three different treatment phase costs to estimate the costs of treatment to be able to best estimate costs in conjunction with expected incidence and long-term survival for each type of cancer.

[18] PHS Act, sec. 3311(a)(4)(A) and sec. 3321(a)(3)(A).

[19] See 42 CFR 88.8(b) for explanation of a certified-eligible survivor.

[20] Zeig-Owens R, Webber MP, Hall CB, Schwartz T, Jaber N, Weakley J, Rohan TE, Cohen HW, Derman O, Aldrich TK, Kelly K, Prezant DJ [2011]. Early Assessment of Cancer Outcomes in New York City Firefighters After the 9/11 Attacks: An Observational Cohort Study. Lancet. 378(9794):898–905.

[21] Zeig-Owens R, Webber MP, Hall CB, Schwartz T, Jaber N, Weakley J, Rohan TE, Cohen HW, Derman O, Aldrich TK, Kelly K, Prezant DJ [2011]. Early Assessment of Cancer Outcomes in New York City Firefighters After the 9/11 Attacks: An Observational Cohort Study. Lancet. 378(9794):898–905.

[22] As Zeig-Owens et al point out, the time interval since 9/11 is short for cancer outcomes, the recorded excess of cancers is not limited to specific sites, and the biological plausibility of chronic inflammation as a possible mediator between WTC-exposure and cancer means that the outcomes remain speculative.

[23] Yabroff KR, Lamont EB, Mariotto A, Warren JL, Topor M, Meekins A, Brown ML [2008]. Cost of Care for Elderly Cancer Patients in the United States. Journal: J Natl Cancer Inst 100(9):630–41.

TABLE A—AVERAGE COSTS OF TREATMENT, MALE AND FEMALE (2011)

Category	Initial (12 month)	Continuing (annual)	Last year of life (12 mos.)
Head and Neck	$28,265	$3,136	$47,730
Digestive System	59,551	2,544	68,242
Respiratory System	45,493	5,026	65,592
Mesothelium	45,493	5,026	65,592
Skin	3,938	1,040	25,351
Female Reproductive Organs	66,527	5,023	64,728
Urinary System	16,926	3,630	40,905
Blood & Lymphoid Tissue	33,312	5,782	69,070
Endocrine System	30,859	3,791	58,623
Soft Tissue Sarcomas	30,859	3,791	58,623
Melanoma	3,938	1,040	25,351
Breast	15,136	1,550	37,684
Eye/Orbit	30,859	3,791	58,623

Source: Yabroff KR, Lamont EB, Mariotto A, Warren JL, Topor M, Meekins A, Brown ML [2008]. Cost of Care for Elderly Cancer Patients in the United States. Journal: J Natl Cancer Inst 100(9):630–41.

These cost figures were based on a study of elderly cancer patients from the Surveillance, Epidemiology, and End Results (SEER) program maintained by the National Cancer Institute using Medicare files.[24] The average costs of treatment described above are given in 2011 prices adjusted using the Medical Consumer Price Index for all urban consumers.[25]

Incident Cases of Cancer

HHS estimated the expected number of cases of cancer that would be observed in a cohort of responders and survivors followed for cancer incidence after September 11, 2001 using U.S. population cancer rates for the cancer types added to the List of WTC-Related Health Conditions under this rulemaking. Demographic characteristics of the cohort were assigned since the actual data are not available for individuals in the responder and survivor populations who have not yet enrolled in the WTC Health Program. Gender and age (at the time of exposure) distributions for responders and survivors were assumed to be the same as current enrollees in the WTC Health Program. According to WTC Health Program data, males comprise 88 percent of the current responder enrollees and 50 percent of survivor enrollees. The age distribution for current enrollees by gender and responder/survivor status is presented in Table B.

TABLE B—PERCENTILES OF CURRENT AGE (ON APRIL 11, 2012) FOR CURRENT ENROLLEES IN THE WTC HEALTH PROGRAM BY GENDER AND RESPONDER/SURVIVOR STATUS

Group	Age percentile (years)								
	Min	1	10	30	50	70	90	99	Max
Male responders	28	32	39	44	49	54	62	74	92
Female responders	28	30	38	44	49	54	62	76	92
Male survivors	12	23	35	46	52	58	67	81	99
Female survivors	12	21	38	49	54	60	68	84	95

HHS assumed race and ethnic origin distributions for responders and survivors according to distributions in the WTC Health Registry cohort:[26] 57 percent non-Hispanic white, 15 percent non-Hispanic black, 21 percent Hispanic, and 8 percent other race/ethnicity for responders and 50 percent non-Hispanic white, 17 percent non-Hispanic black, 15 percent Hispanic, and 18 percent other race/ethnicity for survivors. Follow-up for cancer morbidity for each person began on January 1, 2002 or age 15 years, whichever was later. Age 15 was considered because the cancer incidence rate file did not include rates for persons less than 15 years of age. Follow-up ended on December 31, 2016 or the estimated last year of life, whichever was earlier. The estimated last year of life was used since not all persons would be expected to remain alive at the end of 2016. The estimated last year of life was based on U.S. gender, race, age, and year-specific death rates from CDC Wonder (since rates are currently available through 2008, the rate from 2008 was applied to 2009 and later).[27] A life-table analysis program, LTAS.NET, was used to estimate the expected number of incident cancers for cancer types

[24] Surveillance, Epidemiology, and End Results (SEER) Program (*www.seer.cancer.gov*) Research Data (1973–2006), National Cancer Institute, DCCPS, Surveillance Research Program, Surveillance Systems Branch, released April 2009, based on the November 2008 submission.

[25] Bureau of Labor Statistics. Consumer Price Index *https://research.stlouisfed.org/fred2/series/CPIMEDSL/downloaddata?cid=32419*. Accessed April 23, 2012.

[26] Jordan HT, Brackbill RM, Cone JE, Debchoudhury I, Farfel MR, Greene CM, Hadler JL, Kennedy J, Li J, Liff J, Stayner L, Stellman SD. Mortality Among Survivors of the Sept 11, 2001, Word Trade Center Disaster: Results from the World Trade Center Health Registry Cohort. Lancet 2011;378:879–887. Note: percentages may not sum to 100 percent due to rounding.

[27] Centers for Disease Control and Prevention, National Center for Health Statistics. Compressed Mortality File 1999–2008. CDC WONDER Online Database, compiled from Compressed Mortality File 1999–2008 Series 20 No. 2N, 2011. *http://wonder.cdc.gov/cmf-icd10.html*. Accessed February 15, 2012.

added.[28] HHS calculated cancer incidence rates using data through 2006 from the Surveillance Epidemiology and End Results (SEER) Program, and estimated rates for 2007–2016.[29] The Program applied the resulting gender, race, age, and year-specific cancer incidence rates to the estimated person-years at risk to estimate the expected number of cancer cases for each cancer type starting from year 2002, the first full year following the September 11, 2001, terrorist attacks, to 2016, the last year for which this Program is currently funded.

Prevalence of Cancer

To determine the potential number of persons in the responder and survivor populations with cancer, HHS used the number of incident cases described above for each year starting with 2002 and estimated the prevalence of cancer using survival rate statistics for each incident cancer group through 2016.[30]

Using the incident cases and survival rate statistics for each cancer type, HHS has estimated the prevalence (number of persons living with cancer) of cases during the 15 year period (2002–2016) since September 11, 2001. The resulting table provides for each year from 2002 through 2016, the number of new cases occurring in that year (incidence), the number of individuals who died from their cancer in that year, and the number of persons surviving up to 15 years beyond their first diagnosis with one table for each type of cancer (prevalence).[31] For example, in 2002 there are 23.47 projected new lung cancer cases, which would be listed as incident cases for that year. The survival rate for lung cancer in the first year of diagnosis is 40.6 percent.[32] Therefore the number of deceased persons in 2002 would be 18.78 x (1—0.406) = 11.15. For the lung cancer prevalence table, in year 2003, the number of incident cases would be 20.88 cases. In addition to 20.88 newly diagnosed cases in 2003, there would be the one-year survivors from 2002 which would be 18.78—11.15 (or 18.78 x 0.406) = 7.62 cases. This computation process can be repeated for each year through year 2016. A portion of the lung cancer prevalence table is provided in Table C as an example.

Prevalence tables were created for each type of covered cancer and the results are summarized in Tables E and G. This analysis considers cancers diagnosed in 2002 through 2016.

TABLE C—EXAMPLE FROM PREVALENCE TABLE FOR LUNG CANCER

[Based on 80,000 responders]

Year	Years since exposure to 9/11 agents			Years covered by WTC Health Program			
	2002	2003	2012	2013	2014	2015	2016
1 (incidence)	18.78	20.88	46.53	51.22	56.10	60.69	66.03
2		7.62	17.00	18.89	20.79	22.78	24.64
3			9.25	10.18	11.30	12.45	13.63
4			6.42	7.08	7.79	8.66	9.53
5			4.95	5.46	6.02	6.62	7.35
6			4.01	4.45	4.90	5.40	5.94
7			3.28	3.67	4.07	4.49	4.94
8			2.71	3.03	3.38	3.76	4.14
9			2.55	2.49	2.78	3.10	3.45
10			2.15	2.38	2.33	2.60	2.90
11			1.78	1.98	2.20	2.14	2.40
12				1.66	1.84	2.04	1.99
13					1.52	1.69	1.88
14						1.42	1.58
15							1.35
Live cases from previous years			54.11	61.26	68.94	77.16	85.74
Prevalence	18.78	28.50	100.64	– 112.48	125.03	137.85	151.78
Last year of life	11.15	15.46	39.38	43.54	47.87	52.10	56.79

Cost Computation

To compute the costs for each type of cancer, HHS assumes that all of the individuals who are diagnosed with a cancer type will be certified by the WTC Health Program for treatment and monitoring services. The treatment costs for the first year of treatment (Table A, year adjusted) were applied to the predicted newly incident (Year 1) cases for each year. Likewise, the costs of treatment for the last year of life were applied in each year to the number of people predicted to die from their cancer in that year. The costs of continuing treatment from Table 1 were applied to the number of prevalent cases who had survived their cancers beyond their year of diagnosis, for each year of survival (Year 2–15).

Using this procedure, a cost table is constructed for each year covered by the WTC Health Program. Table D provides an illustrative example for lung cancer. The row for Year 1 is the cost of incident cases for that year. Rows 2–15 show the cost from continuing care for persons surviving n-years beyond the year of diagnosis. Finally, the cost of last year of life treatment is computed by multiplying the cost for last year of life from Table A by the number of persons dying in that year from that type of cancer.

[28] Schubauer-Berigan MK, Hein MJ, Raudabaugh WM, Ruder AM, Silver SR, Spaeth S, Steenland K, Petersen MR, and Waters KM [2011]. Update of the NIOSH Life Table Analysis System: A Person-Years Analysis program for the Windows Computing Environment. American Journal of Industrial Medicine 54:915–924.

[29] National Cancer Institute, Surveillance Epidemiology and End Results (SEER). *http://seer.cancer.gov/*. Accessed May 27, 2012.

[30] National Cancer Institute, Surveillance Epidemiology and End Results (SEER). *http://seer.cancer.gov/*. Accessed May 27, 2012.

[31] The 15-year survival limit is imposed based on the analytic time horizon.

[32] National Cancer Institute, Surveillance Epidemiology and End Results (SEER). *http://seer.cancer.gov/*. Accessed May 27, 2012.

TABLE D—COST PER 80,000 RESPONDERS FOR LUNG CANCER (2011$)

Year	Years covered by the WTC Health Program			
	2013	2014	2015	2016
1	$914,986	$1,002,168	$1,084,205	$1,179,677
2	91,825	101,077	110,708	119,770
3	49,469	54,959	60,497	66,261
4	34,408	37,865	42,068	46,306
5	26,537	29,228	32,165	35,735
6	21,624	23,850	26,268	28,908
7	17,840	19,797	21,834	24,048
8	14,727	16,468	18,274	20,155
9	12,080	13,500	15,096	16,751
10	11,608	11,311	12,641	14,135
11	9,642	10,706	10,433	11,659
12	8,032	8,932	9,917	9,664
13	.....	7,393	8,221	9,128
14	.....	.....	6,936	7,714
15	.....	.....	.....	6,571
Prevalent care	1,212,778	1,337,254	1,459,263	1,589,911
Last year of life care	2,762,609	3,037,261	3,305,416	3,603,198
Total	3,975,387	4,374,515	4,764,679	5,193,109

The sum of the annual costs for the years 2013 through 2016 represents the estimated treatment costs to the WTC Health Program for coverage of lung cancer for 80,000 responders. The cost projections in Table D are based on an assumed responder population size of 80,000.

The same process described above was applied to the survivor cohort. Based on the incidence rate expected from the survivor cohort, prevalence tables were constructed for each covered type of cancer.

The estimated treatment costs for responders and survivors were recomputed under the following two assumptions: (1) the rate of cancer in the WTC Health Program is equal to the rate of cancer observed in the general population; and (2) the rate of cancer exceeds the general population rate by 21 percent due to their exposures in the New York City disaster area.[33] HHS is not aware of any other estimates of excess cancer rates in the 9/11-exposed population in the peer-reviewed literature.

A summary of the estimated prevalence at the U.S. population average for the assumed population of 55,000 responders and 5,000 survivors is provided in Table E. A summary of the estimated treatment costs to the WTC Health Program is provided in Table F.

A summary of the estimated prevalence using cancer rates 21 percent over the U.S. population average for the increased rate of 80,000 responders and 30,000 survivors is given in Table G. A summary of the estimated treatment costs to the WTC Health Program is provided in Table H.

TABLE E—ESTIMATED PREVALENCE BY YEAR AND CANCER TYPE BASED ON 55,000 AND 5,000 RESPONDER AND SURVIVOR POPULATION, RESPECTIVELY AND ASSUMING CANCER RATES AT U.S. POPULATION AVERAGE

Cancer type	Prevalence (incident + live cases)			
	2013	2014	2015	2016
Based on 55,000 responder population				
Head & Neck	89.41	99.20	109.35	119.83
Digestive System	136.54	150.69	165.19	180.38
Respiratory System	77.91	86.61	95.50	105.16
Mesothelioma	1.02	1.12	1.23	1.35
Skin	11.04	12.22	13.43	14.71
Female Reproductive Organs	5.14	5.64	6.14	6.65
Urinary System	108.78	121.39	134.69	148.90
Blood & Lymphoid Tissue	119.72	130.72	141.97	153.71
Endocrine System	53.50	58.75	64.05	69.40
Soft Tissue Sarcomas	11.02	11.86	12.67	13.47
Melanoma	134.33	149.37	165.05	181.42
Breast	102.30	113.46	124.91	136.66
Eye/Orbit	3.89	4.29	4.71	5.14

[33] Zeig-Owens R, Webber MP, Hall CB, Schwartz T, Jaber N, Weakley J, Rohan TE, Cohen HW, Derman O, Aldrich TK, Kelly K, Prezant DJ [2011]. Early Assessment of Cancer Outcomes in New York City Firefighters After the 9/11 Attacks: An Observational Cohort Study. Lancet. 378(9794):898–905. Limitations of the Zeig-Owens study include: limited information on specific exposures experienced by firefighters; short time for follow-up of cancer outcomes; speculation about the biological plausibility of chronic inflammation as a possible mediator between WTC-exposure and cancer outcomes; and potential unmeasured confounders.

TABLE E—ESTIMATED PREVALENCE BY YEAR AND CANCER TYPE BASED ON 55,000 AND 5,000 RESPONDER AND SURVIVOR POPULATION, RESPECTIVELY AND ASSUMING CANCER RATES AT U.S. POPULATION AVERAGE—Continued

Cancer type	Prevalence (incident + live cases)			
	2013	2014	2015	2016
Total	854.59	945.32	1038.88	1136.78
Based on 5,000 survivor population				
Head & Neck	7.78	7.78	7.78	7.78
Digestive System	15.48	15.48	15.48	15.48
Respiratory System	10.28	10.28	10.28	10.28
Mesothelioma	0.10	0.10	0.10	0.10
Skin	1.13	1.13	1.13	1.13
Female Reproductive Organs	2.58	2.58	2.58	2.58
Urinary System	10.47	10.47	10.47	10.47
Blood & Lymphoid Tissue	12.48	12.48	12.48	12.48
Endocrine System	4.29	4.29	4.29	4.29
Soft Tissue Sarcomas	0.96	0.96	0.96	0.96
Melanoma	12.21	13.58	15.00	16.49
Breast	9.30	10.31	11.36	12.42
Eye/Orbit	0.35	0.39	0.43	0.47
Total	87.41	89.83	92.33	94.93

TABLE F—ESTIMATED TREATMENT COSTS BY YEAR AND CANCER TYPE BASED ON 55,000 AND 5,000 RESPONDER AND SURVIVOR POPULATION, RESPECTIVELY AND ASSUMING CANCER RATES AT U.S. POPULATION AVERAGE (2011$)

Cancer type	2013	2014	2015	2016	2013–2016
Based on 55,000 responder population					
Head & Neck	$925,673	$1,007,744	$1,089,966	$1,164,226	$4,187,609
Digestive System	4,181,699	4,525,672	4,856,402	5,191,940	18,755,713
Respiratory System	2,832,704	3,117,317	3,395,504	3,701,062	13,046,587
Mesothelioma	49,088	54,012	58,869	64,417	226,387
Skin	18,078	20,075	21,834	23,072	83,059
Female Reproductive Organs	121,957	130,292	137,643	144,194	534,086
Urinary System	1,278,299	1,398,867	1,521,993	1,642,997	5,842,157
Blood & Lymphoid Tissue	2,224,916	2,391,015	2,551,304	2,697,317	9,864,552
Endocrine System	362,248	385,533	408,544	419,353	1,575,678
Soft Tissue Sarcomas	148,358	158,024	167,208	175,680	649,270
Melanoma	229,538	249,805	270,744	284,528	1,034,615
Breast	420,290	453,613	485,454	510,289	1,869,646
Eye/Orbit	36,018	39,242	42,470	45,255	162,985
Total	12,828,867	13,931,212	15,007,935	16,064,330	57,832,344
Based on 5,000 survivor population					
Head & Neck	77,325	82,580	87,736	92,044	339,685
Digestive System	471,917	502,369	531,352	559,893	2,065,532
Respiratory System	362,274	389,675	416,326	444,551	1,612,827
Mesothelioma	4,625	4,974	5,291	5,659	20,549
Skin	1,843	2,034	2,196	2,300	8,372
Female Reproductive Organs	58,454	61,173	63,740	65,729	249,097
Urinary System	119,698	128,808	137,954	146,467	532,927
Blood & Lymphoid Tissue	229,578	245,051	259,869	272,842	1,007,340
Endocrine System	60,893	62,633	63,909	64,476	251,910
Soft Tissue Sarcomas	14,017	14,748	15,415	15,960	60,140
Melanoma	30,943	32,541	33,962	35,142	132,588
Breast	230,196	241,382	251,227	258,804	981,609
Eye/Orbit	3,434	3,642	3,832	3,994	14,903
Total	1,665,197	1,771,611	1,872,809	1,967,862	7,277,478
Total					
Head & Neck	1,002,998	1,090,324	1,177,702	1,256,270	4,527,294
Digestive System	4,653,616	5,028,041	5,387,754	5,751,833	20,821,244
Respiratory System	3,194,979	3,506,992	3,811,830	4,145,613	14,659,414
Mesothelioma	53,713	58,987	64,160	70,076	246,936
Skin	19,921	22,109	24,030	25,371	91,431

TABLE F—ESTIMATED TREATMENT COSTS BY YEAR AND CANCER TYPE BASED ON 55,000 AND 5,000 RESPONDER AND SURVIVOR POPULATION, RESPECTIVELY AND ASSUMING CANCER RATES AT U.S. POPULATION AVERAGE (2011$)—Continued

Cancer type	2013	2014	2015	2016	2013–2016
Female Reproductive Organs	180,411	191,466	201,383	209,923	783,183
Urinary System	1,397,997	1,527,675	1,659,948	1,789,465	6,375,084
Blood & Lymphoid Tissue	2,454,494	2,636,067	2,811,173	2,970,159	10,871,892
Endocrine System	423,141	448,166	472,452	483,829	1,827,588
Soft Tissue Sarcomas	162,376	172,772	182,622	191,640	709,410
Melanoma	260,481	282,346	304,706	319,670	1,167,203
Breast	650,486	694,995	736,681	769,093	2,851,255
Eye/Orbit	39,452	42,885	46,302	49,250	177,888
Total	14,494,064	15,702,823	16,880,744	18,032,192	65,109,823

TABLE G—ESTIMATED PREVALENCE BY YEAR AND CANCER TYPE BASED ON 80,000 AND 30,000 RESPONDER AND SURVIVOR POPULATION, RESPECTIVELY AND ASSUMING INCIDENCE OF CANCER IS 21% HIGHER THAN THE U.S. POPULATION DUE TO 9/11 EXPOSURE

Cancer type	Prevalence (incident + live cases)			
	2013	2014	2015	2016
Based on 80,000 responder population				
Head & Neck	157.36	174.59	192.45	210.91
Digestive System	240.31	265.21	290.74	317.47
Respiratory System	137.12	152.43	168.07	185.08
Mesothelioma	1.79	1.98	2.16	2.38
Skin	19.43	21.50	23.64	25.89
Female Reproductive Organs	9.05	9.92	10.81	11.71
Urinary System	191.45	213.66	237.05	262.06
Blood & Lymphoid Tissue	210.70	230.07	249.86	270.52
Endocrine System	94.16	103.40	112.73	122.15
Soft Tissue Sarcomas	19.40	20.87	22.29	23.70
Melanoma	236.42	262.90	290.50	319.30
Breast	180.05	199.69	219.84	240.52
Eye/Orbit	6.85	7.56	8.29	9.05
Total	1504.09	1663.77	1828.43	2000.74
Based on 30,000 survivor population				
Head & Neck	56.51	56.51	56.51	56.51
Digestive System	112.39	112.39	112.39	112.39
Respiratory System	74.61	74.61	74.61	74.61
Mesothelioma	0.70	0.70	0.70	0.70
Skin	8.21	8.21	8.21	8.21
Female Reproductive Organs	18.73	18.73	18.73	18.73
Urinary System	76.04	76.04	76.04	76.04
Blood & Lymphoid Tissue	90.61	90.61	90.61	90.61
Endocrine System	31.11	31.11	31.11	31.11
Soft Tissue Sarcomas	6.94	6.94	6.94	6.94
Melanoma	88.66	98.59	108.94	119.74
Breast	67.52	74.88	82.44	90.20
Eye/Orbit	2.57	2.83	3.11	3.39
Total	634.60	652.16	670.34	689.18

TABLE H—ESTIMATED TREATMENT COSTS BY YEAR AND CANCER TYPE BASED ON 80,000 AND 30,000 RESPONDER AND SURVIVOR POPULATION, RESPECTIVELY AND ASSUMING INCIDENCE OF CANCER IS 21% HIGHER THAN THE U.S. POPULATION DUE TO 9/11 EXPOSURE (2011$)

Cancer type	2013	2014	2015	2016	2013–2016
Based on 80,000 responder population					
Head & Neck	$1,656,113	$1,802,945	$1,950,049	$2,082,906	$7,492,013
Digestive System	7,481,440	8,096,839	8,688,544	9,288,852	33,555,675
Respiratory System	5,067,965	5,577,164	6,074,865	6,621,536	23,341,531
Mesothelioma	87,823	96,633	105,323	115,248	405,027

TABLE H—ESTIMATED TREATMENT COSTS BY YEAR AND CANCER TYPE BASED ON 80,000 AND 30,000 RESPONDER AND SURVIVOR POPULATION, RESPECTIVELY AND ASSUMING INCIDENCE OF CANCER IS 21% HIGHER THAN THE U.S. POPULATION DUE TO 9/11 EXPOSURE (2011$)—Continued

Cancer type	2013	2014	2015	2016	2013–2016
Skin	32,344	35,916	39,063	41,278	148,600
Female Reproductive Organs	218,192	233,104	246,256	257,976	955,528
Urinary System	2,286,993	2,502,701	2,722,984	2,939,472	10,452,150
Blood & Lymphoid Tissue	3,980,577	4,277,744	4,564,514	4,825,745	17,648,581
Endocrine System	648,095	689,754	730,922	750,261	2,819,031
Soft Tissue Sarcomas	265,426	282,719	299,150	314,308	1,161,603
Melanoma	410,664	446,924	484,385	509,047	1,851,021
Breast	751,937	811,554	868,522	912,953	3,344,966
Eye/Orbit	64,439	70,208	75,983	80,965	291,595
Total	22,952,009	24,924,205	26,850,560	28,740,547	44,654,652
Based on 30,000 survivor population					
Head & Neck	467,817	499,610	530,802	556,869	2,055,097
Digestive System	2,855,098	3,039,331	3,214,682	3,387,354	12,496,466
Respiratory System	2,191,761	2,357,535	2,518,774	2,689,533	9,757,602
Mesothelioma	27,979	30,096	32,010	34,239	124,324
Skin	11,149	12,304	13,285	13,912	50,650
Female Reproductive Organs	353,646	370,100	385,629	397,662	1,507,036
Urinary System	724,172	779,285	834,625	886,127	3,224,209
Blood & Lymphoid Tissue	1,388,944	1,482,561	1,572,207	1,650,695	6,094,408
Endocrine System	368,403	378,927	386,647	390,079	1,524,055
Soft Tissue Sarcomas	84,805	89,226	93,258	96,557	363,846
Melanoma	187,204	196,873	205,471	212,608	802,156
Breast	1,392,687	1,460,361	1,519,924	1,565,763	5,938,735
Eye/Orbit	20,776	22,037	23,182	24,166	90,160
Total	4,912,377	5,256,038	5,588,087	5,914,152	21,670,654
Total					
Head & Neck	2,123,930	2,302,555	2,480,851	2,639,775	9,547,110
Digestive System	10,336,538	11,136,171	11,903,227	12,676,206	46,052,141
Respiratory System	7,259,726	7,934,699	8,593,639	9,311,069	33,099,133
Mesothelioma	115,803	126,729	137,333	149,487	529,350
Skin	43,493	48,220	52,348	55,190	199,251
Female Reproductive Organs	571,838	603,204	631,884	655,638	2,462,564
Urinary System	3,011,165	3,281,986	3,557,609	3,825,599	13,676,358
Blood & Lymphoid Tissue	5,369,522	5,760,305	6,136,721	6,476,440	23,742,988
Endocrine System	1,016,497	1,068,681	1,117,568	1,140,340	4,343,086
Soft Tissue Sarcomas	350,231	371,945	392,408	410,864	1,525,449
Melanoma	597,868	643,798	689,857	721,654	2,653,177
Breast	2,144,624	2,271,916	2,388,445	2,478,716	9,283,702
Eye/Orbit	85,215	92,244	99,165	105,132	381,756
Total	33,026,449	35,642,452	38,181,054	40,646,111	147,496,066

Summary of Costs and Transfers

Because HHS lacks data to account for either recoupment by health insurance or workers' compensation insurance or reduction by Medicare/Medicaid payments, the estimates offered here are reflective of estimated WTC Health Program costs only. This analysis offers an assumption about the number of individuals who might enroll in the WTC Health Program, and estimates the impact of both a low rate of cancer (U.S. population average rate) and an increased rate (21 percent greater than the U.S. population average) on the number of cases and the resulting estimated treatment costs to the WTC Health Program. This analysis does not include administrative costs associated with certifying additional diagnoses of cancers that are WTC-related health conditions that might result from this action. Those costs were addressed in the interim final rule that established regulations for the WTC Health Program (76 FR 38914, July 1, 2011).

Costs and transfers of screening have been added to the summary estimates. The screening indicated by this rulemaking follows U.S. Preventive Services Task Force (USPSTF) guidelines.

The USPSTF recommends screening for colorectal cancer (cancer of the colon and rectum) using fecal occult blood testing (FOBT), sigmoidoscopy, or colonoscopy, in adults, beginning at age 50 years and continuing until age 75 years.[34] The costs and transfers include the costs of one FOBT for all Program enrollees who are over the age of 50 in 2013, and for those who will reach 50 years of age in 2014 through 2016. In the general population, HHS expects there to be 9 percent positive tests. In a previous study[35] of those with positive

[34] United States Preventive Services Task Force (USPSTF) [2008]. Screening for Colorectal Cancer. *http://www.uspreventiveservicestaskforce.org/uspstf/uspscolo.htm.* Accessed May 28, 2012.

[35] Mandel JS, et. al, Reducing Mortality From Colorectal Cancer by Screening for Fecal Occult Blood, NEJM 328(19): 1365–1371 (1993).

tests who were outside the study university system, 44 percent had a colonoscopy, 42 percent had flexible sigmoidoscopy, 11 percent had repeat FOBT, and 3 percent were told by their physician that no further examination was necessary. HHS applied these rates to the population and assigned costs for each test assuming FOBT cost was $7.60, sigmoidoscopy was $238, and a colonoscopy was $674.[36]

The USPSTF recommends breast cancer screening using biennial mammography for women beginning at age 40. HHS assumed that the population of responders was 12 percent female and the population of survivors was 50 percent female. Based on age distribution information available, HHS estimated the number of women eligible for screening between 2013 and 2016. For those screened in 2013 HHS predicted repeat screening in 2015 and for those screened in 2014 HHS predicted repeat screening in 2016. The cost of a mammogram was estimated at $139.32 based on FECA rates for mammography.[37]

Some responders and survivors enrolled or expected to enroll in the WTC Health Program already have or have access to medical insurance coverage by private health insurance, employer-provided insurance, Medicare, or Medicaid. Therefore, costs to the WTC Health Program can be divided between societal costs and transfer payments.

To describe these societal costs and transfers, the following assumptions were used. For the period of coverage between January 1, 2013 and December 31, 2013, HHS has assumed that 16.3 percent of the survivor population will be uninsured, or based on grandfathered enrollment of responders, 16,925 are covered by the FDNY health plan, while 39,482 are listed as general responders and include construction workers, contractors, and others. For this analysis, HHS assumed that the non-FDNY general responders and all future responder-enrollees are uninsured at the same 16.3 percent rate that HHS applied to the survivor population, based on those without insurance coverage in the general U.S. population.[38] Ward et al.[39] found that access to health care services, quality of care received, stage of disease at diagnosis, and survival outcomes for cancer patients varied according to socioeconomic status and demographic characteristics.

Additionally, after the implementation of provisions of the ACA on January 1, 2014, all of the enrollees and future enrollees can be assumed to have or have access to medical insurance coverage other than through the WTC Health Program. Therefore, all treatment costs to be paid by the WTC Health Program from 2014 through 2016 are considered transfers.

Table I describes the allocation of WTC Health Program costs between societal costs and transfer payments based on 55,000 responders and 5,000 survivors and, alternatively, 80,000 responders and 30,000 survivors.

TABLE I—BREAKDOWN OF ESTIMATED ANNUAL WTC HEALTH PROGRAM COSTS AND TRANSFERS, 80,000 & 55,000 RESPONDERS AND 30,000 AND 5,000 SURVIVORS, 2013–2016, 2011$

	Societal Costs for 2013, 2011$		Annualized Transfers for 2013–2016, 2011$	
	Based on the 16.3 percent of general responders and survivors who are expected to be uninsured		Discounted at 7 percent	Discounted at 3 percent
	Cancer rate –		Cancer rate	
	U.S. average	U.S. + 21%	U.S. average	U.S. + 21%
55,000 Responders	$1,648,706		$10,172,308	
5,000 Survivors	271,427		1,572,907	
Colorectal and Breast Screening	204,491		713,321	
60,000 Total	2,124,624		12,458,535	
80,000 Responders		2,631,100		19,912,464
30,000 Survivors		1,970,560		12,124,118
Colorectal and Breast Screening		417,521		1,271,478
110,000 Total		5,019,182		33,308,060

Examination of Benefits (Health Impact)

This section describes qualitatively the potential benefits of the final rule in terms of the expected improvements in the health and health-related quality of life of potential cancer patients treated through the WTC Health Program, compared to no Program. The assessment of the health benefits for cancer patients uses the number of expected cancer cases that was estimated in the cost analysis section.

[36] Subramanian S, et. al. When Budgets Are Tight, There Are Better Options Than Colonoscopies For Colorectal Cancer Screening. Health Affairs, September 2010, 29:9, 1734–1740.

FECA Rates for FOBT, sigmoidoscopy and colonoscopy at non-facility rates: codes 82270, 45330, and 45378 respectively.

[37] FECA rates for Mammography for New York; FECA code 77057.

[38] U.S. Census Bureau [2011]. Current Population Survey. *http://www.census.gov/cps/data/*. Accessed May 26, 2012.

[39] Ward E, Halpern M, Schrag N, Cokkinides V, DeSantis C, Bandi P, Siegel R, Stewart A, Jemal A [2008]. Association of Insurance with Cancer Care Utilization and Outcomes. CA Cancer J Clin 58:9–31.

HHS does not have information on the health of the population that may have been exposed to 9/11 agents and is not currently enrolled in the WTC Health Program. In addition, HHS has only limited information about health insurance and health care services for cancers caused by exposure to 9/11 agents and suffered by any population of responders and survivors, including responders and survivors currently enrolled in the WTC Health Program and responders and survivors not enrolled in the Program. For the purposes of this analysis, HHS assumes that broad trends on demographics and access to health insurance reported by the U.S. Census Bureau and health care services for cancer similar to those reported by Ward would apply to the population of general responders (those individuals who are not members of the FDNY and who meet the eligibility criteria in 42 CFR part 88 for WTC responders) and survivors both within and outside the Program. For the purposes of this analysis, HHS assumes that access to health insurance and health care services for FDNY responders within and outside the Program would be equivalent because this population is overwhelmingly covered by employer-based health insurance.

Although HHS cannot quantify the benefits associated with the WTC Health Program, enrollees with cancer are expected to experience a higher quality of care than they would in the absence of the Program. Mortality and morbidity improvements for cancer patients expected to enroll in the WTC Health Program are anticipated because barriers may exist to access and delivery of quality health care services for cancer patients in the absence of the services provided by the WTC Health Program. HHS anticipates benefits to cancer patients treated through the WTC Health Program, who may otherwise not have access to health care services (16.3 percent of general responders and survivors who are expected to be uninsured), to accrue in 2013. Starting in 2014, continued implementation of the ACA will result in increased access to health insurance and health care services will improve for the general responder and survivor population that currently is uninsured.

Limitations

The analysis presented here was limited by the dearth of verifiable data on the cancer status of responders and survivors who have yet to apply for enrollment in the WTC Health Program. Because of the limited data, HHS was not able to estimate benefits in terms of averted healthcare costs. Nor was HHS able to estimate administrative costs, or indirect costs, such as averted absenteeism, short and long-term disability, and productivity losses averted due to premature mortality.

Regulatory Alternatives

The Administrator considered alternative approaches to the methods set forth in this rulemaking. One alternative would involve a presumption that 9/11 exposures could have resulted in the development of any and all types of cancer in the exposed populations. A presumption that any and all types of cancer could occur after exposure to 9/11 agents does not require any scientific evidence of a positive association between exposure and a type of cancer. The Administrator declined to determine inclusion of types of cancer based on a presumption approach. The STAC affirmatively rejected a recommendation to include any and all types of cancer to the List of WTC-Related Health Conditions. The Administrator made the policy decision to include only those types of cancer when a positive relationship has been established between exposure to the 9/11 agent and human cancer.

Another alternative would be to rely on epidemiologic studies of the association of 9/11 exposures and the development of cancer or a type of cancer in 9/11-exposed populations exclusively. There are several limitations to using an exclusive 9/11 populations study approach. The Administrator finds that vast uncertainties exist in conducting epidemiologic studies of cancer in 9/11-exposed populations. For example, there exists only very limited, individual exposure data in 9/11-exposed populations. This lack of personal, quantitative exposure data impedes the definitive epidemiologic evidence that exposure to 9/11 agents causes certain types of cancer in responder and survivor populations. In addition, cancer is generally a long latency set of diseases which in some cases may take many years or even decades to manifest clinically. Requiring evidence of positive associations from epidemiologic studies of 9/11-exposed populations exclusively does not serve the best interests of WTC Health Program members.

By expanding the scope of scientific information reviewed to include three complementary methods (including studies in 9/11 exposed populations and generally available epidemiologic criteria), the Administrator has developed a hierarchy of methods to guide consideration of whether to include types of cancers on the List of WTC-Related Health Conditions.

Effects on Other Agency Programs

HHS finds that this rulemaking also has an effect on the VCF[40] administered by DOJ. DOJ administers the VCF under rules promulgated at 28 CFR part 104. The DOJ regulations define, in 28 CFR 104.2 (f), the term "WTC-related health condition" to mean "those health conditions identified as WTC-related by Title I of Public Law 111–347 and by regulations implementing that Title." The preamble to the VCF final rule (76 FR 54115) states, "If the WTC Health Program determines that certain forms of cancer should be added to the list of WTC-related conditions, the final rule requires the Special Master to add such conditions to the list of presumptively covered conditions for the Fund."

Under the VCF program, compensation awards are generally calculated using three components: Economic loss plus non-economic loss minus collateral source payments. To determine economic loss, the Special Master considers any prior loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, and loss of business or employment opportunity. The regulations provide presumed non-economic awards for deceased individuals. Because every physical injury is unique, the Special Master may determine presumed non-economic losses on a case-by-case basis for physically injured claimants. The Special Master then subtracts any collateral offsets received or eligible to be received. The computation of individual compensation due under the fund is based on factors pertinent to each individual claimant.

The statute caps the total amount of funds allocated to the VCF. The VCF regulation at 28 CFR 104.51 provides that, "the total amount of Federal funds paid for expenditures including compensation with respect to claims filed on or after October 3, 2011, will not exceed $2,775,000,000. Furthermore, the total amount of

[40] The September 11th Victim Compensation Fund of 2001 (VCF) was initially established in 2001 pursuant to Title IV of Public Law 107–42, 115 Stat. 230 (Air Transportation Safety and System Stabilization Act) and was open for claims from December 21, 2001, through December 22, 2003. Title II of the Zadroga Act amends and reactivates the September 11th Victim Compensation Fund of 2001. Public Law 111–347. Administered through DOJ by a Special Master, the VCF provides compensation to any individual (or a personal representative of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001, or the debris removal efforts that took place in the immediate aftermath of those crashes.

Federal funds expended during the period from October 3, 2011, through October 3, 2016, may not exceed $875,000,000."

To meet these requirements, the Special Master is authorized to reduce the amount of compensation due to each claimant by prorating the total amount of the compensation award determined for each individual claimant. The VCF intends to establish the fraction for proration such that all claimants receive some payment related to their claim within the overall funding limitation of the program. The Special Master may adjust the percentage of the total award that is to be paid to eligible claims based on experiential information as well as estimates related to potential future claims and availability of funds.

The amount of compensation that would be awarded to each of the living claimants who develop, or the heirs of those who died from, a covered type of cancer during the years 2002 through 2016, would be determined by individual factors considered under the VCF. Depending on the total number of new claims and compensation eligibility, the overall impact on the VCF of increasing the number of eligible VCF claimants as a result of adding eligible health conditions under the WTC Health Program may be to reduce the proration fraction that is applied to all VCF claimants such that the total cost to the government remains unchanged. The additional costs to the VCF due to processing and computing the entitlement for the extra claimants eligible as a result of having a covered type of cancer, plus the costs of paying newly covered claimants their prorated share of the compensation award, would result in amounts that will not be available to pay increased shares for the claimants with non-cancer conditions.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires each agency to consider the potential impact of its regulations on small entities including small businesses, small governmental units, and small not-for-profit organizations. HHS believes that this rule has "no significant economic impact upon a substantial number of small entities" within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The WTC Health Program has contracted with the following healthcare providers and provider network managers to offer treatment and monitoring to enrolled responders and survivors: Seven CCEs, which serve responders and survivors in the New York City metropolitan area (City of New York Fire Department; Mount Sinai School of Medicine; Research Foundation of State University of New York; New York University, Bellevue Hospital Center; University of Medicine and Dentistry of New Jersey; Long Island Jewish Medical Center; and New York City Health and Hospitals Corporation); Logistics Health Incorporated, which manages the nationwide provider network for populations geographically distant from New York City; three Data Centers, which analyze CCE data and coordinate activities (City of New York Fire Department; Mount Sinai School of Medicine; and New York City Health and Hospitals Corporation); and Emdeon, which manages pharmacy benefits.

Of these entities, six of the seven CCEs and two of the three Data Centers are hospitals (NAICS 622110—General Medical and Surgical Hospitals). The Small Business Administration (SBA) identifies as a small business those hospitals with average annual receipts below $34.5 million; none of the six fall below the SBA threshold for small businesses. The City of New York Fire Department's Bureau of Health Services, which provides medical monitoring and treatment for FDNY members as a CCE, and provides data analysis and other services for the FDNY CCE as a Data Center, is considered a local government agency (NAICS 922160—Fire Protection), and as such cannot be considered a small entity by SBA. Finally, neither Logistics Health Incorporated, which manages the national provider network, nor Emdeon, which manages pharmacy benefits, (NAICS 551112—Management of Companies and Enterprises) falls below SBA's $7 million threshold for small businesses in that sector.

Because no small businesses are impacted by this rulemaking, HHS certifies that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. Therefore, a regulatory flexibility analysis as provided for under RFA is not required.

C. Paperwork Reduction Act

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, requires an agency to invite public comment on, and to obtain OMB approval of, any regulation that requires 10 or more people to report information to the agency or to keep certain records. Data collection and recordkeeping requirements for the WTC Health Program are approved by OMB under "World Trade Center Health Program Enrollment, Appeals & Reimbursement" (OMB Control No. 0920–0891, exp. December 31, 2014). HHS has determined that no changes are needed to the information collection request already approved by OMB.

D. Small Business Regulatory Enforcement Fairness Act

As required by Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), HHS will report the promulgation of this rule to Congress prior to its effective date.

E. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*) directs agencies to assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector "other than to the extent that such regulations incorporate requirements specifically set forth in law." For purposes of the Unfunded Mandates Reform Act, this final rule does not include any Federal mandate that may result in increased annual expenditures in excess of $100 million by State, local or Tribal governments in the aggregate, or by the private sector. However, the rule may result in an increase in the contribution made by New York City for treatment and monitoring, as required by Title XXXIII, § 3331(d)(2). For 2012, the inflation adjusted threshold is $139 million.

F. Executive Order 12988 (Civil Justice)

This final rule has been drafted and reviewed in accordance with Executive Order 12988, "Civil Justice Reform," and will not unduly burden the Federal court system. This rule has been reviewed carefully to eliminate drafting errors and ambiguities.

G. Executive Order 13132 (Federalism)

HHS has reviewed this final rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have "federalism implications." The rule does not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

H. Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks)

In accordance with Executive Order 13045, HHS has evaluated the environmental health and safety effects of this final rule on children. HHS has

determined that the rule would have no environmental health and safety effect on children, although an eligible child who has been diagnosed with a cancer type specified in this rulemaking may seek certification of the condition by the Administrator.

I. Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use)

In accordance with Executive Order 13211, HHS has evaluated the effects of this final rule on energy supply, distribution or use, and has determined that the rule will not have a significant adverse effect.

J. Plain Writing Act of 2010

Under Public Law 111–274 (October 13, 2010), executive Departments and Agencies are required to use plain language in documents that explain to the public how to comply with a requirement the Federal Government administers or enforces. HHS has attempted to use plain language in promulgating the final rule consistent with the Federal Plain Writing Act guidelines.

VIII. Final Rule

List of Subjects in 42 CFR Part 88

Aerodigestive disorders, Appeal procedures, Cancer, Health care, Mental health conditions, Musculoskeletal disorders, Respiratory and pulmonary diseases.

For the reasons discussed in the preamble, the Department of Health and Human Services amends 42 CFR part 88 as follows:

PART 88—WORLD TRADE CENTER HEALTH PROGRAM

■ 1. The authority citation for part 88 continues to read as follows:

Authority: 42 U.S.C. 300mm–300mm–61, Pub. L. 111–347, 124 Stat. 3623.

■ 2. Amend § 88.1 by adding paragraph (4) to the definition of "List of WTC-related health conditions" to read as follows:

§ 88.1 Definitions.

* * * * *

List of WTC-Related Health Conditions

* * * * *

(4) Cancers: This list includes those individual cancer types specified in Table 1, below, according to the International Classification of Diseases, 10th Edition (ICD–10) and International Classification of Diseases, 9th Edition (ICD–9).

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Table 1 -- List of types of cancer included in the List of WTC-Related Health Conditions

Region	Type of Cancer	ICD-10[1]	ICD-9[2]
Head & Neck	**Malignant neoplasm of lip**	**C00**	**140**
	• External upper lip	• C00.0	• 140.0
	• External lower lip	• C00.1	• 140.1
	• External lip, unspecified	• C00.2	• 140.9
	• Upper lip, inner aspect	• C00.3	• 140.3
	• Lower lip, inner aspect	• C00.4	• 140.4
	• Lip, unspecified, inner aspect	• C00.5	• 140.5
	• Commissure of lip	• C00.6	• 140.6
	• Overlapping lesion of lip	• C00.8	• 140.8
	• Lip, unspecified	• C00.9	• 140.9
	Malignant neoplasm of base of tongue	**C01**	**141.0**
	Malignant neoplasm of other and unspecified parts of tongue	**C02**	**141.1-141.9**
	• Dorsal surface of tongue	• C02.0	• 141.1
	• Border of tongue	• C02.1	• 141.2
	• Ventral surface of tongue	• C02.2	• 141.3
	• Anterior two-thirds of tongue, part unspecified	• C02.3	• 141.4
	• Lingual tonsil	• C02.4	• 141.6
	• Overlapping lesion of tongue	• C02.8	• 141.5, 141.8
	• Tongue, unspecified	• C02.9	• 141.9
	Malignant neoplasm of parotid gland	**C07**	**142.0**
	Malignant neoplasm of other and unspecified major salivary glands	**C08**	**142.1-142.9**
	• Submandibular gland	• C08.0	• 142.1
	• Sublingual gland	• C08.1	• 142.2
	• Overlapping lesion of major salivary glands	• C08.8	• 142.8
	• Major salivary gland, unspecified	• C08.9	• 142.9
	Malignant neoplasm of floor of mouth	**C04**	**144**
	• Anterior floor of mouth	• C04.0	• 144.0
	• Lateral floor of mouth	• C04.1	• 144.1
	• Overlapping lesion of floor of mouth	• C04.8	• 144.8
	• Floor of mouth, unspecified	• C04.9	• 144.9
	Malignant neoplasm of gum	**C03**	**143**
	• Upper gum	• C03.0	• 143.0

	• Lower gum	• C03.1	• 143.1
	• Gum, unspecified	• C03.9	• 143.8-143.9
	Malignant neoplasm of palate	**C05**	**145.2-145.5, 149.9**
	• Hard palate	• C05.0	• 145.2
	• Soft palate	• C05.1	• 145.3
	• Uvula	• C05.2	• 145.4
	• Overlapping lesion of palate	• C05.8	• 145.5
	• Palate, unspecified	• C05.9	• 145.9
	Malignant neoplasm of other and unspecified parts of mouth	**C06**	**145.0-145.1 145.6, 145.8-145.9**
	• Cheek mucosa	• C06.0	• 145.6
	• Vestibule of mouth	• C06.1	• 145.1
	• Retromolar area	• C06.2	• 145.6
	• Overlapping lesion of other and unspecified parts of mouth	• C06.8	• 145.8
	• Mouth, unspecified	• C06.9	• 149.9
	Malignant neoplasm of tonsil	**C09**	**146.0-146.2, 146.5**
	• Tonsillar fossa	• C09.0	• 146.1
	• Tonsillar pillar (anterior)(posterior)	• C09.1	• 146.2
	• Overlapping lesion of tonsil	• C09.8	• 146.5
	• Tonsil, unspecified	• C09.9	• 146.0
	Malignant neoplasm of oropharynx	**C10**	**146.3-146.4, 146.6-146.9**
	• Vallecula	• C10.0	• 146.3
	• Anterior surface of epiglottis	• C10.1	• 146.4
	• Lateral wall of oropharynx	• C10.2	• 146.6
	• Posterior wall of oropharynx	• C10.3	• 146.7
	• Branchial cleft	• C10.4	• 146.9
	• Overlapping lesion of oropharynx	• C10.8	• 146.8
	• Oropharynx, unspecified	• C10.9	• 146.9
	Malignant neoplasm of nasopharynx	**C11**	**147**
	• Superior wall of nasopharynx	• C11.0	• 147.0
	• Posterior wall of nasopharynx	• C11.1	• 147.1
	• Lateral wall of nasopharynx	• C11.2	• 147.2
	• Anterior wall of nasopharynx	• C11.3	• 147.3
	• Overlapping lesion of nasopharynx	• C11.8	• 147.8
	• Nasopharynx, unspecified	• C11.9	• 147.9
	Malignant neoplasm of piriform sinus	**C12**	**148.1**
	Malignant neoplasm of hypopharynx	**C13**	**148.0-148.9**
	• Postcricoid region	• C13.0	• 148.0
	• Aryepiglottic fold, hypopharyngeal aspect	• C13.1	• 148.2
	• Posterior wall of hypopharynx	• C13.2	• 148.3

	• Overlapping lesion of hypopharynx	• C13.8	• 148.8
	• Hypopharynx, unspecified	• C13.9	• 148.9
	Malignant neoplasms of other and ill-defined conditions in the lip, oral cavity and pharynx	**C14**	**149**
	• Pharynx, unspecified	• C14.0	• 149.0
	• Waldeyer's ring	• C14.2	• 149.1
	• Overlapping lesion of lip, oral cavity and pharynx	• C14.8	• 149.8
	Malignant neoplasm of nasal cavity	**C30**	**160.0**
	• Nasal cavity	• C30.0	• 160.0
	Malignant neoplasm of accessory sinuses	**C31**	**160.2-160.9**
	• Maxillary sinus	• C31.0	• 160.2
	• Ethmoidal sinus	• C31.1	• 160.3
	• Frontal sinus	• C31.2	• 160.4
	• Sphenoidal sinus	• C31.3	• 160.5
	• Overlapping lesion of accessory sinuses	• C31.8	• 160.8
	• Accessory sinus, unspecified	• C31.9	• 160.9
	Malignant neoplasm of larynx	**C32**	**161**
	• Glottis	• C32.0	• 161.0
	• Supraglottis	• C32.1	• 161.1
	• Subglottis	• C32.2	• 161.2
	• Laryngeal cartilage	• C32.3	• 161.3
	• Overlapping lesion of larynx	• C32.8	• 161.8
	• Larynx, unspecified	• C32.9	• 161.9
Digestive System	**Malignant neoplasm of the esophagus**	**C15**	**150**
	• Cervical part of esophagus	• C15.0	• 150.0
	• Thoracic part of esophagus	• C15.1	• 150.1
	• Abdominal part of esophagus	• C15.2	• 150.2
	• Upper third of esophagus	• C15.3	• 150.3
	• Middle third of esophagus	• C15.4	• 150.4
	• Lower third of esophagus	• C15.5	• 150.5
	• Overlapping lesion of esophagus	• C15.8	• 150.8
	• Esophagus, unspecified	• C15.9	• 150.9
	Malignant neoplasm of the stomach	**C16**	**151**
	• Cardia	• C16.0	• 151.0
	• Fundus of stomach	• C16.1	• 151.1
	• Body of stomach	• C16.2	• 151.2
	• Pyloric antrum	• C16.3	• 151.3
	• Pylorus	• C16.4	• 151.4
	• Lesser curvature of stomach, unspecified	• C16.5	• 151.5
	• Greater curvature of stomach, unspecified	• C16.6	• 151.6
	• Overlapping lesion of stomach	• C16.8	• 151.8
	• Stomach, unspecified	• C16.9	• 151.9

	Malignant neoplasm of colon	**C18**	**153**
	• Cecum	• C18.0	• 153.4
	• Appendix	• C18.1	• 153.5
	• Ascending colon	• C18.2	• 153.6
	• Hepatic flexure	• C18.3	• 153.6
	• Transverse colon	• C18.4	• 153.1
	• Splenic flexure	• C18.5	• 153.7
	• Descending colon	• C18.6	• 153.2
	• Sigmoid colon	• C18.7	• 153.3
	• Overlapping lesion of colon	• C18.8	• 153.8
	• Colon, unspecified	• C18.9	• 153.9
	Malignant neoplasm of rectosigmoid junction	**C19**	**154.0**
	Malignant neoplasm of rectum	**C20**	**154.1**
	Malignant neoplasm of other and ill-defined digestive organs	**C26.0, C26.8-C26.9**	**154.8**
	• Intestinal tract, part unspecified	• C26.0	• 154.8
	• Overlapping lesion of digestive system	• C26.8	• 154.8
	• Ill-defined sites within the digestive system	• C26.9	• 154.8
	Malignant neoplasm of liver and intrahepatic bile ducts	**C22**	**155**
	• Liver cell carcinoma	• C22.0	• 155.0
	• Intrahepatic bile duct carcinoma	• C22.1	• 155.1
	• Hepatoblastoma	• C22.2	• 155.0
	• Angiosarcoma of liver	• C22.3	• 155.0
	• Other sarcomas of liver	• C22.4	• 155.0
	• Other specified carcinomas of liver	• C22.7	• 155.0
	• Liver, unspecified	• C22.9	• 155.2
	Malignant neoplasm of retroperitoneum and peritoneum	**C48**	**158**
	• Retroperitoneum	• C48.0	• 158.0
	• Specified parts of peritoneum	• C48.1	• 158.8
	• Peritoneum, unspecified	• C48.2	• 158.9
	• Overlapping lesion of retroperitoneum and peritoneum	• C48.8	• 158.8
Respiratory System	**Malignant neoplasm of trachea**	**C33**	**162.0**
	Malignant neoplasm of bronchus and lung	**C34**	**162.2-162.9**
	• Main bronchus	• C34.0	• 162.2
	• Upper lobe, bronchus or lung	• C34.1	• 162.3
	• Middle lobe, bronchus or lung	• C34.2	• 162.4
	• Lower lobe, bronchus or lung	• C34.3	• 162.5
	• Overlapping lesion of bronchus and lung	• C34.8	• 162.8
	• Bronchus or lung, unspecified	• C34.9	• 162.9
	Malignant neoplasm of heart, mediastinum and pleura	**C38**	**164.1-164.9, 163.9**
	• Heart	• C38.0	• 164.1

	• Anterior mediastinum	• C38.1	• 164.2
	• Posterior mediastinum	• C38.2	• 164.3
	• Mediastinum, part unspecified	• C38.3	• 164.9
	• Pleura	• C38.4	• 163.9
	• Overlapping lesion of heart, mediastinum and pleura	• C38.8	• 164.8
	Malignant neoplasm of other and ill-defined sites in the respiratory system and intrathoracic organs	**C39**	**165**
	• Upper respiratory tract, part unspecified	• C39.0	• 165.0
	• Overlapping lesion of respiratory and intrathoracic organs	• C39.8	• 165.8
	• Ill-defined sites within the respiratory system	• C39.9	• 165.9
Mesothelium	**Mesothelioma**	**C45**	**158.8, 163.9, 164.1**
	• Mesothelioma of pleura	• C45.0	• 163.9
	• Mesothelioma of peritoneum	• C45.1	• 158.8
	• Mesothelioma of pericardium	• C45.2	• 164.1
	• Mesothelioma of other sites	• C45.7	No Code
	• Mesothelioma, unspecified	• C45.9	No Code
Soft Tissue	**Malignant neoplasm of peripheral nerves and autonomic nervous system**	**C47**	**171**
	• Peripheral nerves of head, face and neck	• C47.0	• 171.0
	• Peripheral nerves of upper limb, including shoulder	• C47.1	• 171.2
	• Peripheral nerves of lower limb, including hip	• C47.2	• 171.3
	• Peripheral nerves of thorax	• C47.3	• 171.4
	• Peripheral nerves of abdomen	• C47.4	• 171.5
	• Peripheral nerves of pelvis	• C47.5	• 171.6
	• Peripheral nerves of trunk, unspecified	• C47.6	• 171.7
	• Overlapping lesion of peripheral nerves and autonomic nervous system	• C47.8	• 171.8
	• Peripheral nerves and autonomic nervous system, unspecified	• C47.9	• 171.9
	Malignant neoplasm of other connective and soft tissue	**C49**	**171**
	• Connective and soft tissue of head, face and neck	• C49.0	• 171.0
	• Connective and soft tissue of upper limb, including shoulder	• C49.1	• 171.2
	• Connective and soft tissue of lower limb, including hip	• C49.2	• 171.3
	• Connective and soft tissue of thorax	• C49.3	• 171.4
	• Connective and soft tissue of	• C49.4	• 171.5

	abdomen		
	• Connective and soft tissue of pelvis	• C49.5	• 171.6
	• Connective and soft tissue of trunk, unspecified	• C49.6	• 171.7
	• Overlapping lesion of connective and soft tissue	• C49.8	• 171.8
	• Connective and soft tissue, unspecified	• C49.9	• 171.9
Skin (Non-Melanoma)	**Other malignant neoplasms of skin**	**C44**	**172, 187.7**
	• Skin of lip	• C44.0	• 172.0
	• Skin of eyelid, including canthus'	• C44.1	• 172.1
	• Skin of ear and external auricular canal	• C44.2	• 172.2
	• Skin of other and unspecified parts of face	• C44.3	• 172.3
	• Skin of scalp and neck	• C44.4	• 172.4
	• Skin of trunk	• C44.5	• 172.5
	• Skin of upper limb, including shoulder	• C44.6	• 172.6
	• Skin of lower limb, including hip	• C44.7	• 172.7
	• Overlapping lesion of skin	• C44.8	• 172.8
	• Malignant neoplasm of skin, unspecified	• C44.9	• 172.9
	Scrotum	**C63.2**	**187.7**
Melanoma	**Malignant melanoma of skin**	**C43**	**172**
	• Malignant melanoma of lip	• C43.0	• 172.0
	• Malignant melanoma of eyelid, including canthus	• C43.1	• 172.1
	• Malignant melanoma of ear and external auricular canal	• C43.2	• 172.2
	• Malignant melanoma of other and unspecified parts of face	• C43.3	• 172.3
	• Malignant melanoma of scalp and neck	• C43.4	• 172.4
	• Malignant melanoma of trunk	• C43.5	• 172.5
	• Malignant melanoma of upper limb, including shoulder	• C43.6	• 172.6
	• Malignant melanoma of lower limb, including hip	• C43.7	• 172.7
	• Overlapping malignant melanoma of skin	• C43.8	• 173.3
	• Malignant melanoma of skin, unspecified	• C43.9	• 173.9
Breast	**Malignant neoplasm of breast**	**C50**	**174**
	• Nipple and areola	• C50.0	• 174.0
	• Central portion of breast	• C50.1	• 174.1

	• Upper-inner quadrant of breast	• C50.2	• 174.2
	• Lower-inner quadrant of breast	• C50.3	• 174.3
	• Upper-outer quadrant of breast	• C50.4	• 174.4
	• Lower-outer quadrant of breast	• C50.5	• 174.5
	• Axillary tail of breast	• C50.6	• 174.6
	• Overlapping lesion of breast	• C50.8	• 174.8
	• Breast, unspecified	• C50.9	• 174.9
Female Reproductive Organs	**Malignant neoplasm of ovary**	**C56**	**183.0**
Urinary System	**Malignant neoplasm of bladder**	**C67**	**188.0**
	• Trigone of bladder	• C67.0	• 188.0
	• Dome of bladder	• C67.1	• 188.1
	• Lateral wall of bladder	• C67.2	• 188.2
	• Anterior wall of bladder	• C67.3	• 188.3
	• Posterior wall of bladder	• C67.4	• 188.4
	• Bladder neck	• C67.5	• 188.5
	• Ureteric orifice	• C67.6	• 188.6
	• Urachus	• C67.7	• 188.7
	• Overlapping lesion of bladder	• C67.8	• 188.8
	• Bladder, unspecified	• C67.9	• 188.9
	Malignant neoplasms of kidney except renal pelvis	**C64**	**189.0**
	Malignant neoplasm of renal pelvis	**C65**	**189.1**
	Malignant neoplasm of ureter	**C66**	**189.2**
	Malignant neoplasm of other and unspecified urinary organs	**C68**	**189.3-189.9**
	• Urethra	• C68.0	• 189.3
	• Paraurethral gland	• C68.1	• 189.4
	• Overlapping lesion of urinary organs	• C68.8	• 189.8
	• Urinary organ, unspecified	• C68.9	• 189.9
Eye & Orbit	**Malignant neoplasm of eye and adnexa**	**C69**	**190**
	• Conjunctiva	• C69.0	• 190.3
	• Cornea	• C69.1	• 190.4
	• Retina	• C69.2	• 190.5
	• Choroid	• C69.3	• 190.6

	• Ciliary body	• C69.4	• 190.0
	• Lacrimal gland and duct	• C69.5	• 190.2
	• Orbit	• C69.6	• 190.1
	• Overlapping lesion of eye and adnexa	• C69.8	• 190.8
	• Eye, unspecified	• C69.9	• 190.0
Thyroid	**Malignant neoplasm of thyroid gland**	**C73**	**193**
Blood & Lymphoid Tissue	**Hodgkin's disease**	**C81**	*
	• Lymphocytic predominance	• C81.0	• 201.4
	• Nodular sclerosis	• C81.1	• 201.5
	• Mixed cellularity	• C81.2	• 201.6
	• Lymphocytic depletion	• C81.3	• 201.7
	• Other Hodgkin's disease	• C81.7	• 201.0-201.2
	• Hodgkin's disease, unspecified	• C81.9	• 201.9
	Follicular [nodular] non-Hodgkin lymphoma	**C82**	*
	• Small cleaved cell, follicular	• C82.0	• 202.0
	• Mixed small cleaved and large cell, follicular	• C82.1	• 202.0
	• Large cell, follicular	• C82.2	• 202.0
	• Other types of follicular non-Hodgkin lymphoma	• C82.7	• 202.0
	• Follicular non-Hodgkin lymphoma, unspecified	• C82.9	• 202.0
	Diffuse non-Hodgkin lymphoma	**C83**	*
	• Small cell (diffuse)	• C83.0	• 200.8
	• Small cleaved cell (diffuse)	• C83.1	• 202.4
	• Mixed small and large cell (diffuse)	• C83.2	• 200.8
	• Large cell (diffuse)	• C83.3	• 200.0
	• Immunoblastic (diffuse)	• C83.4	• 200.8
	• Lymphoblastic (diffuse)	• C83.5	• 200.1
	• Undifferentiated (diffuse)	• C83.6	• 202.8
	• Burkitt's tumor	• C83.7	• 200.2
	• Other types of diffuse non-Hodgkin lymphoma	• C83.8	• 200.8
	• Diffuse non-Hodgkin lymphoma, unspecified	• C83.9	• 202.0
	Peripheral and cutaneous T-cell lymphomas	**C84**	*
	• Mycosis fungoides	• C84.0	• 202.1
	• Sezary's disease	• C84.1	• 202.2
	• T-zone lymphoma	• C84.2	• 202.8
	• Lymphoepithelioid lymphoma	• C84.3	• 202.8
	• Peripheral T-cell lymphoma	• C84.4	• 202.0
	• Other and unspecified T-cell	• C84.5	• 202.0

	lymphomas		
	Other and unspecified types of non-Hodgkin lymphoma	**C85**	*
	• Lymphosarcoma	• C85.0	• 200.1
	• B-cell lymphoma, unspecified	• C85.1	• 202.8
	• Other specified types of non-Hodgkin lymphoma	• C85.7	• 202.3
	• Non-Hodgkin lymphoma, unspecified type	• C85.9	• 200.8
	Malignant immunoproliferative diseases	**C88**	*
	• Waldenstrom's macroglobulinemia	• C88.0	• 273.3
	• Alpha heavy chain disease	• C88.1	• 203.8
	• Gamma heavy chain disease	• C88.2	• 203.8
	• Immunoproliferative small intestinal disease	• C88.3	• 203.8
	• Other malignant immunoproliferative diseases	• C88.7	• 203.8
	• Malignant immunoproliferative disease, unspecified	• C88.9	• 203.8
	Multiple myeloma and malignant plasma cell neoplasms	**C90**	*
	• Multiple myeloma	• C90.0	• 203.0
	• Plasma cell leukemia	• C90.1	• 203.1
	• Plasmacytoma, extramedullary	• C90.2	• 203.8
	Lymphoid leukemia	**C91**	*
	• Acute lymphoblastic leukemia	• C91.0	• 204.0
	• Chronic lymphocytic leukemia	• C91.1	• 204.1
	• Subacute lymphocytic leukemia	• C91.2	• 204.2
	• Prolymphocytic leukemia	• C91.3	• 204.9
	• Hairy-cell leukemia	• C91.4	• 202.4
	• Adult T-cell leukemia	• C91.5	• 204.8
	• Other lymphoid leukemia	• C91.7	• 204.8
	• Lymphoid leukemia, unspecified	• C91.9	• 204.9
	Myeloid leukemia	**C92**	*
	• Acute myeloid leukemia	• C92.0	• 205.0
	• Chronic myeloid leukemia	• C92.1	• 205.1
	• Subacute myeloid leukemia	• C92.2	• 205.2
	• Myeloid sarcoma	• C92.3	• 205.3
	• Acute promyelocytic leukemia	• C92.4	• 205.0
	• Acute myelomonocytic leukemia	• C92.5	• 205.0
	• Other myeloid leukemia	• C92.7	• 205.8
	• Myeloid leukemia, unspecified	• C92.9	• 205.9
	Monocytic leukemia	**C93**	*
	• Acute monocytic leukemia	• C93.0	• 206.0
	• Chronic monocytic leukemia	• C93.1	• 206.1
	• Subacute monocytic leukemia	• C93.2	• 206.2
	• Other monocytic leukemia	• C93.7	• 206.8
	• Monocytic leukemia, unspecified	• C93.9	• 206.9
	Other leukemias of specified cell type	**C94**	*

	• Acute erythremia and erythroleukemia	• C94.0	• 207.0
	• Chronic erythremia	• C94.1	• 207.1
	• Acute megakaryoblastic leukemia	• C94.2	• 207.2
	• Mast cell leukemia	• C94.3	• 207.8
	• Acute pan myelosis	• C94.4	• 238.7
	• Acute myelofibrosis	• C94.5	• 238.7
	• Other specified leukemias	• C94.7	• 207.8
	Leukemia of unspecified cell type	**C95**	*
	• Acute leukemia of unspecified cell type	• C95.0	• 208.0
	• Chronic leukemia of unspecified cell type	• C95.1	• 208.1
	• Subacute leukemia of unspecified cell type	• C95.2	• 208.2
	• Other leukemia of unspecified cell type	• C95.7	• 208.8
	• Leukemia, unspecified	• C95.9	• 208.9
	Other and unspecified malignant neoplasms of lymphoid, hematopoietic and related tissue	**C96**	*
	• Letterer-Siwe disease	• C96.0	• 202.5
	• Malignant histiocytosis	• C96.1	• 202.3
	• Malignant mast cell tumor	• C96.2	• 202.6
	• True histiocytic lymphoma	• C96.3	• 202.3
	• Other specified malignant neoplasms of lymphoid, hematopoietic and related tissue	• C96.7	• 202.8
	• Malignant neoplasm of lymphoid, hematopoietic and related tissue, unspecified	• C96.9	• 202.9
Childhood cancers	Any type of cancer occurring in a person less than 21 years of age.		
Rare cancers	Any type of cancer affecting populations smaller than 200,000 individuals in the United States, i.e., occurring at an incidence rate less than 0.08 percent of the U.S. population. Rare cancers will be determined on a case-by-case basis.		

*For ICD-10 C81-C96 the following ICD 9 codes correlate: 200-203, 238.7, 273.3, 289.8

1. WHO (World Health Organization) [1978]. International Classification of Diseases, Ninth Revision. Geneva: World Health Organization.
2. WHO (World Health Organization) [1997]. International Classification of Diseases, Tenth Revision. Geneva: World Health Organization.

* * * * *

Dated: September 5, 2012.

John Howard,

Administrator, World Trade Center Health Program and Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, Department of Health and Human Services.

[FR Doc. 2012–22304 Filed 9–10–12; 4:15 pm]

BILLING CODE 4161–18–C

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 090206140–91081–03]

RIN 0648–XC227

Reef Fish Fishery of the Gulf of Mexico; Gulf of Mexico Individual Fishing Quota Programs

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

ACTION: Temporary rule; determination of catastrophic conditions.

SUMMARY: In accordance with the regulations implementing the individual fishing quota (IFQ) programs for the commercial red snapper and grouper/tilefish components of the reef fish fishery in the Gulf of Mexico (Gulf), the Regional Administrator, Southeast Region, NMFS (RA) has determined that catastrophic conditions exist in the following Louisiana Parishes: Lafourche, St. Bernard, Plaquemines, and Jefferson, as a result of Hurricane Isaac. Consistent with those regulations, the RA has authorized IFQ participants within this affected area to temporarily use paper-based forms, if necessary, for basic required IFQ administrative functions, e.g., landing transactions. This temporary rule announcing the determination of catastrophic conditions and allowance of alternative methods for completing required IFQ administrative functions is intended to facilitate continuation of IFQ operations during the period of catastrophic conditions.

DATES: This temporary rule is effective from September 12, 2012, through October 9, 2012.

FOR FURTHER INFORMATION CONTACT: Anik Clemens, (727) 551–5611, email *Anik.Clemens@noaa.gov*.

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the Fishery Management Plan for Reef Fish Resources of the Gulf of Mexico (FMP). The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Amendment 26 to the FMP established an IFQ program for the commercial red snapper component of the Gulf reef fish fishery (71 FR 67447, November 22, 2006). Amendment 29 to the FMP established an IFQ program for the commercial grouper and tilefish components of the Gulf reef fish fishery (74 FR 44732, August 31, 2009). Regulations implementing these programs (50 CFR 622.16 and 622.20) require that IFQ participants have access to a computer and Internet access and that they conduct administrative functions associated with the IFQ program, e.g., landing transactions, online. However, these regulations also specify that during catastrophic conditions, as determined by the RA, the RA may authorize IFQ participants in the affected area who are unable to submit information electronically to use paper-based forms to complete IFQ administrative functions for the duration of the catastrophic conditions. The RA must determine that catastrophic conditions exist, specify the duration of the catastrophic conditions, and specify which participants or geographic areas are deemed affected by the catastrophic conditions.

Hurricane Isaac made landfall in Plaquemines Parish, Louisiana, as a Category 1 hurricane on August 28, 2012. Strong winds and flooding from this hurricane impacted coastal communities throughout southeast Louisiana, resulting in power outages and damage to homes, businesses, and infrastructure. As a result, the RA has determined that catastrophic conditions exist in Lafourche, St. Bernard, Plaquemines, and Jefferson Parishes, Louisiana. Through this temporary rule, the RA is authorizing IFQ participants within this affected area to use paper-based forms from September 12, 2012, through October 9, 2012. NMFS will provide additional notification to affected participants via NOAA weather radio, Fishery Bulletin, and other appropriate means.

NMFS previously provided each IFQ dealer with the necessary paper forms (sequentially coded) and instructions for submission in the event of catastrophic conditions. Paper forms are also available from the RA upon request. The electronic system for submitting information to NMFS will continue to be available to all participants, and participants in the affected area are encouraged to continue using this system, if accessible.

The administrative program functions available to participants in the area affected by catastrophic conditions will be limited under the paper-based system. There will be no mechanism for transfers of IFQ shares or allocation under the paper-based system in effect during catastrophic conditions. Assistance in complying with the requirements of the paper-based system will be available via IFQ Customer Service 1–866–425–7627 Monday through Friday between 8 a.m. and 4:30 p.m. eastern time.

Classification

The Regional Administrator, Southeast Region, NMFS, has determined this temporary rule is necessary for the conservation and management of Gulf red snapper and grouper and tilefish species managed under the Gulf IFQ Programs, and is consistent with the Magnuson-Stevens Act and other applicable laws.

This action is taken under 50 CFR 622.16(a)(3)(iii) and 622.20(a)(3)(iii) and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because this temporary rule is issued without opportunity for prior notice and comment.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive the requirements to provide prior notice and opportunity for public comment on this temporary rule. Such procedures are unnecessary because the rules implementing the Gulf IFQ programs, namely Amendment 26 to the FMP (71 FR 67447, November 22, 2006) and Amendment 29 to the FMP (74 FR 44732, August 31, 2009), have already been subject to notice and comment. These rules authorize the RA to determine when catastrophic conditions exist, and which participants or geographic areas are deemed affected by catastrophic conditions. The rules also authorize the RA to provide timely notice to affected participants via publication of notification in the **Federal Register**, NOAA Weather Radio, fishery bulletins, and other appropriate means. All that remains is to notify the public that catastrophic conditions exist and that paper forms may be utilized in the affected area. Additionally, delaying this temporary rule to provide prior notice and opportunity for public comment would be contrary to the public interest because affected participants are still fishing for these species in the affected area and need a means of completing their landing transactions. With the power outages that have occurred in the affected area due to Hurricane Isaac numerous businesses are unable to complete landings transactions electronically.

In order to continue with their businesses, they need to be aware they can still complete landing transactions using the paper forms.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

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

Dated: September 6, 2012.

Lindsay Fullenkamp,

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

[FR Doc. 2012–22450 Filed 9–7–12; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 177
Wednesday, September 12, 2012

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0933; Directorate Identifier 2012–NM–107–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. This proposed AD was prompted by reports of an incorrect procedure used to apply the wear and corrosion protective surface coating to attach pins of the horizontal stabilizer rear spar. This proposed AD would require inspecting to determine the part number of the attach pins of the horizontal stabilizer rear spar, and replacing certain attach pins with new, improved attach pins. We are proposing this AD to prevent premature failure of the attach pins, which could cause reduced structural integrity of the horizontal stabilizer to fuselage attachment, resulting in loss of control of the airplane.

DATES: We must receive comments on this proposed AD by October 29, 2012.

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

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket 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: Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone 425–917–6440; fax 425–917–6590; email *nancy.marsh@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2012–0933; Directorate Identifier 2012–NM–107–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 received reports of pins with an unapproved surface coating installed at the horizontal stabilizer rear spar attach locations. An incorrect procedure to apply the wear and corrosion protective surface coating was used by a supplier. The pins were installed on new airplanes and were also distributed by Boeing Spares.

A large number of the part number (P/N) 180A1612–3 and 180A1612–4 pins that were supplied to Boeing between June 30, 2006, and January 31, 2008, have an unapproved surface coating. These pins were distributed by Boeing Spares and were installed on most new airplanes delivered between August 2006 and July 2008. These pins could also have been installed as terminating action for Boeing Service Bulletin 737–55–1086 (specified in AD 2004–05–19, Amendment 39–13514 (69 FR 10921, March 9, 2004; corrected April 13, 2004 (69 FR 19313)), or during maintenance as specified in Section 9 of the Boeing 737–600/700/700C/800/900/900ER Maintenance Planning Document. No practical non-destructive inspection procedures exist to determine whether the pins have an approved or unapproved surface coating. This condition, if not corrected, could result in premature failure of the attach pins, which could cause reduced structural integrity of the horizontal stabilizer to fuselage attachment, resulting in loss of control of the airplane.

Relevant Service Information

We reviewed Boeing Special Attention Service Bulletin 737–55–1093, dated April 9, 2012. The service information describes procedures for replacing certain attach pins of the horizontal stabilizer rear spar with new, improved attach pins.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require inspecting to determine the part number of the attach pins of the horizontal stabilizer rear spar, and replacing certain attach pins with new, improved attach pins.

Costs of Compliance

We estimate that this proposed AD affects 1,050 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection and attach pin replacement.	39 work-hours × $85 per hour = $3,315.	Up to $6,312	$9,627	Up to $10,108,350.

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2012–0933; Directorate Identifier 2012–NM–107–AD.

(a) Comments Due Date

We must receive comments by October 29, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes; certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 55, Stabilizers.

(e) Unsafe Condition

This AD was prompted by reports of an incorrect procedure used to apply the wear and corrosion protective surface coating to attach pins of the horizontal stabilizer rear spar. We are issuing this AD to prevent premature failure of the attach pins, which could cause reduced structural integrity of the horizontal stabilizer to fuselage attachment, resulting in loss of control of the airplane.

(f) Compliance

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

(g) Part Number (P/N) Inspection

For airplanes having line numbers 1 through 3534 inclusive: Before the accumulation of 56,000 total flight cycles, or within 3,000 flight cycles after the effective date of this AD, whichever occurs later, inspect to determine the part number of the attach pins of the horizontal stabilizer rear spar. A review of airplane maintenance records is acceptable in lieu of this inspection if the part number of the attach pin can be conclusively determined from that review.

(h) Replacement

If, during the inspection required by paragraph (g) of this AD, any attach pin of the horizontal stabilizer rear spar has P/N 180A1612–3 or 180A1612–4, before further flight, replace with a new attach pin having P/N 180A1612–7 or 180A1612–8, respectively, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–55–1093, dated April 9, 2012.

(i) Parts Installation Prohibition

For all airplanes: As of the effective date of this AD, no person may install an attach pin of the horizontal stabilizer rear spar having P/N 180A1612–3 or 180A1612–4, on any airplane.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9–ANM-Seattle-ACO–AMOC-Requests@faa.gov.*

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

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

(k) Related Information

(1) For more information about this AD, contact Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone 425–917–6440; fax 425–917–6590; email *nancy.morsh@faa.gov*.

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

Issued in Renton, Washington, on August 31, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certificotion Service.

[FR Doc. 2012–22392 Filed 9–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0934; Directorate Identifier 2011–NM–260–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Airbus Model A330–200 and –300 series airplanes. This proposed AD was prompted by a report of a prematurely fractured main landing gear (MLG) bogie beam. This proposed AD would require replacing certain MLG bogie beams before reaching new reduced life limits. We are proposing this AD to prevent fracture of the MLG bogie beam, which, under high speed, could ultimately result in the airplane departing the runway, the bogie beam detaching from the airplane, or collapse of the MLG; and consequent structural damage to the airplane and injury to the occupants.

DATES: We must receive comments on this proposed AD by October 29, 2012.

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

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

For service information identified in this proposed AD, contact Messier-Dowty: Messier Services Americas, Customer Support Center, 45360 Severn Way, Sterling, VA 20166–8910; telephone 703–450–8233; fax 703–404–1621; Internet *https://techpubs.services/messier-dowty.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1138; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2012–0934; Directorate Identifier 2011–NM–260–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2011–0212, dated October 31, 2011 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> During ground load test cycles on an A340–600 aeroplane, the MLG bogie beam has prematurely fractured.
>
> The results of the investigation identified that this premature fracture was due to high tensile standing stress, resulting from dry fit axle assembly method. Improvement has been introduced subsequently with a grease fit axle assembly method.
>
> Fatigue and damage tolerance analyses were performed, whose results demonstrated that the current life limit of certain MLG bogie beams with dry fit axles installed on A330 aeroplanes only must be reduced compared to the life limit stated in the A330 Airworthiness Limitations Section (ALS) Part 1—Safe Life Airworthiness Limitation Items revision 05 approved by EASA on 29 July 2010.
>
> Failure to comply with the reduced life limit of the MLG bogie beam with dry fit axle might jeopardize the MLG structural integrity.
>
> For the reasons described above, this [EASA] AD requires the replacement of the affected MLG bogie beams before reaching the new reduced life limit.

The unsafe condition is a possible fracture of the MLG bogie beam, which, under high speed, could ultimately result in the airplane departing the runway, the bogie beam detaching from the airplane, or collapse of the MLG; and consequent structural damage to the airplane and injury to the occupants. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Messier-Dowty has issued Service Letter A33–34 A20, Revision 5,

including Appendices A through F, dated July 31, 2009. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 53 products of U.S. registry. We also estimate that it would take about 16 work-hours per MLG bogie beam (2 MLG bogie beams per airplane) to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $255,000 per MLG bogie beam. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be up to $27,174,160, or $256,360 per MLG bogie beam.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus: Docket No. FAA–2012–0934; Directorate Identifier 2011–NM–260–AD.

(a) Comments Due Date

We must receive comments by October 29, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Airbus Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes; certificated in any category; all manufacturer serial numbers (S/Ns).

(d) Subject

Air Transport Association (ATA) of America Code 32, Landing gear.

(e) Reason

This AD was prompted by a report of a prematurely fractured main landing gear (MLG) bogie beam. We are issuing this AD to prevent fracture of the MLG bogie beam, which, under high speed, could ultimately result in the airplane departing the runway, the bogie beam detaching from the airplane, or collapse of the MLG; and consequent structural damage to the airplane and injury to the occupants.

(f) Compliance

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

(g) Bogie Beam Replacement

At the later of the times specified in paragraph (g)(1) or (g)(2) of this AD, replace all MLG bogie beams having part number (P/N) 201485300, 201485301, 201272302, 201272304, 201272306, or 201272307, except those that have S/Ns S2A, S2B, or S2C, as identified in Messier-Dowty Service Letter A33–34 A20, Revision 5, including Appendices A through F, dated July 31, 2009, with a new or serviceable part, in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, or European Aviation Safety Agency (EASA) (or its delegated agent).

(1) Before the accumulation of the flight hours or landings, whichever occurs first, specified in table 1 of this AD, as applicable to airplane type, model, and weight variant (WV).

TABLE 1 TO PARAGRAPH (g)(1) OF THIS *AD—MLG Bogie Beam Life Limit*

Affected airplanes—	Life limit from first installation of MLG bogie beam on an airplane—
Model A330–201, –202, –203, –223, –243, weight variant (WV)02x, WV05x (except WV058), and WV06x series.	50,000 landings or 72,300 total flight hours'
Model A330–201, –202, –203, –223, –243 WV058	50,000 landings or 57,900 total flight hours.

TABLE 1 TO PARAGRAPH (g)(1) OF THIS *AD—MLG Bogie Beam Life Limit*—Continued

Affected airplanes—	Life limit from first installation of MLG bogie beam on an airplane—
Model A330–301, –302, –303, –321, –322, –323, –341, –342, –343 WV00x, WV01x, WV02x, WV05x series.	46,000 landings or 75,000 total flight hours.

(2) Within 6 months after the effective date of this AD.

(h) Parts Installation Limitations

As of the effective date of this AD, a MLG bogie beam having any part number identified in paragraph (g) of this AD, may be installed on an airplane, provided its life has not exceeded the life limit defined in table 1 to paragraph (g)(1) of this AD, and is replaced with a new or serviceable part before reaching the life limit defined in table 1 to paragraph (g)(1) of this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1138; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(j) Related Information

(1) Refer to MCAI EASA Airworthiness Directive 2011–0212, dated October 31, 2011; and Messier-Dowty Service Letter A33–34 A20, Revision 5, including Appendices A through F, dated July 31, 2009; for related information.

(2) For service information identified in this AD, contact Messier-Dowty: Messier Services Americas, Customer Support Center, 45360 Severn Way, Sterling, VA 20166–8910; telephone 703–450–8233; fax 703–404–1621; Internet *https://techpubs.services/messier-dowty.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on August 24, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–22425 Filed 9–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

14 CFR Part 71

[Docket No. FAA–2012–0483; Airspace Docket No. 12–ANM–13]

Proposed Establishment of Class D and Class E Airspace; Camp Guernsey, WY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class D airspace and Class E airspace at Camp Guernsey Airport, Camp Guernsey, WY. The establishment of an air traffic control tower has made this action necessary for the safety and management of Instrument Flight Rules (IFR) aircraft within this airspace.

DATES: Comments must be received on or before October 29, 2012.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone (202) 366–9826. You must identify FAA Docket No. FAA–2012–0483; Airspace Docket No. 12–ANM–13, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2012–0483 and Airspace Docket No. 12–ANM–13) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA–2012–0483 and Airspace Docket No. 12–ANM–13". The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and

phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class D airspace and Class E airspace extending upward from the surface at Camp Guernsey Airport, Camp Guernsey, WY. The establishment of an air traffic control tower has made this action necessary. The intended effect of this proposal is to provide controlled airspace for IFR operations at Camp Guernsey Airport, Camp Guernsey, WY.

Class D airspace and Class E airspace designations are published in paragraph 5000 and 6002, respectively, of FAA Order 7400.9V, dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR 71.1. The Class D and Class E airspace designation listed in this document will be published subsequently in this Order.

The FAA has determined this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed 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 this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish controlled airspace at Camp Guernsey Airport, Camp Guernsey, WY

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR Part 71 continues to read as follows:

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9V, Airspace Designations and Reporting Points, dated August 9, 2011, and effective September 15, 2011 is amended as follows:

Paragraph 5000 Class D airspace.

* * * * *

ANM WY D Camp Guernsey Airport, WY [New]

Camp Guernsey Airport, WY
(Lat. 42°15′35″ N., long. 104°43′42″ W.)

That airspace extending upward from the surface to and including 6,900 feet MSL within a 5-mile radius of Camp Guernsey Airport, and within 1.5 miles each side of the 340° bearing of the airport, extending from the 5-mile radius to 6.5 miles north of the airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Paragraph 6002 Class E airspace designated as surface areas.

* * * * *

ANM WY E2 Camp Guernsey Airport, WY [New]

Camp Guernsey Airport, WY
(Lat. 42°15′35″ N., long. 104°43′42″ W.)

Within a 5-mile radius of Camp Guernsey Airport, and within 1.5 miles each side of the 340° bearing of the airport, extending from the 5-mile radius to 6.5 miles north of the airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Issued in Seattle, Washington, on August 31, 2012.

John Warner,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2012–22464 Filed 9–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 573

[Docket No. FDA–2012–F–0949]

Arcadia Biosciences, Inc.; Filing of Food Additive Petition (Animal Use)

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of petition.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Arcadia Biosciences, Inc., has filed a petition proposing that the food additive regulations be amended to provide for the safe use in dry dog food of oil from a variety of bioengineered safflower.

DATES: Submit either electronic or written comments on the petitioner's request for categorical exclusion from preparing an environmental assessment or environmental impact statement by October 12, 2012.

ADDRESSES: Submit electronic comments 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: Isabel W. Pocurull, Center for Veterinary Medicine (HFV–226), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–453–6853, Email: *isabel.pocurull@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Under section 409(b)(5) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 348(b)(5)), notice is given that a food additive petition (FAP 2275) has been filed by Arcadia Biosciences, Inc., 202 Cousteau Place, suite 200, Davis, CA

95618. The petition proposes to amend Title 21 of the Code of Federal Regulations (CFR) in part 573 *Food Additives Permitted in Feed and Drinking Water of Animals* (21 CFR part 573) to provide for the safe use in dry dog food of oil from a variety of bioengineered safflower (*Carthamus tinctorius* L.). The safflower variety has been bioengineered to contain a gene from the water mold *Saprolegnia diclina* responsible for production of gamma-linolenic acid (GLA) in the seed oil. This GLA-enriched safflower oil will be used as a source of omega-6 fatty acids in dry food for adult dogs.

The petitioner has requested a categorical exclusion from preparing an environmental assessment or environmental impact statement under 21 CFR 25.32(r). Interested persons may submit a single copy of either electronic or written comments regarding this request for categorical exclusion to the Division of Dockets Management (see **DATES** and **ADDRESSES**). 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: September 7, 2012.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. 2012–22422 Filed 9–11–12; 8:45 am]

BILLING CODE 4160–01–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3001

[Docket No. RM2012–7; Order No. 1459]

Analytical Methods Used in Periodic Reporting

AGENCY: Postal Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is noticing a recently-filed Postal Service petition to initiate an informal rulemaking proceeding to consider changes in analytical principles (Proposals Six and Seven) used in periodic reporting. This notice provides an opportunity for the public to comment on potential changes in periodic reporting rules.

DATES: 1. *Initial comments are due:* October 5, 2012.

2. *Reply comments are due:* October 15, 2012.

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 the **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 September 4, 2012, the Postal Service filed a petition pursuant to 39 CFR 3050.11 requesting that the Commission initiate an informal rulemaking proceeding to consider changes in the analytical methods approved for use in periodic reporting.[1]

Proposal Six: Use of Foreign Postal Settlement System as Sole Source for Reporting of Inbound International Revenue, Pieces, and Weights. The Postal Service proposes to use the Foreign Postal Settlement (FPS) system as the sole source for the International Cost and Revenue Analysis's (ICRA) reporting of Inbound International revenue, pieces, and weight. The Postal Service states that using the FPS data source for the ICRA's reporting of Inbound International revenue, pieces, and weight would improve the consistency among the ICRA, RPW, and financial statements, and that it would eliminate the need to make separate Booked Inbound International revenue calculations[2] in the ICRA. Petition at 4. Using FPS would also eliminate the need for the ICRA to calculate inbound volumes based on weight data from the St. Louis Accounting Service Center (ASC) coupled with estimated items per kilogram data from System for International Revenue and Volume Inbound (SIRVI) sampling system. However, the Postal Service also states that this proposal does not entirely eliminate the need for both the Booked and Imputed versions because it does not address the Outbound International calculations. *Id.*

The Postal Service has filed as library reference USPS–LR–RM2012–7–NP1 a version of USPS–FY11–NP2 revised to incorporate this proposal. This library reference is non-public. *Id.* at 2. The Postal Service states that USPS–LR–RM2012–7–NP1 displays two impacts: (1) A comparison between the FY 2011 Imputed version as filed in USPS–FY11–NP2 and the proposed methodology; and (2) a comparison between the FY 2011 Booked version as filed in USPS–FY11–NP2 and the proposed methodology. In the two comparisons, pieces and weight based on FPS increase 2.9 percent and 2.0 percent, respectively, over the USPS–FY11–NP2 amounts. In the Imputed versus proposed comparison, revenue decreases 0.3 percent and volume variable costs decrease 1.2 percent due to changes in the distribution of volumes and weights by country under FPS. In the Booked versus proposed comparison, revenue decreases 0.8 percent and volume variable costs are essentially unchanged. *Id.* at 4–5.

Proposal Seven: Methodology Change to Replace Parcel Densities in the Transportation Cost System Highway Subsystem. The Postal Service proposes a methodology change to replace the parcel densities in the Transportation Cost System (TRACS) Highway Subsystem. *Id.* at 6. These densities are used to develop distribution keys to assign volume-variable costs in Cost Segment 8 (Vehicle Service Driver costs) and Cost Segment 14 (purchased transportation costs) to postal products. The Postal Service states that currently, separate study-based estimates of mailpiece densities by mail category and shape for letters, flats, and parcels are required to convert sampled weight information to cubic feet. Under the proposed methodology, the study-based parcel densities would be replaced with parcel dimensional data now regularly captured in TRACS-Highway tests. *Id.*

The Postal Service states that beginning with Quarter 1 of FY 2012, the TRACS-Highway Subsystem began utilizing actual, measured length, width and height information for parcel-shaped pieces. *Id.* Attachment at 1. As a result, the cubic foot component of the cubic foot mile distribution key for parcels can be determined directly from the product of the three dimensions. These direct measurements obviate the need for Density-Study information and periodic study updates for parcels. The Postal Service believes that this methodology is more reliable since cubic feet information is continuously updated automatically across sampling periods. *Id.* For the subset of parcels identified as irregular in shape, the Origin-Destination System and Revenue, Pieces, and Weight based factor of 0.785 would be applied. For all mail shapes, no other changes would be required or

[1] Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposals Six and Seven). September 4, 2012 (Petition).

[2] The Postal Service has been producing two versions of the ICRA, an Imputed version that relies on ICRA model calculations and a Booked version that forces the ICRA model revenue calculations to agree with other financial statements.

made to the current TRACS-Highway processing system and methodology, including the development of the miles component of the cubic foot-mile distribution key. *Id.* at 1–2.

The Postal Service states that there is a small proportion of sampled parcels for which useable dimensional information is unavailable (approximately 5 percent of sampled parcels). For these parcels a smoothed, composite, four-quarter density ratio would be developed by major mail category to convert sampled weight measures to cubic feet-measures. The Postal Service states that a smoothed, ratio-based density measure helps to adjust for seasonal swings as well as to reduce sampling variation associated with the smaller mail categories. *Id.* at 2.

The Postal Service states that Media and Library Mail is the product group most affected by the proposed methodology change. That product group would receive a change in cost per piece of $ −0.021, a relative change of −2 percent. Parcel Post would receive the next largest change in cost per piece at $ −0.010, with a relative change of 0 percent. All other product groups would have changes in cost per piece of less than $0.010. Petition at 7.

It is ordered:

1. The Petition of the United States Postal Service Requesting Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposals Six and Seven), filed September 4, 2012, is granted.

2. The Commission establishes Docket No. RM2012–7 to consider the matters raised by the Postal Service's Petition.

3. Interested persons may submit comments on Proposals Six and Seven no later than October 5, 2012.

4. Reply comments are due no later than October 15, 2012.

5. Derrick Dennis 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. 2012–22350 Filed 9–11–12; 8:45 am]

BILLING CODE 7710–FW–P

Notices

Federal Register
Vol. 77, No. 177
Wednesday, September 12, 2012

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

September 6, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food Safety and Inspection Service

Title: Laboratories.

OMB Control Number: 0583—New.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 et seq.), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, et seq.), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031). These statues mandate that FSIS protect the public by verifying that meat and poultry products are safe, wholesome, unadulterated, and properly labeled and packaged.

Need and Use of the Information: FSIS will use two forms to collect information for two distinct laboratory programs. FSIS will use the PEPRL–F–0008–04 form as a self assessment audit checklist to collect information related to the quality assurance/quality control procedures in place at in-plant and private laboratories participating n the Pasteurized Egg Product Recognized Laboratory program. Any non-federal laboratory that is applying for the FSIS Accredited Laboratory program will need to complete an Application for FSIS Accredited Laboratory Program 10,110–2 form. FSIS will use the information collected by the form to help access the laboratory applying for admission to the FSIS Accredited Laboratory program.

Description of Respondents: Business or other for-profit.

Number of Respondents: 25.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 24.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–22354 Filed 9–11–12; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–FV–12–0036; FV12–996–1]

Peanut Standards Board

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice; request for nominations.

SUMMARY: The Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) requires the Secretary of Agriculture to establish a Peanut Standards Board (Board) for the purpose of advising the Secretary on quality and handling standards for domestically produced and imported peanuts. The initial Board was appointed by the Secretary and announced on December 5, 2002. USDA seeks nominations for individuals to be considered for selection as Board members for terms of office ending June 30, 2015. Selected nominees would replace three producer and three industry representatives who currently serve on the Board and have terms of office that ended June 30, 2012. Also, one individual would fill a currently vacant industry position for a term of office ending June 30, 2014. The Board consists of 18 members representing producers and the industry. USDA values diversity. In an effort to obtain diversity among candidates, USDA encourages the nomination of men and women of all racial and ethnic groups.

DATES: Written nominations must be received on or before October 12, 2012.

ADDRESSES: Nominations should be sent to Jennie M. Varela, Marketing Order and Agreement Division, Fruit and Vegetable Programs, AMS, USDA, 799 Overlook Drive, Suite A, Winter Haven, FL 33884: Telephone: (863) 324–3375; Fax: (863) 325–8793; Email: *Jennie.Varela@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: Section 1308 of the 2002 Farm Bill requires the Secretary of Agriculture to establish and consult with the Board for the purpose of advising the Secretary regarding the establishment of quality and handling standards for all domestic and imported peanuts marketed in the United States.

The 2002 Farm Bill provides that the Board's makeup will include three producers and three peanut industry representatives from States specified in each of the following producing regions: Southeast (Alabama, Georgia, and Florida); Southwest (Texas, Oklahoma, and New Mexico); and Virginia/Carolina (Virginia and North Carolina).

The term "peanut industry representatives" includes, but is not limited to, representatives of shellers, manufacturers, buying points, and marketing associations and marketing cooperatives. The 2002 Farm Bill

exempted the appointment of the Board from the requirements of the Federal Advisory Committee Act.

USDA invites individuals, organizations, and groups affiliated with the categories listed above to nominate individuals for membership on the Board. Nominees sought by this action would fill two positions in the Southeast region; two positions in the Southwest region; and three positions in the Virginia/North Carolina region, one of which is currently vacant.

Nominees should complete a Peanut Standards Board Background Information form and submit it to Miss Varela at the address provided in the **ADDRESSES** section above. Copies of this form may be obtained at the Internet site *www.ams.usda.gov/PeanutStandardsBoard*, or from Miss Varela. USDA seeks a diverse group of members representing the peanut industry.

Equal opportunity practices will be followed in all appointments to the Board in accordance with USDA policies. To ensure that the recommendations of the Board have taken into account the needs of the diverse groups within the peanut industry, membership shall include, to the extent practicable, individuals with demonstrated abilities to represent minorities, women, persons with disabilities, and limited resource agriculture producers.

Authority: 7 U.S.C. 7958.

Dated: September 6, 2012.

David R. Shipman,

Administrator, Agricultural Marketing Service.

[FR Doc. 2012–22427 Filed 9–11–12; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Forest Service

Lyon & Mineral Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Lyon & Mineral Resource Advisory Committee will meet in Yerington, 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 of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consisent with Title II of the Act. The meeting is open to the public. The purpose of the meeting is to recommend projects for the use of Title II funds to the deciding official.

DATES: The meeting will be held September 25th, 2012 at 10 a.m.

ADDRESSES: The meeting will be held at the Commissioners Meeting Room, Lyon County Administration Complex, 27 South Main Street, Yerington, Nevada. Written comments should be sent to Mike Crawley, Bridgeport Ranger District, Humboldt-Toiyabe National Forest, HC 62 Box 1000, Bridgeport, CA 93517. Comments may also be sent via email to *mcrawley@fs.fed.us*, or via facsimile to 760–932–5899.

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: Mike Crawley, RAC Designated Federal Official, Bridgeport Ranger District, Humboldt-Toiyabe National Forest, 760–932–7070. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The following business will be conducted on the September 25, 2012 meeting: (1) Discussion of recommendations for Title II projects. (2) 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. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by September 18th to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Bridgeport Ranger District, Humboldt-Toiyabe National Forest, HC 62 Box 1000, Bridgeport, CA 93517, or by email to *mcrawley@fs.fed.us* or via facsimile to 760–932–5899.

Dated: September 6, 2012.

Stephaine A. Phillips,

Deputy Forest Supervisor, Humboldt-Toiyabe National Forest.

[FR Doc. 2012–22414 Filed 9–11–12; 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) RAC will meet in Winnemucca, NV. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 112–141) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The purpose of the meeting is to complete any final business needed to recommend projects to the Humboldt-Toiyabe Forest Supervisor. Lacking any final business, this meeting will be cancelled.

DATES: The meeting will be held on September 25, 2012 at 10 a.m. Pacific.

ADDRESSES: The meeting will be held at the Humboldt County Court House Room 201, 50 West 5th Street,Winnemucca, Nevada. The meeting can also be attended by teleconference by dialing 888–858–2144 access code 2567555. Written comments should be sent to USDA Forest Service, 1200 E Winnemucca Blvd., Winnemucca, NV 89445. Comments may also be sent via email to *jlulrich@fs.fed.us*, or via facsimile to775–625–1200.

Written comments may be submitted as described under Supplementary Information. 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: Jeff Ulrich, RAC Designated Federal Official, Santa Rosa Ranger District Humboldt-Toiyabe National Forest, 775–352–1215. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The following business will be conducted: Complete any final business, as yet unknown, needed to recommend projects to the Humboldt-Toiyabe Forest

Supervisor. Lacking any final business, this meeting will be cancelled. Anyone who would like to bring related matters to the attention of the committee may file written statements with the Designated Federal Official before the meeting. A summary of the meeting will be posted at *http://fs.usda.gov/goto/htnf/rac* within 21 days of the meeting.

Meeting Accommodations: If you require sign language interpreting, assistive listening devices or other reasonable accommodation please request this in advance of the meeting by contacting the person listed in the section titled For Further Information Contact. All reasonable accommodation requests are managed on a case by case basis

Dated: September 6, 2012.

Stephanie A. Phillips,

Deputy Forest Supervisor, Humboldt-Toiyabe National Forest.

[FR Doc. 2012–22415 Filed 9–11–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–801]

Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review, and Intent To Revoke Order in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the "Department") is conducting administrative and new shipper reviews ("NSRs") of the antidumping duty order on certain frozen fish fillets ("fish fillets") from the Socialist Republic of Vietnam ("Vietnam").[1] The Department has preliminarily determined that Anvifish Joint Stock Corporation ("Anvifish"), Vinh Hoan Corporation ("Vinh Hoan")[2], An Phu Seafood Corporation ("An Phu"), Docifish Corporation ("Docifish") and Godaco Seafood Joint Stock Company ("Godaco") did not sell merchandise below NV during the period of review ("POR"), August 1, 2010, through July 31, 2011. If these preliminary results are adopted in the final results, the Department will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on all appropriate entries of subject merchandise during the POR. Interested parties are invited to comment on these preliminary results.

DATES: *Effective Date:* September 12, 2012.

FOR FURTHER INFORMATION CONTACT: Scot Fullerton, 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 202.482.1386.

SUPPLEMENTARY INFORMATION:

Case History

On October 3, 2011, the Department initiated the eighth administrative review of fish fillets from Vietnam with respect to 32 companies.[3] Also on October 3, 2011, the Department initiated the ninth NSRs of fish fillets from Vietnam with respect to An Phu, Docifish and Godaco (collectively, the "New Shipper Respondents").[4] On March 15, 2012 the Department aligned the NSRs with the administrative review of fish fillets from Vietnam.[5] On April 4, 2012, the Department extended the time limits for these aligned reviews until August 30, 2012.[6]

Because of the large number of exporters involved in the administrative review, the Department limited the number of respondents individually examined pursuant to section 777A(c)(2) of the Tariff Act of 1930, as amended (the "Act"), and selected Vinh Hoan and Anvifish as mandatory respondents.[7] The Department sent antidumping duty questionnaires to Vinh Hoan and Anvifish, as well as to the New Shipper Respondents, to which they responded in a timely manner. Between November 21, 2011 and August 13, 2012, the Department issued supplemental questionnaires to these respondents to which they responded in a timely manner. Between May 23, 2012, and August 17, 2012, the Department received surrogate country/surrogate value comments, and rebuttal comments from interested parties.

Scope of the Order

The product covered by the order is frozen fish fillets, including regular, shank, and strip fillets and portions thereof, whether or not breaded or marinated, of the species *Pangasius Bocourti, Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus*. Frozen fish fillets are lengthwise cuts of whole fish. The fillet products covered by the scope include boneless fillets with the belly flap intact ("regular" fillets), boneless fillets with the belly flap removed ("shank" fillets), boneless shank fillets cut into strips ("fillet strips/finger"), which include fillets cut into strips, chunks, blocks, skewers, or any other shape. Specifically excluded from the scope are frozen whole fish (whether or not dressed), frozen steaks, and frozen belly-flap nuggets. Frozen whole dressed fish are deheaded, skinned, and eviscerated. Steaks are bone-in, cross-section cuts of dressed fish. Nuggets are the belly-flaps. The subject merchandise will be hereinafter referred to as frozen "basa" and "tra" fillets, which are the Vietnamese common names for these species of fish. These products are classifiable under tariff article codes 1604.19.4000, 1604.19.5000, 0305.59.4000, 0304.29.6033 (Frozen Fish Fillets of the species *Pangasius* including basa and tra) of the Harmonized Tariff Schedule of the United States ("HTSUS").[8] The order covers all frozen fish fillets meeting the above specification, regardless of tariff classification. Although the HTSUS subheading is provided for convenience and Customs purposes, our written description of the scope of the order is dispositive.

Bona Fides Analysis

Consistent with the Department's practice, we examined the *bona fides* of the sales under review in the NSRs by the New Shipper Respondents.[9] In

[1] *See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 FR 47909 (August 12, 2003) ("*Order*").

[2] Vinh Hoan includes Vinh Hoan Corporation and its affiliates Van Duc Food Export Joint Company ("Van Duc") and Van Duc Tien Giang ("VDTG").

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation*, 77 FR 61076 (October 3, 2011) ("*Initiation*").

[4] See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Initiation of New Shipper Reviews, 77 FR 61076 (October 3, 2011).

[5] *See* Memo to the File, from Paul Walker, Case Analyst, regarding the alignment of the annual new shipper reviews with the eighth administrative review.

[6] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Extension of Preliminary Results of Eighth Antidumping Duty Administrative Review and New Shipper Reviews*, 77 FR 20356 (April 4, 2012).

[7] *See* Memorandum to James Doyle from Javier Barrientos, "Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Selection of Respondents for Individual Review," dated November 8, 2011.

[8] Until July 1, 2004, these products were classifiable under tariff article codes 0304.20.60.30 ("Frozen Catfish Fillets"), 0304.20.60.96 ("Frozen Fish Fillets, NESOI"), 0304.20.60.43 ("Frozen Freshwater Fish Fillets") and 0304.20.60.57 ("Frozen Sole Fillets") of the HTSUS. Until February 1, 2007, these products were classifiable under tariff article code 0304.20.60.33 ("Frozen Fish Fillets of the species *Pangasius* including basa and tra") of the HTSUS.

[9] *See, e.g., Honey from the People's Republic of China: Rescission and Final Results of Antidumping Duty New Shipper Reviews*, 71 FR

evaluating whether a sale in a NSR is commercially reasonable or typical of normal business practices, and therefore *bona fide*, the Department considers, *inter alia*, such factors as (a) the timing of the sale, (b) the price and quantity, (c) the expenses arising from the transaction, (d) whether the goods were resold at a profit, and (e) whether the transaction was made at an arm's length basis.[10] Accordingly, the Department considers a number of factors in its *bona fides* analysis, "all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise." [11] In *TTPC*, the court also affirmed the Department's decision that any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant,[12] and found that the weight given to each factor investigated will depend on the circumstances surrounding the sale.[13] Finally, in *New Donghua*, the CIT affirmed the Department's practice of evaluating the circumstances surrounding an NSR sale, so that a respondent does not unfairly benefit from an atypical sale and obtain a lower dumping margin than the producer's usual commercial practice would dictate.[14] Where the Department finds that a sale is not *bona fide*, the Department will exclude the sale from its export price calculations.[15]

We found that the sales by the New Shipper Respondents were made on *bona fide* bases.[16] Based on our investigation into the *bona fide* nature of the sales, the questionnaire responses submitted by New Shipper Respondents, and the companies' eligibility for a separate rate (*see* the "*Separate Rate*" section below), we preliminarily determine that New Shipper Respondents have met the requirements to qualify as new shippers during this POR. Because much of the factual information used in our analysis of the *bona fides* of the New Shipper Respondents' transactions involves business proprietary information, the full discussion of the basis for our preliminary finding that these sales are *bona fide* is set forth in the respective *bona fides* memos.[17] Therefore, for the purposes of these preliminary results, we are treating the New Shipper Respondents' sales of subject merchandise to the United States as appropriate transactions for their NSRs.

Preliminary Partial Rescission of Administrative Review

Pursuant to section 351.213(d)(3) of the Department's regulations, we have preliminarily determined that seven companies made no shipments of subject merchandise during the POR—Bien Dong Seafood Company Ltd., International Development & Investment Corporation, Cuu Long Fish Joint Stock Company, Thien Ma Seafood Co., Ltd., East Sea Seafoods Limited Liability Company [18], Cantho Import-Export Seafood Joint Stock Company and Thuan An Production Trading & Services Co., Ltd. (collectively, the "No Shipment Companies"). Between November 7, 2011 and November 29, 2011, the Department received no-shipment certifications from the No Shipment Companies. In addition, according to entry statistics obtained from CBP, the No Shipment Companies made no entries of subject merchandise during the POR. Moreover, the Department issued no-shipment inquiries to CBP requesting any information for merchandise manufactured and shipped by the No Shipment Companies during the POR.

Between November 7, 2011 and November 15, 2011, the New Shipper Respondents notified the Department that they made no entries during the POR other than the entries under review in the aligned new shipper reviews. Consequently, we are preliminarily rescinding the administrative review with respect to the No Shipment Companies and the New Shipper Respondents.

Non-Market Economy Country Status

In every case conducted by the Department involving Vietnam, Vietnam has been treated as a non-market ("NME") country.[19] In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority.[20] Accordingly, the Department continues to treat Vietnam as a NME in this proceeding.

Separate Rates

There is a rebuttable presumption that all companies within Vietnam are subject to government control, and thus, should be assessed a single antidumping duty rate. It is the Department's standard policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to exports. To establish whether a company is sufficiently independent to be entitled to a separate, company-specific rate, the Department analyzes each exporting entity in an NME country under the test established in *Sparklers* [21] as amplified by *Silicon Carbide*.[22]

A. Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate (a) an absence of restrictive stipulations associated with an individual exporter's business and export licenses, and (b) any legislative enactments decentralizing control of companies.

Although the Department has previously assigned a separate rate to all of the companies eligible for a separate rate in this review, it is the

58579 (October 4, 2006) and accompanying Issues and Decision Memorandum at Comment 1b.

[10] *See Tianjin Tiancheng Pharmaceutical Co., Ltd.* v. *United States*, 366 F. Supp. 2d 1246, 1249–1250 (CIT 2005) ("*TTPC*").

[11] *See Hebei New Donghua Amino Acid Co., Ltd.* v. *United States*, 374 F. Supp. 2d 1333, 1342 (CIT 2005) ("*New Donghua*") (citing *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review*, 67 FR 11283 (March 13, 2002), and accompanying Issues and Decision Memorandum: New Shipper Review of Clipper Manufacturing Ltd.).

[12] *See TTPC*, 366 F. Supp. 2d at 1250.

[13] *Id.* at 1263.

[14] *New Donghua*, 374 F. Supp. 2d at 1344.

[15] *See TTPC*, 366 F. Supp. 2d at 1249.

[16] *See* Memorandum to James C. Doyle, Director, Office 9, through Scot T. Fullerton, Program Manager, Office 9, from Alex Montoro, Case Analyst, Office 9, "New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: *Bona Fide* Analysis of An Phu Seafood Corporation's New Shipper Sale," dated concurrently with the notice.

[17] *See* Memorandum to James C. Doyle, Director, Office 9, through Scot T. Fullerton, Program Manager, Office 9, from Seth Isenberg, Case Analyst, Office 9, "New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: *Bona Fide* Analysis of Docifish Corporation's New Shipper Sale," dated concurrently with the notice; Memorandum to James C. Doyle, Director, Office 9, through Scot T. Fullerton, Program Manager, Office 9, from Alex Montoro, Case Analyst, Office 9, "New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: *Bona Fide* Analysis of Godaco Seafood Joint Stock Company's New Shipper Sale," dated concurrently with the notice; Memorandum to James C. Doyle, Director, Office 9, through Scot T. Fullerton, Program Manager, Office 9, from Alex Montoro, Case Analyst, Office 9, "New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: *Bona Fide* Analysis of An Phu Seafood Corporation's New Shipper Sale," dated concurrently with the notice.

[18] Includes the trade name East Sea Seafoods LLC.

[19] *See, e.g., Certain Frozen Fish Fillets from the Sociolist Republic of Vietnam: Finol Results of the Antidumping Duty Administrotive Review ond New Shipper Reviews*, 74 FR 11349 (March 17, 2009).

[20] *See* section 771(18)(C) of the Act.

[21] *See Finol Determinotion of Soles ot Less thon Foir Volue: Sporklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) ("*Sporklers*").

[22] *See Notice of Final Determinotion of Soles ot Less Thon Foir Volue: Silicon Corbide from the People's Republic of Chino*, 59 FR 22585 (May 2, 1994) ("*Silicon Corbide*").

Department's policy to evaluate separate rates questionnaire responses each time a respondent makes a separate rate claim, regardless of whether the respondent received a separate rate in the past.[23]

In this review, in addition to the two mandatory respondents and the New Shipper Respondents, An Giang Agriculture and Food Import-Export Joint Stock Company ("AFIEX"), An Giang Fisheries Import & Export Joint Stock Company ("Agifish"), Asia Commerce Fisheries Joint Stock Company ("Acomfish"), Binh An Seafood Joint Stock Company ("Binh An"), Cadovimex II Seafood Import-Export and Processing Joint Stock Company ("Cadovimex II"), Hiep Thanh Seafood Joint Stock Company ("Hiep Thanh"), Hung Vuong Corporation ("Hung Vuong"), Nam Viet Corporation ("NAVICO"), NTSF Seafoods Joint Stock Company ("NTSF"), QVD Food Company Ltd. ("QVD"), Saigon Mekong Fishery Co., Ltd. ("SAMEFICO"), Southern Fisheries Industries Company Ltd. ("South Vina") and Vinh Quang Fisheries Corporation ("Vinh Quang") (collectively, the "Separate Rate Respondents") submitted complete separate rate certifications or applications. The evidence submitted by these companies includes government laws and regulations on corporate ownership, business licenses, and narrative information regarding the companies' operations and selection of management. The evidence provided by these companies supports a finding of a *de jure* absence of government control over their export activities, based on (a) an absence of restrictive stipulations associated with the exporter's business license, and (b) the legal authority on the record decentralizing control over the respondents.

B. Absence of De Facto Control

The absence of *de facto* government control over exports is based on whether the respondent (a) sets its own export prices independent of the government and other exporters, (b) retains the proceeds from its export sales and makes independent decisions regarding the disposition of profits or financing of losses, (c) has the authority to negotiate and sign contracts and other agreements, and (d) has autonomy from the government regarding the selection of management.[24]

In this review, in addition to the two mandatory respondents and the New Shipper Respondents, the Separate Rate Respondents submitted evidence indicating an absence of *de facto* government control over their export activities. Specifically, this evidence indicates that (a) each company sets its own export prices independent of the government and without the approval of a government authority, (b) each company retains the proceeds from its sales and makes independent decisions regarding the disposition of profits or financing of losses, (c) each company has a general manager, branch manager or division manager with the authority to negotiate and bind the company in an agreement, (d) the general managers are selected by the board of directors or company employees, and the general managers appoint the deputy managers and the manager of each department, and (e) there is no restriction on any of the companies' use of export revenues. Therefore, the Department preliminarily finds that in this review that the two mandatory respondents, the New Shipper Respondents and the Separate Rate Respondents have established that they qualify for separate rates under the criteria established by *Silicon Carbide* and *Sparklers*.

Rate for Non-Selected Companies

As noted above, there are 13 Separate Rate Respondents not selected for individual examination. The statute and the Department's regulations do not address the establishment of a rate to be applied to individual companies not selected for examination when the Department has limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally we have looked to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents not selected for individual examination. Section 735(c)(5)(A) of the Act instructs that we do not calculate an all-others rate using any zero or *de minimis* weighted-average dumping margins or any weighted-average dumping margins based on total facts available. Accordingly, the Department's usual practice has been to average the rates for the selected companies excluding rates that are zero, *de minimis*, or based entirely on facts available.[25] Section 735(c)(5)(B) of the Act also provides that, where all rates are zero, *de minimis*, or based on total facts available, we may use "any reasonable method" for assigning the rate to non-selected respondents. One method that section 735(c)(5)(B) of the Act contemplates as a possible method is "averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated."

In this review, we have calculated weighted-average dumping margins of zero or de *minimis* for both companies selected as mandatory respondents. In previous cases, the Department has determined that a "reasonable method" to use when, as here, the rates of the respondents selected for individual examination are zero or *de minimis* is to apply to those companies not selected for individual examination the average of the most recently determined rates that are not zero, *de minimis*, or based entirely on facts available (which may be from a prior review or new shipper review).[26] If any such non-selected company had its own calculated rate that is contemporaneous with or more recent than such prior determined rates, however, the Department has applied such individual rate to the non-selected company in the review in question, including when that rate is zero or *de minimis*.[27] However, all prior rates for this proceeding were calculated using the Department's zeroing methodology. The Department has stated that it will not use its zeroing methodology in administrative reviews with preliminary determinations issued after April 16, 2012.[28] Therefore, we will not apply any rates calculated in prior reviews to the non-selected companies in these reviews. Based on this, and in accordance with the statute and the Department's recent practice in *AFBs 2012*,[29] we determine that a reasonable method for determining the weighted-average dumping margins for the non-selected respondents in this review is to average the weighted-average dumping margins calculated for the mandatory

[23] *See, e.g., Manganese Metal from the People's Republic of China. Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 63 FR 12440 (March 13, 1998).

[24] *See Silicon Carbide*, 59 FR at 22587; *Sparklers*, 56 FR at 20589; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).

[25] *See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Review in Part*, 73 FR 52823, 52824 (September 11, 2008) and accompanying Issues and Decision Memorandum at Comment 16.

[26] *Id.*

[27] *Id.*

[28] *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification*, 77 FR 8101 (February 14, 2012) ("*Final Modification for Reviews*").

[29] *See Ball Bearings and Parts Thereof From France, Germany, and Italy: Preliminary Results of Antidumping Duty Administrative Reviews and Rescission of Antidumping Duty Administrative Reviews in Part*, 77 FR 33159 (June 5, 2012) ("*AFBs 2012*").

respondents. Consequently, the rate established for the Separate Rate Respondents is a per-unit rate of $0.00 dollars per kilogram. The Separate Rate Respondents receiving this rate are identified by name in the "*Preliminary Results of Review*" section of this notice.

Vietnam-Wide Entity

Upon initiation of the administrative review, we provided the opportunity for all companies upon which the review was initiated to complete either the separate-rate application or certification. The separate-rate application and certification were available at: *http://ia.ita.doc.gov/nme/nme-sep-rate.html.*

We have preliminarily determined that three[30] companies did not demonstrate their eligibility for a separate rate and are properly considered part of the Vietnam-wide entity. In NME proceedings, "'rates' may consist of a single dumping margin applicable to all exporters and producers."[31] As explained above in the "*Separate Rates*" section, all companies within Vietnam are considered to be subject to government control unless they are able to demonstrate an absence of government control with respect to their export activities. Such companies are thus assigned a single antidumping duty rate distinct from the separate rate(s) determined for companies that are found to be independent of government control with respect to their export activities. We consider the influence that the government has been found to have over the economy to warrant determining a rate for the entity that is distinct from the rates found for companies that have provided sufficient evidence to establish that they operate freely with respect to their export activities.[32] Therefore, we are assigning the entity a rate of 2.11 USD/kg, the only rate ever determined for the Vietnam-wide entity in this proceeding.

Surrogate Country

A. Level of Economic Development

When the Department is investigating imports from an NME country, section 773(c)(1) of the Act directs it to base NV, in most circumstances, on the NME producer's factors of production ("FOPs"), valued in a surrogate market economy ("ME") country, or countries, considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more ME countries that are (a) at a level of economic development comparable to that of the NME country and (b) are significant producers of comparable merchandise.

The Department considers the countries on the Surrogate Country List—Bangladesh, India, Indonesia, Nicaragua, Pakistan and the Philippines—to be comparable to Vietnam in terms of economic development.[33] Section 773(c)(4)(A) of the Act is silent with respect to how the Department may determine that a country is economically comparable to the NME country. As such, the Department's long standing practice has been to identify those countries which are at a level of economic development similar to Vietnam in terms of gross national income ("GNI") data available in the World Development Report provided by the World Bank.[34] In this case, the GNI available are based on data published in 2010. The GNI levels for the list of potential surrogate countries ranged from $640 to $2,580.[35] The Department is satisfied that they are equally comparable in terms of economic development and serve as an adequate group to consider when gathering surrogate value data. Further, providing parties with a range of countries with varying GNIs is reasonable given that any alternative would require a complicated analysis of factors affecting the relative GNI differences between Vietnam and other countries, which is not required by the statute. In contrast, by identifying countries that are economically comparable to Vietnam based on GNI, the Department provides parties with a predictable practice which is reasonable and consistent with the statutory requirements. We note that identifying potential surrogate countries based on GNI data has been affirmed by the Court of International Trade ("CIT").[36]

B. Significant Producers of Comparable Merchandise

As we have stated in prior review determinations, there is no world production data of *Pangasius* frozen fish fillets available on the record with which the Department can identify producers of identical merchandise. Therefore, absent world production data, the Department's practice is to compare, wherever possible, data for comparable merchandise and establish whether any economically comparable country was a significant producer.[37] In this case, we have determined to use the broader category of frozen fish fillets as the basis for identifying producers of comparable merchandise. Therefore, consistent with cases that have similar circumstances as are present here, we obtained export data for each country identified in the surrogate country list. Based on 2009 export data from the United Nations Food and Agriculture Organization,[38] Bangladesh, India, Indonesia, Nicaragua, Pakistan and the Philippines are exporters of frozen fish fillets, and thus, significant producers.

C. Data Considerations

After applying the first two selection criteria, if more than one country remains, it is the Department's practice to select an appropriate surrogate country based on the availability and reliability of data from those countries.[39] In this case, the whole fish input is the most significant input because it accounts for the largest percentage of NV as fish fillets are produced directly from the whole live fish. As such, we must consider the availability and reliability of the surrogate values for whole fish on the record. This record does not contain any data for whole live fish from Nicaragua or Pakistan. Therefore, these countries will not be considered for primary surrogate country purposes at this time. However, this record does contain whole fish surrogate value data from Bangladesh, the Philippines, Indonesia and India.

[30] Includes Nam Viet Company Limited, East Sea Seafoods Joint Venture Co., Ltd. and Vinh Hoan Company, Ltd.

[31] *See* section 351.107(d) of the Department's regulations.

[32] *See Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 FR 37116 (June 23, 2003).

[33] *See* Memorandum from Carole Showers, Director, Office of Policy, to Matthew Renkey, Acting Program Manager, Office 9, "Request for a List of Surrogate Countries for an Administrative Review and a New Shipper Review of the Antidumping Duty Order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam," dated November 5, 2011 ("Surrogate Country List").

[34] *See Pure Magnesium from the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 75 FR 80791 (December 23, 2010) and accompanying Issues and Decision Memorandum at Comment 4.

[35] *See* Surrogate Country List.

[36] *See Fujian Lianfu Forestry Co., Ltd.* v. *United States*, 638 F. Supp. 2d 1325 (CIT 2009).

[37] *See Certain Magnesio Corbon Bricks from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 FR 11847 (March 12, 2010), unchanged for the final determination, 75 FR 45468 (August 2, 2010).

[38] *See* Memorandum to the File, through Scot T. Fullerton, Program Manager, Office 9, from Paul Walker, Case Analyst, "Eighth Administrative Review and Ninth New Shipper Reviews of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Surrogate Values for the Preliminary Results," dated concurrently with this notice ("Surrogate Value Memo") at Attachment I.

[39] *See* Department Policy Bulletin No. 04.1: Non-Market Economy Surrogate Country Selection Process (March 1, 2004).

An Phu placed the Bangladeshi Department of Agriculture Marketing, Ministry of Agriculture, online *pangas* price data ("online DAM data") on the record.[40] The Department issued a letter to the Bangladeshi Department of Agriculture Marketing, requesting among other things, the collection methods of the online DAM data.[41] We have yet to receive a response from the Bangladeshi Department of Agriculture Marketing. The Petitioners placed the *Fisheries Statistics of the Philippines, 2008–2010*, published by the Philippines Bureau of Agricultural Statistics, Department of Agriculture ("*Fisheries Statistics*"), on the record.[42] Moreover, the Petitioners placed Indonesian price and quantity data from the United Nations Food and Agriculture Organization's Fisheries Global Information System ("FIGIS data"), on the record.[43] VASEP placed the *Present Status of the Pangasius, Pangasianodon-Hypophthalmus Farming in Andhra Pradesh, India* ("*Pangasius Study*"), on the record.[44]

When evaluating surrogate value data, the Department considers several factors including whether the surrogate value is publicly available, contemporaneous with the POR, represents a broad market average from an approved surrogate country, is tax and duty-exclusive, and is specific to the input. There is no hierarchy; it is the Department's practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis.

We note that the values submitted in these reviews are identical to the values submitted in the last administrative review with the exception of the online DAM data, which has been updated to match the POR. An analysis of these values may be found in the *7th AR Final*.[45] As the Department already analyzed this data in the last administrative review, and no new information has been placed on the record of these reviews which would call into question the reliability of the data, consistent with the *7th AR Final*, we continue to find that the online DAM data represents the best available information with which to value the whole live fish input.[46] Based on the analysis above, we find that the online DAM data represents the most reliable broad market average for purposes of valuing whole live fish. Therefore, for the preliminary results, the Department will select Bangladesh as the surrogate country. Moreover, we note that the record contains three financial statements from Bangladeshi producers of comparable merchandise which are contemporaneous with the POR.

Fair Value Comparisons

To determine whether sales of the subject merchandise made by Vinh Hoan, Anvifish and the New Shipper Respondents to the United States were at prices below NV, we compared each company's export price ("EP") or constructed export price ("CEP"), where appropriate, to NV, as described below.

A. Export Price

For Vinh Hoan and the New Shipper Respondents' EP sales, we used the EP methodology, pursuant to section 772(a) of the Act, because the first sale to an unaffiliated purchaser was made prior to importation. To calculate EP, we deducted foreign inland freight, foreign cold storage, foreign brokerage and handling, foreign containerization, and international ocean freight from the starting price (or gross unit price), in accordance with section 772(c) of the Act.

B. Constructed Export Price

For Vinh Hoan's and Anvifish's CEP sales, we used the CEP methodology when the first sale to an unaffiliated purchaser occurred after importation of the merchandise into the United States. To calculate CEP, we made adjustments to the gross unit price, where applicable, for billing adjustments, rebates, foreign inland freight, international freight, foreign cold storage, foreign containerization, foreign brokerage and handling, U.S. marine insurance, U.S. inland freight, U.S. warehousing, U.S. inland insurance, other U.S. transportation expenses and U.S. customs duties. In accordance with section 772(d)(1) of the Act, we also deducted those selling expenses associated with economic activities occurring in the United States, including commissions, credit expenses, advertising expenses, indirect selling expenses, inventory carrying costs and U.S. re-packing costs. We also made an adjustment for profit in accordance with section 772(d)(3) of the Act.

Normal Value

Section 773(c)(1) of the Act provides that, in the case of an NME, the Department shall determine NV using an FOP methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home-market prices, third-country prices or constructed value, under section 773(a) of the Act. Because information on the record does not permit the calculation of NV using home-market prices, third-country prices, or constructed value, and no party has argued otherwise, we calculated NV based on FOPs reported by the Respondents, pursuant to sections 773(c)(3) and (4) of the Act and section 351.408(c) of the Department's regulations.

A. Factor Valuation Methodology

In accordance with section 351.408(c)(1) of the Department's regulations, the Department will normally use publicly available information to value the FOPs. However, when a producer sources an input from a ME country and pays for it in an ME currency, the Department may value the FOP using the actual price paid for the input. During the POR, Vinh Hoan and Anvifish reported that they purchased certain inputs, and international freight, from an ME suppliers and paid for the inputs in a ME currency.[47] The Department has a rebuttable presumption that ME input prices are the best available information for valuing an input when the total volume of the input purchased from all ME sources during the period of investigation or review exceeds 33 percent of the total volume of the input purchased from all sources during the period.[48]

In this case, unless case-specific facts provide adequate grounds to rebut the Department's presumption, the Department will use the weighted-average ME purchase price to value the input. Alternatively, when the volume of an NME firm's purchases of an input from ME suppliers during the period is below 33 percent of its total volume of purchases of the input during the

[40] *See* the Vietnamese Association of Seafood Exporters' ("VASEP"), and An Phu's, May 23, 2012 submissions at Exhibit 8.

[41] *See* Letter to Shafiqur Rahman Shaikh, Chief, Research, Planning & Development, Department of Agricultural Marketing from Scot T. Fullerton, Program Manager, Questions for the Bangladeshi Department of Agricultural Marketing Regarding National Wholesale Price Data, " dated July 27, 2012.

[42] *See* the Petitioners' May 23, 2012 submission at Exhibit 11.

[43] *Id.*

[44] *See* VASEP's may 23, 2012 submission at Exhibit 36A.

[45] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 FR 15039 (March 14, 2012) ("*7th AR Final*") and accompanying issues and Decision Memorandum at Comment 1, pages 7–13.

[46] *Id.*

[47] *See, e.g.*, Vinh Hoan's Section D response.

[48] *See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716, 61717–18 (October 19, 2006) ("*Antidumping Methodologies*").

period, but where these purchases are otherwise valid and there is no reason to disregard the prices, the Department will weight-average the ME purchase price with an appropriate SV according to their respective shares of the total volume of purchases, unless case-specific facts provide adequate grounds to rebut the presumption.[49] When a firm has made ME input purchases that may have been dumped or subsidized, are not *bona fide*, or are otherwise not acceptable for use in a dumping calculation, the Department will exclude them from the numerator of the ratio to ensure a fair determination of whether valid ME purchases meet the 33 percent threshold.[50]

As the basis for NV, Vinh Hoan, Anvifish and the New Shipper Respondents provided FOPs used in each of the stages for producing frozen fish fillets. The Department's general policy, consistent with section 773(c)(1) of the Act, is to value the FOPs that a respondent uses to produce the subject merchandise.

To calculate NV, the Department valued the Respondents' reported per-unit factor quantities using publicly available Indonesian, Bangladeshi, Philippine and Indian surrogate values. As noted above, Bangladesh is the surrogate country source from which to obtain data to value inputs, and when data were not available from Bangladesh, we used Indonesian, Indian and Philippine sources. In selecting surrogate values, we considered the quality, specificity, and contemporaneity of the available values. As appropriate, we adjusted the value of material inputs to account for delivery costs. Specifically, we added surrogate freight costs to surrogate values using the reported distances from the Vietnam port to the Vietnam factory, or from the domestic supplier to the factory, where appropriate. This adjustment is in accordance with the decision of the CAFC in *Sigma Corp.* v. *United States*, 117 F.3d 1401, 1407–1408 (Fed. Cir. 1997). For those values not contemporaneous with the POR, we adjusted for inflation using data published in the International Monetary Fund's *International Financial Statistics*.

In accordance with the *OTCA 1988* legislative history, the Department continues to apply its long-standing practice of disregarding surrogate values if it has a reason to believe or suspect the source data may be subsidized.[51] In this regard, the Department has previously found that it is appropriate to disregard such prices from India, Indonesia, South Korea and Thailand because we have determined that these countries maintain broadly available, non-industry specific export subsidies.[52] Based on the existence of these subsidy programs that were generally available to all exporters and producers in these countries at the time of the POR, the Department finds that it is reasonable to infer that all exporters from India, Indonesia, South Korea, and Thailand may have benefitted from these subsidies.

Additionally, we disregarded prices from NME countries. Finally, imports that were labeled as originating from an "unspecified" country were excluded from the average value, because the Department could not be certain that they were not from either an NME country or a country with general export subsidies. For further detail, *see* Surrogate Values Memo.

B. Labor

Section 773(c) of the Act, provides that the Department will value the FOPs in NME cases using the best available information regarding the value of such factors in a ME country or countries considered to be appropriate by the administering authority. The Act requires that when valuing FOPs, the Department utilize, to the extent possible, the prices or costs of FOPs in one or more ME countries that are (a) at a comparable level of economic development and (b) significant producers of comparable merchandise.[53]

On June 21, 2011, the Department revised its methodology for valuing the labor input in NME antidumping proceedings.[54] In *Labor Methodologies*, the Department determined that the best methodology to value the labor input is to use industry-specific labor rates from the primary surrogate country. Additionally, the Department determined that the best data source for industry-specific labor rates is Chapter 6A: Labor Cost in Manufacturing, from the International Labor Organization's ("ILO") *Yearbook of Labor Statistics*.

As noted above, the Department has selected Bangladesh as the surrogate country for the preliminary results. Because Bangladesh does not report labor data to the ILO, we are unable to use ILO's Chapter 6A data to value the Respondents' labor wage. However, the record does contain a labor wage rate for fishery workers in Bangladesh, published by the Bangladesh Bureau of Statistics. The Department finds this labor wage rate to be the best available information on the record. This data is publicly available, represents a broad market average, specific to the fishery industry, and was collected from an official Bangladeshi government source in the surrogate country that the Department has selected. Moreover, we note this source has been used in other cases where Bangladesh has been selected as the surrogate country.[55]

C. Financial Ratios

The Department's criteria for choosing surrogate companies are the availability of contemporaneous financial statements, comparability to the respondent's experience, and publicly available information.[56] Moreover, for valuing factory overhead ("OH"), selling, general & administrative expenses ("SG&A") and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable

[49] *See Antidumping Methodologies.*

[50] *See Antidumping Methodologies; see also* Memo to the File, from Susan Pulongbarit, Case Analyst, "Eighth Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results Analysis Memorandum for Vinh Hoan Corporation," dated concurrently with this notice; Memo to the File, from Paul Walker, Case Analyst, "Eighth Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results Analysis Memorandum for Anvifish Joint Stock Company," dated concurrently with this notice.

[51] *See Omnibus Trade and Competitiveness Act of 1988, Conf. Report to Accompany H.R. 3, H.R. Rep. No. 576, 100th Cong.*, 2nd Sess. (1988) ("*OTCA 1988*") at 590.

[52] *See, e.g., Corbozole Violet Pigment 23 from India: Final Results of the Expedited Five-year (Sunset) Review of the Countervailing Duty Order*, 75 FR 13257 (March 19, 2010) and accompanying Issues and Decision Memorandum at 4–5; *Certain Cut-to-Length Carbon-Quality Steel Plate from India, Indonesia, and the Republic of Korea: Continuation of Antidumping and Countervailing Duty Orders*, 77 FR 264 (January 4, 2012); *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*, 74 FR 2512 (January 15, 2009) and accompanying Issues and Decision Memorandum at 17, 19–20.

[53] *See* section 773(c)(4) of the Act.

[54] *See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 FR 36092 (June 21, 2011) ("*Labor Methodologies*"). This notice followed the Federal Circuit decision in *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372 (Fed. Cir. 2010), which found that the regression-based method for calculating wage rates as stipulated by section 351.408(c)(3) of the Department's regulations uses data not permitted by the statutory requirements laid out in section 773 of the Act (*i.e.*, 19 U.S.C. 1677b(c)).

[55] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 56158 (September 12, 2011) and accompanying Issues and Decision Memorandum at Comment 2I.

[56] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from the People's Republic of China*, 70 FR 24502 (May 10, 2005) and accompanying Issues and Decision Memorandum at Comment 3.

merchandise in the surrogate country.[57] In addition, the CIT has held that in the selection of surrogate producers, the Department may consider how closely the surrogate producers approximate the non-market producer's experience.[58]

As a result, to value the surrogate financial ratios for OH, SG&A and profit, for integrated respondents, the Department averaged the 2010–2011 financial statements of Apex Foods Limited ("Apex") and Fine Foods Co., Ltd. ("Fine Foods"). Apex and Fine Foods are integrated producers of comparable merchandise, frozen seafood, in Bangladesh. To value the surrogate financial ratios for OH, SG&A and profit, for non-integrated respondents, the Department used the 2010–2011 financial statement of Gemini Seafood Limited ("Gemini"). Gemini is a non-integrated producer of comparable merchandise, frozen seafood, in Bangladesh.

Although the Petitioners have argued that the Department should not calculate financial ratios using the Gemini financial statement because the record contains evidence that Gemini received export subsidies, we note that in past cases the Department, consistent with long-standing practice, has stated that we will not reject the use of a factor value that is allegedly subsidized unless the Department has previously found the program to be a countervailable subsidy in a countervailing duty proceeding.[59] A determination of whether a subsidy is countervailable requires the Department to make several complicated legal and factual determinations. Specifically, under U.S. law, the Department must determine that there is a financial contribution from the government that provides a benefit to the recipient which is specific.[60] Without these findings, the alleged program is not countervailable. Absent such a finding, the Department does not believe that the language of the Act or the legislative history requires that the Department exclude the value at issue from its consideration.[61]

D. Currency Conversion

Where necessary, the Department made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

Notice of Intent To Revoke the Order, in Part

On August 24, 2011, and August 26, 2011, Vinh Hoan and QVD, respectively, requested revocation of the antidumping duty order with respect to their sales of subject merchandise, pursuant to section 351.222(e) of the Department's regulations. These requests were accompanied by certifications, pursuant to section 351.222(e)(1) of the Department's regulations that (a) Vinh Hoan and QVD have sold the subject merchandise at not less than NV for at least three consecutive years and that they will not sell the merchandise at less than NV in the future, and (b) Vinh Hoan and QVD sold subject merchandise to the United States in commercial quantities for a period of at least three consecutive years. Vinh Hoan and QVD also agreed to immediate reinstatement of the *Order*, as long as any exporter or producer is subject to the *Order*, if the Department concludes that, subsequent to its revocation, they sold the subject merchandise at less than NV.

Pursuant to section 751(d) of the Act, the Department "may revoke, in whole or in part" an antidumping duty order upon completion of a review under section 751(a) of the Act. In determining whether to revoke an antidumping duty order in part, the Department considers (a) whether the company in question has sold subject merchandise at not less than NV for a period of at least three consecutive years, (b) whether during each of the three consecutive years for which the company sold the merchandise at not less than NV, it sold the merchandise to the United States in commercial quantities, and (c) the company has agreed in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Department concludes that the company, subsequent to revocation, sold the subject merchandise at less than NV.[62]

A. Vinh Hoan

We have preliminarily determined that the request from Vinh Hoan meets all of the criteria under section 351.222(e)(1) of the Department's regulations. As noted in the "*Preliminary Results of the Review*" section below, our preliminary margin calculation confirms that Vinh Hoan sold subject merchandise at not less than NV during the current review period. In addition, we have confirmed that Vinh Hoan sold subject merchandise at not less than NV in the two previous administrative reviews in which they were individually examined (*i.e.*, their dumping margins were zero or *de minimis*).[63]

Based on our examination of the sales data submitted by Vinh Hoan, we preliminarily determine that it sold the subject merchandise in the United States in commercial quantities in during each of the consecutive years cited by Vinh Hoan to support its request for revocation.[64] Thus, we preliminarily find that Vinh Hoan had zero or *de minimis* dumping margins for the last three years and sold subject merchandise in commercial quantities during each of these years.

Furthermore, we preliminarily determine, pursuant to section 751(d) of the Act and section 351.222(b)(2) of the Department's regulations, that the application of the antidumping duty order with respect to Vinh Hoan is no longer warranted because (a) Vinh Hoan had a zero or *de minimis* margin for a period of at least three consecutive years, (b) Vinh Hoan has agreed to immediate reinstatement of the order if the Department finds that it has resumed making sales at less than NV, and (c) the continued application of the order is not otherwise necessary to offset dumping. Therefore, we preliminarily determine that subject merchandise produced and exported by Vinh Hoan qualifies for revocation from the *Order*, and that the *Order*, with respect to such merchandise, should be revoked. If these preliminary findings are affirmed in our final results, we will revoke this order, in part, with respect to fish fillets produced and exported by Vinh Hoan and, in accordance with section 351.222(f)(3) of the Department's regulations, terminate the suspension of liquidation for any of the merchandise in question that is entered, or withdrawn from warehouse, for

[57] *See, e.g., Diamond Sawblades and Parts Thereof from the People's Republic of China, Final Determination in the Antidumping Duty Investigation*, 71 FR 29303 (May 22, 2006) and accompanying Issues and Decision Memorandum at Comment 2; *see also* section 351.408(c)(4) of the Department's regulations and section 773(c)(4) of the Act.

[58] *See Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247, 1253–1254 (CIT 2002); *see also Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 FR 6836 (February 9, 2005) and accompanying Issues and Decision Memorandum at Comment 1.

[59] *See, e.g., 7th AR Final* at Comment II.A.

[60] *See* 19 U.S.C. section 1671 and 1677(5).

[61] *See* the SV Memo for further discussion of this issue.

[62] *See* section 351.222(e)(1) of the Department's regulations.

[63] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 FR 15941 (March 22, 2011); *see also 7th AR Final*.

[64] See Memorandum to the File, through, Scot T. Fullerton, Program Manager, Office 9, from Susan Pulongbarit, International Trade Analyst, Office 9, "Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Analysis of Commercial Quantities for Vinh Hoan Corporation's Request for Revocation," dated concurrently with this notice.

consumption on or after August 1, 2011, and instruct CBP to release any cash deposits for such entries.

B. QVD

We have preliminarily determined that the request from QVD does not meet all of the criteria under section 351.222(e)(1) of the Department's regulations. As noted in the *"Preliminary Results of the Review"* section below, our preliminary margin calculation confirms that QVD sold subject merchandise at less than NV during the current review period. In addition, we note that QVD sold subject merchandise at less than NV in the prior administrative review.[65] Therefore, we preliminarily determine that subject merchandise produced and exported by QVD does not qualify for revocation from the *Order*.

Preliminary Results of the Review

As a result of our review, we preliminarily find that the following margins exist for the period August 1, 2010, through July 31, 2011.

Manufacturer/exporter	Weighted-average margin (dollars per kilogram)[66]
Vinh Hoan Corporation[67]	0.00
Anvifish Joint Stock Company[68]	0.00
An Phu Seafood Corporation ("An Phu")	0.00
Docifish Corporation ("Docifish")	0.00
Godaco Seafood Joint Stock Company ("Godaco")	0.00
An Giang Agriculture and Food Import-Export Joint Stock Company ("AFIEX")	0.00
An Giang Fisheries Import & Export Joint Stock Company ("Agifish")	0.00
Asia Commerce Fisheries Joint Stock Company ("Acomfish")	0.00
Binh An Seafood Joint Stock Company ("Binh An")	0.00
Cadovimex II Seafood Import-Export and Processing Joint Stock Company ("Cadovimex II")	0.00
Hiep Thanh Seafood Joint Stock Company ("Hiep Thanh")	0.00
Hung Vuong Corporation ("Hung Vuong")	0.00
Nam Viet Corporation ("NAVICO")	0.00
NTSF Seafoods Joint Stock Company ("NTSF")	0.00
QVD Food Company Ltd. ("QVD")[69]	0.00
Saigon Mekong Fishery Co., Ltd. ("SAMEFICO")	0.00
Southern Fisheries Industries Company Ltd. ("South Vina")	0.00
Vinh Quang Fisheries Corporation ("Vinh Quang")	0.00
Vietnam-Wide Rate[70]	2.11

Disclosure and Public Comment

In accordance with section 351.224(b) of the Department's regulations, we will disclose to parties of this proceeding the calculations performed in reaching the preliminary results within five days of the date of announcement of the preliminary results.

In accordance with section 351.301(c)(3)(ii) of the Department's regulations, for the final results of these reviews interested parties may submit publicly available information to value FOPs within 20 days after the date of publication of these preliminary results. Interested parties must provide the Department with supporting documentation for the publicly available information to value each FOP. Additionally, in accordance with section 351.301(c)(1) of the Department's regulations, for the final results of these reviews, interested parties may submit factual information to rebut, clarify, or correct factual information submitted by an interested party less than ten days before, on, or after, the applicable deadline for submission of such factual information. However, the Department notes that section 351.301(c)(1) of the Department's regulations permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record. The Department generally cannot accept "the submission of additional, previously absent-from-the-record alternative surrogate value or financial ratio information" pursuant to section 351.301(c)(1) of the Department's regulations.[71] Additionally, for each piece of factual information submitted with surrogate value rebuttal comments, the interested party must provide a written explanation of what information that is already on the record of the ongoing proceeding that the factual information is rebutting, clarifying, or correcting.

Interested parties may submit case briefs within 30 days of publication of the preliminary results and rebuttal briefs, which must be limited to issues raised in the case briefs, within five days after the time limit for filing case

[65] *See* 7th AR Final.

[66] In the third administrative review of this order, the Department determined that it would calculate per-unit assessment and cash deposit rates for all future reviews. *See Certain Frozen Fish Fillets from the Sociolist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partiol Rescission*, 73 FR 15479 (March 24, 2008).

[67] This rate is applicable to the Vinh Hoan Group which includes Vinh Hoan, Van Duc, and VDTG. In the sixth review of this order, the Department found Vinh Hoan, Van Duc, and VDTG to be a single entity and, because there have been no changes to this determination since that administrative review, we continue to find these companies to be part of a single entity. Therefore, we will assign this rate to the companies in the single entity. *See Certain Frozen Fish Fillets From the Sociolist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Sixth Antidumping Duty Administrotive Review and Sixth New Shipper Review*, 75 FR 56061 (September 15, 2010).

[68] Includes the trade name Anvifish Co., Ltd.

[69] This rate is also applicable to QVD Dong Thap Food Co., Ltd and Thuan Hung Co., Ltd. ("THUFICO"). In the second review of this order, the Department found QVD, QVD Dong Thap Food Co., Ltd. and THUFICO to be a single entity and, because there have been no changes to this determination since that administrative review, we continue to find these companies to be part of a single entity. Therefore, we will assign this rate to the companies in the single entity. *See Certain Frozen Fish Fillets from the Sociolist Republic of Vietnam: Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 53387 (September 11, 2006).

[70] The Vietnam-wide rate includes the following companies which are under review, bit did not submit a separate rate application or certification-Nam Viet Company Limited, East Sea Seafoods Joint Venture Co., Ltd. and Vinh Hoan Company, Ltd.

[71] *See Glycine from the People's Republic of Chino: Final Results of Antidumping Duty Administrative Review and Final Rescissian, in Port*, 72 FR 58809 (October 17, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

briefs.[72] Parties who submit arguments are requested to submit with the argument (a) a statement of the issue, (b) a brief summary of the argument, and (c) a table of authorities. Parties submitting briefs should do so pursuant to the Department's electronic filing system, IA ACCESS.[73]

Unless the deadline is extended, pursuant to section 751(a)(3)(A) of the Act, the Department will issue the final results of these reviews, including the results of our analysis of the issues raised by the parties in their comments, within 120 days of publication of the preliminary results. The assessment of antidumping duties on entries of merchandise covered by this review and future deposits of estimated duties shall be based on the final results of these reviews.

Assessment Rates

In accordance with section 351.212(b) of the Department's regulations, upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by these reviews. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final result. For any individually examined respondent whose weighted-average dumping margin is above *de minimis* (*i.e.*, 0.50 percent) in the final results of these reviews, the Department will calculate importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for the importer's examined sales and the total entered value of sales, in accordance with section 351.212(b)(1) of the Department's regulations. As noted above, in this and future reviews, we will direct CBP to assess importer-specific assessment rates based on the resulting per-unit (*i.e.*, per-kilogram) rates by the weight in kilograms of each entry of the subject merchandise during the POR. In these preliminary results, the Department applied the assessment rate calculation method adopted in *Final Modifications for Reviews*, *i.e.*, on the basis of monthly average-to-average comparisons using only the transactions associated with that importer with offsets being provided for non-dumped comparisons.[74] Where an importer/customer-specific per-unit rate is greater than *de minimis*, we will apply the assessment rate to the entered value of the importer's/customer's entries during the POR, in accordance with section 351.212(b)(1) of the Department's regulations. Where an importer/customer-specific per-unit rate is zero or *de minimis*, we will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[75]

For the companies receiving a separate rate that were not selected for individual review, we will assign an assessment rate based on the average of the mandatory respondents, as discussed above. We intend to instruct CBP to liquidate entries containing subject merchandise exported by the Vietnam-wide entity at the Vietnam-wide rate. Finally, for those companies for which this review has been preliminarily rescinded, the Department intends to assess antidumping duties at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with section 351.212(c)(2) of the Department's regulations, if the review is rescinded for these companies.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of these reviews for all shipments of the subject merchandise from Vietnam entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (a) For the exporters listed above, the cash deposit rate will be established in the final results of these reviews (except, if the rate is zero or *de minimis*, no cash deposit will be required for that company); (b) for previously investigated or reviewed Vietnamese and non-Vietnamese exporters not listed above that have a separate rate, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (c) for all Vietnamese exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the Vietnam-wide rate of $2.11 per kilogram; and (d) for all non-Vietnamese exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Vietnamese exporters that supplied that non-Vietnamese exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Interested Parties

This notice serves as a preliminary reminder to importers of their responsibility under section 351.402(f)(2) of the Department's regulations to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing this determination in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: August 30, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–22484 Filed 9–11–12; 8:45 am]

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[72] *See* sections 351.309(c)(1)(ii) and 351.309(d) of the Department's regulations.

[73] *See* section 351.303 of the Department's regulations; *see also https://iaaccess.trade.gov/help/IA%20ACCESS%20User%20Guide.pdf.*

[74] *See Antidumping Proceeding: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8103 (February 14, 2012) ("*Final Modifications for Reviews*").

[75] *See* 351.106(c)(2) of the Department's regulations.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–938]

Citric Acid and Certain Citrate Salts from the People's Republic of China: Notice of Rescission of Countervailing Duty Administrative Review, in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* September 12, 2012.

FOR FURTHER INFORMATION CONTACT: Kristen Johnson, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, Room 4014, 14th Street and Constitution Ave. NW., Washington, DC 20230, telephone: (202) 482–4793

SUPPLEMENTARY INFORMATION:

Background

On May 1, 2012, the Department of Commerce (the Department) published a notice of opportunity to request an administrative review of the countervailing duty (CVD) order on citric acid and certain citrate salts from the People's Republic of China.[1] On

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity*

May 31, 2012, we received a request from Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Ingredients Americas LLC, domestic producers of the subject merchandise and petitioners in the investigation (collectively, the Petitioners), to conduct an administrative review of Yixing-Union Biochemical Co., Ltd. (Yixing-Union).[2]

On July 10, 2012, the Department published the notice of initiation of the administrative review for the review period January 1, 2011, through December 31, 2011 (POR), which covered Yixing-Union and the RZBC Companies.[3] On July 13, 2012, Yixing-Union submitted a letter certifying that it had no sales, shipments, or exports of subject merchandise to the United States during the POR. On August 8, 2012, the Department published a notice of intent to rescind Yixing-Union's administrative review and invited interested parties to comment.[4] We received no comments, and have determined that the review of Yixing-Union should be rescinded.

Scope of the Order

The scope of the order includes all grades and granulation sizes of citric acid, sodium citrate, and potassium citrate in their unblended forms, whether dry or in solution, and regardless of packaging type. The scope also includes blends of citric acid, sodium citrate, and potassium citrate; as well as blends with other ingredients, such as sugar, where the unblended form(s) of citric acid, sodium citrate, and potassium citrate constitute 40 percent or more, by weight, of the blend. The scope of the order also includes all forms of crude calcium citrate, including dicalcium citrate monohydrate, and tricalcium citrate tetrahydrate, which are intermediate products in the production of citric acid, sodium citrate, and potassium citrate. The scope of the order does not include calcium citrate that satisfies the standards set forth in the United States Pharmacopeia and has been mixed with a functional excipient, such as dextrose or starch, where the excipient constitutes at least 2 percent, by weight, of the product. The scope of the order includes the hydrous and anhydrous forms of citric acid, the dihydrate and anhydrous forms of sodium citrate, otherwise known as citric acid sodium salt, and the monohydrate and monopotassium forms of potassium citrate. Sodium citrate also includes both trisodium citrate and monosodium citrate, which are also known as citric acid trisodium salt and citric acid monosodium salt, respectively. Citric acid and sodium citrate are classifiable under 2918.14.0000 and 2918.15.1000 of the Harmonized Tariff Schedule of the United States (HTSUS), respectively. Potassium citrate and crude calcium citrate are classifiable under 2918.15.5000 and 3824.90.9290 of the HTSUS, respectively. Blends that include citric acid, sodium citrate, and potassium citrate are classifiable under 3824.90.9290 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Partial Rescission of Review

Pursuant to 19 CFR 351.213(d)(3), the Department may rescind an administrative review, with respect to a particular exporter or producer, if the Secretary concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise to the United States by that producer. Yixing-Union submitted a letter on July 13, 2012, certifying that it did not have sales, shipments, or exports of subject merchandise to the United States during the POR. We received no comments from any interested party on Yixing-Union's no-shipment claim.

We conducted an internal customs data query for the POR and issued a "no shipments inquiry" message to U.S. Customs and Border Protection (CBP), which posted the message on July 17, 2012.[5] The results of the customs data query indicated that there were no entries of subject merchandise to the United States by Yixing-Union during the POR. We did not receive any information from CBP contrary to Yixing-Union's claim of no sales, shipments, or exports of subject merchandise to the United States during the POR.

Based on our analysis of the shipment data, we determine that Yixing-Union had no entries of subject merchandise to the United States during the POR. Therefore, in accordance with 19 CFR 351.213(d)(3), and consistent with our practice,[6] we determine to rescind the review for Yixing-Union. We will continue this administrative review with respect to the RZBC Companies.

We are issuing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4) of the Department's regulations.

Dated: August 31, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–22474 Filed 9–11–12; 8:45 am]

BILLING CODE 3510–DS–P

To Request Administrative Review, 77 FR 25679 (May 1, 2012).

[2] Petitioners also requested a review of RZBC Co., Ltd., RZBC Imp. & Exp. Co., Ltd., and RZBC (Juxian) Co., Ltd. (collectively, the RZBC Companies). *See* Letter from petitioners to the Department regarding "Request for Administrative Review," dated May 31, 2012. This public document and all other public documents and public versions generated in the course of this review by the Department and interested parties are on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaccess.trade.gov* and in the Central Records Unit (CRU), room 7046 of the main Department of Commerce building. In addition, a complete version of this notice can be accessed directly on the Internet at *http://www.trade.gov/ia/*.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 FR 40565, 40573 (July 10, 2012).

[4] *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Intent to Rescind Countervailing Duty Administrative Review, in Part*, 77 FR 47370 (August 8, 2012).

[5] *See* Memorandum to the File from Kristen Johnson, Trade Analyst, AD/CVD Operations, Office 3, regarding "Release of Results of Query Performed on Customs and Border Protection Trade Data Base," (July 10, 2012) and Customs message number 2199302, available at *http://addcvd.cbp.gov* or IA ACCESS.

[6] *See, e.g., Welded Carbon Steel Standard Pipe and Tube from Turkey: Notice of Rescission of Countervailing Duty Administrative Review, in Part*, 74 FR 47921 (September 18, 2009).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Elwha River Dam Removal and Floodplain Restoration Ecosystem Service Valuation Pilot Project

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before November 13, 2012.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616,

14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Dr. Anthony Dvarskas (732) 872–3090 or *Anthony.Dvarskas@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for a new information collection.

National Ocean Services' Office of Response and Restoration, Assessment and Restoration Division and the National Marine Fisheries Services' Office of Habitat Conservation are requesting approval for a new information collection to conduct a pilot study to test the Elwha River Dam Removal and Floodplain Restoration Ecosystem Service Valuation Survey it has developed.

The removal of two hydroelectric dams on the Elwha River is one of the largest dam-removal projects in U.S. history. This project, along with restoration actions planned for the floodplain and drained reservoir basins, will have numerous impacts to people of the surrounding region. Impacted groups include recreators who engage in river activities such as fishing and rafting, reservoir users, and members of Native American tribes for whom the river has cultural, environmental, and economic significance. The dam removal and restoration actions could also have value to people throughout the Pacific Northwest, regardless of whether they visit the Elwha River or Olympic Peninsula. Such nonuse value may be significant because the dam removal and habitat restoration will restore the river to more natural conditions and will restore populations of salmon and other fish species as well as forests and wildlife. This project will also address an important gap in research on indirect and nonuse values provided by habitat restoration.

A study of the value of ecological restoration is of particular interest in this location because significant baseline ecological data are available to allow a comparison of ecological values with some of the more obvious use losses associated with the reservoir. The ability to link results of the study to precise measures of ecosystem changes will be useful in applying the study to future restoration sites, enabling NOAA to evaluate a broader range of ecosystem services provided by future restoration actions.

NOAA has developed a nonmarket valuation survey to administer to people living in Washington and Oregon. This survey has been tested with small focus groups and one-on-one interviews to ensure the survey questions and choice scenarios presented are accurate, easily understood, and the least burdensome. The next step in the survey development process is to administer a pilot study of the draft survey instrument to test several, complex methodological approaches for presenting information to respondents. In particular, NOAA plans to test several variations of the choice table.

II. Method of Collection

The proposed pilot survey would be administered in two waves. In the first wave, Knowledge Networks (KN) would administer the survey online, to its existing KnowledgePanel™ in Washington and Oregon, with a goal of achieving 1,050 completed surveys. Using the KnowledgePanel™ will allow NOAA to test different ways of presenting information to respondents. Because NOAA ultimately plans to administer the final survey instrument using a mail mode, the second wave would be administered by mail with a goal of achieving 250 completed surveys. The information gained from the testing in KnowledgePanel™ will be used to select and administer one of the approaches for presenting the information in a mail mode.

III. Data

OMB Control Number: None.

Form Number: None.

Type of Review: Regular submission (request for a new information collection).

Affected Public: Individuals or households.

Estimated Number of Respondents: 1,300.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 650.

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: September 6, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–22364 Filed 9–11–12; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for the Fagatele Bay National Marine Sanctuary Advisory Council

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The ONMS is seeking applications for the following vacant seat on the Fagatele Bay National Marine Sanctuary Advisory Council: Community-at-Large: Swains Island. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the sanctuary. Applicants who are chosen as members should expect to serve 3-year terms, pursuant to the council's charter.

DATES: Applications are due by Friday, October 26.

ADDRESSES: Application kits may be obtained from Emily Gaskin in the Tauese P.F. Sunia Ocean Center in Utulei, American Samoa. Completed applications should be submitted to the same address.

FOR FURTHER INFORMATION CONTACT: Emily Gaskin, Tauese P.F. Sunia Ocean Center in Utulei, American Samoa, American Samoa, 684–633–5500 ext. 226, *emily.gaskin@noaa.gov*.

SUPPLEMENTARY INFORMATION: The Fagatele Bay National Marine Sanctuary Advisory Council was established in 1986 pursuant to Federal law to ensure continued public participation in the management of the sanctuary. The Sanctuary Advisory Council brings members of a diverse community together to provide advice to the Sanctuary Manager (delegated from the Secretary of Commerce and the Under Secretary for Oceans and Atmosphere) on the management and protection of the Sanctuary, or to assist the National Marine Sanctuary Program in guiding a proposed site through the designation or the periodic management plan review process.

Authority: 16 U.S.C. 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: August 31, 2012.

Daniel J. Basta,

Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2012–22420 Filed 9–11–12; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Climate Assessment and Development Advisory Committee (NCADAC)

AGENCY: Office of Oceanic and Atmospheric Research (OAR), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of Open Meeting.

SUMMARY: This notice sets forth the schedule of a forthcoming meeting of the DoC NOAA National Climate Assessment and Development Advisory Committee (NCADAC).

DATES: The meeting will be held Thursday, September 27, 2012 from 3–5 p.m. Eastern time.

ADDRESSES: This meeting will be a conference call. Public access will be available at the office of the U.S. Global Change Research Program, Conference Room A, Suite 250, 1717 Pennsylvania Avenue NW., Washington, DC 20006. The public will not be able to dial into the call. Please check the National Climate Assessment Web site for additional information at *http://www.globalchange.gov/what-we-do/assessment.*

FOR FURTHER INFORMATION CONTACT: Dr. Cynthia Decker, Designated Federal Official, National Climate Assessment and Development Advisory Committee, NOAA, Rm. 11230, 1315 East-West Highway, Silver Spring, Maryland 20910. (Phone: 301–734–1156, Fax: 301–713–1459, Email: *Cynthia.Decker@noaa.gov.*

SUPPLEMENTARY INFORMATION: The National Climate Assessment and Development Advisory Committee was established in December 2010. The committee's mission is to synthesize and summarize the science and information pertaining to current and future impacts of climate change upon the United States; and to provide advice and recommendations toward the development of an ongoing, sustainable national assessment of global change impacts and adaptation and mitigation strategies for the Nation. Within the scope of its mission, the committee's specific objective is to produce a National Climate Assessment.

Status: The meeting will be open to public participation with a 10-minute public comment period from 4:45—4:55 p.m. The NCADAC expects that public statements presented at its meetings will not be repetitive of previously submitted verbal or written statements. In general, each individual or group making a verbal presentation will be limited to a total time of two minutes. Written comments should be received in the NCADAC DFO's office by Monday, September 24, 2012, to provide sufficient time for NCADAC review. Written comments received by the NCADAC DFO after Monday, September 24, 2012, will be distributed to the NCADAC, but may not be reviewed prior to the meeting date.

Special Accommodations: These meetings are physically accessible to people with disabilities. Requests for special accommodations may be directed no later than 12 p.m. on Monday, September 21, 2012, to Dr. Cynthia Decker, SAB Executive Director, SSMC3, Room 11230, 1315 East-West Hwy., Silver Spring, MD 20910.

Matters To Be Considered: Please refer to the Web page *http://www.nesdis.noaa.gov/NCADAC/index.html* for the most up-to-date meeting agenda, when available.

Dated: September 6, 2012.

Andy Baldus,

Acting Chief Financial Officer/Chief Administrative Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2012–22376 Filed 9–11–12; 8:45 am]

BILLING CODE 3510–KD–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC175

Permanent Advisory Committee to Advise the U.S. Commissioners to the Western and Central Pacific Fisheries Commission; Meeting Announcement

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

ACTION: Notice of public meeting.

SUMMARY: NMFS announces a meeting of the Permanent Advisory Committee (PAC) to advise the U.S. Commissioners to the Western and Central Pacific Fisheries Commission (WCPFC) on October 25—October 26, 2012. Meeting topics are provided under the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: The meeting of the PAC will be held on October 25, 2012 from 8 a.m. to 5 p.m. HST (or until business is concluded) and October 26, 2012 from 8 a.m. to 5 p.m. HST (or until business is concluded).

ADDRESSES: The meeting will be held in the Ballroom A Meeting Room at the Modern Hotel, 1775 Ala Moana Boulevard, Honolulu, HI, 96815.

FOR FURTHER INFORMATION CONTACT: Oriana Villar, NMFS Pacific Islands Regional Office; telephone: 808–944–2256; facsimile: 808–973–2941; email: *Oriana.Villar@noaa.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the Western and Central Pacific Fisheries Convention Implementation Act (the Act), the Department of Commerce, in consultation with the U.S. Commissioners, has appointed a Permanent Advisory Committee to advise the U.S. Commissioners to the WCPFC established under the Western and Central Pacific Fisheries Convention. The PAC supports the work of the U.S. National Section, which is made up of the U.S. Commissioners and the Department of State, to the WCPFC in an advisory capacity in the WCPFC. NMFS Pacific Islands Regional Office provides administrative and technical support to the PAC in cooperation with the Department of State. The next regular annual session of the WCPFC is scheduled for December 3—December 7, 2012, in Manila, Philippines. More information on this meeting can be found on the WCPFCs web site: *http://wcpfc.int/.*

Meeting Topics

The PAC meeting topics may include, but are not limited to, the following: (1) Outcomes of the 2011 and 2012 WCPFC Scientific Committee, Northern Committee, and Technical and Compliance Committee meetings; (2) development of conservation and management measures for bigeye, yellowfin and skipjack tuna and other species for 2013 and beyond; (3) development of a WCPFC compliance monitoring scheme; (4) issues related to the impacts of fishing on non-target, associated and dependent species, such as sea turtles, marine mammals, seabirds and sharks (5) input and advice from the PAC on issues that may arise at the 2012 WCPFC meetings, potential proposals from other WCPFC members; and (6) other issues as they arise.

Special Accommodations

The meeting location is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Oriana Villar at (808) 944–2256 by October 10, 2012.

Authority: 16 U.S.C. 6902.

Dated: September 7, 2012.

Lindsay Fullenkamp,

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

[FR Doc. 2012–22476 Filed 9–11–12; 8:45 am]

BILLING CODE 3510–22–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 (CNCS), has submitted a public information collection request (ICR) entitled 2013 AmeriCorps State and National Application Instructions 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 contacting the office listed in the addresses section of this notice. Individuals who use a telecommunications device for the deaf (TTY–TDD) may call 1–800–833–3722 between 8 a.m. and 8 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 email 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 CNCS, 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 May 14, 2012. This comment period ended July 13, 2012. No public comments were received from this Notice.

Description: CNCS is seeking approval of 2013 AmeriCorps State and National Application Instructions which is used by applicants for AmeriCorps funding to apply for AmeriCorps State and National funding.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: 2013 AmeriCorps State and National Application Instructions.

OMB Number: 3045–0047.

Agency Number: None.

Affected Public: Nonprofit organizations, State, Local and Tribal.

Total Respondents: 654.

Frequency: Annually.

Average Time per Response: 24 hours.

Estimated Total Burden Hours: 15,696 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Dated: September 5, 2012.

Jennifer Bastress Tahmasebi,

Deputy Director, AmeriCorps State and National.

[FR Doc. 2012–22444 Filed 9–11–12; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Federal Advisory Committee; Defense Intelligence Agency (DIA) Advisory Board; Closed Meeting

AGENCY: DIA, Department of Defense (DoD).

ACTION: Meeting notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C. Appendix 2 (2001)), the Government in the Sunshine Act of 1976 (5 U.S C. 552b), and 41 CFR 102–3.10, DoD hereby announces that the DIA Advisory Board will meet on September 26, 2012. The meeting is closed to the public. The meeting necessarily includes discussions of classified information relating to DIA's intelligence operations including its support to current operations.

DATES: The meeting will be held on September 26, 2012 (from 8:30 a.m. to 3:30 p.m.).

ADDRESSES: The meeting will be held at Joint-Base Bolling-Anacostia, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Ernie Blazar, (703) 693–4676, Alternate Designated Federal Officer, DIA Office for Congressional and Public Affairs, Pentagon 1A874, Washington, DC 20340–5100.

Committee's Designated Federal Officer: Ms. Ellen M. Ardrey, (202) 231–0800, DIA Office for Congressional and Public Affairs, Pentagon 1A874, Washington, DC 20340–5100. *Ellen.ardrey@dodiis.mil.*

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting

For the Advisory Board to discuss DIA operations and capabilities in support of current intelligence operations.

Agenda

September 26, 2012:

8:30 a.m.	Call to Order	Ms. Ellen M. Ardrey, Designated Federal Officer Mrs. Mary Margaret Graham, Chairman.
9 a.m.	Classified Briefings	DIA Personnel.
11 a.m.	Working Lunch	
1:30 p.m.	Classified Discussion with Director, DIA	LTG Michael T. Flynn, USA, Director, DIA.
2:30 p.m.	Agency-wide ceremony	DIA Personnel.
3:30 p.m.	Adjourn	

Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155, the Director, DIA, has determined that the all meetings shall be closed to the public. The Director, DIA, in consultation with the DIA Office of the General Counsel, has determined in writing that the public interest requires that all sessions of the Board's meetings be closed to the public because they include discussions of classified information and matters covered by 5 U.S.C. 552b(c)(1).

Written Statements

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Board Committee Act of 1972, the public or interested organizations may submit written statements at any time to the DIA Advisory Board regarding its missions and functions. All written statements shall be submitted to the Designated Federal Official for the DIA Advisory Board. The Designated Federal Official will ensure that written statements are provided to the Board for its consideration. Written statements may also be submitted in response to the stated agenda of planned board meetings. Statements submitted in response to this notice must be received by the Designated Federal Officer at least five calendar days prior to the meeting which is the subject of this notice. Written statements received after that date may not be provided or considered by the Board until its next meeting. All submissions provided before that date will be presented to the Board before the meeting that is subject of this notice. Contact information for the Designated Federal Officer is listed under **FOR FURTHER INFORMATION CONTACT.**

Dated: September 7, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–22413 Filed 9–11–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Policy Board; Federal Advisory Committee Meeting Notice

AGENCY: Department of Defense, Office of the Under Secretary of Defense (Policy).

ACTION: Federal Advisory Committee Meeting Notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense (DoD) announces the following Federal advisory committee meeting of the Defense Policy Board (hereafter referred to as "the DPB").

DATES: From Tuesday, October 2, 2012 (8:00 a.m. to 6:00 p.m.) through Wednesday, October 3, 2012 (7:30 a.m. to 10:15 a.m.), the DPB will hold a quarterly meeting under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR Parts 101–6 and 102–3 (Federal Advisory Committee Management).

ADDRESSES: The Pentagon, 2000 Defense Pentagon, Washington, DC 20301–2000.

FOR FURTHER INFORMATION CONTACT: Ms. Ann Hansen, 2000 Defense Pentagon, Washington, DC 20301–2000. Phone: (703) 571–9232.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To obtain, review and evaluate classified information related to the DPB's mission to advise on: (a) Issues central to strategic DoD planning; (b) policy implications of U.S. force structure and force modernization and on DoD's ability to execute U.S. defense strategy; (c) U.S. regional defense policies; and (d) other research and analysis of topics raised by the Secretary of Defense, the Deputy Secretary or the Under Secretary of Defense for Policy.

Meeting Agenda: Beginning at 8:00 a.m. on October 2 through the end of the meeting on October 3, the DPB will have secret through top secret (SCI) level discussions on national security issues regarding Iran, including Internal Political Dynamics and Security Posture and Capabilities.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155, the Department of Defense has determined that the meeting shall be closed to the public. The Under Secretary of Defense (Policy), in consultation with the Department of Defense FACA Attorney, has determined in writing that this meeting be closed to the public because the discussions fall under the purview of 5 U.S.C. 552b(c)(1) and are so inextricably intertwined with unclassified material that they cannot reasonably be segregated into separate discussions without disclosing secret or classified material.

Committee's Designated Federal Officer or Point of Contact: Ann Hansen, *defense.policy.board@osd.mil.*

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written statements to the membership of the DPB at any time or in response to the stated agenda of a planned meeting. Written statements should be submitted to the DPB's Designated Federal Officer; the Designated Federal Officer's contact information is listed in **FOR FURTHER INFORMATION CONTACT** or it can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

Written statements that do not pertain to a scheduled meeting of the DPB may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at a planned meeting then these statements must be submitted no later than five business days prior to the meeting in question. The Designated Federal Officer will review all submitted written statements and provide copies to all committee members.

Dated: September 7, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–22449 Filed 9–11–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests; Office of the Secretary; Education Jobs Annual Performance Report

SUMMARY: The Education Jobs program provides $10 billion in assistance to States to save or create education jobs. Jobs funded under this program include those that provide educational and related services for early childhood, elementary, and secondary education.

DATES: Interested persons are invited to submit comments on or before November 13, 2012.

ADDRESSES: Written comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 04909. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Education Jobs Annual Performance Report.

OMB Control Number: Pending.

Type of Review: New.

Total Estimated Number of Annual Responses: 56.

Total Estimated Number of Annual Burden Hours: 840.

Abstract: Under the Education Jobs Fund statute (Pub. L. 111–226 Sec. 101 (10)(A)), each State is required to submit to the U.S. Department of Education (Department) a report that describes the uses of the funds provided under the program and the impact of those funds on education and other areas. The statute requires States to submit these reports for each year of the program at such time and in such manner as the Department may require.

Dated: September 7, 2012.

Darrin A. King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2012–22454 Filed 9–11–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Promising and Practical Strategies to Increase Postsecondary Success; Request for Information

AGENCY: Department of Education.

ACTION: Request for Information (RFI); Promising and Practical Strategies to Increase Postsecondary Success—Second Round Request and Posting of Responses from First Round.

SUMMARY: The Department of Education (Department) requests information about promising and practical strategies, practices, programs, and activities (promising and practical strategies) that have improved rates of postsecondary success, transfer, and graduation. In addition, the Department announces the availability of the material submitted by respondents to an earlier request for information on this same subject.

The Department believes this information will be of interest to others in situations similar to those described in the submissions. We also believe that this information will be useful during future deliberations, possibly including discussions concerning improvements to the Higher Education Act of 1965, as amended (HEA), and other legislative proposals to the Congress. Each response to this RFI should contain the following elements (see *Guidance for Submitting Documents* and *Request for Information* for full details):

(1) Contact information;

(2) Brief one-paragraph abstract;

(3) Detailed description of the promising and practical strategy; and

(4) Applicable keywords or tags (meta data tags).

DATES: Responses to this RFI may be submitted at any time after the publication of this notice, but in order for a response to be considered in the second round of reviews, it should be submitted by November 30, 2012. We will review and post responses received after November 30, 2012 on a regular basis.

ADDRESSES: Provide any submission related to this RFI to the following email address: *collegecompletion@ed.gov*. Alternatively, mail or deliver submissions to Frederick Winter, Fund for the Improvement of Postsecondary Education, Office of Postsecondary Education, U.S. Department of Education, 1990 K Street NW., Room 6145, Washington, DC 20006–8544.

FOR FURTHER INFORMATION CONTACT: Frederick Winter, (202) 502–7632, *frederick.winter@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339. Individuals with disabilities can obtain this document in an accessible format (e.g. braille, large print, audiotape, or compact disc) by contacting Warren Farr at (202) 377–4380 or *warren.farr@ed.gov*.

SUPPLEMENTARY INFORMATION:

Background

In February 2009, President Obama established a goal for the United States to regain, by 2020, its position as the nation with the highest percentage of its population holding postsecondary degrees and credentials. The Secretary of Education is interested in collecting and making available to the public information on promising and practical strategies that can help educational institutions, States, non-profit

organizations, and other entities contribute to achieving this goal.

On January 30, 2012, the Department published in the **Federal Register** a notice seeking information about promising and practical strategies that have improved rates of postsecondary success, transfer, and graduation (77 FR 4550). In order for a response to be considered in the first round of reviews, the Department requested responses by April 30, 2012.

As specified in the original notice, the Department is publishing this second notice to announce that the information submitted by respondents to that first RFI is available on the Postsecondary Completion Web site at *http://www.ed.gov/college-completion/promising-strategies.*

In addition, the Department again invites institutions of higher education (IHEs), non-profit organizations, States, systems of higher education, adult education providers, researchers, and institutional faculty and staff, or consortia of these entities, to provide the Department with information about promising and practical strategies.

The Department is most interested in information about strategies that emphasize the quality of what students learn and timely or accelerated attainment of postsecondary degrees or certificates, including industry-recognized credentials that lead to improved learning and employment outcomes.

The Department is also particularly interested in information about promising and practical strategies that could be replicated or scaled up to help IHEs and States meet the President's goal for postsecondary degree attainment and improve student success generally. In addition to descriptions of these strategies, we are interested in receiving information about the factors perceived as most important to a strategy's successful implementation, the evidence that led the respondent to determine the importance of these factors, the types of environments or contexts for which the practice is most likely to succeed, and the issues that the respondent believes would need to be addressed in order to encourage successful replication elsewhere.

The Department has established the Postsecondary Completion Web site to serve as an online resource that makes publicly available the information submitted in response to the RFI. While we intend to review submissions made in response to this RFI before posting them on the Postsecondary Completion Web site, we will not be responsible for, and will not certify the accuracy of, any of the information or claims contained in these submissions. We have posted a disclaimer to this effect on the Postsecondary Completion Web site. The individual or entity that submits information remains responsible for its accuracy.

This RFI is issued under the authority of the Department of Education Organization Act (DEOA) of 1979, 20 U.S.C. 3402(4), by which the Secretary is authorized to promote improvements in the quality and usefulness of education through federally supported research, evaluation, and sharing of information.

Guidance for Submitting Documents: Respondents to this RFI should provide submissions attached to an electronic mail message sent to the email address provided in the ADDRESSES section of this notice. To help ensure accessibility to all interested parties, we request that all submissions comply with the requirements of section 508 of the Rehabilitation Act of 1973, or be submitted in an electronic format that can be made accessible, such as Microsoft Word. We will accept submissions in any electronic or written form provided, but we will not post submissions in forms that are not compliant with Section 508 and not accessible. Instead, we will index these submissions and make them available in an accessible format upon request.

We ask each respondent to include the name and address of his or her institution, consortium, or affiliation, if any, and the name, title, mailing and email addresses, and telephone number of a contact person. We also ask that each submission begin with a brief, one-paragraph abstract that provides an overview of the information provided.

The submission should include contact information (name, title, phone number, and email address) for an officer of the institution or an official of the submitting entity who is authorized to approve the submission. The Department will contact the officer to confirm authorization for the submission.

If the submission is from a consortium of institutions, we ask that the respondent identify all members of the consortium but provide only the name of one contact person. We also ask that the submission include contact information for the consortium's executive director so that we can confirm authorization for the submission.

Request for Information

At this time, we seek the assistance of entities that can offer information about promising and practical strategies that they have implemented, with or without Federal support, and that they believe have made measurable contributions to accelerated attainment of postsecondary degrees or certificates, including industry-recognized-credentials that lead to improved learning and employment outcomes.

We note that previous efforts to improve outcomes from postsecondary institutions have included improved student support services, early and middle college programs, successful remediation programs, open educational resources (that is, resources that are made freely available to students as a substitute for commercial, proprietary learning materials), distance and tele-presence courses, pay-for-performance scholarships and financial assistance, nontraditional course schedules and sequences, and peer support.

We request each respondent to demonstrate how the promising and practical strategy is supported by data on outcomes. If a strategy described in a submission does not have extensive outcome data, the respondent should submit evidence that the proposed strategy, or one similar to it, has been attempted previously, even if on a limited scale or in a limited setting, and yielded promising results. We are particularly interested in strategies, practices, programs, or activities supported by outcome data or for which evaluations have been conducted that can support any conclusions the respondent makes about the strategies described. We are also interested in receiving information about the costs of implementing the promising and practical strategies, both overall and per participant.

Specifically, we are interested in receiving documents and reports that include the following information:

- A detailed description of the promising and practical strategy:

Clear descriptions of the college completion obstacle addressed, including the dimensions of the problems or obstacles targeted by the intervention.

The theory of action that provides the basis for the promising and practical strategy.

A history of how the promising and practical strategy was developed.

A description of the way submitters or others measured the outcomes of the promising and practical strategy, and of any evaluations of the strategy, where available, including references to published or related studies and links to the relevant data or evaluation. In addition, respondents should discuss any factor or factors that made measuring success difficult and how they addressed those factors.

- A discussion of any difficulties or challenges that arose during the implementation of the promising and practical strategy and of any adjustments that the institution or organization made in response to those challenges.
- A description of the factor or factors the respondent believes were most important to the success of the promising and practical strategy. This could include the participation of a particular individual in the implementation of the strategy or some other reason that goes beyond the design of the activity undertaken.
- A description of the elements of the promising and practical strategy that the respondent believes did not work, including a discussion of why the respondent believes an element did not work and what the respondent would do to change the activity in question in the future.
- Suggestions about how other institutions might best replicate the promising and practical strategy and what potential concerns could make replication difficult.
- Detailed discussion of any Federal regulatory or statutory requirements or other laws, rules, or regulations that made successfully implementing the promising and practical strategy easier or more difficult.

This list of items we invite for submission is illustrative only; respondents may also address other issues that they believe are appropriate to the promising and practical strategies they describe.

Rights to Materials Submitted

By submitting material in response to this RFI (e.g., descriptions of promising and practical strategies or data supporting strategies), the respondent is agreeing to grant the Department a worldwide, royalty-free, perpetual, irrevocable, non-exclusive license to use the material and post it on the Postsecondary Completion Web site. Further, the respondent agrees that it owns, has a valid license, or is otherwise authorized to provide the material to the Department for inclusion on the Postsecondary Completion Web site. The Department will not provide any compensation for material submitted in response to this RFI.

Request for Meta Data Tags

The Department anticipates a significant number of responses. To maximize the utility of the information we can make available on the Postsecondary Completion Web site, and to make it easier for interested parties to search this information, the Department will include specific words or phrases—also known as "keywords" or meta data "tags"—in the database used to support the Web site. Therefore, the Department strongly encourages respondents to use keywords or tags to identify components of the strategies described in their responses. The keywords or tags should be linked to, and accurately reflect substantial components of, the strategies, practices, programs, or other activities described in the submission.

To simplify searches of the database created by the responses to this RFI, the Department provides in Appendix A of this RFI a list of standard keywords and tags that would be useful for the Postsecondary Completion Web site. The Department strongly encourages respondents to select—to the greatest extent possible—from among these standard keywords and tags when identifying tags for their submission. If none of the words or phrases in Appendix A is sufficiently precise for the promising and practical strategy that is the subject of the response, respondents may substitute other keywords or tags of their own choosing. The Department strongly encourages respondents to provide no more than eight keywords or tags for each strategy and limit each tag to no more than three words per tag and 28 characters per word. By limiting keywords and tags in this manner, the Department can most efficiently index the database and enable effective searches of all information obtained through this RFI.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document

The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys*. At this site you can view this document, as well as all other documents of 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 the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov*. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Authority: 20 U.S.C. 3204(4).

Dated: September 6, 2012.

Martha Kanter,

Under Secretary of Education.

Appendix A: Standard Keywords and Tags

- Accelerated Learning
- Accessible Materials
- Achievement Gap Closure
- Adult Education
- Affordability
- Assessment Technology
- Badges
- Basic Skills
- Blended Learning
- Block Scheduling
- Career Pathways
- Certificate Attainment
- Civic/Community Engagement
- Civic Learning
- Cognitive Tutors
- Community of Practice
- Competency-Based Learning
- Contextualized Learning
- Cost Savings
- Course Articulation
- Data Collection/Use
- Degree Attainment
- Developmental/Remedial Education
- Digital Materials
- Disability Services
- Dual Degrees
- Earn and Learn
- Efficiency
- Employer Partnership
- 504 Plan
- Game Design
- Improving Achievement
- Industry-Driven Competencies
- Industry-Recognized Credentials
- Job Placement
- Learning Assessment
- Learning Communities
- Mentoring
- Mobile Devices
- Modular Curriculum
- Momentum Points
- Non-Traditional Age Students
- On-the-Job Training
- Online Teaching/Learning
- Open Educational Resources
- Paid Internships
- Part-Time Students
- Pay-for-Performance
- Persistence
- Personalized Instruction
- Productivity
- Real-Time Online Interactions
- Reasonable Accommodations
- Registered Apprenticeships
- Retention
- SCORM
- Self-Paced Learning
- Simulations
- Skill Assessments
- Stackable Credentials
- Student Services
- Students with Disabilities
- STEM
- Technology-Enabled Learning
- Time to Degree

- Transfer and Articulation
- Tuition Reduction
- Underrepresented Students
- Virtual Environments
- Web-Based Learning

Note 1: SCORM stands for Sharable Content Object Reference Model

Note 2: STEM stands for Science, Technology, Engineering, and Mathematics

[FR Doc. 2012–22509 Filed 9–11–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–2127–001.
Applicants: ITC Midwest LLC.
Description: ITC Midwest Compliance Filing to be effective 8/28/2012.
Filed Date: 9/5/12.
Accession Number: 20120905–5060.
Comments Due: 5 p.m. ET 9/26/12.

Docket Numbers: ER12–2312–001.
Applicants: Perigee Energy, LLC.
Description: Perigee Energy, LLC submits Amendment to Application for Market Based Authority.
Filed Date: 8/16/12.
Accession Number: 20120816–5053.
Comments Due: 5 p.m. ET 9/19/12.
Docket Numbers: ER12–2581–000.
Applicants: KATBRO LLC.
Description: KATBRO LLC, FERC Electric Tariff to be effective 10/15/2012.
Filed Date: 9/5/12.
Accession Number: 20120905–5036.
Comments Due: 5 p.m. ET 9/26/12.

Docket Numbers: ER12–2582–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: SA 2477 Corn Belt-MiAm GFA 477 to be effective 9/6/2012.
Filed Date: 9/5/12.
Accession Number: 20120905–5088.
Comments Due: 5 p.m. ET 9/26/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: September 5, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–22401 Filed 9–11–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1790–007; ER12–1400–001; ER10–2595–001.
Applicants: BP Energy Company, Flat Ridge Wind Energy, LLC, Flat Ridge 2 Wind Energy LLC.
Description: Notification of non-material change in status of BP Energy Company, et al.
Filed Date: 9/4/12.
Accession Number: 20120904–5314.
Comments Due: 5 p.m. ET 9/25/12.

Docket Numbers: ER12–2095–001.
Applicants: ITC Midwest LLC.
Description: Compliance Filing of Executed Agreement to be effective 8/27/2012.
Filed Date: 9/4/12.
Accession Number: 20120904–5202.
Comments Due: 5 p.m. ET 9/25/12.

Docket Numbers: ER12–2577–000.
Applicants: NorthWestern Corporation.
Description: SA 648 Central Montana EPC to be effective 9/5/2012.
Filed Date: 9/4/12.
Accession Number: 20120904–5244.
Comments Due: 5 p.m. ET 9/25/12.

Docket Numbers: ER12–2578–000; ER12–1572–001.
Applicants: ITC Midwest LLC.
Description: New Section 205 and Compliance Filing [ER12–1572] of O&M Agreement with SMMPA to be effective 4/20/2012.
Filed Date: 9/4/12.
Accession Number: 20120904–5256.
Comments Due: 5 p.m. ET 9/25/12.

Docket Numbers: ER12–2579–000.
Applicants: NorthWestern Corporation.
Description: SA 644—Carter Grain Terminal Project—resubmission to be effective 8/13/2012.
Filed Date: 9/5/12.
Accession Number: 20120905–5000.
Comments Due: 5 p.m. ET 9/26/12.

Docket Numbers: ER12–2580–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits LRZ CONE Calculation.
Filed Date: 9/4/12.
Accession Number: 20120904–5313.
Comments Due: 5 p.m. ET 9/25/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR § 385.211 and § 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: September 5, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–22400 Filed 9–11–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF AMERICA

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP11–2473–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Annual Cash-In/Cash-Out Filing—2012.
Filed Date: 8/31/12.
Accession Number: 20120831–5044.
Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP11–2474–000.
Applicants: Gulf Crossing Pipeline Company LLC.
Description: Annual Cash-In/Cash-Out Report.
Filed Date: 8/31/12.
Accession Number: 20120831–5043.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–980–000.

Applicants: Gas Transmission Northwest LLC.

Description: Revising Creditworthiness Language to be effective 10/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5012.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–982–000.

Applicants: Sea Robin Pipeline Company, LLC.

Description: Hurricane Surcharge Filing on 8–31–12 to be effective 10/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5051.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–983–000.

Applicants: Florida Gas Transmission Company, LLC.

Description: Fuel Filing on 8–31–12 to be effective 10/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5052.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–984–000.

Applicants: MoGas Pipeline LLC.

Description: Annual Fuel and Gas Loss Retention Percentage Adjustment to be effective 10/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5053.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–986–000.

Applicants: WBI Energy Transmission, Inc.

Description: 2012 Semi-annual Fuel & Electric Power Reimbursement to be effective 10/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5059.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–987–000.

Applicants: Great Lakes Gas Transmission Limited Par.

Description: Treatment of Discounts to be effective 10/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5064.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–988–000.

Applicants: Gulf South Pipeline Company, LP.

Description: Devon 34694–39 Amendment to Neg Rate Agmt to be effective 9/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5066.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–989–000.

Applicants: Gulf South Pipeline Company, LP.

Description: Devon 34694–40 Amendment to Neg Rate Agmt to be effective 9/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5068.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–990–000.

Applicants: Gulf South Pipeline Company, LP.

Description: HK 37731 to Sequent 40088 Cap Rel Neg Rate Agmt filing to be effective 9/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5070.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–991–000.

Applicants: Gulf South Pipeline Company, LP.

Description: HK 37731 to Texla 40089 Cap Rel Neg Rate Agmt filing to be effective 9/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5071.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–992–000.

Applicants: Arlington Storage Company, LLC.

Description: Arlington Storage Company, LLC—ACA FIling to be effective 10/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5072.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–993–000.

Applicants: Transcontinental Gas Pipe Line Company.

Description: Transco Docket No. RP12-xxx Rate Case to be effective 10/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5087.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–994–000.

Applicants: Carolina Gas Transmission Corporation.

Description: CGT Rate Schedule BH Filing to be effective 10/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5093.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–995–000.

Applicants: Fayetteville Express Pipeline LLC.

Description: FEP 2012 ACA Filing to be effective 10/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5097.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–996–000.

Applicants: ETC Tiger Pipeline, LLC.

Description: Tiger 2012 ACA Filing to be effective 10/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5098.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–997–000.

Applicants: Wyoming Interstate Company, L.L.C.

Description: Interstate Pipeline Nomination Deadline Filing to be effective 10/1/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5099.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–998–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: NegRate Pass-through Process to be effective 10/15/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5100.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–999–000.

Applicants: Big Sandy Pipeline, LLC.

Description: NegRate Pass-through Process to be effective 10/15/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5110.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–1000–000.

Applicants: East Tennessee Natural Gas, LLC.

Description: NegRate Pass-through Process to be effective 10/15/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5117.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–1001–000.

Applicants: Maritimes & Northeast Pipeline, L.L.C.

Description: NegRate Pass-through Process to be effective 10/15/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5122.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–1002–000.

Applicants: Ozark Gas Transmission, L.L.C.

Description: NegRate Pass-Through Process to be effective 10/15/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5127.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–1003–000.

Applicants: Saltville Gas Storage Company L.L.C.

Description: NegRate Pass-Through Process to be effective 10/15/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5129.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–1004–000.

Applicants: Texas Eastern Transmission, LP.

Description: NegRate Pass-through Process to be effective 10/15/2012.

Filed Date: 8/31/12.

Accession Number: 20120831–5133.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–1005–000.

Applicants: Transwestern Pipeline Company, LLC.

Description: 2012 Transwestern Pipeline Co., LLC—Cancellation of Volume No. 2.

Filed Date: 8/31/12.

Accession Number: 20120831–5153.

Comments Due: 5 p.m. ET 9/12/12.

Docket Numbers: RP12–1007–000.
Applicants: Tennessee Gas Pipeline Company, L.L.C.
Description: Volume No. 2—NSD Northeast Supply Diversification Project to be effective 11/1/2012.
Filed Date: 8/31/12.
Accession Number: 20120831–5169.
Comments Due: 5 p.m. ET 9/12/12.
Docket Numbers: RP12–1008–000.
Applicants: Tennessee Gas Pipeline Company, L.L.C.
Description: NSD Project Recourse Rate to be effective 11/1/2012.
Filed Date: 8/31/12.
Accession Number: 20120831–5173.
Comments Due: 5 p.m. ET 9/12/12.
Docket Numbers: RP12–1009–000.
Applicants: Elba Express Company, L.L.C.
Description: ACA Surcharge Filing to be effective 10/1/2012.
Filed Date: 8/31/12.
Accession Number: 20120831–5180.
Comments Due: 5 p.m. ET 9/12/12.
Docket Numbers: RP12–1010–000.
Applicants: Dominion Transmission, Inc.
Description: DTI-August 31, 2012 Negotiated Rate Agreements to be effective 9/1/2012.
Filed Date: 8/31/12.
Accession Number: 20120831–5183.
Comments Due: 5 p.m. ET 9/12/12.
Docket Numbers: RP12–1011–000.
Applicants: Texas Eastern Transmission, LP.
Description: TEAM 2012 In-Service Filing—CP11–67 Compliance to be effective 11/1/2012.
Filed Date: 8/31/12.
Accession Number: 20120831–5184.
Comments Due: 5 p.m. ET 9/12/12.
Docket Numbers: RP12–1013–000.
Applicants: Ruby Pipeline, L.L.C.
Description: Ruby Annual FL&U Filing to be effective 10/1/2012.
Filed Date: 8/31/12.
Accession Number: 20120831–5309.
Comments Due: 5 p.m. ET 9/12/12.
Docket Numbers: RP12–1014–000.
Applicants: Colorado Interstate Gas Company LLC.
Description: CIG Annual FL&U Filing to be effective 10/1/2012.
Filed Date: 8/31/12.
Accession Number: 20120831–5311.
Comments Due: 5 p.m. ET 9/12/12.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated September 5, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary

[FR Doc. 2012–22402 Filed 9–11–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IN12–4–000]

Deutsche Bank Energy Trading LLC; Notice of Designation of Commission Staff as Non-Decisional

With respect to an order issued by the Commission on September 5, 2012 in the above-captioned docket, with the exceptions noted below, the staff of the Office of Enforcement are designated as non-decisional in deliberations by the Commission in this docket. Accordingly, pursuant to 18 CFR 385.2202 (2012), they will not serve as advisors to the Commission or take part in the Commission's review of any offer of settlement. Likewise, as non-decisional staff, pursuant to 18 CFR 385.2201 (2012), they are prohibited from communicating with advisory staff concerning any deliberations in this docket.

Exceptions to this designation as non-decisional are:

- Larry D. Gasteiger
- Sean K. Collins
- Justin M. Shellaway
- Jette S. Gebhart
- Erin Mastrangelo
- Benjamin J. Jarrett

Dated: September 6, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–22399 Filed 9–11–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–2581–000]

Katbro LLC; Supplemental Notice that Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of KATBRO LLC's application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR § 385.211 and § 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is September 26, 2012.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email

FERCOnlineSupport@ferc.gov. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: September 6, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–22403 Filed 9–11–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL- 9522–5]

Agency Information Collection Activities OMB Responses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document announces the Office of Management and Budget (OMB) responses to Agency Clearance requests, in compliance with the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

FOR FURTHER INFORMATION CONTACT: Rick Westlund (202) 566–1682, or email at westlund.rick@epa.gov and please refer to the appropriate EPA Information Collection Request (ICR) Number.

SUPPLEMENTARY INFORMATION:

OMB Responses to Agency Clearance Requests

OMB Approvals

EPA ICR Number 1895.07; Microbial Rules (Renewal); 40 CFR part 141; and 40 CFR part 142; was approved on 08/06/2012; OMB Number 2040–0205; expires on 08/31/2015; Approved with change.

EPA ICR Number 2192.05; Unregulated Contaminant Monitoring in Public Water Systems (Final Rule); 40 CFR 141.35 and 141.40; was approved on 08/06/2012; OMB Number 2040–0270; expires on 08/31/2015; Approved with change.

EPA ICR Number 1560.10; National Water Quality Inventory Reports (Renewal); 40 CFR 130.6–130.10 and 130.15; was approved on 08/10/2012; OMB Number 2040–0071; expires on 08/31/2015; Approved without change.

EPA ICR Number 2445.02; NSPS for Nitric Acid Plants for which Construction, Reconstruction, or Modification Commenced after October 14, 2011; 40 CFR part 60 subpart Ga; was approved on 08/14/2012; OMB Number 2060–0674; expires on 08/31/2015; Approved without change.

EPA ICR Number 1446.10; PCBs: Consolidated Reporting and Recordkeeping Requirements (renewal); 40 CFR part 761; was approved on 08/14/2012; OMB Number 2070–0112; expires on 08/31/2015; Approved without change.

John Moses,

Director, Collections Strategies Division.

[FR Doc. 2012–22397 Filed 9–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2011–0275; FRL–9522–3]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Hydrochloric Acid Production (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before October 12, 2012.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2011–0275, to: (1) EPA online using www.regulations.gov (our preferred method), or by email to: *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 28221T, 1200 Pennsylvania Avenue NW., Washington, DC 20460; and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; email address: *williams.learia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 9, 2011 (76 FR 26900), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to both EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2011–0275, which is available for public viewing online at *http://www.regulations.gov,* or in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue 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 Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov,* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov.*

Title: NESHAP for Hydrochloric Acid Production (Renewal).

ICR Numbers: EPA ICR Number 2032.07, OMB Control Number 2060–0529.

ICR Status: This ICR is scheduled to expire on September 30, 2012. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the Provisions specified at 40 CFR part 63, subpart NNNNN.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 565 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Owners or operators of hydrochloric acid production facilities.

Estimated Number of Respondents: 81.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 105,033.

Estimated Total Annual Cost: $10,789,637, which includes $10,086,076 in labor costs, $1,424 in capital/startup costs, and $702,137 in operation and maintenance (O&M) costs.

Changes in the Estimates: There is an increase in burden hours to the respondent as compared to the most recently approved ICR. The increase is due to industry growth in the past three years, resulting in additional number of respondents that are subject to this standard, and corrections to mathematical errors found in the previous ICR. The growth in respondent universe also results in an increase in the total O&M costs.

In addition, there is an increase in burden costs to both the respondent and the Agency due to an adjustment in labor rates. This ICR uses the most recent labor rates from the Bureau of Labor Statistics in calculating the labor costs.

There is a decrease in capital/startup costs in this ICR as compared to the most recently approved ICR. The previous ICR includes startup costs for all existing and new respondents. This ICR was updated to correctly reflect capital/startup costs associated with new sources only.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2012–22405 Filed 9–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2003–0162; FRL 9521–6]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Regional Haze Regulations (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), "Regional Haze Regulations" (EPA ICR No. 1813.08, OMB Control No. 2060–0421), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through October 31, 2012. Public comments were previously requested via the **Federal Register** (77 FR 24952) on April 26, 2012, during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before October 12, 2012.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2003–0162, to (1) EPA online using *www.regulations.gov* (our preferred method), by email to : *a-and-r-docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, and (2) OMB via email to *oira_submission@omb.eop.gov*. Address comments to OMB Desk Officer for EPA.

The EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Ms. Gobeail McKinley (919) 541–5246, *mckinley.gobeail@epa.gov*, Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail Code C539–04, Research Triangle Park, NC 27711.

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: This ICR is for activities related to the implementation of the EPA's 1999 regional haze rule, for the time period between October 31, 2012 and October 30, 2015, and renews the previous ICR. The regional haze rule, as authorized by sections 169A and 169B of the Clean Air Act (CAA), requires states to develop implementation plans to protect visibility in 156 federally-protected Class I areas. Tribes may choose to develop implementation plans. For this time period, states will be completing their implementation plans to comply with the rule. Before any agency, department, or instrumentality of the federal government engages in, supports in any way, provides financial assistance for, licenses, permits, or approves any activity, that agency has the affirmative responsibility to ensure that such action conforms to the State Implementation Plan (SIP) required under the regional haze rule. Section 176(c) of the CAA requires that all Federal actions conform with the SIP requirements. Depending on the type of action, the federal entities must collect information themselves, hire consultants to collect the

information or require applicants/sponsors of the federal action to provide the information.

Respondents/affected entities: Entities potentially affected by this action are state, local, and tribal air quality agencies, regional planning organizations and facilities potentially regulated under the regional haze rule.

Respondents/affected entities: States and Federal Land Managers.

Respondent's obligation to respond: Mandatory.

Estimated number of respondents: 53.

Frequency of response: Annual.

Total estimated burden: 6,048 hours.

Total estimated cost: $293,631. This includes an estimated labor cost of $293,631 and an estimated cost of $0 for capital investment or maintenance and operational costs.

Changes in the Estimates: There is a decrease of 25,793 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. The last collection request anticipated the program progressing from the planning stages to implementation. The change in burden reflects changes in labor rates, changes in the activities conducted due to the normal progression of the program, and the fact that the aggregate initial regional haze SIPs and best available retrofit technology (BART) determinations will be acted on by the EPA by November 2012 and the states will be evaluating reasonable progress and implementation stages for the goals in those SIPs.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2012–22404 Filed 9–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2012–9727–3]

Notification of an External Peer Review Meeting for the Draft *Framework for Human Health Risk Assessment to Inform Decision Making*

AGENCY: U.S. Environmental Protection Agency.

ACTION: Notice of an external peer review meeting.

SUMMARY: The EPA Office of the Science Advisor announces that Versar, Inc., a contractor to the EPA, will convene an independent panel of experts to review the draft document, *Framework for Human Health Risk Assessment to Inform Decision Making.* Any member of the public may register to attend this peer review meeting as an observer. Time will be set aside for observers to give brief oral comments on the draft document at the meeting. The draft document is available via the internet on the Risk Assessment Forum web page (*http://www.epa.gov/raf/frameworkhhra.htm*).

DATES: The peer review panel meeting on the draft document, *Framework for Human Health Risk Assessment to Inform Decision Making* will be held on October 9, 2012, from 9:00 a.m. to approximately 5:00 p.m. Eastern Daylight Time, with registration beginning at 8:30 a.m.

ADDRESSES: The meeting will be held at the Hyatt Regency Crystal City, 2799 Jefferson Davis Highway, Arlington, VA 22202.

Internet: The draft document can be downloaded from *http://www.epa.gov/raf/frameworkhhra.htm.*

Instructions: To attend the peer review meeting as an observer, register no later than October 2, 2012 by calling Kathy Coon at Versar, Inc., on (703) 750–3000 ext. 545 or toll free on (800) 283–7727; sending a facsimile to (703) 642–6809 (subject line: HHRA Framework Meeting; and include your name, title, affiliation, full address and contact information in the body of the facsimile), or sending an email to *saundkat@versar.com* (subject line: HHRA Framework Meeting; and include your name, title, affiliation, full address and contact information in the body of the email). Space is limited, and registrations will be accepted on a first-come, first-served basis. There will be a limited time for comments from the public at the peer review meeting. Please inform Versar, Inc., in your registration request, if you wish to make oral comments during the meeting.

FOR FURTHER INFORMATION CONTACT: Julie Fitzpatrick, Office of the Science Advisor, Mail Code 8105–R, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 564–4212; fax number: (202) 564–2070, email: *fitzpatrick.julie@epa.gov.*

SUPPLEMENTARY INFORMATION: The EPA has an established history of conducting human health risk assessments. The final *Framework* is intended to foster increased implementation of existing agency guidance for conducting human health risk assessments and improve the utility of risk assessment in the decision-making process.

In developing the draft *Framework,* the relevant recommendations presented in the National Research Council's report *Science and Decisions: Advancing Risk Assessment* have been taken into consideration. Specifically, the recommendations that the EPA formalize and implement planning, scoping and problem formulation early in the risk assessment process and that the agency adopt a framework for risk-based decision-making are included in this *Framework.*

The draft *Framework* highlights the important roles of planning and scoping as well as problem formulation in designing a human health risk assessment process. In accord with long-standing agency policy, it also emphasizes the importance of both scientific review and public involvement. The *Framework* presents the concept of "fit for purpose" to address the development of risk assessments and associated products that are for informing risk management decisions. The final *Framework* will also highlight the agency's emphasis on the importance of transparency in human health risk assessment and decision-making processes.

This document is not intended to supersede existing agency guidance; instead, by citing and discussing existing guidance in the context of the proposed framework, it is intended to foster more effective implementation of that guidance.

The EPA previously announced the release of the draft *Framework* for a 60 day comment period (77 FR 44613), which ends on September 28, 2012. Public comments submitted during the public comment period may be viewed at *http://www.regulations.gov* under Docket ID No. EPA–HQ–ORD–2012–0579. The EPA will forward all public comments to Versar, Inc., for distribution to the members of the review panel. The external review draft does not represent agency policy. As it finalizes the draft document, the EPA intends to consider the comments from the external peer review meeting, along with public comments received by September 28, 2012, in accordance with 77 FR 44613.

Dated: September 6, 2012.

Glenn Paulson,

Science Advisor.

[FR Doc. 2012–22453 Filed 9–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–1017; FRL–9359–1]

Product Cancellation Order for Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's order for the cancellations, voluntarily requested by the registrants and accepted by the Agency, of the products listed in Table 1 and 2 of Unit II., pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This cancellation order follows a June 13, 2012 **Federal Register** Notice of Receipt of Requests from the registrants listed in Table 3 of Unit II. to voluntarily cancel these product registrations. In the June 13, 2012 notice, EPA indicated that it would issue an order implementing the cancellations, unless the Agency received substantive comments within the 30 day comment period that would merit its further review of these requests, or unless the registrants withdrew their requests. The Agency received notice from one registrant, Aceto Agricultural Chemicals Corp, to withdraw their cancellation request for registration no. 002749–00119, a tributyltin oxide product. EPA did not receive any other comments on the notice. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations, with the exception of registration no. 002749–00119. Any distribution, sale, or use of the products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

DATES: The cancellations are effective September 12, 2012.

FOR FURTHER INFORMATION CONTACT: Katie Weyrauch, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–0166; fax number: (703) 308–8005; email address: *weyrauch.katie@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2009–1017, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave., NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets*.

II. What Action is the Agency Taking?

This notice announces the cancellation, as requested by registrants, of 121 products registered under FIFRA section 3. These registrations are listed in sequence by registration number in Tables 1 and 2 of this unit.

TABLE 1—PRODUCT CANCELLATIONS

Registration No.	Product name	Chemical name
000056–00068 ...	Eaton's Answer II	Piperonyl butoxide, Pyrethrins, Silicon Dioxide.
000279–03106 ...	Command 50 WP Herbicide	Clomazone.
000402–00123 ...	No. 2306 Di-Cide	Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl dichloride).
000577–00545 ...	Clear Cuprinol Brand Wood Preservative No. 20.	Zinc naphthenate.
000707–00286 ...	Durotex 5000	Octhilinone, 5-Chloro-2-methyl-3(2H)-isothiazolone, 2-Methyl-3(2H)-isothiazolone.
000748–06010 ...	Liquid Chlorine	Chlorine.
000748–06011 ...	Liquid Chlorine MU	Chlorine.
001706–00159 ...	Nalco 2594	Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl dichloride).
002724–00457 ...	Zoecon 9204 Fogger	Permethrin, 2,4-Dodecadienoic acid, 3,7,11-trimethyl-, ethyl ester, (S-(E,E))-.
002724–00780 ...	Permethrin Plus Inverted Carpet Spray	MGK 264, Permethrin, Pyriproxyfen.
005481–00434 ...	Tre-Hold for Citrus	Ethyl 1-naphthaleneacetate.
010088–00086 ...	Flying Insect Killer	d-trans-Chrysanthemum monocarboxylic ester of dl-2-allyl-4-hydroxy-3-methyl-2-cyclopenten-1-one, MGK 264, Piperonyl butoxide.
010807–00191 ...	Misty Fire Ant Injector Spray II	Tetramethrin, Esfenvalerate.
032802–00028 ...	Seed Safe—Turf Care (3.71% Siduron + 10–15–10 Lawn Food).	Siduron.
035571–00001 ...	Chem Pro Algae Control Ed Liquid	Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl dichloride).
047000–00085 ...	Chem-Tech Dy-Sect Spray	d-trans-Chrysanthemum monocarboxylic ester of dl-2-allyl-4-hydroxy-3-methyl-2-cyclopenten-1-one, Permethrin.
047000–00088 ...	CT–250	Piperonyl butoxide, Pyrethrins, Permethrin.
055137–00001 ...	Bio/Tec 112	Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl dichloride).
060061–00009 ...	Wolman Wood Preservative with Water Repellent Clear.	Zinc naphthenate, Diiodomethyl p-tolyl sulfone.
060061–00016 ...	No. 00 Ready to Use Copper Treat	Copper naphthenate.
061842–00012 ...	Polyquat	Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl dichloride).
062719–00263 ...	Lawn Fertilizer Plus Confront Weed Control.	Clopyralid Triclopyr, triethylamine salt.

TABLE 1—PRODUCT CANCELLATIONS—Continued

Registration No.	Product name	Chemical name
066806–00001	MB–507	Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl dichloride).
067360–00003	Intercide TJP	Tributyltin oxide.
075613–00001	Stormoellen A/S—Stalosan F	Copper sulfate pentahydrate.
081880–00020	MON 12036 Herbicide	Halosulfuron-methyl.
AR020001	Goal 2XL Herbicide	Oxyfluorfen.
AR940005	Lorsban 4E–HF	Chlorpyrifos.
AR960009	Goal (R) 2XL Herbicide	Oxyfluorfen.
AZ020002	Kerb 50W Herbicide in WSP	Propyzamide.
AZ020010	Kerb 50W Herbicide in WSP	Propyzamide.
AZ050005	Kerb 50W Herbicide in WSP	Propyzamide.
CA000014	Visor 2E Herbicide	Thiazopyr.
CA010017	Visor 2E Herbicide	Thiazopyr.
CA020010	Success	Spinosad.
CA020016	GF120 Fruit Fly Bait	Spinosad.
CA040020	Kerb	Propyzamide.
CA040021	Visor*2E	Thiazopyr.
CA790002	Kerb 50W Selective Herbicide	Propyzamide.
CA950008	Goal 1.6E Herbicide	Oxyfluorfen.
CA950014	Lorsban4E	Chlorpyrifos.
CA960019	Goal (R) 2XL Herbicide	Oxyfluorfen.
CA960020	Goal (R) 2XL Herbicide	Oxyfluorfen.
CA960021	Goal (R) 2XL Herbicide	Oxyfluorfen.
CA960022	Goal (R) 2XL Herbicide	Oxyfluorfen.
CA960023	Goal (R) 2XL Herbicide	Oxyfluorfen.
CA960026	Goal (R) 2XL Herbicide	Oxyfluorfen.
CA960028	Goal (R) 2XL Herbicide	Oxyfluorfen.
CA970026	Goal (R) 2XL Herbicide	Oxyfluorfen.
CA990007	Visor 2E Herbicide	Thiazopyr.
CA990008	Visor 2E Herbicide	Thiazopyr.
CT020003	Goal 2XL Herbicide	Oxyfluorfen.
DE930004	Lorsban 4EHF	Chlorpyrifos.
FL990010	Visor 2E Herbicide	Thiazopyr.
GA980001	Tracer	Spinosad.
HI020001	Goal 2XL Herbicide	Oxyfluorfen.
IA080001	GF2017	Nitrapyrin.
ID910016	Kerb 50W Herbicide in WSP	Propyzamide.
KY040001	Strongarm	Diclosulam.
LA020001	Goal 2XL Herbicide	Oxyfluorfen.
LA020007	Goal 2XL	Oxyfluorfen.
LA060011	Intrepid 2F	Methoxyfenozide.
LA960012	Goal (R) 2XL Herbicide	Oxyfluorfen.
MI940001	Lorsban 4EHF	Chlorpyrifos.
MI970002	Goal (R) 2XL Herbicide	Oxyfluorfen.
MN960006	Goal (R) 2XL Herbicide	Oxyfluorfen.
MO040004	Lorsban4E	Chlorpyrifos.
MS000010	Goal 2XL Herbicide	Oxyfluorfen.
MS010012	Glyphomax	Glyphosateisopropylammonium.
MS020003	Goal 2XL Herbicide	Oxyfluorfen.
MS050001	Glyphomax XRT	Glyphosateisopropylammonium.
MS050002	Glypro	Glyphosateisopropylammonium.
MS960015	Goal (R) 2XL Herbicide	Oxyfluorfen.
MT960003	Goal (R) 2XL Herbicide	Oxyfluorfen.
NC020003	Goal 2XL Herbicide	Oxyfluorfen.
NC960005	Goal (R) 2XL Herbicide	Oxyfluorfen.
NC960006	Goal (R) 2XL Herbicide	Oxyfluorfen.
NC970004	Tracer	Spinosad.
NC990007	Goal (R) 2XL Herbicide	Oxyfluorfen.
ND010005	NAF545	Glyphosateisopropylammonium.
ND020006	Goal 2XL Herbicide	Oxyfluorfen.
ND020007	Goal 2XL Herbicide	Oxyfluorfen.
ND050008	Durango	Glyphosate-isopropylammonium.
ND960005	Goal (R) 2XL Herbicide	Oxyfluorfen.
ND980001	Goal (R) 2XL Herbicide	Oxyfluorfen.
NJ010001	Spintor 2SC	Spinosad.
NV940002	Lorsban 4E–HF	Chlorpyrifos.
NV990007	Goal (R) 2XL Herbicide	Oxyfluorfen.
NY060002	Garlon 3A	Triclopyr, triethylamine salt.
NY080008	Radiant SC	Spinetoram (minor component (4-methyl)) Spinetoram (major component (4,5-dihydro)).
NY080009	Delegate WG	Spinetoram (minor component (4-methyl)) Spinetoram (major component (4,5-dihydro)).

TABLE 1—PRODUCT CANCELLATIONS—Continued

Registration No.	Product name	Chemical name
OR940027	Lorsban 4E–HF	Chlorpyrifos.
OR960037	Goal (R) 2XL Herbicide	Oxyfluorfen.
OR970008	Goal (R) 2XL Herbicide	Oxyfluorfen.
PA010003	Spintor 2SC	Spinosad.
SC000001	Telone II	Telone.
SC970005	Tracer	Spinosad.
SD010002	Goal.2XL Herbicide	Oxyfluorfen.
SD960006	Goal (R) 2XL Herbicide	Oxyfluorfen.
TN060005	Telone II	Telone.
TN990002	Tracer	Spinosad.
TX000002	Visor 2E Herbicide	Thiazopyr.
TX040023	Lock-On	Chlorpyrifos.
VA020002	Spintor 2SC	Spinosad.
WA000010	Lorsban-4E	Chlorpyrifos.
WA970024	Goal (R) 2XL Herbicide	Oxyfluorfen.
WI030005	Lorsban-4E	Chlorpyrifos.
WV010001	Spintor 2SC	Spinosad

Table 2 contains a list of registrations for which companies paying at one of the maintenance fee caps requested cancellation in the FY 2012 maintenance fee billing cycle. Because maintaining these registrations as active would require no additional fee, the Agency is treating these requests as voluntary cancellations under 6(f)(1).

TABLE 2—CANCELLATIONS OF PRODUCTS DUE TO NON-PAYMENT OF MAINTENANCE FEES

Registration No.	Product name	Chemical name
002724–00621	Speer Py-Perm Aqueous Insect Killer #4	Permethrin; Pyrethrins; Piperonyl butoxide.
010324–00100	Maquat MC1416–255T	Alkyl* dimethyl benzyl ammonium chloride; Tributyltin oxide.
010324–00101	Microbiocide T–40	Alkyl* dimethyl benzyl ammonium chloride; Tributyltin oxide.
083504–00003	Polyquat MUP	Poly(oxyethylene(dimethylimino)ethylene(dimethylimino)ethylene dichloride).
ID970015	Comite Agricultural Miticide	Propargite.
OR080004	Comite Agricultural Miticide	Propargite.
OR080005	Comite Agricultural Miticide	Propargite.
OR080006	Dimilin 2L	Diflubenzuron.
OR080007	Comite Agricultural Miticide	Propargite.
OR080008	Dimilin 2L	Diflubenzuron.
OR080009	Comite Agricultural Miticide	Propargite.
OR080011	Comite Agricultural Miticide	Propargite.
OR080012	Comite	Propargite.

Table 3 of this unit includes the names and addresses of record for all registrants of the products in Tables 1 and 2 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in Tables 1 and 2 of this unit.

TABLE 3—REGISTRANTS OF CANCELLED PRODUCTS

EPA Company number	Company name and address
56	Eaton JT & Company Inc., 1393 E. Highland Rd., Twinsburg, OH 44087.
279	FMC Corp., Agricultural Products Group, ATTN: Michael C. Zucker, 1735 Market St., RM. 1978, Philadelphia, PA 19103.
402	Hill Manufacturing Co., Inc., 1500 Jonesboro Rd. SE, Atlanta, GA 30315.
577	The Sherwin-Williams Co., 101 Prospect Ave., Cleveland, OH 44115.
707	Rohm & Haas Co., 100 Independence Mall West, Philadelphia, PA 19106.
748	PPG Industries, Inc., 4325 Rosanna Drive, Allison Park, PA 15101.
1706	Nalco Company, 1601 West Diehl Road, Naperville, IL 60563.
2724	Wellmark International—D/B/A Central Life Sciences, 1501 E. Woodfield Rd., Suite 200 W., Schaumburg, IL 60173.
5481	Amvac Chemical Corporation, 4695 MacArthur Court, Suite 1200, Newport Beach, CA 92660–1706.
10088	Athea Laboratories Inc., P.O. Box 240014, Milwaukee, WI 53224.
10324	Mason Chemical Co, 721 W Algonquin Rd, Arlington Heights, IL 60005.
10807	Amrep, Inc., 990 Industrial Park Drive, Marietta, GA 30062.

TABLE 3—REGISTRANTS OF CANCELLED PRODUCTS—Continued

EPA Company number	Company name and address
32802	Gro Tec, Inc., D/B/A Howard Johnson's Enterprises Inc., Agent: RegWest Company, LLC, 8203 West 20th St., Suite A, Greeley, CO 80634–4696.
35571	Chem Pro Lab, Inc., 941 W. 190 St., Gardena, CA 90248.
47000	Chem-Tech, LTD, 4515 Fleur Dr. #303, Des Moines, IA 50321.
55137	Southwest Engineers, 39478 HWY 190 E, Slidell, LA 70461.
60061	Kop-Coat, Inc., 436 Seventh Avenue, Pittsburgh, PA 15219.
61842	Tessenderlo Kerley, Inc., Agent: Pyxis Regulatory Consulting, Inc., 4110 136th Street N.W., Gig Harbor, WA 98332.
66806	Tandem Technologies International, P.O. Box 1125, Carrollton, GA 30112.
67360	Ackros Chemicals, Inc., Agent: Technology Sciences Group Inc., 1150 18th St. N.W., Suite 1000, Washington DC 20036.
75613	Stormollen A/S, Agent: Vitfoss USA, D/B/A Kongskilde Industries, Inc., 19500 N. 1425 East Road, Hudson, IL 61748.
81880	Canyon Group LLC, c/o Gowan Company, 370 S. Main Street, Yuma, AZ 85364.
83504	Kerley Trading Inc., P.O. Box 15627, Phoenix, AZ 85060.
62719; NY060002; CA020016; NY080009; MS050001; ND050008; IA080001; AR940005; CA950014; DE930004; MI940001; MO040004; NV940002; OR940027; WA000010; WI030005; AZ020002; AZ020010; AZ050005; CA040020; CA790002; ID910016; CA000014; CA010017; CA040021; CA990007; CA990008; FL990010; TX000002; CA950008; MS010012; MS050002; ND010005; KY040001; SC000001; TN060005; NJ010001; PA010003; VA020002; WV010001; NY080008; CA020010; GA980001; NC970004; SC970005; TN990002; TX040023; AR960009; CA960019; CA960020; CA960021; CA960022; CA960023; CA960026; CA960028; CA970026; CT020003; LA020007; LA960012; MI970002; MN960006; MS000010; MS960015; MT960003; NC020003; NC960005; NC960006; NC990007; ND960005; ND980001; NV990007; OR960037; OR970008; SD010002; SD960006; WA970024; AR020001; HI020001; LA020001; MS020003; ND020006; ND020007; LA060011.	Dow AgroSciences LLC, 9330 Zionsville RD 308/2E, Indianapolis, IN 46268–1054
ID970015; OR080004; OR080005; OR080006; OR080007; OR080008; OR080009; OR080011; OR080012.	Chemtura Corp., 199 Benson Rd., Middlebury, CT 6749.

III. Summary of Public Comments Received and Agency Response to Comments

During the public comment period provided, EPA received a request from one registrant to rescind their request for voluntary cancellation. Aceto Agricultural Chemicals Corp. rescinded their request for voluntary cancellation of registration number 002749–00119, containing tributyltin oxide. EPA received no other comments in response to the June 13, 2012 **Federal Register** notice announcing the Agency's receipt of the requests for voluntary cancellations of products listed in Table 1 of Unit II.

IV. Cancellation Order

Pursuant to FIFRA section 6(f), EPA hereby approves the requested cancellations of the registrations identified in Tables 1 and 2 of Unit II. Accordingly, the Agency hereby orders that the product registrations identified in Tables 1 and 2 of Unit II. are cancelled. The effective date of the cancellations that are the subject of this notice is September 12, 2012. Any distribution, sale, or use of existing stocks of the products identified in Table 1 and 2 of Unit II. in a manner inconsistent with any of the provisions for disposition of existing stocks set forth in Unit VI. will be a violation of FIFRA.

V. What is the agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be cancelled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the EPA Administrator may approve such a request. The notice of receipt for this action was published for comment in the **Federal Register** issue of June 13, 2012 (77 FR 35379) (FRL–9351–7). The comment period closed on July 13, 2012.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. The existing stocks provisions for the products subject to this order are as follows:

A. Registrations Listed in Table 1 of Unit II

The registrants may continue to sell and distribute existing stocks of products listed in Table 1 of Unit II. until September 12, 2013, which is 1 year after the publication of the Cancellation Order in the **Federal Register**. Thereafter, the registrants are prohibited from selling or distributing products listed in Table 1, except for export in accordance with FIFRA section 17, or proper disposal. Persons other than the registrants may sell, distribute, or use existing stocks of products listed in Table 1 of Unit II. until existing stocks are exhausted,

provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the cancelled products.

B. Registrations Listed in Table 2 of Unit II

Registrants are allowed to sell and distribute existing stocks of these products until January 13, 2013, 1 year after the date on which the maintenance fee was due. Thereafter, registrants will be prohibited from selling or distributing the pesticides identified in Table 2 of Unit II., except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants are allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the cancelled products.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: August 30, 2012.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2012–22197 Filed 9–11–12; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE U.S.

[Public Notice 459]

Agency Information Collection Activities: Final Collection; Comment Request

AGENCY: Export-Import Bank of the U.S.

ACTION: Submission for OMB Review and Comments Request.

Form Title: Application for Long Term Loan or Guarantee (EIB 95–10).

SUMMARY: Export-Import (Ex-Im) Bank is requesting an emergency approval for form EIB 95–10 Application for Long Term Loan or Guarantee, OMB 3048–0013, because the Export Import Bank Reauthorization Act of 2012 has placed additional reporting requirements on the Bank.

The changes to this form are as follows:

1. Addition of a new participant role, Controlling Sponsor, to section 2 of the application. Section 18 of the Export-Import Bank Reauthorization Act of 2012 prohibits Ex-Im Bank's Board of Directors from approving "any transaction in which a person that is a borrower or controlling sponsor, or a person that is owned or controlled by such borrower or controlling sponsor, is subject to sanctions under section 5(a) of the Iran Sanctions Act.". In order for Ex-Im Bank to ensure that the Board of Directors is in compliance with the prohibition, Ex-Im Bank needs to be able to identify the controlling sponsor for a transaction (Ex-Im Bank already asks on the application form who is the borrower for the transaction). Adding this question to the application form will allow Ex-Im Bank to identify the controlling sponsor.

2. Replace Section 6 of the application with new language and questions. Section 10 of the Export-Import Bank Reauthorization Act of 2012 adds a new paragraph (h) to Section 8 of Ex-Im Bank's Charter (12 USC 635g). The new section 8(h) of the Charter requires the Bank to categorize the purpose of each loan and long-term guarantee in the Bank's Annual report. The Reauthorization Act defines the appropriate/acceptable purposes. In order to provide this information to Congress, Ex-Im Bank needs to change the questions it was asking on the application form to align them with the specific purposes identified in the Act. Without this change, Ex-Im Bank will be unable to further break down unavailability of private sector financing into risk constraints vs. maturity limitations.

3. Change the percents in Section 5; sub-section C and sub-section H of the application form to indicate that Ex-Im Bank may have the ability to finance local costs up to 30% of the net contract price. There is an international agreement that was reached between Ex-Im Bank and its foreign competitors that allows Ex-Im Bank (and its competitors) to provide additional local cost financing. This increased availability and flexibility is important to U.S. exporters and helps enhance their competitiveness. Ex-Im Bank would like to make this change to the guidance in the application form to ensure customers are aware of this enhanced support.

The application can be viewed at *www.exim.gov/pub/pending/eib95-10.pdf.*

DATES: Comments should be received on or before November 13, 2012 to be assured of consideration.

ADDRESSES: Comments maybe submitted electronically on *WWW.REGULATIONS.GOV* or by mail to Michele Kuester, Export Import Bank of the United States, 811 Vermont Ave. NW. Washington, DC 20571.

SUPPLEMENTARY INFORMATION: *Titles and Form Number:* EIB 95–10 Application for Long Term Loan or Guarantee.

OMB Number: 3048–0013.

Type of Review: Emergency.

Need and Use: The information collected will provide information needed to determine compliance and creditworthiness for transaction requests submitted to the Export Import Bank under its long term guarantee and direct loan programs.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 84.

Estimated Time per Respondent: 1.5 hours.

Government Annual Burden Hours: 2,100.

Frequency of Reporting or Use: Yearly.

Total Cost to the Government: $81,312.

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. 2012–22465 Filed 9–11–12; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[IB Docket No. 04–286; DA 12–1429]

Second Meeting of the Advisory Committee for the 2015 World Radiocommunication Conference

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the second meeting of the WRC-15 Advisory Committee will be held on October 1, 2012, at the Federal Communications Commission. The Advisory Committee will consider any preliminary views introduced by the Advisory Committee's Informal Working Groups.

DATES: October 1, 2012; 10 a.m.

ADDRESSES: Federal Communications Commission, 445 12th Street SW., Room TW–C305, Washington DC 20554.

FOR FURTHER INFORMATION CONTACT: Alexander Roytblat, Designated Federal Official, WRC–15 Advisory Committee, FCC International Bureau, Strategic Analysis and Negotiations Division, at (202) 418–7501.

SUPPLEMENTARY INFORMATION: The Federal Communications Commission (FCC) established the WRC–15 Advisory Committee to provide advice, technical support and recommendations relating to the preparation of United States proposals and positions for the 2015

World Radiocommunication Conference (WRC–15).

In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, this notice advises interested persons of the second meeting of the WRC–15 Advisory Committee. Additional information regarding the WRC–15 Advisory Committee is available on the Advisory Committee's Web site, *http://www.fcc.gov/wrc-15*. The meeting is open to the public. The meeting will be broadcast live with open captioning over the Internet from the FCC Live web page at *www.fcc.gov/live*. Comments may be presented at the WRC–15 Advisory Committee meeting or in advance of the meeting by email to: *WRC–15@fcc.gov*.

Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via email to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). Such requests should include a detailed description of the accommodation needed. In addition, please include a way for the FCC to contact the requester if more information is needed to fill the request. Please allow at least five days' advance notice; last minute requests will be accepted, but may not be possible to accommodate.

The proposed agenda for the first meeting is as follows:

Agenda

Second Meeting of the WRC–15 Advisory Committee

Federal Communications Commission, 445 12th Street SW., Room TW–C305, Washington, DC 20554, October 1, 2012; 10 a.m.

1. Opening Remarks
2. Approval of Agenda
3. Approval of the Minutes of the First Meeting
4. IWG Reports and Documents Relating to Preliminary Views
5. Future Meetings
6. Other Business

Federal Communications Commission.

Mindel De La Torre,

Chief, International Bureau.

[FR Doc. 2012–22390 Filed 9–11–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

[Notice 2012–06]

Filing Dates for the Kentucky Special Election in the 4th Congressional District

AGENCY: Federal Election Commission.

ACTION: Notice of filing dates for special election.

SUMMARY: Kentucky has scheduled a general election on November 6, 2012, to fill the U.S. House seat in the Fourth Congressional District vacated by Representative Geoff Davis.

Committees required to file reports in connection with the Special General Election on November 6, 2012, shall file a 12-day Pre-General Report, and a 30-day Post-General Report.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth S. Kurland, Information Division, 999 E Street NW., Washington, DC 20463; Telephone: (202) 694–1100; Toll Free (800) 424–9530.

SUPPLEMENTARY INFORMATION:

Principal Campaign Committees

All principal campaign committees of candidates who participate in the Kentucky Special General Election shall file a 12-day Pre-General Report on October 25, 2012; and a 30-day Post-General Report on December 6, 2012. (See chart below for the closing date for each report).

Note that these reports are in addition to the campaign committee's regular quarterly filings. (See chart below for the closing date for each report).

Unauthorized Committees (PACs and Party Committees)

Political committees filing on a quarterly basis in 2012 are subject to special election reporting if they make previously undisclosed contributions or expenditures in connection with the Kentucky Special General Election by the close of books for the applicable report(s). (See chart below for the closing date for each report).

Committees filing monthly that make contributions or expenditures in connection with the Kentucky Special General Election will continue to file according to the monthly reporting schedule.

Additional disclosure information in connection with the Kentucky Special Election may be found on the FEC Web site at *http://www.fec.gov/info/report_dates.shtml*.

Disclosure of Lobbyist Bundling Activity

Principal campaign committees, party committees and Leadership PACs that are otherwise required to file reports in connection with the special elections must simultaneously file FEC Form 3L if they receive two or more bundled contributions from lobbyists/registrants or lobbyist/registrant PACs that aggregate in excess of $16,700 during the special election reporting periods (see charts below for closing date of each period). 11 CFR 104.22(a)(5)(v).

Calendar of Reporting Dates for Kentucky Special Election

COMMITTEES INVOLVED IN THE SPECIAL GENERAL (11/06/12) MUST FILE

Report	Close of books [1]	Reg./cert. and overnight mailing deadline	Filing deadline
Pre-General	10/17/12	10/22/12	10/25/12
Post-General	11/26/12	12/06/12	12/06/12
Year-End	12/31/12	01/31/13	01/31/13

[1] These dates indicate the end of the reporting period. A reporting period always begins the day after the closing date of the last report filed. If the committee is new and has not previously filed a report, the first report must cover all activity that occurred before the committee registered as a political committee with the Commission up through the close of books for the first report due.

Dated: September 5, 2012

On behalf of the Commission,

Caroline C. Hunter,

Chair, Federal Election Commission.

[FR Doc. 2012–22361 Filed 9–11–12; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (www.fmc.gov) or by contacting the Office of Agreements at (202)-523–5793 or *tradeanalysis@fmc.gov*.

Agreement No.: 011325–041.

Title: Westbound Transpacific Stabilization Agreement.

Parties: American President Lines, Ltd./APL Co. Pte Ltd.(withdrawal from agreement effective September 1,2012); COSCO Container Lines Company Limited; Evergreen Line Joint Service Agreement.; Hanjin Shipping Co., Ltd.; Hapag-Lloyd AG; Hyundai Merchant Marine Co. Ltd.; Kawasaki Kisen Kaisha, Ltd.; Nippon Yusen Kaisha Line; Orient Overseas Container Line Limited; and Yangming Marine Transport Corp.

Filing Party: David F. Smith, Esq.; Cozen O'Connor; 627 I Street NW.; Suite 1100; Washington, DC 20006.

Synopsis: This amendment reflects the withdrawal of Nippon Yusen Kaisha effective September 21, 2012.

Agreement No.: 012067–007.

Title: U.S. Supplemental Agreement to HLC Agreement.

Parties: BBC Chartering & Logistics GmbH & Co. KG; Beluga Chartering GmbH; Chipolbrok; Clipper Project Ltd.; Hyndai Merchant Marine Co., Ltd.; Industrial Maritime Carriers, L.L.C.; Nordana Line A/S; and Rickmers-Linie GmbH & Cie. KG.

Filing Party: Wade S. Hooker, Esq.; 211 Central Park W; New York, NY 10024.

Synopsis: The amendment authorizes the parties to appoint other committees in addition to an Executive Committee, clarifies wording, and makes other administrative changes.

Dated: September 7, 2012.

By Order of the Federal Maritime Commission.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2012–22441 Filed 9–11–12; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than September 27, 2012.

A. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. *The Craig R. Curry Blind Trust with Mark E. Rector as Trustee,* Lebanon, Missouri, to acquire additional voting shares of Central Missouri Shares, Inc., and thereby indirectly acquire additional voting shares of Central Missouri Bank, Inc., both of Lebanon, Missouri.

Board of Governors of the Federal Reserve System, September 7, 2012.

Margaret McCloskey Shanks,

Associate Secretary of the Board.

[FR Doc. 2012–22432 Filed 9–11–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than September 27, 2012.

A. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. *The Craig R. Curry Blind Trust with Mark E. Rector as Trustee,* Lebanon, Missouri, to acquire additional voting shares of Central Missouri Shares, Inc., and thereby indirectly acquire additional voting shares of Central Missouri Bank, Inc., both of Lebanon, Missouri.

Board of Governors of the Federal Reserve System, September 7, 2012.

Margaret McCloskey Shanks,

Associate Secretary of the Board.

[FR Doc. 2012–22429 Filed 9–11–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 5, 2012.

A. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. *Financial FedCorp, Inc.*, Memphis, Tennessee; to become a bank holding company through the conversion of its wholly owned subsidiary Financial Federal Savings Bank, Memphis, Tennessee, from a federally chartered savings bank to a state chartered commercial bank.

B. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Weed Investment Group, Inc.*, Cheyenne Wells, Colorado; to acquire 100 percent of the voting shares of Kit Carson Insurance Agency, Inc., and thereby indirectly acquire voting shares of The Kit Carson State Bank, both in Kit Carson, Colorado.

Board of Governors of the Federal Reserve System, September 6, 2012.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2012–22363 Filed 9–11–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 26, 2012.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *American Heartland Bancshares, Inc.*, Sugar Grove, Illinois; to engage *de novo* through its subsidiary, American Heartland Holdings, LLC, Sugar Grove, Illinois, in extending credit and servicing loans, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, September 6, 2012.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2012–22362 Filed 9–11–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodin Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register.**

The following transactions were granted early termination—on the dates indicated—of the waiting period provided by law and the premerger notification rules. The listing for each transaction includes the transaction number and the parties to the transaction. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

EARLY TERMINATIONS GRANTED

August 1, 2012 Through August 31, 2012

08/01/2012		
20120945	G	Technip S.A.; The Shaw Group Inc.; Technip S.A.
20121154	G	DTE Energy Company; GDF Suez S.A.; DTE Energy Company.
20121155	G	DTE Energy Company; Duke Energy Corporation; DTE Energy Company.
08/03/2012		
20121098	G	Time Warner Inc.; Bleacher Report, Inc.; Time Warner Inc.
20121130	G	Marcato International Ltd.; Corrections Corporation of America; Marcato International Ltd.
20121137	G	Oracle Corporation; Massy Mehdipour; Oracle Corporation.
20121150	G	Robert J. Pera; Michael E. Heisley, Sr.; Robert J. Pera.
20121153	G	Xcel Energy Inc.; Bicent Power LLC; Xcel Energy Inc.
20121156	G	Odyssey Investment Partners Fund IV, L.P.; Monitor Clipper Equity Partners II, L.P.; Odyssey Investment Partners Fund IV, L.P.
20121162	G	General Atlantic Partners 90, L.P.; Box, Inc.; General Atlantic Partners 90, L.P.
20121165	G	Mr. Steve Wang; Andrew Nikou; Mr. Steve Wang.
20121166	G	HealthCare Partners Medical Group; Medical Group Holding Company, LLC; HealthCare Partners Medical Group.
20121178	G	Manuel J. Moroun; Universal Truckload Services, Inc.; Manuel J. Moroun.

EARLY TERMINATIONS GRANTED—Continued
August 1, 2012 Through August 31, 2012

08/06/2012		
20121082	G	Bayer AG; AgraQuest, Inc.; Bayer AG.
20121177	G	Universal Truckload Services, Inc.; Mathew T. Moroun; Universal Truckload Services, Inc.
20121179	G	Mathew T. Moroun; Universal Truckload Services, Inc.; Mathew T. Moroun.
08/08/2012		
20121089	G	AT&T Inc.; Cavalier Wireless, LLC; AT&T Inc.
20121101	G	3M Company; Federal Signal Corporation; 3M Company.
20121175	G	Henri Audet; ABRY Partners IV, L.P.; Henri Audet.
08/09/2012		
20121146	G	Walgreen Co.; Stephen L. LaFrance; Walgreen Co.
08/10/2012		
20121181	G	First Reserve Fund XI, L.P.; Devon Energy Corporation; First Reserve Fund XI, L.P.
20121182	G	Chart Industries, Inc.; Ravinder K & Pratibha Bansal, spouses; Chart Industries, Inc.
20121183	G	DreamWorks Animation SKG, Inc.; GTCR Fund IX/A, L.P.; DreamWorks Animation SKG, Inc.
20121187	G	Dentsu Inc.; Aegis Group plc; Dentsu Inc.
20121188	G	Sykes Enterprises, Incorporated; Alpine Access, Inc.; Sykes Enterprises, Incorporated.
20121189	G	ESCO Corporation; Intervale Capital Fund L.P.; ESCO Corporation.
20121190	G	Ingram Micro Inc.; Brightpoint, Inc.; Ingram Micro Inc.
20121191	G	Nespresso Acquisition Corporation; Cequel Communications Holdings, LLC; Nespresso Acquisition Corporation.
20121192	G	Bright Food (Group) Co., Ltd.; Lion/Latimer Investments No. 1 LP; Bright Food (Group) Co., Ltd.
20121193	G	Nexstar Broadcasting Group, Inc.; Providence Equity Partners VI (Umbrella U.S.) L.P.; Nexstar Broadcasting Group, Inc.
20121194	G	OGE Energy Corp.; Chesapeake Energy Corporation; OGE Energy Corp.
20121197	G	Dayton-Cox Trust A; Providence Equity Partners VI (Umbrella U.S.) L.P.; Dayton-Cox Trust A.
08/14/2012		
20121028	G	Berkshire Hathaway Inc.; Jerry L. Wordsworth; Berkshire Hathaway Inc.
20121195	G	ConAgra Foods, Inc.; Unilever N.V.; ConAgra Foods, Inc.
08/16/2012		
20121144	G	Wells Fargo & Company; Matthias Horch; Wells Fargo & Company.
20121149	G	Wells Fargo & Company; Volker Straub; Wells Fargo & Company.
20121180	G	Apple Inc.; AuthenTec, Inc.; Apple Inc.
20121204	G	Oracle Corporation; Xsigo Systems, Inc.; Oracle Corporation.
20121208	G	Anil K. Singhal; NetScout Systems, Inc.; Anil K. Singhal.
08/17/2012		
20121206	G	Accenture plc; Octagon Research Solutions, Inc.; Accenture plc.
20121209	G	JP Morgan Chase & Co.; Natan Peisach; JP Morgan Chase & Co.
20121212	G	Verisk Analytics, Inc.; Oak Investment XII, Limited Partnership; Verisk Analytics, Inc.
20121213	G	Silver II Acquisition S.a.r.l.; United Technologies Corporation; Silver II Acquisition S.a.r.l.
20121221	G	The Williams Companies, Inc.; Explorer Pipeline Company; The Williams Companies, Inc.
20121223	G	Clyde Blowers Capital Fund III LP; Clyde Blowers Capital Fund II LP; Clyde Blowers Capital Fund III LP.
20121225	G	Gregory B Maffei; Liberty Media Corporation; Gregory B Maffei.
20121227	G	The Home Depot, Inc.; U.S. Home Systems, Inc.; The Home Depot, Inc.
08/20/2012		
20121184	G	Roper Industries. Inc.; Sunquest Sponsor Holdings, LLC; Roper Industries, Inc.
20121214	G	Athene Holding Ltd.; Presidental Life Corporation; Athene Holding Ltd.
08/22/2012		
20121069	G	Ixia; BreakingPoint Systems, Inc.; Ixia.
20121205	G	Carlyle Partners V GW, L.P.; Genesee & Wyoming Inc.; Carlyle Partners V GW, L.P.
20121226	G	Gerald F. Smith, Jr.; James A. Perdue; Gerald F. Smith, Jr.
08/24/2012		
20121174	G	TPG Partners VI, L.P.; Par Pharmaceuticals Companies, Inc.; TPG Partners VI, L.P.
20121200	G	Partners Limited; Alcoa Inc.; Partners Limited.
20121228	G	Padre Time, LLC; SoCal SportsNet LLC; Padre Time, LLC.
20121230	G	Dawn Holdings, Inc.; AOT Bedding Super Holdings, LLC; Dawn Holdings, Inc.
20121231	G	JHAC, LLC; Cleveland Browns Holdings LLC; JHAC, LLC.
20121232	G	Skagen 2004 Trust; Method Products, Inc.; Skagen 2004 Trust.

EARLY TERMINATIONS GRANTED—Continued

August 1, 2012 Through August 31, 2012

20121234	G	Safeguard Holdings, L.P.; Bank of America Corporation; Safeguard Holdings, L.P.
20121237	G	KRG Capital Fund IV, L.P.; D&G Management LLC; KRG Capital Fund IV, L.P.
20121238	G	ArcLight Energy Partners Fund V, L.P.; Manulife Financial Corporation; ArcLight Energy Partners Fund V, L.P.
20121239	G	ArcLight Energy Partners Fund V, L.P.; Mr. Dean Vanech; ArcLight Energy Partners Fund V, L.P.
20121244	G	Seven & i Holdings Co., Ltd.; Eliahu Zahavi; Seven & i Holdings Co., Ltd.
20121246	G	Eagle Rock Energy Partners, L.P.; BP p.l.c.; Eagle Rock Energy Partners, L.P.
20121247	G	TD Ameritrade Holding Corporation; Knight Capital Group, Inc.; TD Ameritrade Holding Corporation.
20121253	G	GTCR Fund X/A LP; CCMP Capital Investors II, L.P.; GTCR Fund X/A LP.
08/27/2012		
20121245	G	Donata Holding SE; Peet's Coffee & Tea, Inc.; Donata Holding SE.
20121259	G	EQT VI (No. 1) Limited Partnership; Carlyle Europe Technology Partners, L.P.; EQT VI (No. 1) Limited Partnership.
08/28/2012		
20121211	G	Jefferies Group, Inc.; Knight Capital Group, Inc.; Jefferies Group, Inc.
20121250	G	GETCO Holding Company, LLC; Knight Capital Group, Inc.; GETCO Holding Company, LLC.
20121255	G	Sinclair Broadcast Group, Inc.; Providence Equity Partners VI (Umbrella U.S.) L.P.; Sinclair Broadcast Group, Inc.
08/29/2012		
20121104	G	Becton, Dickinson and Company; Howard Energy Co., Inc.; Becton, Dickinson and Company.
20121216	G	Cerberus Institutional Partners, L.P.; DigitalGlobe, Inc.; Cerberus Institutional Partners, L.P.
20121222	G	Parametric Technology Corporation; Marlin Equity II, L.P.; Parametric Technology Corporation.
20121257	G	New Werner Holding Co., Inc.; Emerson Electric Co.; New Werner Holding Co., Inc.
08/30/2012		
20121196	G	2003 TIL Settlement; MarkMonitor Holdings, Inc.; 2003 TIL Settlement.
08/31/2012		
20121229	G	State Street Corporation; The Goldman Sachs Group, Inc.; State Street Corporation.
20121260	G	JDW, III 2006 Irrevocable Trust; Willbanks Metals, Inc.; JDW, III 2006 Irrevocable Trust.
20121266	G	Compass Investors Inc.; The Toronto-Dominion Bank; Compass Investors Inc.
20121267	G	Morgan Stanley Offshore Infrastructure Partners A LP; General Electric Company; Morgan Stanley Offshore Infrastructure Partners A LP.
20121277	G	Continental AG; Parker Hannifin Corporation; Continental AG.
20121283	G	Titan International, Inc.; Titan Europe Plc; Titan International, Inc.

FOR FURTHER INFORMATION CONTACT: Renee Chapman, Contact Representative, or Theresa Kingsberry, Legal Assistant., Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2012–22386 Filed 9–11–12; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0145; Docket 2012–0076; Sequence 23]

Federal Acquisition Regulation; Information Collection; Use of Data Universal Numbering System (DUNS) as Primary Contractor Identification

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning use of the Data Universal Numbering System (DUNS) as primary contractor identification. The DUNS number is the nine-digit identification number assigned by Dun and Bradstreet Information Services to an establishment.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the Federal Acquisition Regulations (FAR), and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before November 13, 2012.

ADDRESSES: Submit comments identified by Information Collection 9000–0145, *Use of data universal Numbering System (DUNS) as Primary Contractor Identification,* by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by inputting "Information Collection 9000–0145, Use of Data Universal Numbering System (DUNS) as Primary Contractor Identification" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "Information Collection 9000–0145, Use of Data Universal Numbering System (DUNS) as Primary Contractor Identification". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "Information Collection 9000–0145, Use of Data Universal Numbering System (DUNS) as Primary Contractor Identification" on your attached document.

- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0145, Transportation Requirements.

Instructions: Please submit comments only and cite Information Collection 9000–0145, Use of Data Universal Numbering System (DUNS) as Primary Contractor Identification, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, Office of Governmentwide Acquisition Policy, GSA (202) 501–1448 or via email at *curtis.glover@gsa.gov.*

SUPPMENTARY INFORMATION:

A. Purpose

The Data Universal Numbering System (DUNS) number is the nine-digit identification number assigned by Dun and Bradstreet Information Services to an establishment. The Government uses the DUNS number to identify contractors in reporting to the Federal Procurement Data System (FPDS). The FPDS provides a comprehensive mechanism for assembling, organizing, and presenting contract placement data for the Federal Government. Federal agencies report data on all contracts in excess of the micro-purchase threshold to the Federal Procurement Data Center which collects, processes, and disseminates official statistical data on Federal contracting. Contracting officers insert the Federal Acquisition Regulation (FAR) provision at 52.204–6, Data Universal Numbering System (DUNS) Number, in solicitations they expect will result in contracts in excess of the micro-purchase threshold and do not contain FAR 52.204–7, Central Contractor Registration. The majority of offerors submit their DUNS through CCR as required by FAR 52.204–7, and not under the FAR provision at 52.204–6.

B. Annual Reporting Burden

The estimated annual reporting burden has been adjusted since published in the **Federal Register** at 74 FR 37991, on July 30, 2009. The adjustment is based on use of Fiscal Year 2011 Federal Procurement Data System data, and consideration for the fact that the majority of vendors are required to report their DUNS number into the Central Contractor Registration per FAR 52.204–7, and not FAR.204–6, as required by this information collection.

Respondents: 38,679.

Responses per Respondent: 3.

Annual Responses: 116,037.

Hours per Response: .02416.

Total Burden Hours: 2,804.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control Number 9000–0145, Use of Data Universal Numbering System (DUNS) as Primary Contractor Identification, in all correspondence.

Dated: September 6, 2012.

William Clark,

Acting Director, Federal Acquisition Policy Division, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2012–22408 Filed 9–11–12; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0029; Docket 2012–0076; Sequence 27]

Federal Acquisition Regulation; Information Collection; Extraordinary Contractual Action Requests

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration NASA).

ACTION: Notice of request for comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning extraordinary contractual action requests.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the Federal Acquisition Regulations (FAR), and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before November 13, 2012.

ADDRESSES: Submit comments identified by *Information Collection 9000–0029, Extraordinary Contractual Action Requests,* by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link "Submit a Comment" that corresponds with "Information Collection 9000–0029, Extraordinary Contractual Action Requests". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and

"Information Collection 9000–0029, Extraordinary Contractual Action Requests" on your attached document.

- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0029, Extraordinary Contractual Action Requests.

Instructions: Please submit comments only and cite Information Collection 9000–0029, Extraordinary Contractual Action Requests, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, Office of Governmentwide Acquisition Policy, GSA (202) 219–0202 or email at *Cecelia.davis@gsa.gov*.

SUPPLEMENTARY INFORMATION:

A. Purpose

FAR Subpart 50.1 prescribes policies and procedures that allow contracts to be entered into, amended, or modified in order to facilitate national defense under the extraordinary emergency authority granted under 50 U.S.C. 1431 et seq. and Executive Order (EO) 10789 dated November 14, 1958, et seq. In order for a contractor to be granted relief under the FAR, specific evidence must be submitted which supports the firm's assertion that relief is appropriate and that the matter cannot be disposed of under the terms of the contract.

The information is used by the Government to determine if relief can be granted under FAR and to determine the appropriate type and amount of relief.

B. Annual Reporting Burden

The annual reporting burden is not changed from what was published in the **Federal Register** at 74 FR 48744, on September 24, 2009. Based on coordination with subject matter experts and consideration of the requirements for estimating the burden within the Paperwork Burden Act, the determination was made to not revise the annual reporting burden. However, at any point, members of the public may submit comments for further consideration, and are encouraged to provide data to support their request for an adjustment.

The annual reporting burden is estimated as follows:

Respondents: 100.
Responses per Respondent: 1.
Total Responses: 100.
Hours per Response: 16.
Total Burden Hours: 1,600.

Obtaining Copies of Proposals: Requester may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0029, Extraordinary Contractual Action Requests, in all correspondence.

Dated: September 5, 2012.

William Clark,

Acting Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2012–22411 Filed 9–11–12; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Measure Development: Quality of Family-Provider Relationships in Early Care and Education.

OMB No.: New Collection

The Office of Planning, Research and Evaluation (OPRE), the Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is proposing a data collection activity as part of the development of an early care and education (ECE) quality measurement tool to assess family-provider relationships that support positive child developmental outcomes and family wellbeing. The major goal of this project is to develop a measure of the quality of family-provider relationships that will be (1) applicable across multiple types of early care and education settings and diverse program structures (including Head Start/Early Head Start); (2) sensitive across cultures associated with racial, ethnic, and socioeconomic characteristics; and (3) reliable in both English and Spanish. At this time, four self-administered surveys (one for center- and home-based child care directors, one for child care providers/teachers, and two for parents) have been developed, based on a literature review, a review of existing measures, and information collected through focus groups (under OMB Clearance 0970–0356) and cognitive interviews (under OMB Clearance 0970–0355). To test these measures, two stages of data collection activities are proposed for this information collection request: a pilot test and a field test.

The pilot test data will be used to examine the distribution of the items and to determine whether they behave in a manner consistent with the conceptual model that was developed as part of the project. The pilot test will also test data collection procedures prior to conducting a large-scale field test. Any problematic items or procedures identified by the pilot test will be corrected and revisions submitted to OMB before the field test.

The purpose of the field test is to obtain sufficient data on a diverse population to enable full psychometric testing of the measures and compare subgroups to ensure that the measure can be used in diverse ECE settings.

Respondents: Directors of center-based child care programs, home-based child care programs, Early Head Start programs, and Head Start programs; center-based and home-based child care providers and ECE teachers; and parents whose children are enrolled in these diverse-types of ECE settings.

ANNUAL BURDEN ESTIMATE—PILOT AND FIELD TESTS

Instrument	Respondent number	Number of responses per respondent	Average burden hours per response	Total burden hours
Director Screener	428	1	0.08	34.2
Provider/Teacher Screener	758	1	0.08	60.6
Parent Screener	1650	1	0.08	132.0
Director Survey	143	1	0.17	24.3
Provider/Teacher Survey	253	1	0.17	43.0
Parent Survey about FSWs	76	1	0.17	12.9
Parent Survey about Providers/Teachers	475	1	0.17	80.8

ANNUAL BURDEN ESTIMATE—PILOT AND FIELD TESTS—Continued

Instrument	Respondent number	Number of responses per respondent	Average burden hours per response	Total burden hours
Estimated Total				387.8

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: OPRE Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *OPREinfocollection@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, Email: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

Steven Hanmer,

Reports Clearance Officer.

[FR Doc. 2012–22387 Filed 9–11–12; 8:45 am]

BILLING CODE 4184–22–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: April 2014 Current Population Survey Supplement on Child Support.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Child Support Survey	41,300	1	0.03	1,239

Estimated Total Annual Burden Hours: 1,239.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *info collection@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, Email: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

OMB No.: 0992–0003.

Description: Collection of these data will assist legislators and policymakers in determining how effective their policymaking efforts have been over time in applying the various child support legislation to the overall child support enforcement picture. This information will help policymakers determine to what extent individuals on welfare would be removed from the welfare rolls as a result of more stringent child support enforcement efforts.

Respondents: Individuals and households.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2012–22412 Filed 9–11–12; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Cancer Target Discovery and Development Network.

Date: October 18–19, 2012.

Time: 6 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Adriana Stoica, Ph.D., Scientific Review Officer, Special Review & Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., Suite 703, Room 7072 Bethesda, MD 20892–8329, 301–594–1408, *Stoicaa2@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Validation and Advanced Development of Emerging Technologies for Cancer Research.

Date: October 30, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Ploce: National Institutes of Health, 6120 Executive Boulevard, Room 511, Rockville, MD 20852.

Contact Person: Thomas A. Winters, Ph.D., Scientific Review Officer, Special Review & Logistics Branch, Division of Extramural Activities, 6116 Executive Boulevard, Room 8146, National Cancer Institute, NIH, Bethesda, MD 20892–8329, 301–594–1566, *twinters@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Quantitative Imaging for Evaluation of Responses to Cancer Therapies.

Date: October 31, 2012.

Time: 10 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Ploce: National Institutes of Health, 6116 Executive Boulevard, Room 611, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Gerald G. Lovinger, Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 8101 Bethesda, MD 20892–8329 301/496–7987 *lovingeg@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Cancer Diagnostic and Therapeutic Agents Enabled by Nanotechnology.

Date: November 27, 2012.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Boulevard, Room J, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Savvas C. Makrides, Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard., Room 8050A Bethesda, MD 20892, 301–496–7421 *makridessc@mail.nih.gov.*

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/sep/sep.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: September 6, 2012.

Melanie J. Gray,

Progrom Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–22384 Filed 9–11–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Nome of Committee: Oncology 1-Basic Translational Integrated Review Group; Cancer Etiology Study Section.

Dote: October 11, 2012.

Time: 8 a.m. to 6 p.m.

Agendo: To review and evaluate grant applications.

Ploce: Renaissance Long Beach Hotel, 111 East Ocean Blvd., Long Beach, CA 90802.

Contact Person: Elaine Sierra-Rivera, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, MSC 7804, Bethesda, MD 20892, 301–435–1779, *riverase@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Integrative and Clinical Endocrinology and Reproduction Study Section.

Date: October 11, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Ploce: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Dianne Hardy, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6175, MSC 7892, Bethesda, MD 20892, 301–435–1154, *dianne.hardy@nih.gov.*

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Gastrointestinal Mucosal Pathobiology Study Section.

Date: October 11–12, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Peter J. Perrin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892, (301) 435–0682, *perrinp@csr.nih.gov.*

Nome of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Cellular Aspects of Diabetes and Obesity Study Section.

Date: October 11–12, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Long Beach Hotel, 111 East Ocean Blvd., Long Beach, CA 90802.

Contact Person: Robert Garofalo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 6156, MSC 7892, Bethesda, MD 20892, 301–435–1043, *gorofalors@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Biodata Management and Analysis Study Section.

Date: October 11–12, 2012.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Ploce: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20892.

Contact Person: Mark Caprara, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5156, MSC 7844, Bethesda, MD 20892, 301–435–1042, *capraramg@mail.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Modeling and Analysis of Biological Systems Study Section.

Date: October 11–12, 2012

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Ploce: Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: Craig Giroux, Scientific Review Officer, BST IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5150, Bethesda, MD 20892, 301–435–2204, *girouxcn@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neural Oxidative Metabolism and Death Study Section.

Date: October 11–12, 2012.

Time: 8 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Loews L'Enfant Plaza Hotel, 480 L'Enfant Plaza SW., Washington, DC 20024–2197.

Contact Person: Carol Hamelink, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4192, MSC 7850, Bethesda, MD 20892, (301) 213–9887, *hamelinc@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group; Molecular and Integrative Signal Transduction Study Section.

Date: October 11–12, 2012.

Time: 8 a.m. to 5:30 p.m.

Agendo: To review and evaluate grant applications.

Place: Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.

Contact Person: Raya Mandler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5134, MSC 7840, Bethesda, MD 20892, (301) 402–8228, *rayam@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Neurobiology of Motivated Behavior Study Section.

Date: October 11, 2012.

Time: 8 a.m. to 7 p.m.

Agenda: To review and evaluate grant applications.

Place: Spring Hill Suites New Orleans Downtown, New Orleans, LA 70130.

Contact Person: Nicholas Gaiano, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5178, MSC 7844, Bethesda, MD 20892–7844, 301–435–1033, *gaianonr@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group; Vaccines Against Microbial Diseases Study Section.

Date: October 11–12, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Marriott, 1221 22nd Street NW., Washington, DC 20037.

Contact Person: Jian Wang, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4218, MSC 7812, Bethesda, MD 20892, (301) 435–2778, *wangjia@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Mechanisms of Sensory, Perceptual, and Cognitive Processes Study Section.

Date: October 11–12, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Springhill Suites New Orleans Downtown, 301 St. Joseph St, New Orleans, LA 70130.

Contact Person: Kirk Thompson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5184, MSC 7844, Bethesda, MD 20892, 301–435–1242, *kgt@mail.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Brain Injury and Neurovascular Pathologies Study Section.

Date: October 11–12, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: New Orleans Marriott at the Convention Center, 859 Convention Center Boulevard, New Orleans, LA 70130.

Contact Person: Alexander Yakovlev, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5206, MSC 7846, Bethesda, MD 20892, 301–435–1254, *yakovleva@csr.nih.gov.*

Name of Committee: Oncology 1-Basic Translational Integrated Review Group; Tumor Progression and Metastasis Study Section.

Date: October 11–12, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Rolf Jakobi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6187, MSC 7806, Bethesda, MD 20892, 301–495–1718, *jakobir@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 6, 2012.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–22385 Filed 9–11–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5603–N–62]

Notice of Submission of Proposed Information Collection to OMB Disaster Recovery Grant Reporting System

AGENCY: Office of the Chief Information Officer, HUD

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The Disaster Recovery Grant Reporting (DRGR) System is a grants management system used by the Office of Community Planning and Development to monitor special appropriation grants under the Community Development Block Grant program. This collection pertains to Community Development Block Grant Disaster Recovery (CDBG–DR) and Neighborhood Stabilization Program (NSP) grant appropriations. The CDBG program is authorized under Title I of the Housing and Community Development Act of 1974, as amended. Following major disasters, Congress appropriates supplemental CDBG funds for disaster recovery. According to Section 104(e)(1) of the Housing and Community Development Act of 1974, HUD is responsible for reviewing grantees' compliance with applicable requirements and their continuing capacity to carry out their programs. Grant funds are made available to states and units of general local government, Indian tribes, and insular areas, unless provided otherwise by supplemental appropriations statute, based on their unmet disaster recovery needs.

The Neighborhood Stabilization Program (NSP) was established for the purpose of stabilizing communities that have suffered as a result of foreclosures and property abandonment. On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) into law (Pub. L. 111–203). This law provides $1 billion of formula grant funding for the redevelopment of foreclosed and abandoned homes to be allocated under the terms of Title XII, Division A, Section 2 of the American Recovery and Reinvestment Act (Recovery Act) and by the formula factors provided in Title III of Division B of the Housing and Economic Recovery Act of 2008 (Pub. L. 110–289) (HERA). In 2008, HERA provided for an initial round of formula funding to regular State and entitlement Community Development Block Grant (CDBG) grantees through the Neighborhood Stabilization Program (NSP1).[1] The Recovery Act provided for a neighborhood stabilization grant competition open to state and local governments, as well as non-profit groups and consortia that may include for-profit entities (NSP2).[2] The Dodd-Frank Act is the third round of Neighborhood Stabilization Funding (NSP3). Although NSP funds are otherwise to be considered CDBG funds, HERA, the Recovery Act and the Dodd-Frank Act make substantive revisions to the eligibility, use, and method of distribution of NSP3 funds. For NSP1 and NSP3, grantees are required to submit substantial amendments to their consolidated plans to secure funding they are entitled to under the formula grants. NSP3 Technical Assistance grants were appropriated under Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) (Pub. L. 111–203). Grantees were selected through a competitive process set forth in the NSP3–TA Notice of Funding Availability (NOFA),[3] with the purpose of assessing the need for technical assistance and targeting technical assistance in order to achieve the highest level of performance and results for the programs administered by HUD's Office of Community Planning and Development. Eligible applicants include states, units of local government, public housing authorities,

non-profit organizations, for-profit entities, and joint applicants NSP–TA grants. CDBG–DR and NSP grant funds are made available to states and units of general local government, Indian tribes, and insular areas, unless provided otherwise by supplemental appropriations statute. NSP–TA grant funds are awarded on a competitive basis and are open to state and local governments, as well as non-profit groups and consortia that may include for-profit entities.

DATES: *Comments Due Date:* October 12, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2506–0165) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov* fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's 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 through 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: Disaster Recovery Grant Reporting System.

OMB Approval Number: 2506–0165.

Form Numbers: SF–424 Application for Federal Assistance.

Description of The Need for the Information and Its Proposed

The Disaster Recovery Grant Reporting (DRGR) System is a grants management system used by the Office of Community Planning and Development to monitor special appropriation grants under the Community Development Block Grant program. This collection pertains to Community Development Block Grant Disaster Recovery (CDBG–DR) and Neighborhood Stabilization Program (NSP) grant appropriations. The CDBG program is authorized under Title I of the Housing and Community Development Act of 1974, as amended. Following major disasters, Congress appropriates supplemental CDBG funds for disaster recovery.

According to Section 104(e)(1) of the Housing and Community Development Act of 1974, HUD is responsible for reviewing grantees' compliance with applicable requirements and their continuing capacity to carry out their programs. Grant funds are made available to states and units of general local government, Indian tribes, and insular areas, unless provided otherwise by supplemental appropriations statute, based on their unmet disaster recovery needs.

The Neighborhood Stabilization Program (NSP) was established for the purpose of stabilizing 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) into law (Pub. L. 111–203). This law provides $1 billion of formula grant funding for the redevelopment of foreclosed and abandoned homes to be allocated under the terms of Title XII, Division A, Section 2 of the American Recovery and Reinvestment Act (Recovery Act) and by the formula factors provided in Title III of Division B of the Housing and Economic Recovery Act of 2008 (Pub. L. 110–289) (HERA). In 2008, HERA provided for an initial round of formula funding to regular State and entitlement Community Development Block Grant (CDBG) grantees through the Neighborhood Stabilization Program (NSP1).[1] The Recovery Act provided for a neighborhood stabilization grant competition open to state and local governments, as well as non-profit groups and consortia that may include for-profit entities (NSP2).[2] The Dodd-Frank Act is the third round of Neighborhood Stabilization Funding (NSP3). Although NSP funds are otherwise to be considered CDBG funds, HERA, the Recovery Act and the Dodd-Frank Act make substantive revisions to the eligibility, use, and method of distribution of NSP3 funds. For NSP1 and NSP3, grantees are required to submit substantial amendments to their consolidated plans to secure funding they are entitled to under the formula grants. NSP3 Technical Assistance grants were appropriated under Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) (Pub. L. 111–203). Grantees were selected through a competitive process set forth in the NSP3–TA Notice of Funding Availability (NOFA),[3] with the purpose of assessing the need for technical assistance and targeting technical assistance in order to achieve the highest level of performance and results for the programs administered by HUD's Office of Community Planning and Development. Eligible applicants include states, units of local government, public housing authorities, non-profit organizations, for-profit entities, and joint applicants. NSP–TA grants. CDBG–DR and NSP grant funds are made available to states and units of general local government, Indian tribes, and insular areas, unless provided otherwise by supplemental appropriations statute. NSP–TA grant funds are awarded on a competitive basis and are open to state and local governments, as well as non-profit groups and consortia that may include for-profit entities.

	Number of respondents	Annual responses	×	Hours per response	Burden hours
Reporting Burden	53	4		41.849	8,872

Total Estimated Burden Hours: 8,872.

Status: Reinstatement with change of previously approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: September 7, 2012.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2012–22475 Filed 9–11–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5639–N–02]

Notice of Regulatory Waiver Requests Granted for the Second Quarter of Calendar Year 2012

AGENCY: Office of the General Counsel, HUD.

ACTION: Notice.

SUMMARY: Section 106 of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act) requires HUD to publish quarterly **Federal Register** notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous **Federal Register** notice. The purpose of this notice is to comply with the requirements of section 106 of the HUD Reform Act. This notice contains a list of regulatory waivers granted by HUD during the period beginning on April 1, 2012, and ending on June 30, 2012.

FOR FURTHER INFORMATION CONTACT: For general information about this notice, contact Camille E. Acevedo, Associate General Counsel for Legislation and Regulations, Department of Housing and Urban Development, 451 Seventh Street SW., Room 10282, Washington, DC 20410–0500, telephone 202–708–1793 (this is not a toll-free number). Persons with hearing- or speech-impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

For information concerning a particular waiver that was granted and for which public notice is provided in this document, contact the person whose name and address follow the description of the waiver granted in the accompanying list of waivers that have been granted in the second quarter of calendar year 2012.

SUPPLEMENTARY INFORMATION: Section 106 of the HUD Reform Act added a new section 7(q) to the Department of Housing and Urban Development Act (42 U.S.C. 3535(q)), which provides that:

1. Any waiver of a regulation must be in writing and must specify the grounds for approving the waiver;

2. Authority to approve a waiver of a regulation may be delegated by the Secretary only to an individual of Assistant Secretary or equivalent rank, and the person to whom authority to waive is delegated must also have authority to issue the particular regulation to be waived;

3. Not less than quarterly, the Secretary must notify the public of all waivers of regulations that HUD has approved, by publishing a notice in the **Federal Register**. These notices (each covering the period since the most recent previous notification) shall:

a. Identify the project, activity, or undertaking involved;

b. Describe the nature of the provision waived and the designation of the provision;

c. Indicate the name and title of the person who granted the waiver request;

d. Describe briefly the grounds for approval of the request; and

e. State how additional information about a particular waiver may be obtained.

Section 106 of the HUD Reform Act also contains requirements applicable to waivers of HUD handbook provisions that are not relevant to the purpose of this notice.

This notice follows procedures provided in HUD's Statement of Policy on Waiver of Regulations and Directives issued on April 22, 1991 (56 FR 16337). In accordance with those procedures and with the requirements of section 106 of the HUD Reform Act, waivers of regulations are granted by the Assistant Secretary with jurisdiction over the regulations for which a waiver was requested. In those cases in which a General Deputy Assistant Secretary granted the waiver, the General Deputy Assistant Secretary was serving in the absence of the Assistant Secretary in accordance with the office's Order of Succession.

This notice covers waivers of regulations granted by HUD from April 1, 2012 through June 30, 2012. For ease of reference, the waivers granted by HUD are listed by HUD program office (for example, the Office of Community Planning and Development, the Office of Fair Housing and Equal Opportunity, the Office of Housing, and the Office of Public and Indian Housing, etc.). Within each program office grouping, the waivers are listed sequentially by the regulatory section of title 24 of the Code of Federal Regulations (CFR) that is being waived. For example, a waiver of a provision in 24 CFR part 58 would be listed before a waiver of a provision in 24 CFR part 570.

Where more than one regulatory provision is involved in the grant of a particular waiver request, the action is listed under the section number of the first regulatory requirement that appears in 24 CFR and that is being waived. For example, a waiver of both § 58.73 and § 58.74 would appear sequentially in the listing under § 58.73.

Waiver of regulations that involve the same initial regulatory citation are in time sequence beginning with the earliest-dated regulatory waiver.

Should HUD receive additional information about waivers granted during the period covered by this report (the second quarter of calendar year 2012) before the next report is published (the third quarter of calendar year 2012), HUD will include any additional waivers granted for the second quarter in the next report.

Accordingly, information about approved waiver requests pertaining to HUD regulations is provided in the Appendix that follows this notice.

Dated: September 6, 2012.

Helen R. Kanovsky,

General Counsel.

Appendix

Listing of Waivers of Regulatory Requirements Granted by Offices of the Department of Housing and Urban Development April 1, 2012 through June 30, 2012

Note to Reader: More information about the granting of these waivers, including a copy of the waiver request and approval, may be obtained by contacting the person whose name is listed as the contact person directly after each set of regulatory waivers granted.

The regulatory waivers granted appear in the following order:

I. Regulatory waivers granted by the Office of Community Planning and Development.

II. Regulatory waivers granted by the Office of Housing.

III. Regulatory waivers granted by the Office of Public and Indian Housing.

I. Regulatory Waivers Granted by the Office of Community Planning and Development

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

- *Regulation:* 24 CFR 58.22(a).

Project/Activity: The town project entailed the construction of a multiplex facility in the Town of Grand Isle, LA that included a senior citizens multi-function recreation and social area, a medical clinic, and a sheriff's substation.

In this situation the Town of Grand Isle previously received two Economic Development Initiative (EDI) grants in 2002 and 2003 in which the environmental review

was completed and approved for planning. The Town of Grand Isle mistakenly believed that the environmental review requirements had been satisfied for the project and thus did not complete the environmental review for the construction component of the project prior to starting construction in August of 2010.

Nature of Requirement: The regulation requires that an environmental review be performed and a Request for Release of Funds be completed and certified prior to the commitment of non-HUD funds to a project using HUD funds.

Granted By: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: April 5, 2012.

Reasan Waived: The waiver was granted because the above project was determined to further the HUD mission and advance HUD program goals to develop viable, quality communities. The Town of Grand Isle did not have experience administering HUD grants and the Town stated that it did not intend to violate HUD's environmental requirements and no HUD funds were committed. Based on the environmental assessment, the Town's mitigation of floodplain impacts and the Town's purchase of flood insurance, granting a waiver would not result in any unmitigated, adverse environmental impact.

Contact: Kathryn Au, Office of Environment and Energy, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7250, Washington, DC 20410, telephone (202) 402–6340.

• *Regulatian:* 24 CFR 91.105(c)(2).

Project/Activity: The City of Tuscaloosa, AL, planned to commit $450,000 in HOME Program funds to the rebuilding of Rosedale Court, a housing development affected by storms and a tornado that struck on April 27, 2011, and requested a waiver of the citizen participation requirement at 24 CFR 91.105(c)(2) that requires a 30-day public comment period for a substantial amendments.

Nature af Requirements: The citizen participation and consultation section of HUD's regulations in 24 CFR part 91, which is § 91.105(c)(2), provides citizens with reasonable notice and an opportunity to comment on substantial amendments. The citizen participation plan must provide a period, not less than 30 days, to receive comments on the substantial amendment before the amendment is implemented.

Granted By: Mark Johnston, Acting Assistant Secretary for Community Planning and Development.

Date Granted: May 30, 2012.

Reasons Waived: The waiver of 24 CFR 91.105(c)(2) was granted to shorten the period of time for public comment. The Tuscaloosa City Council met to consider the project on May 29, 2012, and, due to the Alabama meeting sunshine laws requiring at least 7-day public notice, did not have sufficient time to publish the additional notice and reschedule a Council meeting before the program commitment deadline of May 31, 2012. Failure to approve the proposed project would have jeopardized funds necessary to assist the City with its disaster recovery efforts.

Contact: Virginia Sardone, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7164, Washington, DC 20410, telephone (202) 708–2684.

• *Regulatians:* 24 CFR 92.503(b)(3).

Project/Activity: The City of Macon committed funding for 11 activities to provide HOME-assisted units. However, after expending some of the funds, the projects were terminated because it was determined they could not produce HOME-assisted units due to the poor economic climate. Accordingly, the City requested a waiver of the requirement to repay HOME funds to the account of disbursement.

Nature af Requirements: The HOME program regulations at § 92.503(b)(3) require that HOME funds that were disbursed from the participating jurisdiction's HOME Treasury account must be repaid to the Treasury account. If the HOME funds were disbursed from the participating jurisdiction's HOME local account, they must be repaid to the local account.

Granted By: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: April 20, 2012.

Reasons Waived: The City of Macon was obligated to repay $50,294.26 to its 2002, 2003, and 2004 HOME grants, which had expired. Had these funds been received by HUD, they would have been considered by the U.S. Treasury as miscellaneous receipts. Also, these funds would have been unavailable to be used for local HOME projects and would have negated the program's intent to make repaid funds immediately available for investment. Accordingly, the City requested a waiver of the requirement at 24 CFR 92.503(b)(3) to allow the repayments to be repaid to the City of Macon's local account to be used for local HOME projects.

Cantact: Virginia Sardone, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7164, Washington, DC 20410, telephone (202) 708–2684.

• *Regulatians:* 24 CFR 92.503(b)(3).

Project/Activity: The City of Ontario, CA, requested a waiver of 24 CFR 92.503(b)(3), which requires funds to be repaid to the account from which they were disbursed. The City had committed HOME funds for a new construction homeownership project, which was never constructed.

Nature of Requirements: The City of Ontario was obligated to repay HOME funds for a project that was terminated before completion to the HOME grant from which the funds were expended. If all or a portion of the total repayment was repaid to an expired account, the repayment would have been received by HUD but retained by the U.S. Treasury. As a result, the repaid funds would have no longer been available for the participating jurisdiction to use in eligible affordable housing activities. The National Affordable Housing Act states that such repaid funds shall be immediately available to the grantee for investment in eligible affordable housing activities. In this case, compliance with the regulation thwarted statutory intent. The waiver was granted to permit the City to repay their local HOME Investment Trust Fund account instead of their HOME Investment Trust Treasury account and make the repaid funds available for investment in additional HOME-eligible activities.

Granted By: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: April 27, 2012.

Reasans Waived: The waiver was granted to permit the City to repay their HOME Investment Trust Fund local account to make the funds available for eligible affordable housing activities.

Contact: Virginia Sardone, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7164, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 574.330(a)(1).

Project/Activity: The Downtown Emergency Service Center (DESC), a Seattle, WA, recipient received a competitive grant under HUD's Housing Opportunities for Persons With AIDS (HOPE) program, requested a waiver of the HOPWA short-term supported housing regulation to continue the provision of emergency shelter housing assistance to 60 households which is over the maximum 50 households allowed by HOPWA regulation. DESC requested an additional waiver to continue provision of this emergency shelter housing assistance beyond the 60-day limit.

Nature of Requirement: The HOPWA short-term supported housing regulation at 24 CFR 574.330(a)(1): States: "A short-term supported facility may not provide shelter or housing for more than 60 days during any six-month period."

Granted By: Mark Johnston, Acting Assistant Secretary for Community Planning and Development.

Date Granted: June 28, 2012.

Reasan Waived: The unavailability of other reasonable critical short-term emergency housing options within close proximity of this facility remained an impediment to identifying other housing options for homeless individuals with challenging mental health issues. This waiver was granted for the current 6-month period for the 5 homeless individuals DESC has been unable to place in permanent housing. DESC will continue to make a good faith effort to acquire permanent housing for these individuals.

Contact: David Vos, Director of the Office of HIV/AIDS Housing, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7212, Washington, DC 20410, telephone (202) 708–1934.

• *Regulation:* 24 CFR 84.32(c)(2).

Project/Activity: The organization, AIDS Alabama, requested a waiver for 8 scattered-site manufactured homes that met the HOPWA minimum use period and that AIDS Alabama wanted to sell. AIDS Alabama

would reinvest the funds back into the *Alabama Rural AIDS Project* by creating a new master leasing program. HUD's property disposition requirement requires that a portion of the funds be repaid to the government.

Nature of Requirement: The HUD property disposition requirement at § 84.32(c)(2) states: "the recipient may be directed to sell the property under guidelines provided by HUD and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project."

Granted By: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: May 17, 2012.

Reason Waived: The physical condition of these manufactured homes deteriorated over time and the current cost of maintenance is prohibitive for the tenants and the organization. All 8 manufactured homes met the minimum use period and served HOPWA program purposes during the minimum use period. The master leasing project will continue to serve program participants in the same service area.

Contact: David Vos, Director of the Office of HIV/AIDS Housing, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7212, Washington, DC 20410, telephone (202) 708–1934.

II. Regulatory Waivers Granted by the Office of Housing—Federal Housing Administration (FHA)

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR part 5, subpart G and 24 CFR part 200, subpart P.

Project/Activity: Co-Op City (aka Riverbay Corporation), Bronx, New York City, New York

Nature of Requirement: HUD's regulations at 24 CFR part 5, subpart G and 24 CFR part 200, subpart P, require that HUD Uniform Physical Condition Standard (UPCS) inspections be conducted on the property.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 21, 2012.

Reason Waived: HUD granted the waiver on the basis that the New York State Homes and Community Renewal (HCR) would be allowed to conduct the physical inspections of the residential and commercial components of the Co-Op City property typically conducted by the responsible entity pursuant to 24CFR part 200, subpart P. It was determined that the inspection protocol for the power plant could be (and would be) satisfied by the State of New York and Department of Energy.

Contact: Daniel Sullivan, Acting Director, Office of Multifamily Housing Development, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6148, Washington, DC 20410, telephone (202)708–6130.

• *Regulation:* 24 CFR 200.85(b).

Project/Activity: The Meadows, Jacksonville, Arkansas Project Number: FHA 082–35428.

Nature of Requirement: HUD's regulations at 24 CFR 200.85(b) provide as follows: " A covenant against repayments of a Commissioner-approved inferior lien from mortgage proceeds other than surplus cash or residual receipts, except in the case of an inferior lien created pursuant to section 223(d) of the Act, or a supplemental loan insured pursuant to section 241 of the Act."

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: June 14, 2012.

Reason Waived: The award of low-income housing tax credits (LIHTC) is tied to the award of HOME funds. The project would not qualify for an allocation of LIHTCs if the owner/borrower did not accept the HOME funds, and the acceptance of such funds is prohibited by 24 CFR 200.85(b). Accordingly, without the use of the tax credits, which requires waiver of § 200.85(b), the affordable housing units could not be built.

Contact: Daniel Sullivan, Acting Director, Office of Multifamily Housing Development, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6148, Washington, DC 20410, telephone (202)708–6130.

• *Regulation:* 24CFR 266.410(e).

Project/Activity: California Housing Finance Agency (CalHFA)

Nature of Requirement: Section 266.410 of HUD's regulations requires that mortgages insured under the section 542(c) Risk Sharing program be regularly amortizing over the term of the mortgage.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: April 27, 2012.

Reason Waived: Additional risk would be offset by the fact that the projects to be substantially rehabilitated using the New Issue Bond Program (NIBP) have already demonstrated performance in CalHFA's portfolio, many with current Section 8 HAP contracts. HUD's own exposure is further limited with the condition that CalHFA take 50 percent or more of the risk on these transactions.

Contact: Daniel Sullivan, Acting Director, Office of Multifamily Housing Development, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6148, Washington, DC 20410, telephone (202) 708–6130.

• *Regulation:* 24 CFR 202.5(g).

Project/Activity: Applicants for FHA lender approval or renewal as supervised lenders and mortgagees that possess consolidated assets below the thresholds for required submission of annual audited financial statements set by their respective regulators at 12 CFR 363.1(a), 12 CFR 562.4(b)(2), or 12 CFR 715.4(c) requested waiver of audited financial submission requirements.

Nature of Requirement: Section 202.5(g) of HUD's regulations requires supervised, non-supervised, and investing lenders or mortgagees to furnish to FHA a copy of their annual audited financial statements within 90 days of the lender or mortgagee's fiscal year end in order to obtain or renew FHA lender approval. The other requirements in this section were not requested to be waived.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: February 17, 2012.

Reason Waived: For some small supervised lenders and mortgagees that originate low volumes of FHA loans, the new expense for obtaining audited financial statements may be deemed too burdensome to justify continued participation in FHA programs as approved lenders and mortgagees. Due to the fact that many of these small supervised lenders and mortgagees are located in rural communities that possess a limited selection of residential mortgage lending entities, the relinquishment of FHA lender approval by these institutions may decrease access to FHA programs for some rural communities. In the midst of the present economic recovery, and given FHA's more prominent role in the nation's mortgage market at present, a reduction in the availability of FHA-insured mortgage credit could adversely impact the recovery of some states and communities. A waiver of the new audited financial statement requirements for supervised lenders meeting the designated consolidated asset thresholds would ensure the continued availability of FHA products throughout the nation, and not pose significant additional risk to FHA's insurance funds.

Contact: Volky A. Garcia, Director, Lender Approval and Recertification Division, Office of Lender Activities and Program Compliance, Office of Housing, Department of Housing and Urban Development, 490 L'Enfant Plaza East SW., Room P3214, Washington, DC 20024, telephone (202) 708–1515 (this is not a toll-free number).

• *Regulation:* 24 CFR 219.220(b).

Project/Activity: Stovall Terrace Apartments—FHA Project Number 122–EH305, Los Angeles, California. The owner requested deferral of repayment of the Flexible Subsidy Operating Assistance Loan due to the project owner's inability to repay the loan in full upon maturity or prepayment of the loan.

Nature of Requirement: Section 219.220(b) of HUD's regulations governs the repayment of operating assistance provided under the Flexible Subsidy Program for Troubled Projects prior to May 1, 1996 states: "Assistance that has been paid to a project owner under this subpart must be repaid at the earlier of the expiration of the term of the mortgage, termination of mortgage insurance, prepayment of the mortgage, or a sale of the project * * *" Either of these actions would typically terminate FHA involvement with the property, and the Flexible Subsidy Loan would be repaid, in whole, at that time.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 7, 2012.

Reason Waived: The owner's request was granted to allow deferment of repayment of the Flexible Subsidy Operating Assistance Loan due to their inability to repay the loan in full upon the prepayment or refinance of the loan. The waiver would allow the Owner

to prepay and refinance the loan, allowing recapitalization of the project and performance of long needed critical and noncritical repairs at the project. A commitment was made to execute a Rental Use Agreement for a term of an additional 35 years. These measures will ensure the preservation of the project as an affordable housing resource for eligible residents of the Los Angeles, California area.

Contact: Mark B. Van Kirk, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6160, Washington, DC 20410, telephone (202) 708–3730.

• *Regulation:* 24 CFR 219.220(b).

Project/Activity: Dunn Family Senior Citizens Home—FHA Project Number 044–44801, Centerline, Michigan. The Owner is unable to repay the Flexible Subsidy Operating Assistance Loan in full. Granting this waiver will prevent dire consequences to the property and tenants who reside there.

Nature of Requirement: Section 219.220(b) governs the repayment of operating assistance provided under the Flexible Subsidy Program for Troubled Projects prior to May 1, 1996 states: "Assistance that has been paid to a project owner under this subpart must be repaid at the earlier of the expiration of the term of the mortgage, termination of mortgage insurance, prepayment of the mortgage, or a sale of the project * * *" Either of these actions would typically terminate FHA involvement with the property, and the Flexible Subsidy Loan would be repaid, in whole, at that time.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 7, 2012.

Reason Waived: The non-profit owner's request was granted to exempt the requirement to repay their loan upon maturity. Granting of the waiver was determined would allow the 60 Section 236 tenants to maintain their vouchers and keep rents reduced for this low-income elderly population, and allow this property to remain as a much-needed affordable housing resource for the Centerline, Michigan area. A commitment was made to execute a Rental Use Agreement for an additional 20-year term.

Contact: Mark B. Van Kirk, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6160, Washington, DC 20410, telephone (202) 708–3730.

• *Regulation:* 24 CFR 232.3.

Project/Activity: Elderberry Square is a 48 unit assisted living and dementia care facility located in Florence, Oregon.

Nature of Requirement: HUD's regulation at § 232.3 mandates in a board and care home or assisted living facility that the not less than one full bathroom must be provided for every four residents. Also, the bathroom cannot be accessed from a public corridor or area.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 9, 2012.

Reason Waived: The dementia care and most of the assisted living residents at the Elderberry Square facility need assistance with bathing and the needed care presents special circumstances that do not exist in a traditional assisted living facility. In terms of the building, the "hallways" which the residents in each building must cross in order to bathe are not located in an area that will be frequented by anyone other than staff or other residents, and on this basis the waiver was granted.

Contact: Vance T. Morris, Special Assistant, Office of Healthcare Programs, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 2337, Washington, DC 20410, telephone (202) 402–2419.

• *Regulation:* 24 CFR 232.3.

Project/Activity: Autumn Years at Newport Mesa located in Costa Mesa, CA.

Nature of Requirement: HUD's regulation at § 232.3 mandates in a board and care home or assisted living facility that the bathroom cannot be accessed from a public corridor or area.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: June 14, 2012.

Reason Waived: All of the residents are Autumn Years dementia care residents and require assistance with bathing and toileting. Consequently, Autumn Years has toileting and shower rooms located outside of the units. This allows for a larger space, giving their staff more room to provide assistance to the residents, and for these reasons the waiver was granted.

Contact: Vance T. Morris, Special Assistant, Office of Healthcare Programs, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 2337, Washington, DC 20410, telephone (202) 402–2419.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Wellspring Tonini, Louisville, KY,

Project Number: 083–HD103/KY36–Q091–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: April 11, 2012.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Franklin Senior Housing, Inc, Franklin, WI,

Project Number: 075–EE145/WI39–S091–003.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: April 11, 2012.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: PVCDC/St. Andrews Apartments, El Paso, TX,

Project Number: 113–HD039/TX16–Q091–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 2, 2012.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: The Woods of Crooked Creek Apartments, Indianapolis, IN,

Project Number: 073–HD087/IN36–Q091–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 30, 2012.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Village at Oasis Park II, Mesa, AZ,

Project Number: 123–HD046/AZ20–Q091–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 30, 2012.

Reasan Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulatian:* 24 CFR 891.100(d).

Project/Activity: Bonney Brook, Cornwall, CT, Project Number: 017–EE109/CT26–S091–006.

Nature af Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 30, 2012.

Reasan Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Cantact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Flagship City Apartments, Erie, PA, Project Number: 033HD114/PA28–Q091–004.

Nature af Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: June 16, 2012.

Reasan Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202)708–3000.

• *Regulatian:* 24 CFR 891.130(a).

Project/Activity: Parallel Senior Villas, Kansas City, KS, Project Number: 084–EE076/KS16–S091–003.

Nature af Requirement: Section 891.130(a) prohibits an identity of interest between the sponsor or the owner with development team members or between development team members until two years after final closing.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: April 13, 2012.

Reason Waived: The land sale transaction between the sponsor and owner are considered no longer a prohibited relationship by the Department.

Cantact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202)708–3000.

• *Regulation:* 24 CFR 891.130(b).

Project/Activity: Tyee Court, Soldotna, AK, Project Number: 176–HD035/AK06–Q101–002

Nature af Requirement: Section 891.130(b) prohibits contracts between the owner (or borrower, as applicable) and the sponsor or the sponsor's non-profit.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 30, 2012.

Reason Waived: It was determined that land seller would not profit from the transaction.

Cantact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202)708–3000.

• *Regulatian:* 24 CFR 891.130(b).

Project/Activity: Cherry Park, Vancouver, WA, Project Number: 126–HD051/OR16–Q091–002.

Nature af Requirement: Section 891.130(b) prohibits contracts between the owner (or borrower, as applicable) and the sponsor or the sponsor's non-profit affiliate.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 30, 2012.

Reason Waived: It was determined that the land seller would not profit from the transaction.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202)708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Dutchess Community Living, Poughkeepsie, NY, Project Number: 012–HD120/NY36–Q031–005.

Nature af Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: April 27, 2012.

Reasan Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources. Additional time was needed for the project to achieve initial closing.

Cantact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing. Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Hale Mahaolu Ehiku, Phase II, Kihei, HI, Project Number: 140–EE035/HI10–S051–002.

Nature af Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: April 10, 2012.

Reason Waived: Additional time was needed for the various agencies involved in the development of this CAUC project to finalize closing documents.

Cantact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulatian:* 24 CFR 891.165.

Project/Activity: Westcliff Heights Senior Apartments, Las Vegas, NV, Project Number: 125–EE131/NV25–S081–001.

Nature af Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: April 13, 2012.

Reason Waived: Additional time was needed to process the firm commitment application for this mixed finance project to start construction and reach initial closing.

Cantact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: AHEPA Apartments #63, Tallmadge, OH, Project Number: 042–EE218/OH12–S071–004.

Nature af Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with

limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: April 25, 2012.

Reason Waived: Additional time was needed for the project to achieve initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202)708–3000.

- *Regulation:* 24 CFR 891.165.

Project/Activity: Cheriton Heights, West Roxbury, MS. Project Number: 023–EE225/MA06–S081–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 30, 2012.

Reason Waived: Additional time was needed for the project to achieve initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202)708–3000.

- *Regulation:* 24 CFR 891.165, 24 CFR 891.830(b), 24 CFR 891.830(c)(4) and 24 CFR 891.830 (c)(5).

Project/Activity: 121 Golden Gate Avenue, San Francisco, CA, Project Number: 121–EE022/CA39–S091–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis. Section 891.830(b) requires that the capital advance funds be drawn down only in approved ratio to other funds, in accordance with a drawdown schedule approved by HUD. Section 891.830(c)(4) prohibits the capital advance funds from paying off bridge or construction financing, or repaying or collateralizing bonds, and § 891.830(c)(5) provides the amount of the drawdown is consistent with the ratio of section 202 or section 811 supportive housing units to other units.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: April 30, 2012.

Reason Waived: Additional time was needed to allow for demolition and construction of the two-story structure in addition to construction of the residential units for this mixed finance project. HUD in its response to the public comments in the final rule published September 23, 2005, stated "while HUD generally expects the capital advance funds to be drawn down in a one-to-one ratio for eligible costs actually incurred, HUD may permit on a case-by-case basis, some variance from the drawdown requirements as needed for the success of the project." Therefore, the waiver was granted to permit capital advance funds to be used to collateralize the tax exempt bonds issued to finance the construction of the project and to pay off a portion of the tax-exempt bonds that strictly relate to capital advance eligible costs. Also, to allow the capital advance funds to be drawn down in a different mechanism than a pro rata basis in order to satisfy the 50 percent test of the Internal Revenue Service (IRS).

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202)708–3000.

- *Regulation:* 24 CFR 891.205.

Project/Activity: Belleville House, Phase II, North Kingstown, RI. Project Number: 016–EE084/RI43–S101–002.

Nature of Requirement: Section 891.205 requires Section 202 project owners to have tax exemption status under section 501(c)(3) or (c)(4) of the Internal Revenue Code.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: April 13, 2012.

Reason Waived: It was determined that the projects would be adjacent to one another and time and cost savings would be realized from not having to create a separate owner entity.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202)708–3000.

- *Regulation:* 24 CFR 891.205.

Project/Activity: Hallsville Court Phase 2A Project Number: 024–EE140/NH36–S101–003.

Nature of Requirement: Section 891.205 requires Section 202 project owners to have tax exemption status under section 501(c)(3) or (c)(4) of the Internal Revenue Code.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 7, 2012.

Reason Waived: It was determined that the projects would be on the same site and there would be time and cost savings from not having to create a separate owner entity.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202)708–3000.

- *Regulation:* 24 CFR 891.205.

Project/Activity: Independent Living Horizons 14, Harlem, GA, Project Number: 061–EE181/GA06–S101–001.

Nature of Requirement: Section 891.205 requires Section 202 project owners to have tax exemption status under Section 501(c) (3) or (c) (4) of the Internal Revenue Code.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 21, 2012.

Reason Waived: It was determined that the projects would be on the same site and there would be time and cost savings from not having to create a separate owner entity.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202)708–3000.

III. Regulatory Waivers Granted by the Office of Public and Indian Housing

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

- *Regulation:* 24 CFR 5.801(d)(1).

Project/Activity: Housing Authority and Urban Development Agency of the City of Atlantic City, (NJ014), Atlantic City, New Jersey.

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the housing authority's (HA) fiscal year end (FYE), in accordance with the Single Audit Act and OMB Circular A–133.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: May 4, 2012.

Reason Waived: The housing authority (HA) stated that its reason for not submitting its financial information by the due date was because of miscommunication between the HA and its auditor. Specifically, according to the HA, the auditor submitted the audit to REAC on time. However, the third and final, submission procedure that requires the HA to submit the financial information to REAC, was inadvertently not performed until January 5, 2012. The waiver was granted for these reasons.

Contact: Johnson Abraham, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street SW., Suite 100, Washington, DC 20410, telephone (202) 475–8583.

- *Regulation:* 24 CFR 85.6(c).

Project/Activity: Baltimore Housing Authority.

Nature of Requirement: HUD's regulation at 24 CFR 85.6(c) allows HUD to authorize the procurement through a non-competitive proposal.

Granted By: Sandra B. Henriquez, Assistant Secretary of Public and Indian Housing

Date Granted: June 12, 2012.

Reason Waived: HUD reviewed and approved the justifications for the Baltimore Housing Authority's decision to procure the Regional Administrator and the Regional Administrator's noncompetitive procurement of a subcontractor through a noncompetitive proposal under the Settlement Agreement.

Contact: Dominique Blom, Deputy Assistant Secretary for the Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4130, Washington, DC 20140, telephone (202) 402–4181.

• *Regulation:* 24 CFR 902.20.

Project/Activity: Lodi Housing Authority, (NJ011), Lodi, NJ.

Nature of Requirement: The objective of this regulation is to determine whether a housing authority (HA) is meeting the standard of decent, safe, sanitary, and in good repair. The Real Estate Assessment Center (REAC) provides for an independent physical inspection of a PHA's property of properties that includes a statistically valid sample of the units.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: April 5, 2012.

Reason Waived: The housing authority (HA) was impacted by severe flooding following Hurricane Irene and was located in a presidentially-declared disaster area. The HA experienced extensive physical damage throughout its inventory, and there remained a number of vacant units as a result. The waiver was granted because the circumstances surrounding the waiver request were unusual and beyond the HA's control. Even though the HA would not receive a Public Housing Assessment System (PHAS) score and designation, the HA would still be required to submit its unaudited and audited financial information in accordance with the Uniform Financial Reporting Standards Rule (24 CFR part 5), and the PHAS (24 CFR 902.33).

Contact: Johnson Abraham, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street SW., Suite 100, Washington, DC 20410, telephone (202) 475–8583.

• *Regulation:* 24 CFR 941.306(c).

Project/Activity: Philadelphia Housing Authority (PHA), Community Based Management Office Scattered Site Development #903

Nature of Requirement: HUD's regulation at 24 CFR 941.306(c) requires that the construction is within limits of Housing Construction Costs.

Granted By: Sandra B. Henriquez, Assistant Secretary of Public and Indian Housing.

Date Granted: May 17, 2012.

Reason Waived: As a result of the modifications to two buildings, construction costs exceeded the Housing Cost Cap limits. Given the extraordinary circumstances related to zoning variance litigation and the modifications necessary for the housing authority to complete in order to comply with the Philadelphia current zoning code, the PHA requested a waiver. HUD granted the waiver to permit the PHA to continue with its development.

Contact: Dominique Blom, Deputy Assistant Secretary for the Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4130, Washington, DC 20140, telephone (202) 402–4181.

• *Regulation:* 24 CFR 941.606(n)(1)(ii).

Project/Activity: Home Forward (formerly known as the Housing Authority of Portland) in Portland, Oregon.

Nature of Requirement: HUD's regulation at 24 CFR 941.606(n)(1)(ii) states that a Housing Authority will use an open and competitive process pursuant to 24 CFR 85.36 in the procurement of a partner and/or owner entity to develop public housing.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: June 8, 2012.

Reason Waived: Home Forward was approached by Lifeworks, a Portland non-profit organization and provider health and addiction services, to assist with development of a new residential facility to replace their current obsolete facility. Lifeworks had previously engaged Gerding Eden Development Company (GED) as developer and design/build contractor. Home Forward stated that due to GED's past involvement in the project, known design expertise and the integrated nature of the two housing components and potential time and cost savings that the non-competitive selection of GED as the design/build contractor is an important aspect of the project. HUD has reviewed the request and concurs with the non-competitive procurement of GED.

Contact: Dominique Blom, Deputy Assistant Secretary, U.S. Department of Housing and Urban Development, Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh St SW., Room 4130, Washington, DC 20410, telephone (202) 402–4181.

• *Regulation:* 24 CFR 941.606(n)(1)(ii)(B).

Project/Activity: Detroit Housing Commission, Herman Gardens—Gardenview Phase IIIC, HOPE VI Grant: MI28URD001I296.

Nature of Requirement: HUD's regulation at 24 CFR 941.606(n)(1)(ii)(B) requires that "if the partner and/or owner entity (or any other entity with and identity of interest with such parties) wants to serve as the general contractor for the project or development, it may award itself the construction contract only if it can demonstrate to HUD's satisfaction that its bid is the lowest bid submitted in response to a public request for bids."

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: April 18, 2012.

Reason Waived: The waiver was granted because the Detroit Housing Commission submitted an independent cost estimate.

Contact: Dominique Blom, Deputy Assistant Secretary for the Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4130, Washington, DC 20140, telephone (202) 402–4181.

• *Regulation:* 24 CFR 941.606(n)(1)(ii)(B).

Project/Activity: Mississippi Regional Housing Authority No. VIII, Azalea Gardens

Nature of Requirement: HUD's regulation at 24 CFR 941.606(n)(1)(ii)(B) requires that "if the partner and/or owner entity (or any other entity with and identity of interest with such parties) wants to serve as the general contractor for the project or development, it may award itself the construction contract only if it can demonstrate to HUD's satisfaction that its bid is the lowest bid submitted in response to a public request for bids."

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: April 18, 2012.

Reason Waived: The waiver was granted because the Mississippi Regional Housing Authority submitted an independent cost estimate.

Contact: Dominique Blom, Deputy Assistant Secretary for the Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4130, Washington, DC 20140, telephone (202) 402–4181.

• *Regulation:* 24 CFR 941.606(n)(1)(ii)(B).

Project/Activity: Wausau Community Development Authority, Riverview Towers Mixed Finance Project.

Nature of Requirement: HUD's regulation at 24 CFR 941.606(n)(1)(ii)(B) requires that "if the partner and/or owner entity (or any other entity with and identity of interest with such parties) wants to serve as the general contractor for the project or development, it may award itself the construction contract only if it can demonstrate to HUD's satisfaction that its bid is the lowest bid submitted in response to a public request for bids."

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: June 12, 2012.

Reason Waived: The waiver was granted because Wausau Community Development Authority submitted an independent cost estimate.

Contact: Dominique Blom, Deputy Assistant Secretary for the Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4130, Washington, DC 20140, telephone (202) 402–4181.

• *Regulation:* 24 CFR 941.606(n)(1)(ii)(B).

Project/Activity: Housing Authority of Covington, Jacob Price Homes HOPE VI Grant: KY36URD002I109.

Nature of Requirement: HUD's regulation at 24 CFR 941.606(n)(1)(ii)(B) requires that "if the partner and/or owner entity (or any other entity with and identity of interest with such parties) wants to serve as the general contractor for the project or development, it may award itself the construction contract only if it can demonstrate to HUD's satisfaction that its bid is the lowest bid submitted in response to a public request for bids."

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: June 12, 2012.

Reason Waived: The waiver was granted because the Housing Authority of Covington submitted an independent cost estimate.

Contact: Dominique Blom, Deputy Assistant Secretary for the Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW.,

Washington, DC 20140, Room 4130, telephone (202) 402–4181.

• *Regulation:* 24 CFR 941.610(a)(1) through (a)(7).

Project/Activity: Closing of the Boulevard Homes HOPE VI Seniors Project—NC19URD003I109 of the Charlotte Housing Authority (CHA) in North Carolina.

Nature of Requirement: HUD's regulation at 24 CFR 941.610(a)(1) through (a)(7) requires HUD review and approval of certain legal documents relating to mixed-finance development before a closing can occur and public housing funds can be released. In lieu of HUD's review of these documents, CHA must submit certifications to the accuracy and authenticity of the legal documents detailed in 24 CFR 941.610 (a)(1)–(a)(7).

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing

Date Granted: May 3, 2012.

Reason Waived: The waiver was granted because it would streamline the review process and expedite the closing and public housing production, as well as for the following reasons: (1) CHA has extensive mixed-finance experience at its four existing HOPE VI projects and with other new construction projects, and will use the same self-development approach; (2) the financial structure of the project is the same as previous mixed-finance projects undertaken by CHA, which underwent full evidentiary document review and approval by HUD; (3) CHA will be represented by legal counsel that has extensive experience with mixed-finance and Low Income Housing Tax Credits, and has handled many of CHA's previous projects; and (4) the principals at Laurel Street Residential have extensive development experience in affordable and public housing development.

Contact: Dominique Blom, Deputy Assistant Secretary for the Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20140, Room 4130, telephone (202) 402–4181.

• *Regulation:* 24 CFR 970.19(b).

Project/Activity: King County Housing Authority (KCHA), Greenbridge HOPE VI Grant No.WA19URD002I101 and Seola Gardens HOPE VI Grant No. WA19URD002I108

Nature of Requirement: HUD's regulation at 24 CFR 970.19(b) states that a Housing Authority may pay the allowable reasonable costs of disposition out of the gross proceeds, as approved by HUD.

Granted By: Deborah Hernandez for Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: May 11, 2012.

Reason Waived: HUD has reviewed and approved in concept KCHA's request to use disposition proceeds at the Greenbridge and Seola Gardens HOPE VI sites to repay the reasonable costs of infrastructure construction which were state required as a precondition to disposition of the for-sale parcels and which were described in the HUD-approved HOPE VI revitalization plans. HUD reviewed the actual costs and, as permitted by this waiver, determined them to be reasonable. Therefore, HUD found good cause to waive 24 CFR 970.19(b) for the limited purpose of using gross proceeds to retire the debt associated with infrastructure for the for-sale lots, in addition to the costs otherwise allowable under 24 CFR 970.19(b).

Contact: Dominique Blom, Deputy Assistant Secretary, U.S. Department of Housing and Urban Development, Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh St. SW., Room 4130, Washington, DC, 20410, telephone (202) 402–4181.

• *Regulation:* 24 CFR 982.305(c)(1).

Project/Activity: Housing Authority of the County of Contra Costa (HACCC), Contra Costa County, CA.

Nature of Requirement: HUD's regulation at 24 CFR 982.305(c)(1) establishes the requirement that a housing assistance payments (HAP) contract must be executed no later than 60 calendar days from the beginning of the lease term.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indián Housing.

Date Granted: June 26, 2012.

Reason Waived: This waiver was granted as a reasonable accommodation since the client's failure to initially sign the lease was due to her disability.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.503(c), 982.503(c)(4)(ii) and 982.503(c)(5).

Project/Activity: Minot Housing Authority (MHA), Minot, ND.

Nature of Requirement: HUD's regulation 24 CFR 982.503(c) establishes the methodology for establishing exception payment standards for an area. HUD's regulation at 24 CFR 503(c)(4)(ii) states that HUD will only approve an exception payment standard amount after six months from the date of HUD approval of an exception payment standard amount above 110 percent to 120 percent of the published fair market rent (FMR). HUD's regulation at 24 CFR 982.503(c)(5) states that the total population of a HUD-approved exception areas in an FMR area may not include more than 50 percent of the population of the FMR area.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: June 5, 2012.

Reason Waived: These waivers were granted because of significant impact to the rental housing market caused by increased economic activity in the FMR area due to natural resource exploration.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.503(c), 982.503(c)(4)(ii) and 982.503(c)(5).

Project/Activity: Burleigh County Housing Authority (BCHA), Burleigh County, ND.

Nature of Requirement: HUD's regulation at 24 CFR 982.503(c) establishes the methodology for establishing exception payment standards for an area. HUD's regulation at 24 CFR 503(c)(4)(ii) states that HUD will only approve an exception payment standard amount after six months from the date of HUD approval of an exception payment standard amount above 110 percent to 120 percent of the published fair market rent (FMR). HUD's regulation at 24 CFR 982.503(c)(5) states that the total population of a HUD-approved exception areas in an FMR area may not include more than 50 percent of the population of the FMR area.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: June 6, 2012.

Reason Waived: These waivers were granted because of significant impact to the rental housing market in the Bismarck, ND, FMR area caused by increased economic activity due to natural resource exploration.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.503(d) and 982.505(c)(3).

Project/Activity: Adams Metropolitan Housing Authority (AMHA), Adams, OH.

Nature of Requirement: HUD's regulation at 24 CFR 982.503(d) allows HUD to consider a public housing agency's request for approval to establish a payment standard that is lower than the basic range of 90 to 110 percent of the published fair market rent for each/any bedroom size, but HUD will not approve such payment standard amounts if the family share for more than 40 percent of voucher participants exceeds 30 percent of monthly adjusted income. HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: June 6, 2012.

Reason Waived: These waivers were granted because these cost-saving measures would enable the AMHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).
Project/Activity: Fairfield Housing Authority (FHA), Fairfield, CT.
Nature of Requirement: HUD's regulation 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.
Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.
Date Granted: April 6, 2012.
Reason Waived: This waiver was granted because this cost-saving measure would enable the FHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.
Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).
Project/Activity: Reed City Housing Commission (RCHC), Reed City, MI.
Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.
Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.
Date Granted: April 6, 2012.
Reason Waived: This waiver was granted because this cost-saving measure would enable the RCHC to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.
Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).
Project/Activity: Housing Authority of the City of Pasco and Franklin County (HACPFC), Seattle, WA.
Nature of Requirement: HUD's regulation 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.
Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.
Date Granted: May 3, 2012.
Reason Waived: This waiver was granted because this cost-saving measure would enable the HACPFC to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.
Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).
Project/Activity: Mitchell Housing Authority (MHA), Mitchell, SD.
Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.
Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.
Date Granted: May 31, 2012.
Reason Waived: This waiver was granted because this cost-saving measure would enable the MHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.
Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).
Project/Activity: Housing Authority of the City of Eloy (HACE), Eloy, AZ.
Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.
Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.
Date Granted: May 31, 2012.
Reason Waived: This waiver was granted because this cost-saving measure would enable the HACE to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.
Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).
Project/Activity: Emmetsburg Low-Rent Housing Agency (ELRHA), Emmetsburg, IA.
Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.
Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.
Date Granted: May 31, 2012.
Reason Waived: This waiver was granted because this cost-saving measure would enable the ELRHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.
Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).
Project/Activity: Watertown Housing and Redevelopment Commission (WHRC), Watertown, SD.
Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.
Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.
Date Granted: May 31, 2012.
Reason Waived: This waiver was granted because this cost-saving measure would enable the WRCHC to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.
Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).
Project/Activity: Bremerton Housing Authority (BHA), Bremerton, WA.
Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.
Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.
Date Granted: June 7, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the BHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

- *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Housing and Redevelopment Authority of Bemidji (HRAB), Bemidji, MN.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: June 14, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the HRAB to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

- *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Housing Authority of the City of Danville (HACD), Danville, IL.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: June 28, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the HACD to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

- *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Pontiac Housing Commission (PHC), Pontiac, MI.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: June 28, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the PHC to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

- *Regulation:* 24 CFR 982.505(c)(4).

Project/Activity: Housing Authority of the City of Danbury (HACD), Danbury, CT.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(4) states that if the payment standard amount is increased during the term of the housing assistance payments (HAP) contract, the increased payment standard amount shall be used to calculate the monthly HAP for the family beginning at the effective date of the family's first regular reexamination on or after the effective date of the increase in the payment standard amount.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: April 6, 2012.

Reason Waived: Since HACD should realize a significant surplus of HAP funding at the end of calendar years 2012 and 2013, and the rent burden data in the Public and Indian Housing Information Center indicated that 84 percent of HACD's voucher participants were paying more than 30 percent of adjusted monthly income toward their rent share, a waiver was granted to reduce this rent burden.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

- *Regulation:* 24 CFR 982.505(d).

Project/Activity: Amherst Town, Amherst, NY.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(d) states that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: April 6, 2012.

Reason Waived: The participant and his wife, who are disabled, require an exception payment standard to move to a wheelchair-accessible unit. To provide this reasonable accommodation so the clients could move to an accessible unit and pay no more than 40 percent of their adjusted income toward the family share, the town was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

- *Regulation:* 24 CFR 982.505(d).

Project/Activity: Dedham Housing Authority (DHA), Dedham, MA.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(d) states that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: May 10, 2012.

Reason Waived: The participant, who is disabled, required an exception payment standard to move to a new unit that met her health needs. To provide this reasonable accommodation so the client could be assisted in a new unit and pay no more than 40 percent of her adjusted income toward the family share, the DHA was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

- *Regulation:* 24 CFR 982.505(d).

Project/Activity: Dedham Housing Authority (DHA), Dedham, MA.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(d) states that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: June 8, 2012.

Reason Waived: The participant, who is disabled, requires an exception payment standard to move to a new unit that accommodates his needs. To provide this reasonable accommodation so the client could be assisted in this new unit and pay no more than 40 percent of his adjusted income toward the family share, the DHA was allowed to approve an exception

payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

- *Regulation:* 24 CFR 982.505(d).

Project/Activity: Housing Authority of Spirit Lake (HASL), Spirit Lake, IA.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(d) states that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: June 19, 2012.

Reason Waived: The participants, who are disabled, require an exception payment standard to move to a group home where the units are accessible. To provide this reasonable accommodation so the clients could be assisted in these group home units and pay no more than 40 percent of their adjusted income toward the family share, the HASL was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

- *Regulation:* 24 CFR 983.59(b)(1).

Project/Activity: Washington County Department of Housing Services (WCDHA), Washington County, OR.

Nature of Requirement: HUD's regulation at 24 CFR 983.59(b)(1) states that the rent to owner for public housing agency (PHA) owned units is determined according to the same requirements as for other project-based voucher (PBV) units, except that the independent entity approved by HUD must establish the initial contract rents based on an appraisal by a licensed, state-certified appraiser.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: June 13, 2012.

Reason Waived: WCDHA had difficulty in procuring the services of a licensed, state-certified appraiser. It had exhausted all of its available resources such as referrals from other PHAs, Internet searches, telephone resources, newspaper advertisements, etc.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

- *Regulation:* 24 CFR 985.101(a).

Project/Activity: Cambridge Economic Development Authority (CEDA), Cambridge, MN, Todd County Housing and Redevelopment Authority (TCHRA), Todd County, MN, Otter Tail County Housing and Redevelopment Authority (OTCHRA), Otter Tail County, MN, Mental Health Resources (MHR), St. Paul, MN, Morrison County Housing and Redevelopment Authority (MCHRA), Morrison County.

Nature of Requirement: HUD's regulation at 24 CFR 985.101(a) states that a public housing agency must submit the HUD-required Section Eight Management Assessment Program (SEMAP) certification form within 60 calendar days after the end of its fiscal year.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: April 6, 2012.

Reason Waived: The public housing agencies are small with less than 250 units and the HUD field office was not aware that these agencies were required to submit their biennial SEMAP certifications for the period ending December 31, 2010.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

[FR Doc. 2012–22482 Filed 9–11–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2011–N267; FXRS12650400000–123–FF04R02000]

White River National Wildlife Refuge, AR; Final Comprehensive Conservation Plan and Finding of No Significant Impact for Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for the environmental assessment for White River National Wildlife Refuge (NWR) in Desha, Monroe, Phillips, and Arkansas Counties, AR. In the final CCP, we describe how we will manage this refuge for the next 15 years.

ADDRESSES: You may obtain a copy of the CCP by writing to: Mr. Dennis Sharp, Refuge Manager, White River NWR, 57 CC Camp Road, St. Charles, AR 72140. Alternatively, you may download the document from our Internet Site: *http://southeast.fws.gov/planning* under "Final Documents."

FOR FURTHER INFORMATION CONTACT: Mr. Mike Dawson, Refuge Planner, Jackson, MS, at 601/955–1518 (telephone), or *mike_dawson@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the CCP process for White River NWR. We started this process through a notice in the **Federal Register** on January 21, 2009 (74 FR 3628). For more about the process, see that notice.

White River Migratory Waterfowl Refuge was established by Executive Order 7173 of President Franklin D. Roosevelt on September 5, 1935. The purpose of the refuge is to protect and conserve migratory birds and other wildlife resources. White River NWR contains 160,000 acres and 90 miles of the White River lie within the boundaries of the refuge.

We announce our decision and the availability of the final CCP and FONSI for White River NWR in accordance with the National Environmental Policy Act (NEPA) (40 CFR 1506.6(b)) requirements. We completed a thorough analysis of impacts on the human environment, which we included in the draft comprehensive conservation plan and environmental assessment (Draft CCP/EA).

The CCP will guide us in managing and administering White River NWR for the next 15 years. Alternative C, as we described in the final CCP, is the foundation for the CCP.

The compatibility determinations for the following can be found in the final CCP: (1) Hunting, (2) fishing, (3) wildlife observation and photography, (4) environmental education and interpretation, (5) amateur ham radio operation, (6) camping, (7) commercial guiding for wildlife observation and photography, (8) commercial video and photography, (9) commercial waterfowl guiding, (10) commercial fishing, (11) cooperative farming, (12) field trials, (13) forest products harvesting, (14) furbearer trapping, (15) haying, (16) nuisance animal control, (17) research and monitoring, and (18) tournament fishing.

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, 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, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every15 years in accordance with the Administration Act.

Comments

Approximately 100 copies of the Draft CCP/EA were made available for a 30-day public review and comment period via a **Federal Register** notice on October 14, 2011 (76 FR 63945). Fifty seven public comments and two agency comments were received.

Selected Alternative

After considering the comments we received and based on our professional judgment, we selected Alternative C for implementation. This alternative is judged to be the most effective management action for meeting the purposes of the refuge by optimizing habitat management and visitor services throughout the refuge. Over the life of the CCP, this management action will balance an enhanced wildlife management program with increased opportunities for public use on the refuge. This alternative will pursue the same five broad refuge goals as each of the other alternatives described in the Draft CCP/EA.

We selected Alternative C for implementation because it directs the development of programs to best achieve the refuge's purpose and goals; emphasizes a landscape approach to land management; collects habitat and wildlife data; and ensures long-term achievement of refuge and Service objectives. At the same time, its management actions provide balanced levels of compatible public use opportunities consistent with existing laws, Service policies, and sound biological principles. It provides the best mix of program elements to achieve the desired long-term conditions within the anticipated funding and staffing levels, and positively addresses significant issues and concerns expressed by the public.

Authority

This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: January 4, 2012.

Mark J. Musaus,

Acting Regional Director.

[FR Doc. 2012–22416 Filed 9–11–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Final Determination Against Acknowledgment of the Brothertown Indian Nation

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of final determination.

SUMMARY: The Department of the Interior (Department) gives notice that the Assistant Secretary—Indian Affairs (AS-IA) declines to acknowledge the petitioner known as the Brothertown Indian Nation as an Indian tribe within the meaning of Federal law. This notice is based on a determination that the petitioner does not satisfy criterion 83.7(g) in the applicable regulations and, therefore, the Department lacks the authority to extend acknowledgment as an Indian tribe to the petitioner.

DATES: This determination is final and will become effective 90 days from publication of this notice in the **Federal Register** on December 11, 2012, unless the petitioner or an interested party files within 90 days a request for reconsideration before the Interior Board of Indian Appeals under 25 CFR 83.11.

ADDRESSES: Requests for a copy of the final determination that includes the summary evaluation under the criterion should be addressed to the Office of the Assistant Secretary—Indian Affairs, Attention: Office of Federal Acknowledgment, 1951 Constitution Avenue NW., MS: 34B–SIB, Washington, DC 20240. The complete final determination is also available at *http://www.bia.gov/WhoWeAre/AS-IA/OFA/RecentCases/index.htm.*

FOR FURTHER INFORMATION CONTACT: R. Lee Fleming, Director, Office of Federal Acknowledgment, (202) 513–7650.

SUPPLEMENTARY INFORMATION: Pursuant to 25 CFR 83.10(l)(2), the Department publishes this notice that the Brothertown Indian Nation (BIN), Petitioner #67, is not an Indian tribe within the meaning of Federal law. The Department issued a proposed finding (PF) to decline to acknowledge the petitioner on August 17, 2009, and published notice of that preliminary determination in the **Federal Register** on August 24, 2009. This final determination (FD) affirms the PF that the Brothertown Indian Nation, does not satisfy criterion 83.7(g) in part 83 of title 25 of the *Code of Federal Regulations* (25 CFR part 83), and, therefore, the Department lacks the authority to extend acknowledgment as an Indian tribe to the petitioner.

The acknowledgment process is based on the regulations at 25 CFR Part 83. Under these regulations, the petitioner has the burden to present evidence that it meets the seven mandatory criteria in section 83.7. Failure to meet any one of the mandatory criteria results in a determination that the petitioning group is not an Indian tribe within the meaning of Federal law. This determination is issued under 25 CFR 83.10(m) and the Guidance and Direction notice (73 FR 30148) published by the AS–IA on May 23, 2008, which permits the Department to issue decisions against acknowledgment based on failure to meet fewer than seven criteria.

This FD on the petition of the Brothertown Indian Nation evaluates the evidence in the record, including evidence the petitioner and third parties submitted, documents located by the Office of Federal Acknowledgment (OFA), and the transcript of the on-the-record technical assistance meeting held on January 4, 2010. The petitioner submitted evidence for the PF and FD, and OFA staff conducted limited research to verify and evaluate the evidence, arguments, and interpretation that the petitioner and third parties submitted. The burden of providing sufficient evidence under the criteria in the regulations rests with the petitioner.

The BIN petitioner does not satisfy criterion 83.7(g). This criterion requires that the petitioner not be subject to "congressional legislation that has expressly terminated or forbidden the Federal relationship." The comments on the PF do not present any new evidence or arguments that provide a basis for revising the conclusion of the PF.

In the Act of 1839, Congress provided that the Brothertown Indian tribe's "rights as a tribe," and specifically its power to act as a political and governmental entity, would "cease and determine." By expressly terminating its relationship with the Brothertown of Wisconsin, Congress has limited the authority of the executive branch to acknowledge the Brothertown as an Indian tribe. Thus, because the Act of 1839, by its "cease and determine"

language, has both expressly ended and forbidden the Federal relationship for this petitioner, the BIN petitioner does not meet the requirements of criterion 83.7(g).

Based on this determination and the regulatory requirement in section 83.10(m), the Department issues the final determination declining to acknowledge the petitioner known as the Brothertown Indian Tribe as an Indian tribe within the meaning of Federal law.

A copy of the FD that includes the summary evaluation under criterion 83.7(g) and summarizes the evidence, reasoning, and analyses that are the basis for the FD will be provided to the petitioner and interested parties, and is available to other parties upon written request. It will be posted on the Bureau of Indian Affairs Web site *http://www.bia.gov/WhoWeAre/AS-IA/OFA/RecentCases/index.htm*. Requests for a copy of the FD should be addressed to the Federal Government as instructed in the **ADDRESSES** section of this notice.

After the publication of notice of the FD in the **Federal Register**, the petitioner or any interested party may file a request for reconsideration with the Interior Board of Indian Appeals (IBIA) under the procedures in section 83.11 of the regulations. The IBIA must receive this request no later than 90 days after the publication of the FD in the **Federal Register**. The FD will become effective as provided in the regulations, 90 days after the **Federal Register** publication unless a request for reconsideration is received within that time.

Dated: September 4, 2012.

Donald E. Laverdure,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 2012–22380 Filed 9–11–12; 8:45 am]

BILLING CODE 4310–G1–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–SER–VIIS–10517; 5360–726]

Minor Boundary Revision at Virgin Islands National Park

AGENCY: National Park Service, Interior.

ACTION: Notification of Boundary Revision.

SUMMARY: Notice is hereby given that, pursuant to 16 U.S.C. 460*l*–9(c)(1)(ii), the boundary of the Virgin Islands National Park is modified to include an additional 3.57 acres of unimproved land identified as Tract 03–157, which will then be donated to the United States. The land is located at Estate Haulover on the east end of the Island of St. John, immediately adjacent to the current boundary of the Virgin Islands National Park. The boundary revision is depicted on Map No. 161/92,009A dated March 2011. The map is available for inspection at the following locations: National Park Service, Southeast Region Land Resources Program Center, 1924 Building, 100 Alabama Street SW., Atlanta. Georgia 30301, and National Park Service, Department of the Interior, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: National Park Service, Chief, Southeast Region Land Resources Program Center, 1924 Building, 100 Alabama Street SW., Atlanta, Georgia 30303, telephone (404) 507–5664.

DATES: The effective date of this boundary revision is September 12, 2012.

SUPPLEMENTARY INFORMATION: 16 U.S.C. 460*l*–9(c)(1)(ii) provides that, after notifying the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources, the Secretary of the Interior is authorized to make this boundary revision upon publication of notice in the **Federal Register**. The Committees have been notified of this boundary revision. This boundary revision will make a significant contribution to the purposes for which the national park was established by enabling the Service to efficiently manage and protect significant resources similar to that already protected within the present park boundary. This property contains significant natural and cultural resources. Its two wetlands and expanse of shoreline make this an important site for resident and migratory birds, as well as locally listed flora and fauna. The site has a rich history as well, as Taino Indian and colonial period pottery shards have been found in this area.

Dated: July 23, 2012.

David Vela,

Regional Director, Southeast Region.

[FR Doc. 2012–22406 Filed 9–11–12; 8:45 am]

BILLING CODE 4310–VP–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–11134; 2200–3200–665]

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 August 18, 2012. 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 September 27, 2012. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: August 27, 2012.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

LOUISIANA

East Baton Rouge Parish

Corona Building, 1854 North St., Baton Rouge, 12000825

MAINE

Kennebec County

Togus VA Medical Center and National Cemetery, 1 VA Center, Augusta, 12000826

MASSACHUSETTS

Hampshire County

Middlefield Center Historic District, 138–188 Skyline Trail, & 7 Bell Rd., Middlefield, 12000827

MONTANA

Carbon County

Montana, Wyoming and Southern Railroad Depot, 403 Broadway Ave., Belfry, 12000828

Lake County

Dayton State Bank, 133 C St., Dayton, 12000829

Yellowstone County

Garfield School, 3212 1st Ave., S., Billings, 12000830

NEW YORK

Kings County

MARY A. WHALEN (tanker), Pier 9B, Red Hook Container Terminal, Red Hook, 12000831

Rensselaer County

Cornell—Manchester Farmstead, (Farmsteads of Pittstown, New York MPS) 292 Lower Pine Valley Rd., Hoosick Falls, 12000832

NORTH CAROLINA

Pitt County

Falkland Historic District, Roughly Crisp, N. Main, & S. Main Sts., & West Ave., Falkland, 12000833

OHIO

Cuyahoga County

Neal Terrace, (Apartment Buildings in Ohio Urban Centers, 1870–1970 MPS) 8811 Detroit Ave., Cleveland, 12000834

Hamilton County

St. Aloysius Orphanage, 4721 Reading Rd., Cincinnati, 12000835

Washington County

Bell Covered Bridge, Bell Rd., Vincent, 12000836

[FR Doc. 2012–22407 Filed 9–11–12; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Temporary Labor Camps Standard

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Occupational Safety and Health Administration (OSHA) sponsored information collection request (ICR) titled, "Temporary Labor Camps Standard," to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before October 12, 2012.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain*, on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov*.

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax Number: 202–395–6881 (this is not a toll-free number), email: *OIRA_submission@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov*.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: The Temporary Labor Camps Standard makes it mandatory for covered employers to report to the local public health officer the name and address of any individual in the camp known to have, or suspected of having, a communicable disease. Employers are also required to notify local public health authorities of each occurrence of a suspected case of food poisoning or of an unusual prevalence of any illnesses in which fever, diarrhea, sore throat, vomiting, or jaundice is a prevalent symptom. These reporting requirements are necessary to minimize the possibility of communicable disease epidemics spreading throughout the camps and endangering the health of the camp residents. In addition, the Standard requires marking "for men" and "for women" on certain toilet rooms.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1218–0096. The current approval is scheduled to expire on October 31, 2012; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on May 25, 2012 (77 FR 31395).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1218–0096. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–OSHA.

Title of Collection: Temporary Labor Camps Standard.

OMB Control Number: 1218–0096.

Affected Public: Private Sector—businesses or other for-profits and farms.

Total Estimated Number of Respondents: 673.

Total Estimated Number of Responses: 673.

Total Estimated Annual Burden Hours: 54.

Total Estimated Annual Other Costs Burden: $0.

Dated: September 5, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–22430 Filed 9–11–12; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Forms for Agricultural Recruitment System Affecting Migratory Farm Workers

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employment

and Training Administration (ETA) sponsored information collection request (ICR) revision titled, "Forms for Agricultural Recruitment System Affecting Migratory Farm Workers," to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before October 12, 2012.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–ETA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax: 202–395–6881 (this is not a toll-free number), email: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: Employers and farm labor contractors complete forms ETA–790 (the Agricultural and Food Processing Clearance Order) and ETA–795 (the Agricultural Food and Food Processing Clearance Memorandum) to recruit agricultural workers in compliance with the regulations at 20 CFR 653.500. These same forms are also used by State Workforce Agencies and American Job Centers to recruit workers from outside the local commuting area.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1205–0134. The current approval is scheduled to expire on October 31, 2012; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on May 15, 2012 (77 FR 28625).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0134. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–ETA.

Title of Collection: Forms for Agricultural Recruitment System Affecting Migratory Farm Workers.

OMB Control Number: 1205–0134.

Affected Public: Private Sector—businesses or other for-profits—and State, Local, and Tribal Governments.

Total Estimated Number of Respondents: 8,409.

Total Estimated Number of Responses: 9,356.

Total Estimated Annual Burden Hours: 8,606.

Total Estimated Annual Other Costs Burden: $0.

Dated: September 5, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–22431 Filed 9–11–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Office of the Secretary

National Advisory Committee for Labor Provisions of U.S. Free Trade Agreements; Notice of Open Meeting

AGENCY: Bureau of International Labor Affairs, U.S. Department of Labor.

ACTION: Notice of open meeting, September 27, 2012.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App. 2, the Office of Trade and Labor Affairs (OTLA) gives notice of a meeting of the National Advisory Committee for Labor Provisions of U.S. Free Trade Agreements ("Committee" or "NAC"), which was established by the Secretary of Labor. The purpose of the meeting is to discuss the implementation of the labor provisions of Free Trade Agreements (FTAs), technical cooperation programs and planning, and a Subcommittee's report regarding the North American Agreement on Labor Cooperation.

DATES: The Committee will meet on Thursday, September 27, 2012 from 9:30 a.m. to 5 p.m.

ADDRESSES: The Committee will meet at the U.S. Department of Labor, 200 Constitution Avenue NW., Deputy Undersecretary's Conference Room, Washington, DC 20210. Mail comments, views, or statements in response to this notice to Paula Church Albertson, Office of Trade and Labor Affairs, Bureau of International Labor Affairs, U.S. Department of Labor, 200 Constitution Avenue NW., Room S–5004, Washington, DC 20210; phone (202) 693–4789; fax (202) 693–4784 (this is not a toll free number).

FOR FURTHER INFORMATION CONTACT: Paula Church Albertson, Designated Federal Official, Office of Trade and Labor Affairs, Bureau of International Labor Affairs, U.S. Department of Labor, 200 Constitution Avenue NW., Room S–5004, Washington, DC 20210; phone (202) 693–4789.

Individuals with disabilities wishing to attend the meeting should contact Ms. Albertson no later than September 20, 2012. to obtain appropriate accommodations.

SUPPLEMENTARY INFORMATION: NAC meetings are open to the public on a first-come, first-served basis, as seating is limited. Attendees must present valid identification and will be subject to security screening to access the Department of Labor for the meeting.

Agenda: Agenda items will include an update and discussion on the

implementation of the labor provisions of FTAs, technical assistance efforts in FTA countries, and a review and discussion by the full Committee of the additional work done by the Subcommittee on the North American Agreement on Labor Cooperation.

Public Participation: Written data, views, or comments for consideration by the NAC on the agenda listed above should be submitted to Paula Church Albertson at the address listed above. Submissions received by September 20, 2012 will be provided to Committee members and will be included in the record of the meeting. Requests to make oral presentations to the Committee may be granted as time permits.

Signed at Washington, DC, the 5th day of September 2012.

Carol Pier,

Acting Deputy Undersecretary, International Affairs.

[FR Doc. 2012–22433 Filed 9–11–12; 8:45 am]

BILLING CODE 4510–28–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency has submitted to OMB for approval the information collections described in this notice. The public is invited to comment on the proposed information collections pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted to OMB at the address below on or before October 12, 2012 to be assured of consideration.

ADDRESSES: Send comments to Mr. Nicholas A. Fraser, Desk Officer for NARA, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5167; or electronically mailed to *Nicholas_A._Fraser@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number 301–837–1694 or fax number 301–713–7409.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. NARA published a notice of proposed collection for this information collection on June 18, 2012 (77 FR 36297 and 36298). No comments were received. NARA has submitted the described information collections to OMB for approval.

In response to this notice, comments and suggestions should address one or more of the following points: (a) Whether the proposed information collection is necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of information technology; and (e) whether small businesses are affected by this collection. In this notice, NARA is soliciting comments concerning the following information collection:

Title: Independent Researcher Listing Application.

OMB number: 3095–0054.

Agency form numbers: NA Form 14115.

Type of review: Regular.

Affected public: Individuals or households.

Estimated number of respondents: 458.

Estimated time per response: 10 minutes.

Frequency of response: On occasion.

Estimated total annual burden hours: 76.

Abstract: In the past, the National Archives has made use of various lists of independent researchers who perform freelance research for hire in the Washington, DC, area. We have sent these lists upon request to researchers who could not travel to the metropolitan area to conduct their own research. To better accommodate both the public and NARA staff, the Customer Services Division (RD–DC) of the National Archives maintains a listing of independent researchers for the public. All interested independent researchers provide their contact information via this form. Collecting contact and other key information from each independent researcher and providing such information to the public when deemed appropriate will only increase business. This form is not a burden in any way to any independent researcher who voluntarily submits a completed form. Inclusion on the list will not be viewed or advertised as an endorsement by the National Archives and Records Administration (NARA). The listing is compiled and disseminated as a service to the public.

Dated: August 30, 2012.

Michael L. Wash,

Executive for Information Services/CIO.

[FR Doc. 2012–22479 Filed 9–11–12; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Seek Approval To Establish an Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and request for comments.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request clearance 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 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 November 13, 2012 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Celestine Pea, Ph.D., National Science Foundation, 885 S 4201 Wilson Boulevard, Arlington, Virginia 22230, 703–292–5186, *cpea@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays). You may obtain a copy of the data collection instruments and instructions from Dr. Pea.

SUPPLEMENTARY INFORMATION:

Title of Collection: A Survey of Program Evaluation of the National Science Foundation's Discovery Research K–12 (DR K–12) Program.

OMB Number: 3145–NEW.

Expiration Date of Approval: Not Applicable.

Type of request: New.

Abstract: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the Office of the Director, the National

Science Foundation (NSF), will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

A Survey of Principal Investigators for the National Science Foundation's Discovery Research K–12 (DR K–12) program. Type of Information Collection Request: New collection. Need and Use of Information Collection: This study will assess the implementation of resources, models, and technologies to determine how and why implementation affects STEM learning, to inform program improvement, and to enhance understanding of both what the program is accomplishing and how. The primary objectives of the study are to conduct a survey of principal investigators of the DR–K12 programs to understand the impact and influence of the DRK–12 program and to identify the links between the DR K–12 program and other NSF programs. The findings will provide valuable information concerning the impacts and influences of the granting program and grantees and the extent to which DR K–12 program influence broader American society.

Frequency of Response: Once.

Affected Public: Individuals.

Type of Respondents: DR K–12 Principal Investigators. There are no Capital Costs to report.

Estimated Number of Respondents: 388; Estimated Number of Responses per *Respondent:* 1: Average Burden Hours Per Response: .30. Estimated Total Annual *Burden Hours Requested:* 194.00 and the annualized cost to respondents is estimated at $6,208.

Comments: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the NSF, including whether the information shall have practical utility; (b) the accuracy of the NSF'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; (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: September 7, 2012.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2012–22456 Filed 9–11–12; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Seek Approval To Establish an Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and request for comments.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request clearance 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 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 November 13, 2012 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Celestine Pea, Ph.D., National Science Foundation, 885 S 4201 Wilson Boulevard, Arlington, Virginia 22230, 703–292–5186, cpea@nsf.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays). You may obtain a copy of the data collection instruments and instructions from Dr. Pea.

SUPPLEMENTARY INFORMATION:

Title of Collection: Program Evaluation of the National Science Foundation's Research and Evaluation on Education in Science and Engineering (REESE).

OMB Number: 3145–NEW.

Expiration Date of Approval: Not Applicable.

Type of request: New.

Abstract: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the Office of the Director, the National Science Foundation (NSF), will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

A Program Evaluation of the National Science Foundation's Research and Evaluation on Education in Science and Engineering (REESE). Type of Information Collection Request: New collection. Need and Use of Information Collection: This study will provide data on program accomplishments and contributions to the field of STEM teaching and learning, informing program improvement, and enhancing understanding of both what the program is accomplishing and how. The primary objectives of the study are to conduct a survey of the REESE program to understand the impact and influence of the REESE program and to identify links between the REESE program and other NSF programs. The findings will provide valuable information concerning the impacts and influences of the granting program and the grantees and whether the REESE program has had an influence on broader American society.

Frequency of Response: Once.

Affected Public: Individuals.

Type of Respondents: REESE Grantees and unsuccessful Grantees. There are no Capital Costs to report.

Estimated Number of Respondents: 494; Estimated Number of Responses per *Respondent:* 1: Average Burden Hours Per Response: .30. Estimated Total Annual *Burden Hours Requested:* 247 and the annualized cost to respondents is estimated at $7,904.

Comments: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the NSF, including whether the information shall have practical utility; (b) the accuracy of the NSF'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; (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: September 7, 2012.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2012–22455 Filed 9–11–12; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB Review; Comment Request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. This is the second notice for public comment; the first was published in the **Federal Register** at 77 FR 40090, and no comments were received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. The full submission may be found at: *http://www.reginfo.gov/public/do/PRAMain.* Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; 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 should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725—17th Street NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send email to *chines@nsf.gov.* Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling 703–292–7556.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton at (703) 292–7556 or send email 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.

NSF may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

SUPPLEMENTARY INFORMATION:

Title of Collection: "Biological Sciences Proposal Classification Form"

OMB Approval Number: 3145–0203.

Type of Request: Intent to seek approval to renew an information collection for three years.

Proposed Project: Five organizational units within the Directorate of Biological Sciences of the National Science Foundation will use the Biological Sciences Proposal Classification Form. They are the Division of Biological Infrastructure (DBI), the Division of Environmental Biology (DEB), the Division of Molecular and Cellular Biosciences (MCB), the Division of Integrative Organismal Systems IOS) and Emerging Frontiers (EF). All scientists submitting proposals to these units will be asked to complete an electronic version of the Proposal Classification Form. The form consists of brief questions about the substance of the research and the investigator's previous federal support. Each division will have a slightly different version of the form. In this way, submitters will only confront response choices that are relevant to their discipline.

Use of the Information: The information gathered with the Biological Sciences Proposal Classification Form serves two main purposes. The first is facilitation of the proposal review process. Since peer review is a key component of NSF's grant-making process, it is imperative that proposals are reviewed by scientists with appropriate expertise. The information collected with the Proposal Classification Form helps ensure that the proposals are evaluated by specialists who are well versed in appropriate subject matter. This helps maintain a fair and equitable review process.

The second use of the information is program evaluation. The Directorate is committed to investing in a range of substantive areas. With data from this collection, the Directorate can calculate submission rates and funding rates in specific areas of research. Similarly, the information can be used to identify emerging areas of research, evaluate changing infrastructure needs in the research community, and track the amount of international research. As the National Science Foundation is committed to funding cutting-edge science, these factors all have implications for program management.

The Directorate of Biological Sciences has a continuing commitment to monitor its information collection in order to preserve its applicability and necessity. Through periodic updates and revisions, the Directorate ensures that only useful, non-redundant information is collected. These efforts will reduce excessive reporting burdens

Burden on the Public: The Directorate estimates that an average of five minutes is expended for each proposal submitted. An estimated 6,500 responses are expected during the course of one year for a total of 542 public burden hours annually.

Expected Respondents: Individuals.

Estimated Number of Responses: 6,500.

Estimated Number of Respondents: 6,500.

Estimated Total Annual Burden on Respondents: 542 hours.

Frequency of Responses: On occasion.

Dated: September 7, 2012.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2012–22428 Filed 9–11–12; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463 as amended), the National Science Foundation announces the following meeting:

Name: Site visit review of the Materials Research Science and Engineering Center (MRSEC) at the Colorado School of Mines by the Division of Materials Research (DMR) #1203.

Dates & Times: October 4, 2012; 7:15 a.m.–5:30 p.m.; October 5, 2012; 8 a.m.–4:45 p.m.

Place: Colorado School of Mines, Golden, CO.

Type of Meeting: Part open.

Contact Person: Dr. Sean L. Jones, Program Director, Materials Research Science and Engineering Centers Program, Division of Materials Research, Room 1065, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, Telephone (703) 292–2986.

Purpose of Meeting: To provide advice and recommendations concerning further support of the MRSEC at CSM.

Agenda:

Thursday, October 4, 2012

7:15 a.m.–3:45 p.m. Open—Review of the MRSEC
3:45 p.m.–5:30 p.m. Closed—Executive Session

Friday, October 5, 2012

8 a.m.–9 a.m. Closed—Executive session
9 a.m.–10:45 a.m. Open—Review of the MRSEC
10:45 a.m.–4:45 p.m. Closed—Executive Session, Draft and Review Report

Reason for Closing: The work being reviewed may include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the MRSEC. These matters are exempt under 5 U.S.C. 552 b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: September 7, 2012.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2012–22409 Filed 9–11–12; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review; Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces its intent to hold proposal review meetings throughout the year. The purpose of these meetings is to provide advice and recommendations concerning proposals submitted to the NSF for financial support. The agenda for each of these meetings is to review and evaluate proposals as part of the selection process for awards. The review and evaluation may also include assessment of the progress of awarded proposals. The majority of these meetings will take place at NSF, 4201 Wilson Blvd., Arlington, Virginia 22230.

These meetings will be closed to the public. The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act. NSF will continue to review the agenda and merits of each meeting for overall compliance of the Federal Advisory Committee Act.

These closed proposal review meetings will not be announced on an individual basis in the **Federal Register**. NSF intends to publish a notice similar to this on a quarterly basis. For an advance listing of the closed proposal review meetings that include the names of the proposal review panel and the time, date, place, and any information on changes, corrections, or cancellations, please visit the NSF Web site: *http://www.nsf.gov.* This information may also be requested by telephoning, 703/292–8182.

Dated: September 7, 2012.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2012–22410 Filed 9–11–12; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978 (Pub. L. 95–541)

AGENCY: National Science Foundation.

ACTION: Notice of Permit Applications Received under the Antarctic Conservation Act of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish a notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act at Title 45 Part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by October 12, 2012. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Polly A. Penhale at the above address or (703) 292–7420.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas a requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

The applications received are as follows:

1. Applicant

Permit Application: 2013–020.

Lockheed Martin IS&GS, Antarctic Support Contract, 7400 S. Tucson Way, Centennial, CO 80112–3938.

Activity for Which Permit Is Requested

Introduce non-indigenous species into Antarctica. The applicant plans to import and use commercially available, freeze-dried marine bacterium, Vibrio fisheri, NRRL B–11177, for experimental use at the Crary Science and Engineering Center (CSEC) at McMurdo Station. This bacterium is used as one of the reagents for the Microtox toxicity analyzer, Azur Environmental model 500, 0073486. The bacterium is used with a reconstituting reagent to determine toxicity levels. All laboratory plastic-ware (tubes tips, etc.) used with the bacteria will be autoclaved to destroy any residual bacteria.

Location

McMurdo Station. Antarctica.

Dates

October 10, 2012 to August 31, 2017.

Applicant

Permit Application: 2013–021.

Larissa Min, 1425 E. Prospect St., #5, Seattle, WA 98112.

Activity for Which Permit Is Requested

Enter Antarctic Specially Protected Areas. The applicant plans to enter ASPA 105—Beaufort Island, ASPA 121—Cape Royds, ASPA 124—Cape Crozier, ASPA 131—Canada Glacier, ASPA 154—Cape Evans, ASPA 156—Backdoor Bay, Cape Royds, ASPA 157—Discovery Hut, and ASPA 172—Blood Falls to photograph, audio tape and shoot video of science teams working in these various areas. In addition, the applicant will photograph the historic huts to document how the early explorers coped with the environment. The applicant will use these observations to construct a creative narrative of Antarctica and its scientific pursuits.

Location

ASPA 105—Beaufort Island, ASPA 121—Cape Royds, ASPA 124—Cape Crozier, ASPA 131—Canada Glacier, ASPA 154—Cape Evans, ASPA 156—Backdoor Bay, Cape Royds, ASPA 157—Discovery Hut, ASPA 172—Blood Falls, and the McMurdo Sound sea ice.

Dates

October 1, 2012 to February 28, 2012.

Nadene G. Kennedy,

Permit Officer, Office of Polar Programs.

[FR Doc. 2012–22426 Filed 9–11–12; 8:45 am]

BILLING CODE 7555–01–P

NEIGHBORHOOD REINVESTMENT CORPORATION

Finance, Budget & Program. Committee Meeting of the Board of Directors; Sunshine Act

TIME & DATE: 3 p.m., Thursday, September 20, 2012.

PLACE: 1325 G Street NW., Suite 800, Boardroom, Washington, DC 20005.

STATUS: Open.

CONTACT PERSON FOR MORE INFORMATION: Erica Hall, Assistant Corporate Secretary, (202) 220–2376; *ehall@nw.org.*

AGENDA:

I. Call to Order
II. Executive Session
III. Approval of Preliminary FY 2013 Budget
IV. Financial Report
V. DC Lease Update and Discussion of Associated Budget
VI. FY 12 Corporate Milestone Report and Dashboard
VII. National Foreclosure Mitigation Counseling
VIII. Program Updates
IX. Adjournment

Erica Hall,

Assistant Corporate Secretary.

[FR Doc. 2012–22537 Filed 9–10–12; 11:15 am]

BILLING CODE 7570–02–P

NEIGHBORHOOD REINVESTMENT CORPORATION

Audit Committee Meeting of the Board of Directors; Sunshine Act

TIME & DATE: 1 p.m., Friday, September 21, 2012.

PLACE: 1325 G Street NW., Suite 800, Boardroom, Washington, DC 20005.

STATUS: Open.

CONTACT PERSON FOR MORE INFORMATION: Erica Hall, Assistant Corporate Secretary, (202) 220–2376; *ehall@nw.org.*

AGENDA:

I. Call to Order
II. Executive Session with Internal Audit Director
III. Executive Session with Officers
IV. Quality Assessment Review—Results & Survey
V. Amendment to the Audit Committee Charter
VI. Internal Audit Response with Management's Response
VII. FY 2013 Risk Assessment & Internal Audit Plan
VIII. Internal Audit Performance Scorecard
IX. Internal Audit Status Reports
X. National Foreclosure Mitigation Counseling (NFMC)/Emergency Homeowners Loan Program (EHLP) Update
XI. Posting of Internal Audit Reports
XII. CFO Update
XIII. OHTS Watch List NWO Update Affiliations/Disaffiliations
XIV. Adjournment

Erica Hall,

Assistant Corporate Secretary.

[FR Doc. 2012–22538 Filed 9–10–12; 11:15 am]

BILLING CODE 7570–02–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–382; NRC–2012–0212]

Wolf Creek Nuclear Operating Corporation, Wolf Creek Generating Station; Application for Amendment to Facility Operating License

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; withdrawal.

ADDRESSES: Please refer to Docket ID NRC–2012–0212 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and are publicly available, using any of the following methods:

- *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0212. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select "*ADAMS Public Documents*" and then select "*Begin Web-based ADAMS Search.*" For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Brian J. Benney, Senior Project Manager, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone: 301–415–2767; email: *brian.benney@nrc.gov.*

SUPPLEMENTARY INFORMATION: The U.S. Nuclear Regulatory Commission (NRC or the Commission) has granted the request of Wolf Creek Nuclear Operating Corporation (the licensee) to withdraw its application dated November 4, 2010 (ADAMS Accession No. ML103200209), as supplemented by letters dated October 19, 2011 (ADAMS Accession No. ML11312A137), and January 31, 2012 (ADAMS Accession No. ML12039A091), for proposed amendment to Facility Operating License No. NPF–42 for the Wolf Creek Generating Station, located in Coffey County, Kansas.

The proposed amendment would have revised Technical Specification (TS) 5.6.5, "CORE OPERATING LIMITS REPORT (COLR)," to replace the existing large break loss-of-coolant accident (LOCA) analysis methodology. Specifically, the proposed change adds a reference to WCAP–16009–P–A, "Realistic Large Break LOCA Evaluation Methodology Using Automated Statistical Treatment of Uncertainty Method (ASTRUM)," to TS 5.6.5b.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on December 28, 2010 (75 FR 81673). However, by letter dated August 23, 2012 (ADAMS Accession No. ML12248A261), the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated November 4, 2010, as supplemented by letters dated October 19, 2011, and January 31, 2012, and the licensee's letter dated August 23, 2012,

which withdrew the application for license amendment.

Dated at Rockville, Maryland, this 5th day of September 2012.

For the Nuclear Regulatory Commission.

Brian J. Benney,

Senior Project Manager, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–22442 Filed 9–11–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Regulatory Policies & Practices; Notice of Meeting

The ACRS Subcommittee on Regulatory Policies & Practices will hold a meeting on September 18, 2012, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Tuesday, September 18, 2012–8:30 a.m. Until 12 p.m.

The Subcommittee will review the proposed Draft Final Revision 1 to Regulatory Guide 1.163, "Performance-Based Containment Leak-Test Program." The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Quynh Nguyen (Telephone 301–415–5844 or Email: *Quynh.Nguyen@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64126–64127).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs*. Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (240–888–9835) to be escorted to the meeting room.

Dated: September 4, 2012.

Antonio Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–22434 Filed 9–11–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Plant License Renewal; Notice of Meeting

The ACRS Subcommittee on Plant License Renewal will hold a meeting on September 19, 2012, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, September 19, 2012–8:30 a.m. Until 5 p.m.

The Subcommittee will review the license renewal application for the Davis-Besse Nuclear Power station and the associated draft Safety Evaluation Report (SER) with open items. The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff, First Energy Nuclear Operation Company, and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Kent Howard (Telephone 301–415–2989 or Email: *Kent.Howard@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64126–64127).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs*. Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: August 28, 2012.

Antonio Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–22437 Filed 9–11–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Meeting of the ACRS Subcommittee on US–APWR; Notice of Meeting

The ACRS Subcommittee on US–APWR will hold a meeting on September 20, 2012, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance with the exception of a portion that may be closed to protect information that is propriety, pursuant to 5 U.S.C. 552(c)(4). The agenda for the subject meeting shall be as follows:

Thursday, September 20, 2012–8:30 a.m. until 5 p.m.

The Subcommittee will review Chapter 13, "Conduct of Operations," of the Safety Evaluation Report (SER) with open items associated with the Comanche Peak Combined License Application (COLA). In addition, the NRC staff will brief the Subcommittee on Advanced Accumulator and Generic Safety Issue-191 (GSI–191), "Assessment of Debris Accumulation on PWR Sump Performance." The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff, Luminant Generation Company LLC, Mitsubishi Heavy Industries (MHI), and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Girija Shukla (Telephone 301–415–6855 or Email: *Girija.Shukla@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64126–64127).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs*. Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: August 28, 2012.

Antonio Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–22439 Filed 9–11–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Radiation Protection and Nuclear Materials; Notice of Meeting

The ACRS Subcommittee on Radiation Protection and Nuclear Materials will hold a meeting on September 18, 2012, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Tuesday, September 18, 2012—8:30 a.m. Until 12 p.m.

The Subcommittee will review the risk associated with the transportation of spent nuclear fuel. The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Christopher Brown (Telephone 301–415–7111 or Email: *Christopher.Brown@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64126–64127).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs*. Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: August 29, 2012

Antonio Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–22435 Filed 9–11–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0002]

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATES: Week of September 10, 2012.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

ADDITIONAL ITEMS TO BE CONSIDERED:

Week of September 10, 2012

Friday, September 14, 2012

10 a.m. Discussion of Management and Personnel Issues (Closed—Ex. 2 and 6).

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

Additional Information

The start time to the above referenced Discussion of Management and Personnel Issues has been moved up one hour and is now scheduled to begin at 10 a.m. instead of 11 a.m.

The NRC Commission Meeting Schedule can be found on the Internet at: *www.nrc.gov/about-nrc/policy-making/schedule.html.*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Bill Dosch, Chief, Work Life and Benefits Branch, at 301–415–6200, TDD: 301–415–2100, or by email at *william.dosch@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an email to *darlene.wright@nrc.gov.*

Dated: September 10, 2012.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2012–22540 Filed 9–10–12; 11:15 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0131]

Notice of Withdrawal of Final Design Approval; Westinghouse Electric Company; Advanced Passive 1000

By letter dated December 10, 2010, Westinghouse Electric Company (WEC) requested that the U.S. Nuclear Regulatory Commission (NRC or the Commission) "retire" the final design approval (FDA) for the Advanced Passive 1000 (AP1000) design upon the completion of rulemaking for the amendment to the AP1000 design and the issuance of the amended AP1000 design certification (DCR) rule in part 52 of Title 10 of the Code of Federal Regulations (10 CFR). The FDA issued on March 10, 2006, and found under NRC's Agencywide Documents Access and Management System (ADAMS) Accession No. ML060110467, referenced Revision 15 of the AP1000 design control document (DCD).

As amended on August 28, 2007, the design approval process under 10 CFR Part 52 no longer requires an FDA as a prerequisite to a DCR, but is instead a separate licensing process. WEC's application to amend the AP1000 DCR did not request an update to the AP1000 FDA.

The NRC staff completed its review of Revision 19 to WEC's AP1000 DCD on August 5, 2011, and issued Supplement 2 to NUREG–1793, "Final Safety Evaluation Report for Revision 19 to the AP1000 Standard Design Certification" (FSER), in September 2011. On December 30, 2011, the NRC published in the **Federal Register** a final rule to amend 10 CFR Part 52, Appendix D, to certify the amended AP1000 design. As a result, there are now two different NRC-approved versions of the AP1000 design—an FDA for Revision 15 of the AP1000 DCD and a DCR for Revision 19 of the AP1000 DCD. The NRC staff's practice in initial certification of the four current DCRs was to request that the FDA holder update the Final Safety Analysis Report supporting the FDA (essentially the DCD) to reflect the version of the DCD approved and incorporated by reference as part of the final DC rulemaking. This practice was intended to ensure that there would be only a single version of the design approved both by the FDA and the DCR. WEC's letter of December 10, 2010, indicates its preference not to update the FDA to reflect Revision 19 of the DCD, but instead for the FDA to be "retired."

Based on the certification of the amended AP1000 design, which has superseded the previous AP1000 DCR in 10 CFR part 52, Appendix D, the NRC staff agrees that the AP1000 FDA can be "retired" (i.e., withdrawn by the NRC) as WEC has voluntarily requested. The NRC therefore withdraws the FDA for the AP1000 design. The NRC has communicated this determination to WEC, (see ADAMS Accession No. ML12202A071). As a result, combined license applicants seeking to reference the AP1000 design will need to reference the DC rule in lieu of the FDA.

Copies of the AP1000 FSER (NUREG–1793, Supplements 1 and 2) and FDA have been placed in the NRC's Public Document Room, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, for review and copying by interested persons.

Dated at Rockville, Maryland, this 31st day of August 2012.

For the Nuclear Regulatory Commission.

David B. Matthews,

Director, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2012–22443 Filed 9–11–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR WASTE TECHNICAL REVIEW BOARD

Board Meeting; October 17, 2012; Idaho Falls, ID

The U.S. Nuclear Waste Technical Review Board will meet to discuss DOE work on packaging, transporting, and disposing of SNF and HLW.

Pursuant to its authority under section 5051 of Public Law 100–203, Nuclear Waste Policy Amendments Act of 1987, the U.S. Nuclear Waste Technical Review Board will hold a public meeting in Idaho Falls, Idaho, on Wednesday, October 17, 2012, to review U.S. Department of Energy (DOE) plans for the packaging transportation, and disposition of spent nuclear fuel (SNF) and high-level radioactive waste (HLW). Among the topics that will be discussed are current activities being undertaken by DOE related to designing and planning the components of a repository system. The Nuclear Waste Policy Amendments Act of 1987 requires the Board to conduct an independent review of the technical and scientific validity of DOE activities related to nuclear waste management, including transporting, packaging, and disposing of SNF and HLW.

The Board meeting will be held at the Hilton Garden Inn, 700 Lindsay Boulevard, Idaho Falls, ID 83402; (tel.) 208–522–9500, (fax) 208–522–9501.

A block of rooms has been reserved for meeting attendees at the Hilton

Garden Inn. Reservations can be made online at *http://hiltongardeninn.hilton.com/en/gi/groups/personalized/I/IDAIFGI-TEC-20121014/index.jhtml?WT.mc_id=POG;* Group Name: Nuclear Waste Technical Review Board Meeting; Group Code: TEC, or by calling 208–522–9500. Reservations must be made by October 7, 2012, to ensure receiving the meeting rate.

The meeting will begin at 8:00 a.m. on Wednesday morning with a call to order and introductory statement by the Board Chairman. A panel composed of representatives of several state regional organizations from around the country will then present their views on the recommendations of the Blue Ribbon Commission on America's Nuclear Future on transporting SNF. Completing the morning's agenda, DOE representatives will present the following: an overview on current activities being undertaken by DOE's Office of Used Fuel Disposition, an update on the Used Fuel Disposition System Architecture Study underway at Argonne National Laboratory, and a discussion of logistical and operational issues associated with the transport of "orphaned" SNF. The afternoon will be devoted to following up on information presented by DOE at the Board's January 2012 meeting in Arlington, Virginia, including discussions of additional thermal analyses of repository concepts involving open, or ventilated, systems.

A detailed meeting agenda will be available on the Board's Web site: *www.nwtrb.gov*, approximately one week before the meeting. The agenda also may be obtained by telephone request at that time. The meeting will be open to the public, and opportunities for public comment will be provided. Those wanting to speak are encouraged to sign the "Public Comment Register" at the check-in table. It may be necessary to set a time limit on individual remarks, but written comments of any length may be submitted for the record.

Transcripts of the meeting will be available on the Board's Web site, by email, on computer disk, and in paper format on library-loan from Davonya Barnes of the Board's staff no later than November 5, 2012.

The Board was established as an independent federal agency to provide objective expert advice to Congress and the Secretary of Energy on technical issues and to review the technical validity of DOE activities related to implementing the NWPA. Board members are experts in their fields and are appointed to the Board by the President from a list of candidates submitted by the National Academy of Sciences. The Board is required to report to Congress and the Secretary no fewer than two times each year. All Board reports, correspondence, congressional testimony, and meeting transcripts and related materials are posted on the Board's Web site.

For information on the meeting agenda, contact Daniel Metlay: *metlay@nwtrb.gov*. For information on lodging or logistics, contact Linda Coultry: coultry@nwtrb.gov. Both also can be reached by mail at 2300 Clarendon Boulevard, Suite 1300; Arlington, VA 22201–3367; by telephone at 703–235–4473; or by fax at 703–235–4495.

Dated: September 7, 2012.

Nigel Mote,

Executive Director, U.S. Nuclear Waste Technical Review Board.

[FR Doc. 2012–22388 Filed 9–11–12; 8:45 am]

BILLING CODE 6820–AM–M

SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33–9358; 34–67801, File No. 265–28]

Dodd-Frank Investor Advisory Committee

AGENCY: Securities and Exchange Commission.

ACTION: Notice of Meeting of Securities and Exchange Commission Dodd-Frank Investor Advisory Committee.

SUMMARY: The Securities and Exchange Commission Investor Advisory Committee, established pursuant to Section 911 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, is providing notice that it will hold a public meeting on Friday, September 28, 2012, in Multi-Purpose Room LL–006 at the Commission's headquarters, 100 F Street NE., Washington, DC 20549. The meeting will begin at 10:00 a.m. (EDT) and end at 4:00 p.m. and will be open to the public, except during portions of the meeting reserved for meetings of the Committee's subcommittees. The meeting will be webcast on the Commission's Web site at *www.sec.gov*. Persons needing special accommodations to take part because of a disability should notify the contact person listed below. The public is invited to submit written statements to the Committee. The agenda for the meeting includes: introductory remarks from Commissioners; introductory remarks from Committee officers; and reports from the four Investor Advisory Committee subcommittees (the Investor as Owner subcommittee, the Investor as Purchaser subcommittee, the Investor Education subcommittee, and the Market Structure subcommittee).

DATES: Written statements should be received on or before September 28, 2012.

ADDRESSES: Written statements may be submitted by any of the following methods:

Electronic Statements

- Use the Commission's Internet submission form (*http://www.sec.gov/rules/other.shtml*); or
- Send an email message to *rules-comments@sec.gov*. Please include File No. 265–28 on the subject line; or

Paper Statements

- Send paper statements in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Stop 1090, 100 F Street NE., Washington, DC 20549—1090.

All submissions should refer to File No. 265–28. This file number should be included on the subject line if email is used. To help us process and review your statement more efficiently, please use only one method.

Statements also will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Room 1580, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All statements received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: M. Owen Donley, Chief Counsel, at (202) 551–6322, Office of Investor Education and Advocacy, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

Dated: September 7, 2012.

Elizabeth M. Murphy,

Committee Management Officer.

[FR Doc. 2012–22440 Filed 9–11–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67791; File No. SR–OPRA–2012–05]

Options Price Reporting Authority; Notice of Filing and Immediate Effectiveness of Proposed Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information To Amend Section 3.1 of the OPRA Plan

September 6, 2012.

Pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act")[1] and Rule 608 thereunder,[2] notice is hereby given that on August 27, 2012, the Options Price Reporting Authority ("OPRA") submitted to the Securities and Exchange Commission ("Commission") an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA Plan").[3] The proposed amendment would make a clarifying change to Section 3.1 of the OPRA Plan. The Commission is publishing this notice to solicit comments from interested persons on the proposed OPRA Plan amendment.

I. Description and Purpose of the Plan Amendment

The purpose of the Amendment is to eliminate an ambiguity in the way in which the current OPRA Plan describes Exhibit A to the Plan, which consists of a list of the national securities exchanges that are Members of OPRA. Section 3.1 of the Plan describes Exhibit A as a list of the "initial" Members of OPRA, suggesting that the list includes only those exchanges that were Members when OPRA was restructured as a limited liability company on January 1, 2010. By contrast, the definition of "Member" in Section 1.1 of the Plan correctly states that "Exhibit A * * * may be amended to include any other national securities exchange that becomes a Member pursuant to the provisions of Section 3.2." To eliminate this ambiguity it is proposed to eliminate the word "initial" from both the heading and text of Section 3.1, so that as amended that Section is clear that Exhibit A lists all current Members of OPRA from time to time, and not just the "initial" Members.[4]

The text of the proposed amendment to the OPRA Plan is available at OPRA, the Commission's Public Reference Room, *http://opradata.com*, and on the Commission's Web site at *www.sec.gov*.

II. Implementation of the OPRA Plan Amendment

Pursuant to paragraph (b)(3)(ii) of Rule 608 of Regulation NMS under the Act[5] OPRA designated the proposed OPRA Plan amendment as concerned solely with the administration of the OPRA Plan, thereby qualifying for effectiveness upon filing.

The Commission may summarily abrogate the amendment within sixty days of its filing and require refiling and approval of the amendment by Commission order pursuant to Rule 608(b)(2) under the Act[6] if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed OPRA Plan amendment is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File No. SR–OPRA–2012–05 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–OPRA–2012–05. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan amendment that are filed with the Commission, and all written communications relating to the proposed plan amendment between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of OPRA. 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–OPRA–2012–05 and should be submitted on or before October 3, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22394 Filed 9–11–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67790; File No. SR–CBOE–2012–066]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Increase Position and Exercise Limits for EEM Options

September 6, 2012.

On July 9, 2012, the Chicago Board Options Exchange, Incorporated

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[1] 15 U.S.C. 78k–1.

[2] 17 CFR 242.608.

[3] The OPRA Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 608 thereunder (formerly Rule 11Aa3–2). *See* Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981). The full text of the OPRA Plan is available at *http://www.opradata.com*.

The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The ten participants to the OPRA Plan are BATS Exchange, Inc., BOX Options Exchange, LLC, Chicago Board Options Exchange, Incorporated, C2 Options Exchange, Incorporated, International Securities Exchange, LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, NASDAQ Stock Market LLC, NYSE MKT LLC, and NYSE Arca, Inc.

[4] Seven national securities exchanges were Members of OPRA on January 1, 2010. Since then, two of those seven exchanges have changed their names, and three additional exchanges have become Members of OPRA.

[5] 17 CFR 242.608(b)(3)(ii).

[6] 17 CFR 242.608(b)(2).

[7] 17 CFR 200.30–3(a)(29).

("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 increase position and exercise limits for EEM options. The proposed rule change was published for comment in the **Federal Register** on July 26, 2012.[3] The Commission received no comment letters on this 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 September 9, 2012. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider this proposed rule change, which would increase the position and exercise limits for EEM options.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates October 24, 2012 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–CBOE–2012–066).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Kevin M. O'Neill,

Deputy Secretary.

COM048[FR Doc. 2012–22393 Filed 9–11–12; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67478 (July 20, 2012), 77 FR 43897.

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67792; File No. SR–MSRB–2012–07]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed Amendments to the Real-Time Transaction Reporting System Information System and Subscription Service

September 6, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("the Exchange Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 24, 2012, the Municipal Securities Rulemaking Board ("MSRB") 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 MSRB. 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 MSRB is filing with the Commission a proposed rule change consisting of amendments to the Real-Time Transaction Reporting System ("RTRS") information system and subscription service (collectively, "proposed rule change"). The proposed rule change will enhance the transaction data publicly disseminated from RTRS in real-time by including the exact par value on all transactions with a par value of $5 million or less and including an indicator of "MM+" in place of the exact par value on transactions where the par value is greater than $5 million. The exact par value of transactions where the par value is greater than $5 million would be disseminated from RTRS five business days later.

The text of the proposed rule change is available on the MSRB's Web site at *www.msrb.org/Rules-and-Interpretations/SEC-Filings/2012-Filings.aspx*, at the MSRB's principal office, 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 MSRB 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 MSRB 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

RTRS is a facility for the collection and dissemination of information about transactions occurring in the municipal securities market. Currently, transaction information disseminated from RTRS includes the exact par value on all transactions with a par value of $1 million or less but includes an indicator of "1MM+" in place of the exact par value on transactions where the par value is greater than $1 million. The exact par value of such transactions is disseminated from RTRS five business days later. The proposed rule change would enhance the transaction data publicly disseminated from RTRS in real-time by including the exact par value on all transactions with a par value of $5 million or less and including an indicator of "MM+" in place of the exact par value on transactions where the par value is greater than $5 million. The exact par value of transactions where the par value is greater than $5 million would be disseminated from RTRS five business days later.

Background

MSRB Rule G–14, on transaction reporting, requires brokers, dealers and municipal securities dealers (collectively "dealers") to report all transactions in municipal securities to RTRS within fifteen minutes of the time of trade, with limited exceptions. Since the implementation of RTRS in 2005, the MSRB has made transaction data available to the public through subscription services designed to achieve the widest possible dissemination of transaction information with the goal of ensuring the fairest and most accurate pricing of municipal securities transactions.

In addition to subscription services, MSRB makes publicly available for free transaction data on the Electronic Municipal Market Access (EMMA®) Web site. Since the launch of EMMA as a pilot in 2008, MSRB has incorporated into the display of market-wide and security specific information all transaction data disseminated from RTRS so that transaction information

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

would be available on the EMMA Web site simultaneously with the availability of information to subscribers to the RTRS subscription service.

Large Trade Size Masking

In connection with the MSRB's predecessor end-of-day trade reporting system and the subsequent development of RTRS, MSRB received comments that, given the prevalence of thinly traded securities in the municipal securities market, it sometimes is possible to identify institutional investors and dealers by the exact par value included on trade reports. It was noted that, where the market for a specific security is thin and only one or two dealers are active, revealing the exact par amount also may convey information about a dealer's inventory (*i.e.*, size of position and acquisition cost) and allow other dealers to use this information to trade against the dealer's position, thus reducing the incentive for a dealer to take large positions in these circumstances.

To address these concerns, transaction information disseminated through RTRS subscription services and displayed on EMMA includes an indicator of "1MM+" for any trade with a par value greater than $1 million. This indicator is replaced with the exact par value of the trade five business days later. The MSRB implemented this approach to help to preserve the anonymity of trading parties while not detracting in a substantial way from the benefits of price transparency.[3] The MSRB noted that it would review this masking policy as it gains experience with real-time transparency.[4]

In January 2012, the Government Accountability Office ("GAO") published a report on municipal securities market structure, pricing, and regulation, as required by Section 977 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[5] In this report the GAO, among other conclusions, concluded that individual investors generally have less information about transaction prices than institutional investors. The GAO, which had interviewed a broad range of market participants, including institutional investors, observed that: "Some of these [institutional] investors said that even though MSRB's RTRS system did not disclose total transaction amounts for trades over $1 million—which the system reports as trade amounts of '$1+ million'—they typically were aware of the amount and the price of these large transactions through their relationships with broker-dealers."

A foundational principal of RTRS is that all market participants would have equal access to transaction information. The GAO observation that certain market participants are able to determine, through their relationships with dealers, the par amount of large transactions for which the par value is masked in RTRS subscription services and on EMMA undermines the purpose of masking the exact par value. Further, if certain market participants are able to determine exact par values yet the information disseminated by RTRS masks exact par values, then the foundational principal of RTRS has been compromised since the equality of access to transaction information is lost for the five business day period that certain institutional customers have access to the exact par value while the rest of the marketplace must await the unmasking of such information by RTRS five business days after the trade was reported.

To ensure that as many market participants as possible have access to the same amount of information about each transaction disseminated from RTRS and to further promote price transparency consistent with the MSRB's intent to review its masking policy as it gained experience with real-time transparency, the proposed rule change would enhance the transaction data publicly disseminated from RTRS in real-time by including the exact par value on all transactions with a par value of $5 million or less. While the MSRB considered discontinuing masking of the exact par value on transactions where the par value is greater than $1 million, with the result that RTRS subscription services and EMMA would include the exact par value on all transactions when initially disseminated to the public, as more fully discussed in the MSRB's statement on comments received on the proposed rule change, dealers and institutional investors oppose eliminating the practice of masking large trade sizes and cited concerns related to adverse impacts on liquidity. However, these commenters stated that raising the par value threshold for masking large trade sizes would provide additional transparency to the municipal market without adversely impacting liquidity. Based upon 2011 trade data, the number of trades that were subject to the over $1 million trade size mask was 342,906 and, if the trade size mask was raised to par values over $5 million, this number would have been 97,124 trades.

The MSRB believes that raising the par value threshold to par values over $5 million would be an appropriate first step to take in the short term as it would greatly reduce the number of trades subject to the par value mask. The MSRB plans to continue to evaluate whether this threshold can be raised further or completely eliminated with a view towards bringing full transparency of exact par values to the municipal market in real-time.[6] As part of the MSRB's Long-Range Plan for Market Transparency Products,[7] the MSRB plans to undertake an initiative to reengineer RTRS. Through the RTRS reengineering initiative, additional industry comment will be solicited on long-term measures for increasing transparency of large trade sizes or alternative methods of disseminating such information. MSRB also plans to evaluate any impacts on liquidity from the near-term increase of the trade size mask threshold to $5 million to assist it in determining whether any future changes to this threshold are merited or could result in unanticipated consequences.

Effective Date of Proposed Rule Change

The MSRB proposes that the proposed rule change be made effective on November 5, 2012 to coincide with other planned changes to RTRS.[8]

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Exchange Act, which provides that the MSRB's rules shall:

> be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

[3] *See* MSRB Notice 2003–12 (April 7, 2003).

[4] *See* MSRB Notice 2004–13 (June 1, 2004). *See also* Exchange Act Release No. 49902 (June 22, 2004), 69 FR 38925 (June 29, 2004), *approved* Exchange Act Release No. 50294 (August 31, 2004), 69 FR 54170 (September 7, 2004).

[5] U. S. Government Accountability Office, Municipal Securities: Overview of Market Structure, Pricing, and Regulation, GAO–12–265, January 17, 2012.

[6] As part of the proposed rule change, the MSRB plans to use a different indicator for disseminating those par values that are greater than $5 million. Currently, the MSRB disseminates an indicator of "1MM+" to indicate par values greater than $1 million. Instead of changing this to "5MM+", the MSRB plans to include an indicator of "MM+" so that the par value threshold could be changed in the future without requiring subscribers to make system changes to accommodate a new indicator.

[7] *See* MSRB Notice 2012–06 (February 23, 2012).

[8] *See* MSRB Notice 2012–42 (August 10, 2012).

The MSRB believes that the proposed rule change is consistent with the Exchange Act. The proposed rule change would remove impediments to and perfect the mechanism of a free and open market in municipal securities by increasing the number of transactions disseminated from RTRS in real-time that include the exact par value, which would ensure more market participants have equal access to information about transactions disseminated from RTRS. This change would contribute to the MSRB's continuing efforts to improve market transparency and to protect investors, municipal entities, obligated persons and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Information disseminated by RTRS is available to all persons on an equal and non-discriminatory basis. The information disseminated from RTRS real-time, including the exact par value on all transactions with a par value of $5 million or less, will be available to all subscribers simultaneously with the availability of the information through the EMMA web portal. In addition to making the information available for free on the EMMA web portal to all members of the public, the MSRB makes the information collected by RTRS available by subscription on an equal and non-discriminatory basis without imposing restrictions on subscribers from, or imposing additional charges on subscribers for, re-disseminating such information or otherwise adding value-added services and products based on such information on terms determined by each subscriber.[9]

In addition, the proposed rule change would not impose any burden on dealers or any other market participant in connection with the reporting of data to the MSRB since dealers already are, and would continue to be, required to report the full principal amount of transactions to the MSRB, regardless of trade size. Thus, no change in submitter inputs to RTRS would be required. The large trade size indicator is applied automatically by the MSRB's systems and will require minimal programming efforts on the part of the MSRB. The MSRB estimates that implementing the proposed rule change will require one to two weeks of work for the equivalent of one full time employee. Some subscribers to the RTRS subscription service may bear minimal one-time programming and/or database costs to be able to accept and process a value of "MM+" rather than "1MM+," likely of equal or lesser magnitude than the costs the MSRB would bear in making its own programming changes. The MSRB believes that an effective date of November 5, 2012 will provide subscribers with sufficient time to make any required changes in due course without causing material disruptions to their information technology plans or budgets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

On June 1, 2012, the MSRB published a notice requesting comment on enhancing the transaction data publicly disseminated in real-time from RTRS by including the exact par value on all transactions disseminated ("June 2012 Notice").[10] The June 2012 Notice solicited input on whether the masking of trade size has been effective at achieving its initial purpose. In addition, the June 2012 Notice sought comment on whether the benefits, if any, of retaining such masking outweigh the potential negative effects of withholding such information known to certain institutional investors from the broader marketplace. Further, the MSRB sought comment on whether other methods exist for market participants to determine the exact or relative size of large trades and to infer the identity of parties to the transaction from the RTRS trade data history, such as through public filings by certain institutional investors through the SEC's EDGAR system or other sources, that otherwise undermine the effectiveness of trade size masking in achieving its initial purpose. Finally, the June 2012 Notice requested that market participants believing that such masking should be continued should provide justification for doing so in light of the GAO findings and the foundational principles for RTRS, as well as suggestions for alternatives to discontinuing par value masking that would further the initial purpose of such practice while reducing or eliminating the selective dissemination of such information.

In response to the June 2012 Notice, comment letters were received from: Benchmark Solutions, Bond Dealers of America ("BDA"), Government Finance Officers Association ("GFOA"), Investment Company Institute ("ICI"), Securities Industry and Financial Markets Association ("SIFMA"), and Stifel Nicolaus. Summaries of those comments and the MSRB's responses follow.

All commenters were supportive of providing additional transparency of exact par values of large trades; however, commenters differed on whether the practice of masking large trade sizes should be eliminated altogether.

Benchmark Solutions and GFOA stated support for eliminating the practice of masking large trade sizes. Benchmark Solutions stated that disseminating exact par values in real-time would provide investors with equal access to information and facilitate pricing bonds in the traded security as well as in other comparable securities.[11] While GFOA acknowledged the reasons why the practice of masking large trade sizes was originally implemented, it stated that MSRB should "look to developing appropriate guidance to address those concerns rather than using the masking of pricing information as a means to this end."

BDA, ICI, SIFMA and Stifel Nicolaus stated opposition to eliminating the practice of masking large trade sizes. BDA stated that institutional investors "may materially alter their trading practices" if exact par values are disseminated in real-time, which "may prove disruptive to the municipal markets." Stifel Nicolaus noted that disseminating exact par values in real-time could "eliminate the anonymity of the buyer and seller * * * [which] is valued in the market and assists in the maintenance of liquidity." SIFMA noted that "a significant portion of trading activity in the municipal market involves dealers taking bonds into inventory with no identified buyers" and without the anonymity provided by large trade size masking, it stated that some dealers that regularly engage in large block trades "may become less willing to bid on investors' positions." However, SIFMA acknowledged that other dealers "stated that eliminating the mask would not have an effect on their market activity." ICI stated that "increased transparency could diminish market liquidity" and noted that "secondary market liquidity for investors is provided by dealers that are willing to risk their capital pending the-

[9] The MSRB notes that subscribers may be subject to proprietary rights of third parties in information provided by such third parties that is made available through the subscription.

[10] *See* MSRB Notice 2012–29 (June 1, 2012).

[11] Benchmark Solutions also provided comments related to shortening the fifteen minute timeframe for dealers to report transactions to RTRS. In the future, the MSRB plans to request comment on shortening the fifteen minute reporting deadline and this comment will be considered with any other comments received at that time.

location of customers who are willing to purchase a block of bonds."

As an alternative to eliminating the practice of masking large trade sizes altogether, ICI, SIFMA and Stifel Nicolaus suggested that the trade size masking threshold in RTRS be raised from the current $1 million level to those trades in par values that exceed $5 million.[12]

Discussion. Representatives of both dealers and institutional investors stated consistent concerns about the potential adverse effects on liquidity that could arise from eliminating the practice of masking large trade sizes. The MSRB notes that these commenters did not refute the GAO observation that certain market participants are able to determine, through their relationships with dealers, the par amount of large transactions for which the par value is masked, but acknowledges the commenters' view that a certain level of anonymity continues to exist in the reports of large trades for which the exact par value is masked. The MSRB is sensitive to the views of those commenters that argued for eliminating the practice of masking large trade sizes as it would ensure that a foundational principal of RTRS to provide all market participants with equal access to transaction information is achieved. However, the comments received did not provide specific evidence that the benefits to transparency from disseminating exact par values in real-time outweigh potential adverse impacts on liquidity and the MSRB does not currently have its own data to assess any such impact. Thus, while the MSRB continues to believe that the municipal securities market will benefit from full transparency on all transactions, the MSRB has determined that it would be appropriate to take an initial interim step toward that ultimate goal that will allow the MSRB to assess the impact of such transparency on trades in sizes ranging between $1 million and $5 million. Information derived from such interim step would assist the MSRB in determining whether increased trade size transparency results in adverse effects on market liquidity.

[12] In response to the question in the June 2012 Notice of whether other methods exist for market participants to determine the exact or relative size of large trades and to infer the identity of parties to the transaction from the RTRS trade data history, SIFMA noted that the SEC's EDGAR system does not serve as a source of such information and that while there are "publicly available sources of information [that] detail[ ] portfolio holdings of certain institutional investors * * * it is sometimes not possible to reliably determine actual trade sizes for 1MM+ trade reports from publicly available information."

While dealers and institutional investors oppose eliminating the practice of masking large trade sizes, these commenters stated that raising the par value threshold for masking large trade sizes would provide additional transparency to the municipal market without adversely impacting liquidity. Based upon 2011 trade data, the number of trades that were subject to the over $1 million trade size mask was 342,906 and if the trade size mask was raised to par values over $5 million, this number would have been 97,124 trades. MSRB believes that raising the par value threshold to par values over $5 million would be an appropriate first step to take in the short term as it would greatly reduce the number of trades subject to the par value mask. However, as noted above, the MSRB plans to continue to evaluate whether this threshold can be raised with a view towards bringing full transparency of exact par values to the municipal market in real-time.

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 email to *rule-comments@sec.gov*. Please include File Number SR–MSRB–2012–07 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MSRB–2012–07. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the MSRB's offices. 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–MSRB–2012–07, and should be submitted on or before October 3, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22395 Filed 9–11–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67794; File No. SR–CBOE–2012–068]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend the Customer Large Trade Discount

September 6, 2012.

I. Introduction

On July 11, 2012, Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the

[13] 17 CFR 200.30–3(a)(12).

Securities and Exchange Commission (the "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")[1] and Rule 19b–4 thereunder,[2] a rule change relating to the Customer Large Trade Discount (the "Discount").

CBOE proposed to amend the Discount for any executing Trading Permit Holder ("TPH") whose affiliate[3] is the issuer of one or more securities, the combined total asset value of which is $1 billion or greater, that are based on or track the performance of VIX futures.[4] CBOE designated the proposed rule change as immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Exchange Act.[5] The Commission published notice of filing of the proposed rule change in the **Federal Register** on July 26, 2012.[6] To date, the Commission has not received any comment letters on the Exchange's proposed rule change.

Pursuant to Section 19(b)(3)(C) of the Exchange Act, the Commission hereby is: (1) Temporarily suspending the proposed rule change; and (2) instituting proceedings to determine whether to approve or disapprove the proposal.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] CBOE defines "affiliate" as "a person who, directly or indirectly, controls, is controlled by, or is under common control with, such other person." CBOE Rule 1.1(j). CBOE Rule 1.1(k) defines "control" as "the power to exercise a controlling influence over the management or policies of a person, unless such power is solely the result of an official position with such person. Any person who owns beneficially, directly or indirectly, more than 20% of the voting power in the election of directors of a corporation, or more than 25% of the voting power in the election of directors of any other corporation which directly or through one or more affiliates owns beneficially more than 25% of the voting power in the election of directors of such corporation, shall be presumed to control such corporation." CBOE Rule 1.1(ff) defines "person" as "an individual, partnership (general or limited), joint stock company, corporation, limited liability company, trust or unincorporated organization, or any governmental entity or agency or political subdivision thereof."

[4] CBOE Volatility Index® ("VIX") measures market expectations of near term volatility conveyed by S&P 500 index option prices. Options on VIX offer a way for market participants to buy and sell option volatility. VIX option prices reflect the market's expectation of the VIX level at expiration and are exclusively traded on CBOE. *See http://www.cboe.com/micro/VIX/VIXoptionsFAQ.aspx.*

[5] 15 U.S.C. 78s(b)(3)(A). Although the proposed rule change was effective upon filing, CBOE indicated that the fee change would take effect on August 1, 2012. *See* Notice, *infra* note 6, at 43880.

[6] *See* Securities Exchange Act Release No. 67481 (July 20, 2012) 77 FR 43879 ("Notice").

II. Summary of the Proposed Rule Change

The Exchange's proposal amended the Discount, which caps regular customer transaction fees on a per-order basis for large customer trades.[7] Specifically, CBOE's proposal lowered the transaction fee cap in VIX options from 10,000 contracts to 7,500 contracts per order in a qualifying calendar month but only for TPHs who have an affiliate that issues one or more securities, the combined total value of which is $1 billion or greater, that are based on or track the performance of VIX futures (a "qualifying affiliate").[8] Pursuant to that recent change, incremental volume above 7,500 contracts in a single order is not assessed a regular customer transaction fee for TPHs with such an affiliate. TPHs that do not have a qualifying affiliate do not qualify for the lower fee cap and continue to be assessed the regular customer transaction fee up to the first 10,000 contracts in VIX options.

III. Suspension of the CBOE Proposal

Pursuant to Section 19(b)(3)(C) of the Exchange Act,[9] at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Exchange Act,[10] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization 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 Exchange Act.

[7] Prior to the proposal, CBOE charged all TPHs transaction fees on the first 10,000 contracts in a single order in VIX options. For example, if a broker-dealer submitted a single order for 12,000 VIX contracts, the broker-dealer was only charged a transaction fee on the first 10,000 contracts and the remaining 2,000 contracts were not charged a transaction fee. The Discount also caps customer transaction fees up to the first 10,000 contracts for SPX; up to the first 5,000 contracts for other index options; and up to the first 3 000 contracts for ETF, ETN and HOLDRs options. Threshold levels for the other products subject to the Discount were not changed by this rule filing.

[8] On the first business day following the end of a calendar month, the Exchange will multiply the reported net asset value of each security that is based on or tracks the performance of VIX futures (as reported on the final calendar day of the month) by the amount of outstanding shares in that security to determine the total asset value of that security. *See* Notice, *supra* note 6, at 43880. The Exchange will then amalgamate the total asset values of all the securities that are based on or track the performance of VIX futures issued by the same issuer to determine if such issuer reaches the $1 billion threshold. *See id.* If it does, the affiliated TPH would qualify for the 7,500 contract breakpoint for that month.

[9] 15 U.S.C. 78s(b)(3)(C).

[10] 15 U.S.C. 78s(b)(1).

The Commission believes it is appropriate in the public interest to temporarily suspend the proposal to solicit comment on and evaluate further the statutory basis for CBOE's proposal to lower the fee-cap for only certain TPHs, specifically those TPHs that have a qualifying affiliate.

In justifying its proposal, the Exchange stated that the proposal is reasonable because it allows TPHs with a qualifying affiliate to pay lower fees for large customer VIX options transactions.[11] The Exchange also argued that the proposed rule change is equitable[12] and not unfairly discriminatory[13] "because it is intended to incentivize the creation and issuance of securities that are based on or track the performance of VIX futures, which provides more trading opportunities for all market participants."[14] The Exchange further stated that the lower threshold for qualifying TPHs encourages such TPHs to bring more customer VIX options orders to the Exchange[15] and the resulting increased volume and liquidity would benefit all market participants that trade VIX options.[16] The Exchange did not in its filing specifically analyze the burden, if any, of the fee change on competition.[17] For example, if both TPH #1 and TPH #2 bring a 12,000 contract order to CBOE, but only TPH #1 has a qualifying affiliate, CBOE's analysis did not address why it is not unfairly discriminatory or a burden on competition for TPH #1, but not TPH #2, to qualify for the lower discount level.

In temporarily suspending the fee change, the Commission intends to further assess whether the resulting fee-cap disparity between TPHs trading VIX options is consistent with the statutory

[11] *See* Notice, *supra* note 5, at 43880. *See also* Section 6(b)(4) of the Exchange Act, which requires that the rules of a national securities exchange "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities."

[12] *See* Section 6(b)(4) of the Exchange Act, which requires that the rules of a national securities exchange "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities."

[13] *See* Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers."

[14] *See* Notice, *supra* note 5, at 43880.

[15] *See id.*

[16] *See id.*

[17] *See* Section 6(b)(8) of the Exchange Act, which requires that the rules of a national securities exchange "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]." *See also* Item 4 of Form 19b–4 ("Self-Regulatory Organization's Statement on Burden on Competition ("Form 19b–4 Information")). 17 CFR 249.819.

requirements applicable to a national securities exchange under the Exchange Act. In particular, the Commission will assess whether the proposed rule change satisfies the standards under the Exchange Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[18]

Therefore, the Commission finds that it is appropriate in the public interest,[19] for the protection of investors, and otherwise in furtherance of the purposes of the Exchange Act, to temporarily suspend the proposed rule change.

IV. Proceedings to Determine Whether to Approve or Disapprove the CBOE Proposal

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)[20] and 19(b)(2) of the Exchange Act[21] to determine whether the Exchange's proposed rule change should be approved or disapproved. Further, pursuant to Section 19(b)(2)(B) of the Exchange Act,[22] the Commission hereby is providing notice of the grounds for disapproval under consideration. The Commission believes it is appropriate to institute proceedings at this time in view of the significant legal and policy issues raised by the proposal. Institution of proceedings does not indicate, however, that the Commission has reached any conclusions with respect to the issues involved.

As discussed above, pursuant to CBOE's proposal, TPHs that have a qualifying affiliate (i.e., that issues securities valued at $1 billion or greater that are based on or track the performance of VIX futures) pay a lower transaction fee for large VIX customer options orders as compared to TPHs that do not have such an affiliate. The Exchange Act and the rules thereunder require that an exchange's rules, among other things, provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Commission solicits comment on whether the proposal is consistent with these Exchange Act standards and whether CBOE has sufficiently met its burden in presenting a statutory analysis of how its proposal meets these standards.

In particular, the grounds for disapproval under consideration include whether CBOE's proposal is consistent with the following sections of the Exchange Act:

- Section 6(b)(4) of the Exchange Act, which requires that the rules of a national securities exchange "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;"[23]
- Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers;"[24] and
- Section 6(b)(8) of the Exchange Act, which requires that the rules of a national securities exchange "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]."[25]

The Commission intends to assess whether CBOE's proposal is consistent with these and other Exchange Act standards.

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by October 3, 2012. Rebuttal comments should be submitted by October 17, 2012. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[26]

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following:

- As noted above, Section 6(b)(4) of the Exchange Act, requires that the rules of a national securities exchange "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities." The Commission seeks comment on whether it is an equitable allocation of reasonable dues to charge lower transaction fees to TPHs that have a qualifying affiliate for VIX customer options orders as compared to TPHs that do not have such an affiliate;
- Section 6(b)(5) of the Exchange Act requires, among other things, that the rules of a national securities exchange not be "designed to permit unfair discrimination between customers, issuers, brokers or dealers." The Commission seeks comment on whether discrimination on the basis of whether a TPH has an affiliation with an issuer of securities that are based on or track the performance of VIX futures is a "fair" basis for discrimination among its participants with respect to the fees charged by the Exchange for the execution of customer orders in VIX options;
- The Commission seeks comment on whether the filing was sufficient under Section 19(b) of the Exchange Act in addressing issues regarding the basis for discrimination between a TPH with a qualifying affiliate and a TPH that is not so affiliated, and whether the basis for such discrimination is fair, and why or why not;
- Section 6(b)(8) of the Exchange Act requires that the rules of a national

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[18] *See* 15 U.S.C. 78f(b)(4), (5) and (8).

[19] For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[20] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Exchange Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[21] 15 U.S.C. 78s(b)(2).

[22] 15 U.S.C. 782(b)(2)(B). Section 19(b)(2)(B) of the Exchange Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding. *See id.*

[23] 15 U.S.C. 78f(b)(4).

[24] 15 U.S.C. 78f(b)(5).

[25] 15 U.S.C. 78f(b)(8).

[26] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Exchange Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

securities exchange "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]." The Commission seeks comment on whether the filing was sufficient in addressing issues regarding the potential effects of the proposed fee change on competition, and what, if any, impact the proposed fee change might have on competition; and

• Whether the proposed fee change will affect competition in the market for VIX options or the broader market, and if so, how and what type of impact might it have.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, including whether the proposed rule change is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2012–68 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2012–68. The file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 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 publicly available. All submissions should refer to File Number SR–CBOE–2012–68 and should be submitted on or before October 3, 2012. Rebuttal comments should be submitted by October 17, 2012.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Exchange Act,[27] that File No. SR–CBOE–2012–68, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22396 Filed 9–11–12; 8:45 am]

BILLING CODE 8011–01–P

[27] 15 U.S.C. 78s(b)(3)(C).

[28] 17 CFR 200.30–3(a)(57) and (58).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13269 and #13270]

North Carolina Disaster #NC–00044

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of NORTH CAROLINA dated 09/05/2012.

Incident: Severe Storms and Flooding.

Incident Period: 08/25/2012.

Effective Date: 09/05/2012.

Physical Loan Application Deadline Date: 11/05/2012.

Economic Injury (EIDL) Loan Application Deadline Date: 06/05/2013.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: 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: Halifax.

Contiguous Counties: North Carolina: Bertie, Edgecombe, Franklin, Martin, Nash, Northampton, Warren.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	3.375
Homeowners Without Credit Available Elsewhere	1.688
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	3.125
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 13269 6 and for economic injury is 13270 0.

The State which received an EIDL Declaration # is North Carolina.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: September 5, 2012.

Karen G. Mills,

Administrator.

[FR Doc. 2012–22377 Filed 9–11–12; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13271 and #13272]

Louisiana Disaster Number LA–00048

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Louisiana (FEMA—4080—DR), dated 08/31/2012.

Incident: Hurricane Isaac.

Incident Period: 08/26/2012 and continuing.

Effective Date: 09/04/2012.

Physical Loan Application Deadline Date: 10/30/2012.

EIDL Loan Application Deadline Date: 05/29/2013.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Presidential disaster declaration for the State of Louisiana, dated 08/31/2012 is hereby amended to include the following areas as adversely affected by the disaster:

Primary Parishes: (Physical Damage and Economic Injury Loans): Saint Charles.

All Contiguous Parishes have previously been declared.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2012–22374 Filed 9–11–12; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[PUBLIC NOTICE 8020]

Culturally Significant Objects Imported for Exhibition Determinations: "The Body Beautiful in Ancient Greece"

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition "The Body Beautiful in Ancient Greece," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit objects at the Portland Art Museum, Portland, Oregon, from on or about October 6, 2012, until on or about January 6, 2013, the Dallas Museum of Art, Dallas, Texas, from on or about May 5, 2013, until on or about October 6, 2013, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: September 6, 2012.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2012–22445 Filed 9–11–12; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8019]

Culturally Significant Objects Imported for Exhibition Determinations: "Picasso Black and White"

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition "Picasso Black and White," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Solomon R. Guggenheim Museum, New York, New York, from on or about October 5, 2012, until on or about January 23, 2013, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: September 5, 2012.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2012–22447 Filed 9–11–12; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aviation Rulemaking Advisory Committee (ARAC); New Task Assignment for the ARAC: Establishment of Airman Testing Standards and Training Working Group

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice

SUMMARY: The FAA assigned the ARAC a new task arising from recommendations of the Airman Testing Standards and Training Aviation Rulemaking Committee (ARC). The ARC recommended ways to ensure that the FAA's airman testing and training materials better support reduction of fatal general aviation accidents. The new task is to integrate 14 CFR part 61 aeronautical knowledge and flight proficiency requirements for the private pilot and flight instructor certificates and the instrument rating into a single Airman Certification Standards document for each type of certificate and rating; to develop a detailed proposal to realign FAA training handbooks with the Airman Certification Standards documents; and to propose knowledge test item bank questions consistent with the integrated Airman Certification Standards documents and the principles set forth in the ARC's recommendations.

This action item informs the public of the new ARAC's task and solicits membership for the new Airman Testing Standards and Training Working Group (Working Group).

FOR FURTHER INFORMATION CONTACT: Van L. Kerns, Manager, Regulatory Support Division, FAA Flight Standards Service, AFS 600, FAA Mike Monroney Aeronautical Center P.O. Box 25082 Oklahoma City, OK 73125; telephone (405) 954–4431, email *van.l.kerns@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA established ARAC to provide advice and recommendations to the FAA Administrator on the FAA's rulemaking activities. ARAC's objectives are to improve the development of the FAA's regulations by providing information, advice, and recommendations related to aviation issues.

On September 21, 2011, the FAA chartered the ARC for the U.S. aviation community to develop recommendations for more effective training and testing in the areas of aeronautical knowledge and flight proficiency required for safer operation in today's National Airspace System (NAS).

The FAA's charge to the ARC was to help ensure that FAA's technical information related to existing standards for airman knowledge and skill tests, computer testing supplements, knowledge test guides, practical test standards and training handbooks incorporates the most current, relevant, and effective approaches to training and testing. The FAA specifically tasked the ARC with providing recommendations on a process for ongoing stakeholder participation in developing the content of these materials, and methodologies for developing better test item bank questions. The FAA also asked the ARC to develop a prioritized list of certificates and ratings to update.

This new task is the FAA's response to several of the ARC's recommendations. Establishment of the ARAC's Working Group creates a process by which the stakeholders' real world aviation education and training expertise can contribute to the development of materials and methodologies. In accordance with the ARC's recommended certificate and rating priorities, the Working Group will address the private pilot, flight instructor, and instrument rating training and testing materials by developing an integrated Airman Certification Standards document for each one.

By aligning the aeronautical knowledge testing standards required by 14 CFR part 61 with the flight proficiency standards set out in the existing Practical Test Standards (PTS), the integrated Airman Certification Standard will enhance the relevance, reliability, validity, and effectiveness of aeronautical knowledge testing and training materials and thus support the FAA's goal of reducing fatal general aviation accidents. The FAA is also tasking the ARAC's Working Group to develop a detailed proposal to realign and, as appropriate, streamline and consolidate existing FAA guidance material (e.g., handbooks) with each integrated Airman Certification Standards documents; and to propose methodologies to ensure that knowledge test item bank questions are consistent with both the Airman Certification Standards documents and the test question development principles set forth in the ARC's recommendations.

In August 2012, the ARAC's Executive Committee discussed the proposed actions for this tasking. This notice advises the public that the FAA has assigned, and the Executive Committee has accepted, a new task to develop the items listed below. The FAA has specifically tasked the ARAC's Working Group to support the FAA's goal to enhance general aviation safety and reduce the fatal general aviation accident rate by providing:

(1) An integrated Airman Certification Standards document that aligns the aeronautical knowledge testing standards required by 14 CFR part 61 with the flight proficiency standards ("Areas of Operation") set out in 14 CFR part 61 and the existing Practical Test Standards (PTS) for (a) the private pilot and (b) flight instructor certificates and (c) the instrument rating. To accomplish this task, the Working Group should follow the ARC's recommendations to integrate appropriate elements of aeronautical knowledge and risk management into each Area of Operation in the current Practical Test Standards documents.

(2) A recommendation on priorities for revision of additional certificates and ratings, along with ways to ensure expert review of any revisions to these documents.

(3) A detailed proposal to realign and, as appropriate, streamline and consolidate existing FAA guidance material (e.g., the handbooks listed below) with the integrated Airman Certification Standards documents developed in accordance with item (1). The Working Group will also develop and recommend a process for review and revision of these materials.

(4) Proposed knowledge test item bank questions that are consistent with both the newly developed Airman Certification Standards documents and the test question development principles set forth in the ARC's recommendations. The Working Group will also recommend options that provide for expert outside review ("boarding") of proposed questions while safeguarding the integrity of the testing process.

The Working Group is expected to develop a report containing each of the listed elements. Any disagreements should be documented, including the rationale for each position and the reasons for the disagreement.

In developing this report, the Working Group shall familiarize itself with:

1. A Report to the FAA from the Airman Testing Standards and Training Aviation Rulemaking Committee: Recommendations to Enhance Airman Knowledge Test Content and Its Processes and Methodologies for Training and Testing (*www.faa.gov/aircraft/draft_docs/arc*).

2 Aeronautical knowledge standards set forth in 14 CFR part 61, Certification: Pilots, Flight Instructors, and Ground Instructors.

3. Flight proficiency standards set forth in 14 CFR part 61, Certification: Pilots, Flight Instructors, and Ground Instructors.

4. FAA Airman Knowledge Test Guide (FAA–G–8082–17E).

5. Current Practical Test Standards documents for Private Pilot Airplane (FAA–S–8081–14B); Flight Instructor Airplane (FAA–S–8081–6C); and Instrument Rating for Airplane, Helicopter, and Powered Lift (FAA–S–8081–4E).

6. Current FAA guidance materials, to include the Pilot's Handbook of Aeronautical Knowledge (FAA–H–8083–25A); the Airplane Flying Handbook (FAA–H–8083–3A); the Aviation Instructor's Handbook (FAA–H–8083–9A); the Instrument Flying Handbook (FAA–H–8083–15A); and the Instrument Procedures Handbook (FAA–H–8083–1A).

Schedule

The recommendations must be forwarded to the ARAC Executive Committee for review and approval no later than September 30, 2013.

ARAC Acceptance of New Task

The ARAC's Executive Committee has accepted the task and assigned it to the newly-established ARAC Working Group. The Working Group serves as staff to ARAC and assists in the analysis of the assigned new task. ARAC must review and approve the Working Group's recommendations. If ARAC accepts the Working Group's recommendations, it will send them to the FAA in the form of a written report.

Working Group Activity

The Working Group must comply with the procedures adopted by ARAC. As part of the procedures, the Working Group must:

1. Recommend a work plan for completion of the task, including the rationale supporting such a plan, for

consideration at the next ARAC Executive Committee meeting held following publication of this notice.

2. Provide a status report at each meeting of the ARAC Executive Committee.

3. Draft the recommendations report and required analyses and/or any other related materials or documents.

4. Present the final recommendations to the ARAC Executive Committee for review and approval.

Participation in the ARAC Working Group

The Working Group will be comprised of aviation professionals with experience and expertise in airman training and testing, and technical experts having an interest in the assigned new task. The FAA would like a wide range of members to ensure that all aspects of airman testing and training, including best practices, are considered in the development of its recommendations.

If you wish to become a member of the Working Group, please write the person listed under the caption **FOR FURTHER INFORMATION CONTACT** expressing such desire. Describe your interest in the new task and state the expertise you would bring to the Working Group. We must receive all requests by October 2, 2012.

The ARAC Executive Committee and the FAA will review the requests and advise you whether your request is approved.

If you are chosen for membership on the Working Group, you must actively participate by attending all meetings and providing written comments when requested to do so. You must devote the resources necessary to support the Working Group in meeting any assigned deadlines. You must keep your management chain, and those you may represent, advised of the Working Group's activities and decisions to ensure the proposed technical solutions do not conflict with your sponsoring organization's position, when the subject is presented to ARAC for approval. Once the Working Group has begun deliberations, members will not be added or substituted without the approval of the FAA and the Working Group chair.

The Secretary of Transportation determined the formation and use of ARAC is necessary and in the public interest in connection with the performance of duties imposed on the FAA by law. ARAC meetings are open to the public. However, ARAC Working Group's meetings are not open to the public, except to the extent individuals with an interest and expertise are selected to attend. The FAA will make no public announcement of the Working Group's meetings.

Issued in Washington, DC, on September 5, 2012.

Lirio Liu,

Acting Director, Office of Rulemaking.

[FR Doc. 2012–22451 Filed 9–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

60th Meeting: RTCA Special Committee 135, Environmental Conditions and Test Procedures for Airborne Equipment

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

ACTION: Meeting Notice of RTCA Special Committee 135, Environmental Conditions and Test Procedures for Airborne Equipment

SUMMARY: The FAA is issuing this notice to advise the public of the sixtieth meeting of the RTCA Special Committee 135, Environmental Conditions and Test Procedures for Airborne Equipment

DATES: The meeting will be held November 8, 2012 from 9 a.m.—5 p.m.

ADDRESSES: The meeting will be held at FAA Aircraft Certification Office, 2601 Meacham Blvd., Ft. Worth, TX 76137. Foreign Nationals will need to complete a Foreign National Authorization Form. Send a completed form to host/point of contact: Daniele Jordan at the following email address: *Danielle.Jordan@faa.gov.*

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street, NW., Suite 910, Washington, DC, 20036, or by telephone at (202) 330–0652/(202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) (2) of the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of Special Committee 135. The agenda will include the following:

November 8, 2012

- Chairmen's Opening Remarks, Introductions.
- Introduce FAA Representative
- Approval of Summary from the Fifty-Ninth Meeting
- Presentation on the rotorcraft DO–160 environmental qualification of equipment
- Review open proposal's for User's Guide's
- Review Working Group activities
  - Section 4
  - Section 5
  - Section 8
  - Section 16
  - Section 20
  - Section 21
- RTCA Workspace Discussion
- New/Unfinished Business
  - Errata Sheet
  - Schedule for Users Guide
- Establish Date for Next SC–135 Meeting
- Closing/Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on September 7, 2012.

David Sicard,

Manager, Business Operations Group, Federal Aviation Administration.

[FR Doc. 2012–22466 Filed 9–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Ninth Meeting: RTCA Special Committee 225, Rechargeable Lithium Battery and Battery Systems—Small and Medium Size

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

ACTION: Meeting Notice of RTCA Special Committee 225, Rechargeable Lithium Battery and Battery Systems—Small and Medium Size.

SUMMARY: The FAA is issuing this notice to advise the public of the ninth meeting of the RTCA Special Committee 225, Rechargeable Lithium Battery and Battery Systems—Small and Medium Size.

DATES: The meeting will be held October 9–11, 2012, from 9 a.m.–5 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1150 18th Street NW., Suite 910, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 330–0652/(202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) (2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of Special Committee 225. The agenda will include the following:

Tuesday, October 9, 2012

- Introductions and administrative items.
- Review agenda.
- Review and approval of summary from last plenary meeting.
- Review schedule for upcoming Plenaries, working group meetings, and document preparation.
- Review action items.
- Working Group Meeting—Review draft document.

Wednesday, October 10, 2012

- Review agenda, other actions.
- Working Group Meeting—Review draft document.

Thursday, October 11, 2012

- Review agenda, other actions.
- Verify dates of next plenary and upcoming working group meetings.
- Establish Agenda for next plenary meeting.
- Working Group Meeting—Review draft document.
- Working Group report, review progress and actions.
- Review new action items
- Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on September 6, 2012.

David Sicard,

Manager, Business Operations Group, Federal Aviation Administration.

[FR Doc. 2012–22462 Filed 9–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

89th Meeting: RTCA Special Committee 159, Global Positioning Systems (GPS)

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

ACTION: Meeting Notice of RTCA Special Committee 159, RTCA Special Committee 159, Global Positioning Systems (GPS).

SUMMARY: The FAA is issuing this notice to advise the public of the eighty-ninth meeting of the RTCA Special Committee 159, Global Positioning Systems (GPS).

DATES: The meeting will be held October 5, 2012 from 9 a.m.—4:30 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1150 18th Street NW., Suite 910, Washington, DC, 20036.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC, 20036, or by telephone at (202) 330–0652/(202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) (2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of Special Committee 159. The agenda will include the following:

October 5, 2012

- Chairman's Introductory Remarks.
- Approval of Summary of the Eighty-Eighth Meeting held March 16, 2012.
- Review Working Group (WG) Progress and Identify Issues for Resolution.
  - GPS/3nd Civil Frequency (WG–1)
  - GPS/WAAS (WG–2)
  - GPS/GLONASS (WG–2A)
  - GPS/Inertial (WG–2C)
  - GPS/Precision Landing Guidance (WG- 4)
  - GPS/Airport Surface Surveillance (WG–5)
  - GPS/Interference (WG–6)
  - GPS/Antennas (WG–7)
- Review of EUROCAE Activities
- Review/Approval of Change 1 to DO–229D—*Minimum Operational Performance Standards for Global Positioning System/Wide Area Augmentation System Airborne Equipment*
- Assignment/Review of Future Work.
- Other Business.
- Date and Place of Next Meeting.
- Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on September 6, 2012.

David Sicard,

Manager, Business Operations Group, Federal Aviation Administration.

[FR Doc. 2012–22458 Filed 9–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Twentieth Meeting: RTCA Special Committee 213, Enhanced Flight Vision Systems/Synthetic Vision Systems (EFVS/SVS)

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

ACTION: Meeting Notice of RTCA Special Committee 213, Enhanced Flight Vision Systems/Synthetic Vision Systems (EFVS/SVS).

SUMMARY: The FAA is issuing this notice to advise the public of the twentieth meeting of the RTCA Special Committee 213, Enhanced Flight Vision Systems/ Synthetic Vision Systems (EFVS/SVS).

DATES: The meeting will be held October 2–4, 2012 from 9 a.m.–5 p.m.

ADDRESSES: The meeting will be held at the following facilities at Jetcraft Corporation, CH–4030 Basel-Airport, Basel, Switzerland, +41 58 158 4958 (Phone), +41 58 158 4988 (Fax), Web Site: *www.jetcraft.com.*

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street, NW., Suite 910, Washington, DC, 20036, or by telephone at (202) 330–0652/(202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.* Additional contact information: Please contact Tim Etherington, *tjetheri@rockwellcollins.com,* telephone (319) 295–5233 or mobile at (319) 431–7154, to register for the meeting.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) (2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of Special Committee 213. The agenda will include the following:

Tuesday, October 2, 2012

Plenary Discussion (sign in at 9:00 a.m.)

- Introductions and administrative items.
- Review and approve minutes from last full plenary meeting.
- Review of terms of reference.
- Status of DO–XXX.
- WG–1 DO–315C draft review.

Wednesday, October 3, 2012

Plenary Discussion

- WG–1 DO–315C draft review.
- WG–2 objectives and overview.

Thursday, October 4, 2012

Plenary Discussion

- WG–1 DO–315C draft review.
- Administrative items.
- Adjourn.

Attendance is open to the interested public but limited to space availability With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on September 6, 2012

David Sicard,

Manager, Business Operations Group, Federal Aviation Administration.

[FR Doc. 2012–22460 Filed 9–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No FMCSA–2011–0097]

Pilot Program on NAFTA Trucking Provisions

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

ACTION: Notice; request for public comment.

SUMMARY: FMCSA announces and requests public comment on data and information concerning the Pre-Authorization Safety Audit (PASA) for Transportes Monteblanco SA de CV which applied to participate in the Agency's long-haul pilot program to test and demonstrate the ability of Mexico-domiciled motor carriers to operate safely in the United States beyond the municipalities on the international border or the commercial zones of such municipalities. This action is required by the "U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007" and all subsequent appropriations.

DATES: Comments must be received on or before September 24, 2012.

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA–2011–0097 by any one of the following methods: *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility, (M–30), U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., West Building, Ground Floor, Room 12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Same as mail address above, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. All submissions must include the Agency name and docket number for this notice. See the "Public Participation" heading below for instructions on submitting comments and additional information.

Note that all comments received, including any personal information provided, will be posted without change to *http://www.regulations.gov.* Please see the "Privacy Act" heading below.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to Room W12–140 on the ground floor of the DOT Headquarters Building at 1200 New Jersey Avenue SE., Washington, DC, 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act System of Records Notice for the DOT Federal Docket Management System published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8–785.pdf.*

Public Participation: The *http://www.regulations.gov* Web site is generally available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the "help" section of the *http://www.regulations.gov* Web site. Comments received after the comment closing date will be included in the docket, and will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Marcelo Perez, FMCSA, North American Borders Division, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Telephone (512) 916–5440 Ext. 228; email *marcelo.perez@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

On May 25, 2007, the President signed into law the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (the Act), (Pub. L. 110–28, 121 Stat. 112, 183, May 25, 2007). Section 6901 of the Act requires that certain actions be taken by the Department of Transportation (the Department) as a condition of obligating or expending appropriated funds to grant authority to Mexico-domiciled motor carriers to operate beyond the municipalities in the United States on the United States-Mexico international border or the commercial zones of such municipalities (border commercial zones).

On July 8, 2011, FMCSA announced in the **Federal Register** [76 FR 40420] its intent to proceed with the initiation of a U.S.-Mexico cross-border long-haul trucking pilot program to test and demonstrate the ability of Mexico-domiciled motor carriers to operate safely in the United States beyond the border commercial zones as detailed in the Agency's April 13, 2011, **Federal Register** notice [76 FR 20807]. The pilot program is a part of FMCSA's implementation of the North American Free Trade Agreement (NAFTA) cross-border long-haul trucking provisions in compliance with section 6901(b)(2)(B) of the Act. FMCSA reviewed, assessed, and evaluated the required safety measures as noted in the July 8, 2011, notice and considered all comments received on or before May 13, 2011, in response to the April 13, 2011, notice. Additionally, to the extent practicable, FMCSA considered comments received after May 13, 2011.

In accordance with section 6901(b)(2)(B)(i) of the Act, FMCSA is required to publish in the **Federal Register**, and provide sufficient opportunity for public notice and comment, comprehensive data and information on the PASAs of motor carriers domiciled in Mexico that are granted authority to operate beyond the border commercial zones. This notice fulfills that requirement.

FMCSA is publishing for public comment the data and information relating to one PASA that was completed on June 17, 2012. FMCSA announces that the Mexico-domiciled motor carrier in Table 1 successfully completed the PASA. Notice of this completion was also published in the FMCSA Register.

Tables 2, 3 and 4 all titled ("Successful Pre-Authorization Safety Audit (PASA) Information") set out additional information on the carrier(s) noted in Table 1. A narrative description of each column in the tables is provided as follows:

A. *Row Number in the Appendix for the Specific Carrier:* The row number for each line in the tables.

B. *Name of Carrier:* The legal name of the Mexico-domiciled motor carrier that applied for authority to operate in the United States (U.S.) beyond the border commercial zones and was considered for participation in the long-haul pilot program.

C. *U.S. DOT Number:* The identification number assigned to the Mexico-domiciled motor carrier and required to be displayed on each side of the motor carrier's power units. If granted provisional operating authority, the Mexico-domiciled motor carrier will be required to add the suffix "X" to the ending of its assigned U.S. DOT Number for those vehicles approved to participate in the pilot program.

D. *FMCSA Register Number:* The number assigned to the Mexico-domiciled motor carrier's operating authority as found in the FMCSA Register.

E. *PASA Initiated:* The date the PASA was initiated.

F. *PASA Completed:* The date the PASA was completed.

G. *PASA Results:* The results upon completion of the PASA. The PASA receives a quality assurance review before approval. The quality assurance process involves a dual review by the FMCSA Division Office supervisor of the auditor assigned to conduct the PASA and by the FMCSA Service Center New Entrant Specialist designated for the specific FMCSA Division Office. This dual review ensures the successfully completed PASA was conducted in accordance with FMCSA policy, procedures and guidance. Upon approval, the PASA results are uploaded into the FMCSA's Motor Carrier Management Information System (MCMIS). The PASA information and results are then recorded in the Mexico-domiciled motor carrier's safety performance record in MCMIS.

H. *FMCSA Register:* The date FMCSA published notice of a successfully completed PASA in the FMCSA Register. The FMCSA Register notice advises interested parties that the application has been preliminarily granted and that protests to the application must be filed within 10 days of the publication date. Protests are filed with FMCSA Headquarters in Washington, DC. The notice in the FMCSA Register lists the following information:

a. Current registration number (e.g., MX–123456);

b. Date the notice was published in the FMCSA Register;

c. The applicant's name and address; and

d. Representative or contact information for the applicant.

The FMCSA Register may be accessed through FMCSA's Licensing and Insurance public Web site at *http://li-public.fmcsa.dot.gov/*, and selecting FMCSA Register in the drop down menu.

I. *U.S. Drivers:* The total number of the motor carrier's drivers approved for long-haul transportation in the United States beyond the border commercial zones.

J. *U.S. Vehicles:* The total number of the motor carrier's power units approved for long-haul transportation in the United States beyond the border commercial zones.

K. *Passed Verification of 5 Elements (Yes/No):* A Mexico-domiciled motor carrier will not be granted provisional operating authority if FMCSA cannot verify all of the following five mandatory elements. FMCSA must:

a. Verify a controlled substances and alcohol testing program consistent with 49 CFR part 40.

b. Verify a system of compliance with hours-of-service rules of 49 CFR part 395, including recordkeeping and retention;

c. Verify the ability to obtain financial responsibility as required by 49 CFR 387, including the ability to obtain insurance in the United States;

d. Verify records of periodic vehicle inspections; and

e. Verify the qualifications of each driver the carrier intends to use under such authority, as required by 49 CFR parts 383 and 391, including confirming the validity of each driver's Licencia Federal de Conductor and English language proficiency.

L. *If No, Which Element Failed:* If FMCSA cannot verify one or more of the five mandatory elements outlined in 49 CFR part 365, Appendix A, Section III, this column will specify which mandatory element(s) cannot be verified.

Please note that for items L through P below, during the PASA, after verifying the five mandatory elements discussed in item K above, FMCSA will gather information by reviewing a motor carrier's compliance with "acute and critical" regulations of the Federal Motor Carrier Safety Regulations (FMCSRs) and Hazardous Materials Regulations (HMRs). Acute regulations are those where noncompliance is so severe as to require immediate corrective actions by a motor carrier regardless of the overall basic safety management controls of the motor carrier. Critical regulations are those where noncompliance relates to management and/or operational controls. These regulations are indicative of breakdowns in a carrier's management controls. A list of acute and critical regulations is included in 49 CFR part 385, Appendix B, Section VII.

Parts of the FMCSRs and HMRs having similar characteristics are combined together into six regulatory areas called "factors." The regulatory factors are intended to evaluate the adequacy of a carrier's management controls.

M. *Passed Phase 1, Factor 1:* A "yes" in this column indicates the carrier has successfully met Factor 1 (listed in part 365, Subpart E, Appendix A, Section IV(f)). Factor 1 includes the General Requirements outlined in parts 387 (Minimum Levels of Financial Responsibility for Motor Carriers) and 390 (Federal Motor Carrier Safety Regulations—General).

N. *Passed Phase 1, Factor 2:* A "yes" in this column indicates the carrier has successfully met Factor 2, which includes the Driver Requirements outlined in parts 382 (Controlled Substances and Alcohol Use and Testing), 383 (Commercial Driver's License Standards; Requirements and Penalties) and 391 (Qualifications of Drivers and Longer Combination Vehicle (LCV) Driver Instructors).

O. *Passed Phase 1, Factor 3:* A "yes" in this column indicates the carrier has successfully met Factor 3, which includes the Operational Requirements outlined in parts 392 (Driving of Commercial Motor Vehicles) and 395 (Hours of Service of Drivers).

P. *Passed Phase 1, Factor 4:* A "yes" in this column indicates the carrier has successfully met Factor 4, which includes the Vehicle Requirements outlined in parts 393 (Parts and Accessories Necessary for Safe Operation) and 396 (Inspection, Repair and Maintenance) and vehicle inspection and out-of-service data for the last 12 months.

Q. *Passed Phase 1, Factor 5:* A "yes" in this column indicates the carrier has successfully met Factor 5, which includes the hazardous material requirements outlined in parts 171 (General Information, Regulations, and Definitions), 177 (Carriage by Public Highway), 180 (Continuing Qualification and Maintenance of

Packagings) and 397 (Transportation of Hazardous Materials; Driving and Parking Rules).

R. *Passed Phase 1, Factor 6:* A "yes" in this column indicates the carrier has successfully met Factor 6, which includes Accident History. This factor is the recordable accident rate during the past 12 months. A recordable "accident" is defined in 49 CFR 390.5, and means an accident involving a commercial motor vehicle operating on a public road in interstate or intrastate commerce which results in a fatality; a bodily injury to a person who, as a result of the injury, immediately received medical treatment away from the scene of the accident; or one or more motor vehicles incurring disabling damage as a result of the accident requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

S. *Number U.S. Vehicles Inspected:* The total number of vehicles (power units) the motor carrier is approved to operate in the United States beyond the border commercial zones that received a vehicle inspection during the PASA. During a PASA, FMCSA inspected all power units to be used by the motor carrier in the pilot program and applied a current Commercial Vehicle Safety Alliance (CVSA) inspection decal, if the inspection is passed successfully. This number reflects the vehicles that were inspected, irrespective of whether the vehicle received a CVSA inspection at the time of the PASA decal as a result of a passed inspection.

T. *Number U.S. Vehicles Issued CVSA Decal:* The total number of inspected vehicles (power units) the motor carrier is approved to operate in the United States beyond the border commercial zones that received a CVSA inspection decal as a result of an inspection during the PASA.

U. *Controlled Substances Collection:* Refers to the applicability and/or country of origin of the controlled substance and alcohol collection facility that will be used by a motor carrier that has successfully completed the PASA.

a. "US" means the controlled substance and alcohol collection facility is based in the United States.

b. "MX" means the controlled substance and alcohol collection facility is based in Mexico.

c. "Non-CDL" means that during the PASA, FMCSA verified that the motor carrier is not utilizing commercial motor vehicles subject to the commercial driver's license requirements as defined in 49 CFR 383.5 (Definition of Commercial Motor Vehicle). Any motor carrier that does not operate commercial motor vehicles as defined in § 383.5 is not subject to DOT controlled substance and alcohol testing requirements.

V. *Name of Controlled Substances and Alcohol Collection Facility:* Shows the name and location of the controlled substances and alcohol collection facility that will be used by a Mexico-domiciled motor carrier who has successfully completed the PASA.

TABLE 1

Row number in Tables 2, 3 and 4 of the Appendix to today's notice	Name of carrier	USDOT No.
1	Transportes Monteblanco SA de CV.	1059694

TABLE 2—SUCCESSFUL PRE-AUTHORIZATION SAFETY AUDIT (PASA) INFORMATION

[See also Tables 3 and 4]

Column A—Row number	Column B—Name of Carrier	Column C—US DOT number	Column D—FMCSA register number	Column E—PASA initiated	Column F—PASA completed	Column G—PASA results	Column H—FMCSA register	Column I—US drivers	Column J—US vehicles
1	Transportes Monteblanco SA de CV.	1059694	MX–443410	5/8/12	6/7/12	Pass	8/31/12	4	2

TABLE 3—SUCCESSFUL PRE-AUTHORIZATION SAFETY AUDIT (PASA) INFORMATION

[See also Tables 2 and 4]

Column A—Row number	Column B—Name of carrier	Column C—US DOT number	Column D—FMCSA register number	Column K—Passed verification of 5 elements (yes/no)	Column L—If no, which element failed	Column M—Passed phase 1 factor 1	Column N—Passed phase 1 factor 2	Column O—Passed phase 1 factor 3	Column P—Passed phase 1 factor 4
1	Transportes Monteblanco SA de CV	1059694	MX–443410	Yes	None	Pass	Pass	Pass	Pass

TABLE 4—SUCCESSFUL PRE-AUTHORIZATION SAFETY AUDIT (PASA) INFORMATION AS OF SEPTEMBER 9, 2011

[See also Tables 2 and 3]

Column A—Row number	Column B—Name of carrier	Column C—US DOT number	Column D—FMCSA register number	Column Q—Passed phase I factor 5	Column R—Passed phase I factor 6	Column S—Number US vehicles inspected	Column T—Number US vehicles issued cvsa decal	Column U—Controlled substance collection	Column V—Name of controlled substances and alcohol collection facility
1	Transportes Monteblanco SA de CV	1059694	MX–443410	N/A	Pass	2	2	US	Laredo Examiners, Inc.

In an effort to provide as much information as possible for review, the application and PASA results for this carrier are posted at the Agency's Web site for the pilot program at *http://www.fmcsa.dot.gov/intl-programs/trucking/Trucking-Program.aspx*. For carriers that participated in the Agency's demonstration project that

ended in 2009, copies of the previous PASA and compliance review, if conducted, are also posted. All documents were redacted so that personal information regarding the drivers is not released. Sensitive business information, such as the carrier's tax identification number, is also redacted. In response to previous comments received regarding the PASA notice process, FMCSA also posted copies of the vehicle inspections conducted during the PASA in the PASA document.

A list of the carrier's vehicles approved by FMCSA for use in the pilot program is also available at the above referenced Web site.

The Agency acknowledges that through the PASA process it determined that Transportes Monteblanco SA de CV has affiliations with additional companies. An attachment to the PASA provides information regarding these affiliations. During the carrier vetting and PASA process, FMCSA reviewed its records related to the affiliates, and confirmed that the companies are U.S.-domiciled motor carriers registered with FMCSA.

FMCSA notes that Transportes Monteblanco SA de CV is affiliated with two companies: Transportes Monteblanco (US DOT number 1871386, an interstate motor carrier) and MG Alimentos Inc. (US DOT number 1442274, an intrastate motor carrier). While this information was not reflected on the carrier's application, it was noted during the Agency's vetting and documented during the PASA. Additionally, the Agency is aware that the operating authority associated with Transportes Monteblanco (US DOT number 1871386) was revoked on April 18, 2012, as a result of a lapse of insurance. The Agency notes that this carrier has been inspected three times since this date, but has not been cited for operating without authority. The Agency confirmed that the reason for this is that the carrier was transporting exempt commodities which do not require operating authority. The carrier filed evidence of insurance on April 26, 2012 and submitted the required reinstatement fee. FMCSA reinstated Transportes Monteblanco's (USDOT number 1871386) operating authority effective July 23, 2012, and it may now transport non-exempt commodities. FMCSA is aware that one of the affiliated companies, Transportes Monteblanco (USDOT number 1871386), an enterprise carrier, has a Safety Measurement System (SMS) alert in the fatigued driving (hours of service) Behavior Analysis and Safety Improvement Category (BASIC). While this is a matter of concern with respect to the safety performance of that carrier, the Agency has confirmed that Transportes Monteblanco SA de CV (USDOT number 1059694) was created to fulfill a separate business need and not to evade or conceal a negative safety performance history of the affiliated motor carriers. The Agency will continue monitoring the safety of the affiliated interstate motor carrier through SMS and will take action directly on the carrier, if appropriate.

Therefore, we will not apply the SMS scores of the affiliated carriers to Transportes Monteblanco SA de CV when considering whether Transportes Monteblanco SA de CV has demonstrated that it is willing and able to comply with the safety regulations. The Agency reiterates that during the PASA, we determined that Transportes Monteblanco SA de CV has the systems in place to comply with the FMCSRs, including U.S. hours-of-service regulations.

Lastly, it is noted that Transportes Monteblanco SA de CV currently has a 100 percent Driver out of service rate as a commercial zone carrier. This is based on the only two inspections completed within the preceding 24 months. Both inspections were conducted by FMCSA staff members on May 10, 2012 to verify the compliance of the vehicles and the drivers proposed to participate in the pilot program. During these inspections, the drivers were cited for failing to communicate in English. However, these drivers proposed for participation in the pilot program were retested for English language proficiency on May 31, 2012, and passed that evaluation.

To date, no carriers have failed the PASA. The Act requires publication of data of only those carriers receiving operating authority, as failure to successfully complete the PASA precludes the carrier from being granted authority to participate in the long-haul pilot program. FMCSA will publish this information to show motor carriers that failed to meet U.S. safety standards.

Request for Comments

In accordance with the Act, FMCSA requests public comment from all interested persons on the PASA information presented in this notice. All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable. In addition to late comments, the FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

FMCSA notes that under its regulations, preliminary grants of authority, pending the carrier's showing of compliance with insurance and process agent requirements and the resolution of any protests, are publically noticed through publication in the FMCSA Register. Any protests of such grants must be filed within 10 days of publication of notice in the FMCSA Register.

Issued on: September 5, 2012.

Anne S. Ferro,

Administrator.

[FR Doc. 2012–22457 Filed 9–11–12; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0219]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice of applications for exemption from the diabetes mellitus requirement; request for comments.

SUMMARY: FMCSA announces receipt of applications from 14 individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before October 12, 2012.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2012–0219 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

• *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

• *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8–785.pdf.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption." The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 14 individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b) (3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statutes.

Qualifications of Applicants

Edward K. Belcher

Mr. Belcher, age 52, has had ITDM since 2008. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Belcher understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Belcher meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he has stable nonproliferative diabetic retinopathy. He holds an operator's license from Kentucky.

Philip C. Brooks, Jr.

Mr. Brooks, 41, has had ITDM since 2010. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Brooks understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Brooks meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds an operator's license from Virginia.

Michael R. Conley

Mr. Conley, 51, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Conley understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Conley meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

Patrick J. Connors

Mr. Connors, 58, has had ITDM since 2010. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Connors understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Connors meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Massachusetts.

John C. Halabura

Mr. Halabura, 58, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Halabura understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Halabura meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Paul L. Harrison III

Mr. Harrison, 65, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no

severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Harrison understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Harrison meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New York.

Daniel T. Kelly

Mr. Kelly, 69, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Kelly understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Kelly meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New York.

Timothy L. Leavelle, Sr.

Mr. Leavelle, 54, has had ITDM since 2001. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Leavelle understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Leavelle meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class M operator's license from Virginia.

Robert D. Marshall

Mr. Marshall, 66, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Marshall understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Marshall meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Pennsylvania.

John W. Martinson

Mr. Martinson, 69, has had ITDM since 2010. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Martinson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Martinson meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from North Dakota.

William Z. Polk

Mr. Polk, 26, has had ITDM since 2010. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Polk understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Polk meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Georgia.

Thomas E. Swayne

Mr. Swayne, 58, has had ITDM since 2006. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Swayne understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Swayne meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Kansas.

Anthony Williams

Mr. Williams, 49, has had ITDM since 1984. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Williams understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Williams meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from New Jersey.

Mark S. Wilt

Mr. Wilt, 56, has had ITDM since 2009. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Wilt understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Wilt meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have

diabetic retinopathy. He holds a Class E operator's license from West Virginia.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441).[1] The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 USC. 31136 (e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary.

The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

[1] Section 4129(a) refers to the 2003 notice as a "final rule." However, the 2003 notice did not issue a "final rule" but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

Issued on: August 27, 2012.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2012–22463 Filed 9–11–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0216]

Qualification of Drivers; Exemption Applications; Vision

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

ACTION: Notice of applications for exemptions; request for comments.

SUMMARY: FMCSA announces receipt of applications from 7 individuals for exemption from the vision requirement in the Federal Motor Carrier Safety Regulations. They are unable to meet the vision requirement in one eye for various reasons. The exemptions will enable these individuals to operate commercial motor vehicles (CMVs) in interstate commerce without meeting the prescribed vision requirement in one eye. If granted, the exemptions would enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce.

DATES: Comments must be received on or before October 12, 2012.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2012–0216 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8–785.pdf*.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption." FMCSA can renew exemptions at the end of each 2-year period. The 7 individuals listed in this notice have each requested such an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting an exemption will achieve the required level of safety mandated by statute.

Qualifications of Applicants

Donald L. Blakeley II

Mr. Blakeley, age 60, has had loss of vision in his left eye due to a traumatic incidence that occured in 1990. The best corrected visual acuity in his right eye

is 20/15, and in his left eye, 20/200. Following an examination in 2012, his ophthalmologist noted, "I certify in my opinion, which includes your twenty years experience with this condition, that you have sufficient vision to perform the driving tasks required to operate a commercial vehicle." Mr. Blakeley reported that he has driven straight trucks for 44 years, accumulating 528,000 miles, and tractor-trailer combinations for 35 years, accumulating 420,000 miles. He holds a Class A Commercial Driver's License (CDL) from Nevada. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Paul M. Griffey

Mr. Griffey, 59, has loss of vision in his left eye due to retinal necrosis sustained in 1996. The best corrected visual acuity in his right eye is 20/25, and in his left eye, light perception only. Following an examination in 2012, his ophthalmologist noted, "He has been operating a commercial vehicle with this level of vision for that period of time and it is my feeling that he has the ability to continue to operate a commercial vehicle." Mr. Griffey reported that he has driven straight trucks for 2 years, accumulating 300,000 miles, and tractor-trailer combinations for 38 years, accumulating 6.1 million miles. He holds a Class A CDL from Missouri. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Roger S. Hardin

Mr. Hardin, 41, has had amblyopia in his right eye since childhood. The best corrected visual acuity in his right eye is 20/60, and in his left eye, 20/20. Following an examination in 2012, his optometrist noted, "It is my professional opinion that Mr. Hardin has sufficient vision to perform the driving tasks required to operate a commercial vehicle." Mr. Hardin reported that he has driven tractor-trailer combinations for 15 years, accumulating 1.9 million miles. He holds a Class D operator's license from Alabama. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Stephen J. Hodge

Mr. Hodge, 53, has had corneal scarring in his right eye since childhood. The best corrected visual acuity in his right eye is 20/200, and in his left eye, 20/20. Following an examination in 2012, his optometrist noted, "Therefore, Mr. Hodge does have sufficient field of vision to perform the driving tasks required to operate a vehicle, personal or commercial." Mr. Hodge reported that he has driven straight trucks for 20 years, accumulating 600,000 miles. He holds a Class C operator's license from Maine. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Matthew J. Mantooth

Mr. Mantooth, 44, has had fibrotic scarring due to toxoplasmosis in his right eye since childhood. The visual acuity in his right eye is no light perception, and in his left eye, 20/20. Following an examination in 2012, his optometrist noted, "Patient's vision is medically sufficient to perform the driving tasks required to operate a commercial vehicle." Mr. Mantooth reported that he has driven straight trucks for 24 years, accumulating 624,000 miles, and tractor-trailer combinations for 6 months, accumulating 10,500 miles. He holds a Class D CDL from Kentucky. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

James J. Monticello

Mr. Monticello, 48, has a traumatic ruptured globe in his right eye due to an accident sustained in 2008. The visual acuity in his right eye is light perception only, and in his left eye, 20/20. Following an examination in 2012, his ophthalmologist noted, "Based on the requirements listed here, with 20/20 vision and a full field of at least 160° in his left eye combined with his past experience, I feel he has sufficient vision to operate a commercial vehicle." Mr. Monticello reported that he has driven straight trucks for 5½ years, accumulating 247,500 miles, and tractor-trailer combinations for 3½ years, accumulating 332,500 miles. He holds a Class A CDL from Indiana. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Michael J. Wells

Mr. Wells, 56, has had refractive amblyopia in his right eye since childhood. The best corrected visual acuity in his right eye is hand motion vision, and in his left eye, 20/20. Following an examination in 2012, his optometrist noted, "It is my professional opinion that Michael's vision is satisfactory for him to hold a commercial driver's license and drive safely." Mr. Wells reported that he has driven straight trucks for 40 years, accumulating 880,000 miles, and tractor-trailer combinations for 20 years, accumulating 240,000 miles. He holds a Class A CDL from North Carolina. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. The Agency will consider all comments received before the close of business October 12, 2012. Comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. The Agency will file comments received after the comment closing date in the public docket, and will consider them to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should monitor the public docket for new material.

Issued on: September 4, 2012.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2012–22461 Filed 9–11–12; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2004–17195; FMCSA–2008–0106; FMCSA–2010–0161]

Qualification of Drivers; Exemption Applications; Vision

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

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 14 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective October 6, 2012. Comments must be received on or before October 12, 2012.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No. FMCSA–2004–17195; FMCSA–2008–0106; FMCSA–2010–0161, using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov*, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf*.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, 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 that would be achieved absent such exemption." The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 14 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 14 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Ramon Adame (IL)
Calvin D. Bills (VA)
Joel W. Bryant (LA)
Jonathan E. Carriaga (NM)
Curtis E. Firari (WI)
Percy L. Gaston (TX)
Ronald M. Green (OH)
Charles S. Huffman (KS)
Richard Iocolano (NY)
Daniel W. Johnson (NY)
Charles R. Murphy (TX)
Danny W. Nuckles (VA)
Charles E. Queen (OH)
Matias P. Quintanilla (CA)

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 14 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (69 FR 17263; 69 FR 31447; 71 FR 27033; 73 FR 35194; 73 FR 36954; 73 FR 48273; 75 FR 38602; 75 FR 39725; 75 FR 44050; 75 FR 61833). Each of these 14 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by October 12, 2012.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed,

subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 14 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: August, 27, 2012.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2012–22459 Filed 9–11–12; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2012 0089]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel TREE OF LIFE; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before October 12, 2012.

ADDRESSES: Comments should refer to docket number MARAD–2012–0089. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel TREE OF LIFE is:

Intended Commercial Use of Vessel: "Passenger carrying charter vessel."

Geographic Region: Rhode Island, Massachusetts, New Hampshire, Maine, Connecticut, New York, Georgia, North Carolina, South Carolina, Florida, California.

The complete application is given in DOT docket MARAD–2012–0089 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: September 7, 2012.

By Order of the Maritime Administrator.

Christine Gurland,

Acting Secretary, Maritime Administration.

[FR Doc. 2012–22473 Filed 9–11–12; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2012 0090]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel HAPPY ENDINGS; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before October 12, 2012.

ADDRESSES: Comments should refer to docket number MARAD–2012–0090. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–

366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel HAPPY ENDINGS is:

Intended Commercial Use of Vessel: "Sunset, day and overnight captained charters."

Geographic Region: "Florida."

The complete application is given in DOT docket MARAD–2012–0090 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: September 7, 2012.

Christine Gurland,

Acting Secretary, Maritime Administration.

[FR Doc. 2012–22472 Filed 9–11–12; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration (NHTSA)

[Docket No. NHTSA–2012–0046]

Proposed Information Collection Submitted to the Office of Management and Budget (OMB); Request for Comments

ACTION: Notice and request for comment.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), this notice announces that the Information Collection Request (ICR) abstracted below is being submitted to the Office of Management and Budget (OMB) for review. The ICR describes the nature of the information collection and its expected burden. A **Federal Register** notice with a 60-day comment period soliciting comments on the following information collection was published on April 30, 2012 (77 FR 25533).

DATES: Send comments on or before October 12, 2012.

ADDRESSES: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: NHTSA Desk Officer.

Comments are invited on the following:

i. Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;

ii. The accuracy of the Department's estimate of the burden of the proposed information collection;

iii. Ways to enhance the quality, utility and clarity of the information to be collected; and

iv. Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Gayle Dalrymple (NVS–123), U.S. Department of Transportation, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone (202) 366–5559. Email address: *gayle.dalrymple@dot.gov.*

For access to the docket to read background documents, go to *http://www.regulations.gov* or the street address listed above. Follow the online instructions for accessing the dockets.

SUPPLEMENTARY INFORMATION:

Title: Recruitment of human subjects for observational experiments regarding keyless ignition controls, gear selection controls and audible warnings.

OMB Control Number: Not assigned.

Type of Request: New Information Collection.

Abstract: Pursuant to 49 U.S.C. Section 30111(a), the National Highway Traffic Safety Administration (NHTSA) (by delegation from the Secretary of Transportation) is directed to prescribe Federal motor vehicle safety standards (FMVSSs). Human factors observational experiments are proposed to support the current agency regulatory efforts that contemplate revising FMVSS No. 114 (Docket No. NHTSA–2011–0174 RIN 2127–AK88).

The first experiment will examine factors contributing to driver errors in the use of keyless ignition and gear selection controls using a driving simulator (simulator experiment), and the second experiment will evaluate the lack of effectiveness in current audible warnings designed to prevent rollaways related to leaving propulsion systems operative when the driver leaves the vehicle (rollaway warning experiment). The simulator experiment will be conducted in a laboratory setting and participants will be recruited through email. The rollaway warning experiment will be conducted in a public parking lot using face-to-face recruitment of participants.

Before these experiments are conducted, information about the participants will be collected in order to balance the participants between younger and older age groups, genders, and previous driving experience with keyless ignition. The Massachusetts Institute of Technology Age Lab (Age Lab), under contract with the Volpe National Transportation Systems Center (Volpe Center), which is an element of the U.S. Department of Transportation (U.S. DOT), Research and Innovative Technology Administration (RITA), would collect the participant information and conduct this research under an Inter-Agency Agreement (IAA) between Volpe Center and NHTSA.

Affected Public: Participants for the simulator experiment will be selected from a list of individuals in the Boston area who have indicated to the Age Lab that they would like to participate in these types of experiments. Participants for the rollaway warning experiment will be drawn from passers-by.

All participants, regardless of which experiment they participate in, will be asked the same recruiting questions.

Number of Respondents: 375 respondents, including 135 for the simulator experiment and 240 for the rollaway experiment.

Number of Responses: One response per respondent for a total of 375 responses.

Total Annual Burden Hours: 18.75 hours. This estimate is based on three minutes per respondent to consider and respond to the 9 to 11 recruitment questions (375 participants × 0.05 hours (i.e., 3 minutes)).

Frequency of Collection: One time.

On April 30, 2012, NHTSA published a notice announcing the proposed collection of information and providing a 60-day comment period (77 FR 25533). The agency received one comment from

the Alliance of Automobile Manufacturers (Alliance). The Alliance offered detailed comments on the collection of information and the associated experiments. An extensive discussion of the Alliance comments and the changes NHTSA has made to the information collection and ICR package as a result can be found in the supporting statement that will be placed in the docket for this notice.

Christopher J. Bonanti,

Associate Administratar far Rulemaking.

[FR Doc. 2012–22477 Filed 9–11–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35522][1]

CSX Transportation, Inc.—Acquisition of Operating Easement—Grand Trunk Western Railroad Company

AGENCY: Surface Transportation Board, DOT.

ACTION: Decision No. 2; Notice of Acceptance of Primary Application and Related Filings; Issuance of Procedural Schedule.

SUMMARY: CSX Transportation, Inc. (CSXT) and Grand Trunk Western Railroad Company (GTW) have agreed to exchange perpetual rail operating easements over certain parts of each other's lines. GTW has agreed to grant CSXT an easement over a GTW line between Munster, Ind., and Elsdon, Ill. (Elsdon Line), over which GTW would retain local and overhead trackage rights. CSXT also has agreed to convey local and overhead trackage rights over that line to various GTW affiliates and a CSXT affiliate. In exchange for that easement, CSXT has agreed to grant GTW an easement over a CSXT line between Leewood, Tenn., and Aulon, Tenn., over which CSXT would retain local and overhead trackage rights.

In this docket, CSXT has filed an application for authority to acquire an easement from GTW, and in the embraced Docket Nos. FD 35522 (Sub-No. 1) and (Sub-No. 2), the CSXT affiliate and the various GTW affiliates, respectively, seek authority to acquire trackage rights over that line.

In this decision, the Surface Transportation Board (Board) accepts for consideration CSXT's application and the filings in the two embraced subdockets, finds that the transaction proposed in CSXT's application qualifies as "minor," and adopts a procedural schedule to govern this proceeding and the embraced trackage rights proceedings.

GTW's acquisition of an easement from CSXT will be adjudicated in a separate docket, Docket No. FD 35661, and is the subject of a separate Board decision being served in that docket today. The Board intends to adjudicate both easement acquisitions on parallel schedules, concluding with a final Board decision in both dockets on February 8, 2013.

DATES: The effective date of this decision is September 12, 2012. Any person who wishes to participate in this proceeding as a party of record (POR) must file a notice of intent to participate no later than September 26, 2012. All comments, protests, and requests for conditions, and any other evidence and argument in opposition to the application, including filings by the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), must be filed by November 9, 2012. Comments on the Board's Draft Environmental Assessment (Draft EA) also must be filed by November 9, 2012. Responses to comments on the merits of the application and rebuttals in support of the application must be filed by November 29, 2012. The Board expects to issue a Final EA completing the environmental review process on or before January 14, 2013, and a final decision on February 8, 2013. For further information respecting dates, see Appendix A (Procedural Schedule).

ADDRESSES: Any filing submitted in this proceeding must be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board's Web site at *www.stb.dot.gov* at the "E–FILING" link. Any person submitting a filing in the traditional paper format should send an original and ten paper copies of the filing (and also an electronic version) to: Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, one copy of each filing must be sent (and may be sent by email only if service by email is acceptable to the recipient) to each of the following: (1) Secretary of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) Steven C. Armbrust, CSX Transportation, Inc., 500 Water Street J–150, Jacksonville, FL 32202; (4) Louis E. Gitomer, Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204; and (5) any other person designated as a POR on the service list notice (to be issued as soon after September 26, 2012, as practicable).

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman, (202) 245–0386. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: CSXT owns and operates about 21,000 miles of railroad in Alabama, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia, the District of Columbia, and the Canadian Provinces of Ontario and Quebec. GTW owns and operates about 642 miles of railroad in Illinois, Indiana, Michigan, and Ohio and the Province of Ontario. GTW is directly controlled by Grant Trunk Corporation, which is controlled by Canadian National Railway Company (CN).

CSXT and GTW have entered an Agreement for Exchange of Perpetual Easements dated as of August 13, 2012. To obtain the required Board authority to carry out their agreement, CSXT and GTW have filed various requests for authority in this docket and Docket No. FD 35661 as follows:

Docket No. FD 35522

In Docket No. FD 35522, CSXT has filed an application pursuant to 49 U.S.C. 11323(a)(2) and 49 CFR pt. 1180 seeking approval for the carrier to acquire a proposed easement (Acquisition). Specifically, CSXT wishes to acquire an exclusive, perpetual, non-assignable railroad operating easement over 22.37 miles of GTW track on the Elsdon Subdivision between the connection with CSXT at Munster, Ind., milepost 31.07, and Elsdon, Ill., milepost 8.7, which connects to the southern end of the BNSF Railway Company's Corwith Yard. GTW will retain local and overhead trackage rights over the Elsdon Line.[2] Currently, CSXT already operates

[1] This decision also embraces *Baltimore & Ohio Chicago Terminal Railroad Co.—Trackage Rights Exemption—CSX Transportation, Inc.*, FD 35522 (Sub-No. 1) and *Chicago, Central & Pacific Railroad Co., Elgin, Joliet & Eastern Railroad Co., Illinois Central Railroad Co., and Wisconsin Central Ltd.—Trackage Rights Exemption—CSX Transportation, Inc.*, FD 35522 (Sub-No. 2).

[2] Under the agreement concerning GTW's retained trackage rights, GTW (referred to in the

over the Elsdon Line pursuant to trackage rights.[3]

CSXT seeks to effectuate the Acquisition to improve the efficiency of its operations in and through the Chicago, Ill., area (Chicago Terminal). Pursuant to the Acquisition, CSXT would assume responsibility for the maintenance, dispatching and capital improvements on the Elsdon Line. CSXT notes that the Chicago Terminal has the densest concentration of railroad lines in the United States. The carrier currently operates over several rail lines that are owned by other railroads and where the maintenance, dispatching, and capital improvements are controlled by those railroads. In becoming the operator of the Elsdon Line, CSXT claims that it would be able to reduce congestion on the other lines that it uses to operate through the Chicago Terminal, increase the efficiency of the operations in the Chicago Terminal, and generate savings in excess of $2 million per year.[4]

Embraced trackage rights. In Docket No. FD 35522 (Sub-No. 1), CSXT has agreed to grant its subsidiary, Baltimore & Ohio Chicago Terminal Company (B&OCT), local and overhead trackage rights over the Elsdon Line. With its application in Docket No. FD 35522, CSXT includes a notice of exemption from B&OCT seeking an exemption for those trackage rights.

In Docket No. FD 35522 (Sub-No. 2), CSXT has agreed to grant several GTW affiliates—Chicago, Central & Pacific Railroad Company, Elgin, Joliet and Eastern Railroad Company, Illinois Central Railroad Company, and Wisconsin Central Ltd.—local and overhead trackage rights over the Elsdon Line. These GTW affiliates currently have trackage rights over the line granted by GTW. GTW and CSXT have agreed that CSXT would not be assigned those existing agreements; instead, CSXT would grant new local and overhead trackage rights over the Elsdon Line to the GTW affiliates to ensure that these carriers continue to have access to the line after the proposed CSXT Acquisition.[5] CSXT includes this notice of exemption with its application in Docket No. FD 35522.

Docket No. FD 35661

In exchange for obtaining the easement over the Elsdon Line, CSXT has agreed to grant GTW an exclusive, perpetual, non-assignable railroad operating easement over approximately 2.1 miles of CSXT's Memphis Terminal Subdivision, between Leewood, Tenn., milepost 00F371.4, and Aulon, Tenn., milepost 00F373.4 (the Leewood-Aulon Line). The Leewood-Aulon Line is currently owned by CSXT; Illinois Central Railroad Company (IC), a GTW affiliate, operates over the line pursuant to a trackage rights agreement.[6] CSXT would retain local and overhead trackage rights over the line.[7] According to GTW, it would assume responsibility for dispatching, track maintenance, and capital improvements on the Leewood-Aulon Line, including all interlockings, control points, and connections, including those at Leewood and Aulon themselves. Although GTW, as owner of the easement, would have the legal right to operate over the line, it expects rail operations to be continued to be provided by IC. According to GTW, this easement would allow GTW and its affiliates greater control over their north-south trains running between the Gulf of Mexico and Chicago.

To obtain authority for this easement acquisition, on August 13, 2012, GTW filed a petition for exemption under 49 U.S.C. 10502 from the prior approval requirements at 49 U.S.C. 11323–25. The Board today is issuing a separate decision in Docket No. FD 35661 beginning a proceeding to consider GTW's petition for exemption and setting a procedural schedule for that proceeding, which largely will parallel the schedule established in this decision for Docket No. FD 35522.

Financial Arrangements. CSXT is acquiring from GTW the permanent exclusive railroad easement over the Elsdon Line, and in return, GTW is acquiring from CSXT a similar easement over the Leewood-Aulon Line. CSXT and GTW have determined that the two easements are of equivalent value and thus the grant of each easement is essentially the entire consideration for the other. CSXT would not incur any fixed charges as a result of the Acquisition.

Passenger Rail Service Impacts. CSXT does not expect the acquisition of its easement over the Elsdon Line to cause adverse impacts on commuter or other passenger rail service. No lines would be downgraded, eliminated, or operated on a consolidated basis. CSXT expects that the transaction will help remove freight trains from a portion of the Chicago to Indianapolis to Washington, DC Amtrak route.

Discontinuances/Abandonments. CSXT does not anticipate discontinuing service over or abandoning any of its rail lines as a result of the Acquisition.

Public Interest Considerations. CSXT states that, once in the Chicago Terminal, CSXT must currently use a combination of its own lines and other carriers' lines to move traffic to and from yards and terminals. It notes that the significant freight and passenger rail activity in the Chicago Terminal affects the speed at which freight moves through the Chicago Terminal. CSXT claims that, by acquiring the easement over the Elsdon Line, it would acquire a route that is not encumbered by the control of another rail carrier and with it the need of that other rail carrier to balance the competing priorities of multiple route users, including the ability to dispatch the route. CSXT anticipates being able to operate into, out of, and through the Chicago Terminal on a more consistent basis, which in turn would yield a more efficient and reliable service to the CSXT shippers. And, because CSXT would be able to remove traffic from those other rail carriers' lines, those carriers would also benefit from the proposed Acquisition.

Additionally, CSXT claims that the Acquisition would also further the goals of the Chicago Regional Environmental and Transportation Efficiency (CREATE) program, a public-private partnership among the U.S. Department of Transportation, the State of Illinois, City of Chicago, Metra commuter rail and Class I railroad companies. The primary objective of CREATE is to increase the efficiency of the Chicago-region's rail infrastructure by reducing train delays and congestion through the area.

CSXT claims that the Acquisition would not result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight in any region of the United States. According to CSXT, it would not result in a reduction in the number of rail

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agreement as CN) agrees that its traffic shall not be limited over the line, except that the total number of CN/Union Pacific Railroad Company interchange trains using the Elsdon Line between Blue Island (at or near milepost 19.3) and Munster (Milepost 31.07) is limited to two trains in each direction per day. *See* CSXT's Application, vol. 2, Exh. E of Exh. E, 3.2 (filed Aug. 13, 2012). The agreement in Docket No. 35522 (Sub-No. 2) in which CSXT grants trackage rights to the GTW affiliates includes a similar limit to two trains in each direction per day. *See* CSXT's Application, vol. 2, Exh. F of Exh. E, 3.2 (filed Aug. 13, 2012).

[3] *See CSX Transp., Inc.—Trackage Rights Exemption—Grand Trunk W. R.R.*, FD 35346 (STB served Feb. 12, 2010).

[4] *See* CSXT's Application, vol. 1, p. 4, August 13, 2012.

[5] *See id.*

[6] According to GTW's petition, although IC (as opposed to GTW) currently operates over the Leewood-Aulon Line, the parties are structuring the transaction as a grant to GTW (rather than IC) so that the easement exchange would qualify as a like-kind exchange under the Internal Revenue Code.

[7] Under the agreement concerning CSXT's retained trackage rights, CSXT may operate 16 trains per day over the line, but the parties may agree to increase that number. *See* CSXT's Application, vol. 2, p. 2 and Exh. E of Exh. F, 3.2 (filed Aug. 13, 2012).

carriers serving any shipper. CSXT asserts that all of the railroads operating in the Chicago Terminal would continue to serve that area. CSXT notes that GTW and the GTW affiliates would be able to continue to jointly use the Elsdon Line via trackage rights and other railroads would continue to be able to use their own routes.[8]

Time Schedule for Consummation. The transaction is scheduled to be consummated in the first quarter of 2013.

Environmental Impacts. The National Environmental Policy Act of 1969, 42 U.S.C. 4321–4347 (NEPA), requires that the Board take environmental considerations into account in its decisionmaking. Environmental review under NEPA will be required here because the projected increases in train traffic on some segments of the Elsdon Line (19.5 more trains per day on one segment and approximately 10 more trains per day on two others) exceed the thresholds in the Board's environmental rules (generally an increase of 3 or 8 trains per day). Consistent with those rules, the Board's Office of Environmental Analysis (OEA) currently is preparing a Draft EA. OEA anticipates issuing its Draft EA on October 5, 2012. Parties interested in commenting on the Draft EA must file comments by November 9, 2012. OEA anticipates issuing a Final EA on or before January 14, 2013.

Historic Preservation Impacts. In accordance with Section 106 of the National Historic Preservation Act, 16 U.S.C. 470 (NHPA), the Board is required to determine the effects of its licensing action on cultural resources.[9] Based on OEA's consultations with state historic preservation officers, it appears that no historic properties would be affected by the Acquisition because no historic sites or structures would be altered, the Elsdon Line would continue to be operated, and Board approval would be required should CSXT seek to abandon the Elsdon Line in the future.[10]

Labor Impacts. According to CSXT, it and GTW would not integrate any of their forces, including those maintaining, dispatching, or operating the Elsdon Line. CSXT employees would assume the responsibilities for maintaining and dispatching the Elsdon Line. Its employees would operate CSXT trains, and GTW employees would operate GTW trains. Any GTW affiliate trains operating on the Elsdon Line would be operated by their employees.

To the extent necessary, CSXT states that it would hire additional employees to maintain, operate, and dispatch the Elsdon Line. CSXT does not believe that any of its employees would be adversely affected by the Acquisition, but it notes that no more than four positions would be abolished on the GTW property as a result of the Acquisition. It notes that these employees would have available other equivalent job opportunities in the Chicago Terminal area. It acknowledges that the Acquisition would be subject to employee protective conditions in *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979), as modified by *Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc.*, 6 I.C.C.2d 799, 814–826 (1990); *aff'd sub nom. Railway Labor Executives Ass'n.* v. *ICC*, 930 F.2d 511 (6th Cir. 1991).

Application Accepted. Under 49 CFR 1180.4(b)(2)(iv), the Board must determine whether a proposed transaction is "major," "significant," or "minor." Here, we must determine whether the transaction CSXT seeks in its Docket No. FD 35522 application is "significant" under 1180.2(b) or "minor" under 1180.2(c).[11] A transaction not involving the control or merger of two or more Class I railroads is not of regional or national transportation significance and therefore is classified as "minor" if: (1) the transaction clearly will not have any anticompetitive effects, or (2) any anticompetitive effects will clearly be outweighed by the anticipated contribution to the public interest in meeting significant transportation needs. *See* 49 CFR 1180.2(b), (c).

Based on a review of the application, the Board agrees that CSXT's proposed acquisition of the easement over the Elsdon Line qualifies as a "minor" transaction under the agency's regulatory scheme. According to CSXT, the Elsdon transaction would not result in a reduction in the number of rail carriers serving any shippers. The application indicates that CSXT's use and control of the Elsdon Line would not restrain trade because GTW and its affiliates would be able to continue to jointly use the Elsdon Line via trackage rights and other railroads would continue to be able to use their own routes. The application further indicates that the transaction would result in more efficient CSXT operations in the Chicago area stemming from an overall reduction in train delays and congestion. Specifically, CSXT states that this easement acquisition would allow it to take advantage of an underutilized freight line and allow it move trains off Indiana Harbor Belt Line Railroad Company's Franklin Park Branch, the Bulkmatic Railroad Corporation's rail line east of Clearing Yard, the Union Pacific Railroad Company's (UP) Villa Grove Subdivision north of Dolton, and a portion of the CSXT/UP Joint Line. The transaction would also reduce train conflicts in the region and reduce congestion at Dolton, a major intersection of freight activity in the Chicago area.

In sum, the Board finds the Acquisition to be a "minor" transaction because it appears on the face of the application that there would not be any clear anticompetitive effects from the transaction. *Cf. Norfolk S. Ry.—Consolidation of Operations—CSX Transp. Inc.*, FD 32299 (ICC served Aug. 5, 1993) (concluding that the consolidation of operations in a limited geographic area by two Class I carriers was a "minor" transaction because it only involved a paring down of expenses to operate more efficiently in markets the carriers were already serving). The Board's findings regarding the anticompetitive impact are preliminary. The Board will give careful consideration to any claims that the Acquisition would have anticompetitive effects that are not apparent from the application itself. The Board can also condition the Acquisition to mitigate or eliminate any deleterious effects on regional or national transportation.

The Board also accepts the application and the filings in the two related subdockets for consideration. The application is in substantial compliance with the applicable regulations governing "minor" transactions. *See* 49 CFR pt. 1180; 49 U.S.C. 11321–26. The Board reserves the right to require the filing of further information as necessary to complete the record.

Procedural Schedule. CSXT provides a proposed procedural schedule with its application. We have adjusted the schedule, in part, to better accommodate the Board's environmental review responsibilities. Because the easement acquisitions in Docket Nos. FD 35522 and FD 35661 are related parts of the same overall negotiated easement exchange, we are adopting a schedule under which we will consider and rule on the application in this docket and the petition for exemption in Docket No. FD 35661 at the same time. *See Grand Trunk W. R.R.—Acquis. of Operating*

[8] *See* n. 3.

[9] *See* 49 CFR 1105.8.

[10] *See* 49 CFR 1105.8(b)(1).

[11] *See* 49 CFR 1180.4(b)(2)(iv). CSXT's transaction is not "major" because it does not involve control or merger of two or more Class I railroads. *See* 1180.2(a). It also is not "exempt" because it is not within one of the eight class exemptions listed at 1180.2(d).

Easement—CSX Transp., Inc., FD 35661 (STB served Sept. 12, 2012).

Under the procedural schedule we are adopting in this case: any person who wishes to participate in this proceeding as a POR must file a notice of intent to participate no later than September 26, 2012; all comments, protests, requests for conditions, and any other evidence and argument in opposition to the application, including filings by DOJ and DOT, must be filed by November 9, 2012; comments on the Draft EA also must be filed with OEA by November 9, 2012; and responses to comments, protests, requests for conditions, and other opposition on the transportation merits of the Acquisition, as well as Applicant's rebuttal in support of the Application, must be filed by November 29, 2012. The Board plans to issue its Final EA on or before January 14, 2013, and its final decision by February 8, 2013, and to make any such approval effective by March 10, 2013. The Board reserves the right to adjust the schedule as circumstances may warrant. For further information respecting dates, see Appendix A (Procedural Schedule).

Additionally, discovery may begin immediately. Requests for discovery from CSXT are due on September 26, 2012. CSXT responses are due on October 11, 2012. The parties are encouraged to resolve all discovery matters expeditiously and amicably.

Notice of Intent to Participate. Any person who wishes to participate in this proceeding as a POR must file with the Board, no later than September 26, 2012, a notice of intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on the Secretary of Transportation, the Attorney General of the United States, and Steven C. Armbrust and Louis E. Gitomer (counsel for CSXT).

If a request is made in the notice of intent to participate to have more than one name added to the service list as a POR representing a particular entity, the extra name will be added to the service list as a "Non-Party." The list will reflect the Board's policy of allowing only one official representative per party to be placed on the service list, as specified in Press Release No. 97–68 dated August 18, 1997, announcing the implementation of the Board's "One Party-One Representative" policy for service lists. Any person designated as a Non-Party will receive copies of Board decisions, orders, and notices but not copies of official filings. Persons seeking to change their status to a Party of Record must accompany that request with a written certification that he or she has complied with the service requirements set forth at 49 CFR 1180.4 and any other requirements set forth in this decision.

Service List Notice. The Board will serve, as soon after September 26, 2012, as practicable, a notice containing the official service list (the service list notice). Each POR will be required to serve upon all other PORs, within ten days of the service date of the service-list notice, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each POR also will be required to file with the Board, within ten days of the service date of the service-list notice, a certificate of service indicating that the service required by the preceding sentence has been accomplished. Every filing made by a POR after the service date of the service list notice must have its own certificate of service indicating that all PORs on the service list have been served with a copy of the filing. Members of the United States Congress (MOCs) and Governors (GOVs) are not parties of record and need not be served with copies of filings, unless any MOC or GOV has requested to be, and is designated as, a POR.

Service of Decisions, Orders, and Notices. The Board will serve copies of its decisions, orders, and notices only on those persons who are designated on the official service list as either POR, MOC, GOV, or Non-Party. All other interested persons are encouraged to obtain copies of decisions, orders, and notices via the Board's Web site at "*www.stb.dot.gov*" under "E–LIBRARY/Decisions & Notices."

Access to Filings. Under the Board's rules, any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order. 49 CFR 1180.4(a)(3). The application and other filings in this proceeding are available for inspection in the library (Room 131) at the offices of the Surface Transportation Board, 395 E Street SW., in Washington, DC, and will also be available on the Board's Web site at "*www.stb.dot.gov*" under "E–LIBRARY/Filings." In addition, the application may be obtained from Messrs. Armbrust and Gitomer at the addresses indicated above.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The application and notices of exemption in the related subdockets are accepted for consideration.

2. The parties to this proceeding must comply with the procedural schedule adopted by the Board in this proceeding as shown in Appendix A.

3. The parties to this proceeding must comply with the procedural requirements described in this decision.

4. This decision is effective on September 12, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

Jeffrey Herzig,

Clearance Clerk.

Appendix A

Procedural Schedule

August 13, 2012 CSXT's application, protective order, and notices of exemption filed with the Board.

September 26, 2012 Notices of intent to participate due to the Board. Discovery requests due to CSXT.

October 5, 2012 OEA issues Draft EA.

October 11, 2012 CSXT responds to discovery requests.

November 9, 2012 Comments due from all parties, including the Attorney General and the Secretary of Transportation, on the transportation merits of the Acquisition. Comments on Draft EA due to OEA.

November 29, 2012 Responses to comments on the transportation merits of the Acquisition due. Applicant's rebuttal in support of the application due.

December 26, 2012 Close of record.

On or before January 14, 2013 OEA issues Final EA.

February 8, 2013 Final decision served. *

* The Board reserves the right to modify this schedule as circumstances may warrant

[FR Doc. 2012–22421 Filed 9–11–12; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35625]

City of Milwaukie—Petition for Declaratory Order

The City of Milwaukie, Or. (the City), filed a petition for declaratory order on June 29, 2012 (Petition), requesting that the Board declare that 49 U.S.C. 10501(b) does not preempt certain municipal regulations regarding the scattering of rubbish and the blocking of vehicular and pedestrian traffic along the border of the Oregon Pacific Railroad Company's (OPRC) train maintenance facility and in a public right-of-way. For the reasons discussed below, the request to institute a declaratory order proceeding will be granted.

On June 29, 2012, the City filed a petition for declaratory order. On July 3,

2012, OPRC filed a letter with the Board noting its opposition to the Petition and requesting 30 days to prepare its case in opposition should the Board institute a proceeding. OPRC's letter included no substantive support for why it opposed the Petition and, to date, OPRC has not submitted anything more to the Board.

The Petition requests that the Board find the City is not preempted from enforcing two municipal regulations that the City claims protect the public and ensure the public's health and safety. The regulations prohibit (1) scattering rubbish, and (2) obstructing vehicular and pedestrian traffic. Milwaukie, Or. Mun. Code §§ 8.04.120, 10.44.030 (2011). According to the City, OPRC owns a train maintenance facility on approximately 0.78 acres within the City. The City claims that along the border of OPRC's property, and in the public right of way, OPRC stores rails, railroad ties, piles of gravel, and other large "debris." The City argues that this debris is a hazard for drivers, pedestrians, and cyclists and violates the two above regulations; the City has cited OPRC at least twice.

The City argues that it should be permitted to enforce the regulations for the safety of its citizens and that there is no reason why the regulations should be preempted by federal law. It claims the ordinances are of general applicability, are not directed at or limited to railroads operating within the City, and are not directed at OPRC's use of its own property. It further claims that the regulations are within its traditional police power and that their enforcement will not affect transportation by a rail carrier.

In a letter to the City, OPRC claims "[m]unicipal interference with railroad operations is pre-empted by USC 10501 (b); therefore, the City has no jurisdiction over these matter [sic] as they apply to Interstate Commerce." [1] The record shows that OPRC has contested the second set of citations in the Municipal Court for the City of Milwaukie and that a trial was set for July 23, 2012. No update has been filed with the Board since the scheduled trial date. OPRC has also indicated it intends to appeal the fine for the first set of citations.

The Board has discretionary authority under 5 U.S.C. 554(e) and 49 U.S.C. 721 to issue a declaratory order to eliminate a controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction.[2] Questions of preemption are often fact specific determinations, particularly when addressing whether land use restrictions interfere with railroad operations.[3]

The Interstate Commerce Act, as revised by the ICC Termination Act of 1995, vests in the Board broad jurisdiction over "transportation by rail carrier," 49 U.S.C. 10501(a)(1), which extends to property, facilities, instrumentalities, or equipment of any kind related to that transportation, 49 U.S.C. 10102(9). The preemption provision in the Board's governing statute states that "the remedies provided under [49 U.S.C. 10101–11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. 10501(b).

The Board will institute a declaratory order proceeding and establish a procedural schedule for the filing of pleadings. This will ensure that the record is complete on the issue of whether the activities occurring in the right-of-way are part of "transportation" by a "rail carrier" and therefore could be preempted by § 10501(b).

The Board will consider this matter under the modified procedure rules at 49 CFR part 1112. The City's detailed Petition will serve as its opening statement. Replies will be due 30 days from the date of service of this decision. The City's rebuttal will be due 45 days from the service date of this decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A declaratory order proceeding is instituted.

2. Replies are due by October 10, 2012.

3. The City's rebuttal statement is due by October 25, 2012.

4. This decision is effective on it service date.

Decided: September 7, 2012.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2012–22452 Filed 9–11–12; 8:45 am]

BILLING CODE 4915–01–P

[1] Petition, V.S. Salyers, Exh. I.

[2] *See Bos. & Me. Corp.* v. *Town of Ayer*, 330 F.3d 12, 14 n.2 (1st Cir. 2003); *see also Intercity Transp. Co.* v. *United States*, 737 F.2d 103, 106–07 (DC Cir. 1984); *Delegation of Auth.—Declaratory Order Proceedings*, 5 I.C.C. 2d 675, 675 (1989).

[3] *See Borough of Riverdole—Petition for Declaratory Order—The N.Y. Susquehonna & W. Ry.*, FD 33466, slip op. at 2 (STB served Feb. 27, 2001); *Borough of Riverdole—Petition for Declaratary Order—The N.Y. Susquehanna & W. Ry.*, 4 S.T.B. 380, 387 (1999) ("whether a particular land use restriction interferes with interstate commerce is a fact-bound question").

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35674]

CSX Transportation, Inc.—Temporary Trackage Rights Exemption—Alabama Great Southern Railroad Company and Meridian Speedway, LLC

Pursuant to a written trackage rights agreement dated August 31, 2012, Alabama Great Southern Railroad Company (AGS) has agreed to grant CSX Transportation, Inc. (CSXT) temporary overhead trackage rights over: (1) AGS South District between the connection of AGS and CSXT in Birmingham, Ala., near 14th Street at milepost 143.5 and the connection with the trackage of The Kansas City Southern Railway Company (KCSR) near 27th Avenue in Meridian, Miss., at milepost 295.4; (2) AGS NO & NE District between the connection with the trackage of Meridian Speedway, LLC (Meridian Speedway) at Meridian, Miss., 27th Avenue, milepost NO–0.4, and New Orleans, La., Oliver Junction, milepost 194.1; and (3) New Orleans Terminal Back Belt Line between New Orleans, La., Oliver Junction, milepost 7.9–NT, and East City Junction at milepost 3.8–NT and between East City Junction at milepost 3.5–A and CN/IC connection in Shrewsbury, La., milepost 0.0–A, a distance of 352.8 miles. Pursuant to a second written trackage rights agreement, Meridian Speedway has agreed to grant CSXT temporary overhead trackage rights over the connection between AGS and Meridian Speedway near 27th Avenue in Meridian, Miss., at milepost 295.4 and the connection between Meridian Speedway and AGS NO & NE District at milepost NO–0.4, a distance of 0.4 miles. The lines in question total 353.2 miles of track.

CSXT explains that the temporary trackage rights will permit it to resume overhead rail service between Pascagoula, Miss., and New Orleans, La., in the aftermath of Hurricane Isaac. CSXT states that as a result of Hurricane Isaac, portions of its track along the Gulf Coast have been damaged and put out of service between Pascagoula, Miss., and New Orleans, La., and CSXT does not expect the line to be operable in the immediate future.

In addition to this verified notice of exemption, CSXT concurrently filed a petition requesting that the Board waive the requirement of 49 CFR 1180.4(g) so that the exemption could become effective immediately. By decision served September 7, 2012, the Board granted CSXT's request. As a result, this

exemption is now effective and will expire on December 16, 2012.

As a condition to this exemption, any employees affected by the temporary trackage rights will be protected by the conditions imposed in *Norfolk and Western Railway—Trackage Rights—Burlington Northern*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease and Operate—California Western Railroad*, 360 I.C.C. 653 (1980) (*N&W*), and any employees affected by the discontinuance of those trackage rights will be protected by the conditions set out in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth and Ammon, in Bingham and Bonneville Counties, Idaho*, 360 I.C.C. 91 (1979). Because of the nature of the situation, CSXT reports that the unions representing employees of CSXT and AGS have agreed to waive the 20-day notice period under *N&W* before consummation so that operations may start upon the effective date of this exemption.

This notice is filed under 49 CFR 1180.2(d)(8). If it contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption.

An original and 10 copies of all pleadings, referring to Docket No. FD 35674, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Louis E. Gitomer, Law Offices of Louis E. Gitomer, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

Board decisions and notices are available on our Web site at *www.stb.dot.gov*.

Decided: September 7, 2012.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2012–22448 Filed 9–11–12; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations, Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") is publishing the name of one individual whose property and interests in property have been blocked pursuant to the Foreign Narcotics Kingpin Designation Act ("Kingpin Act") (21 U.S.C. 1901–1908, 8 U.S.C. 1182).

DATES: The designation by the Director of OFAC of the individual identified in this notice pursuant to section 805(b) of the Kingpin Act is effective on September 6, 2012.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Office of Foreign Assets Control, U.S. Department of the Treasury, Washington, DC 20220, Tel: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available on OFAC's Web site at *http://www.treasury.gov/ofac* or via facsimile through a 24-hour fax-on-demand service at (202) 622–0077.

Background

The Kingpin Act became law on December 3, 1999. The Kingpin Act establishes a program targeting the activities of significant foreign narcotics traffickers and their organizations on a worldwide basis. It provides a statutory framework for the imposition of sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and the benefits of trade and transactions involving U.S. companies and individuals.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury, in consultation with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security may designate and block the property and interests in property, subject to U.S. jurisdiction, of persons who are found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; or (3) playing a significant role in international narcotics trafficking.

On September 6, 2012, the Director of OFAC designated the following individual whose property and interests in property are blocked pursuant to section 805(b) of the Kingpin Act.

Individual

1. LOPEZ PEREZ, Griselda Natividad (a.k.a. LOPEZ PEREZ, Gricelda; a.k.a. PEREZ ROJO, Karla), Cerro de las Siete Gotas #642, Fraccionamiento Colinas de San Miguel, Culiacan, Sinaloa, Mexico; DOB 19 Aug 1959; alt. DOB 30 Dec 1966; POB Sinaloa, Mexico; nationality Mexico; citizen Mexico; C.U.R.P. LOPG590819MSLPRR04 (Mexico); alt. C.U.R.P. LOPG661230MSLPRR04 (Mexico) (individual) [SDNTK].

Dated: September 6, 2012.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2012–22358 Filed 9–11–12; 8:45 am]

BILLING CODE 4811–AL–P

FEDERAL REGISTER

Vol. 77 Wednesday,
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Part II

Securities and Exchange Commission

17 CFR Parts 240, 249, and 249b
Conflict Minerals; Disclosure of Payments by Resource Extraction Issuers; Final Rules

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249b

[Release No. 34–67716; File No. S7–40–10]

RIN 3235–AK84

Conflict Minerals

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting a new form and rule pursuant to Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to the use of conflict minerals. Section 1502 added Section 13(p) to the Securities Exchange Act of 1934, which requires the Commission to promulgate rules requiring issuers with conflict minerals that are necessary to the functionality or production of a product manufactured by such person to disclose annually whether any of those minerals originated in the Democratic Republic of the Congo or an adjoining country. If an issuer's conflict minerals originated in those countries, Section 13(p) requires the issuer to submit a report to the Commission that includes a description of the measures it took to exercise due diligence on the conflict minerals' source and chain of custody. The measures taken to exercise due diligence must include an independent private sector audit of the report that is conducted in accordance with standards established by the Comptroller General of the United States. Section 13(p) also requires the issuer submitting the report to identify the auditor and to certify the audit. In addition, Section 13(p) requires the report to include a description of the products manufactured or contracted to be manufactured that are not "DRC conflict free," the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin. Section 13(p) requires the information disclosed by the issuer to be available to the public on its Internet Web site.

DATES: *Effective Date:* November 13, 2012.

Compliance Date: Issuers must comply with the final rule for the calendar year beginning January 1, 2013 with the first reports due May 31, 2014.

FOR FURTHER INFORMATION CONTACT: John Fieldsend, Special Counsel in the Office of Rulemaking, Division of Corporation Finance, at (202) 551–3430, 100 F Street NE., Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: We are adopting new Rule 13p–1 [1] and new Form SD [2] under the Securities Exchange Act of 1934 ("Exchange Act").[3]

Table of Contents

[1] 17 CFR 240.13p–1.

[2] 17 CFR 249.448.

[3] 15 U.S.C. 78a *et seq.*

I. Background and Summary

A. Statutory Provision

On December 15, 2010, we proposed a number of amendments to our rules[4] to implement the requirements of Section 1502 ("Conflict Minerals Statutory Provision") of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Act"),[5] relating to new disclosure and reporting obligations by issuers concerning "conflict minerals"[6] that originated in the Democratic Republic of the Congo ("DRC") or an adjoining country[7] (together with the DRC, the "Covered Countries").[8] Section 1502 amended the Exchange Act by adding new Section 13(p).[9] New Exchange Act Section 13(p) requires us to promulgate disclosure and reporting regulations regarding the use of conflict minerals from the Covered Countries.[10]

As reflected in the title of Section 1502(a), which states the "Sense of the Congress on Exploitation and Trade of Conflict Minerals Originating in the Democratic Republic of the Congo," in enacting the Conflict Minerals Statutory Provision, Congress intended to further the humanitarian goal of ending the extremely violent conflict in the DRC, which has been partially financed by the exploitation and trade of conflict minerals originating in the DRC. This section explains that the exploitation and trade of conflict minerals by armed groups is helping to finance the conflict and that the emergency humanitarian crisis in the region warrants the disclosure requirements established by Exchange Act Section 13(p).[11]

Similarly, the legislative history surrounding the Conflict Minerals Statutory Provision, and earlier legislation addressing the trade in conflict minerals, reflects Congress's motivation to help end the human rights abuses in the DRC caused by the conflict.[12] Other parts of the Conflict Minerals Statutory Provision also point to the fact that Congress intended to promote peace and security.[13] For example, the Conflict Minerals Statutory Provision states that once armed groups no longer continue to be directly involved and benefiting from commercial activity involving conflict minerals, the President may take action to terminate the provision.[14] To accomplish the goal of helping end the human rights abuses in the DRC caused by the conflict, Congress chose to use the securities laws disclosure requirements to bring greater public awareness of the source of issuers' conflict minerals and to promote the exercise of due diligence on conflict mineral supply chains. By doing so, we

[4] Conflict Minerals, Release No. 34–63547 (Dec. 15, 2010) [75 FR 80948] (the "Proposing Release").

[5] Public Law 111–203, 124 Stat. 1376 (July 21, 2010).

[6] The term "conflict mineral" is defined in Section 1502(e)(4) of the Act as (A) columbite-tantalite, also known as coltan (the metal ore from which tantalum is extracted); cassiterite (the metal ore from which tin is extracted); gold; wolframite (the metal ore from which tungsten is extracted); or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.

[7] The term "adjoining country" is defined in Section 1502(e)(1) of the Act as a country that shares an internationally recognized border with the DRC, which presently includes Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia.

[8] In the Proposing Release, we referred to the DRC and its adjoining countries as the "DRC Countries." In this release, we use the term "Covered Countries" instead. Both terms have the same meaning. For consistency within this release, there are instances when we refer to the text of the Proposing Release and use the term "Covered Countries" instead of "DRC Countries," which was used in the Proposing Release.

[9] 15 U.S.C. 78m(p).

[10] *See* Exchange Act Section 13(p)(1)(A). This Exchange Act Section requires that the Commission promulgate rules no later than 270 days after the date of enactment.

[11] *See* Section 1502(a) of the Act ("It is the sense of the Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b).").

[12] The Congo conflict has been an issue raised in the United States Congress for a number of years. For example, in the 109th Congress, then-Senator Sam Brownback, along with Senator Richard J. Durbin and then-Senator Barack Obama, among others, co-sponsored S. 2125, the Democratic Republic of Congo Relief, Security, and Democracy Promotion Act of 2006. *See* Public Law 109–456 (Dec. 22, 2006) (stating that the National Security Strategy of the United States, dated September 17, 2002, concludes that disease, war, and desperate poverty in Africa threatens the United States' core value of preserving human dignity and threatens the United States' strategic priority of combating global terror). The legislation committed the United States to work toward peace, prosperity, and good governance in the Congo. As another example, in the 110th Congress, then-Senator Brownback and Senator Durbin introduced S. 3058, the Conflict Coltan and Cassiterite Act, which would have prohibited the importation of certain products containing columbite-tantalite or cassiterite that was mined or extracted in the DRC by groups that committed serious human rights and other violations. *See* S. 3058, 110th Cong. (2008). As a further example, in the 111th Congress, then-Senator Brownback introduced S. 891, the Congo Conflict Minerals Act of 2009. *See* S. 891, 111th Cong. (2009). This bill would have required U.S.-registered companies selling products using conflict minerals to disclose annually to the Commission the country of origin of these minerals and, if the country of origin was one of the Covered Countries, to disclose the mine of origin. Additionally, later in the 111th Congress, then-Senator Brownback sponsored S.A. 2707, which was similar to S. 891. *See* S.A. 2707, 111th Cong. (2009). We note also that the Democratic Republic of Congo Relief, Security, and Democracy Promotion Act of 2006 states that the National Security Strategy of the United States, dated September 17, 2002, concludes that disease, war, and desperate poverty in Africa threatens the United States' core value of preserving human dignity and threatens the United States' strategic priority of combating global terror. *See* Pub. L. 109–456 (Dec. 22, 2006). *See also U.S. Gov't Accountability Office, GAO–12–763, Conflict Minerals Disclosure rule: SEC's Actions and Stakeholder-Developed Initiatives* (Jul. 2012) (discussing the Democratic Republic of Congo Relief, Security, and Democracy Promotion Act of 2006), *available at http://www.gao.gov/products/GAO–12–763.*

[13] *See* Section 1502(d)(2)(A) of the Act (stating that two years after enactment of the Act and annually thereafter, "the Comptroller General of the United States shall submit to the appropriate congressional committees a report that includes" an "assessment of the effectiveness" of the Conflict Minerals Statutory Provision "in promoting peace and security" in the Covered Countries).

[14] *See* Exchange Act Section 13(p)(4) (stating that the provision "shall terminate on the date on which the President determines and certifies to the appropriate congressional committees * * * that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals").

understand Congress's main purpose to have been to attempt to inhibit the ability of armed groups in the Covered Countries to fund their activities by exploiting the trade in conflict minerals. Reducing the use of such conflict minerals is intended to help reduce funding for the armed groups contributing to the conflict and thereby put pressure on such groups to end the conflict. The Congressional object is to promote peace and security in the Covered Countries.[15]

Congress chose to use the securities laws disclosure requirements to accomplish its goals. In addition, one of the co-sponsors of the provision noted in a floor statement that the provision will "enhance transparency" and "also help American consumers and investors make more informed decisions."[16] Also, as discussed throughout the release, a number of commentators on our rule proposal, including co-sponsors of the legislation and other members of Congress, have indicated that the Conflict Minerals Statutory Provision will provide information that is material to an investor's understanding of the risks in an issuer's reputation and supply chain.[17]

Exchange Act Section 13(p) mandates that we promulgate regulations requiring that a "person described"[18] disclose annually whether any "conflict minerals" that are "necessary to the functionality or production of a product manufactured by such person"[19] originated in the Covered Countries, and make that disclosure publicly available on the issuer's Internet Web site.[20] If such a person's conflict minerals originated in the Covered Countries, that person must submit a report ("Conflict Minerals Report") to us that includes a description of the measures taken by the person to exercise due diligence on the minerals' source and chain of custody.[21] Under Exchange Act Section 13(p), the measures taken to exercise due diligence "shall include an independent private sector audit" of the Conflict Minerals Report that is conducted according to standards established by the Comptroller General of the United States, in accordance with our promulgated rules, in consultation with the Secretary of State.[22] The person submitting the Conflict Minerals Report must also identify the independent private sector auditor[23] and certify the independent private sector audit.[24]

Further, according to Exchange Act Section 13(p), the Conflict Minerals Report must include "a description of the products manufactured or contracted to be manufactured that are not DRC conflict free,"[25] the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and "the efforts to determine the mine or location of origin with the greatest possible specificity."[26] Also, Exchange Act Section 13(p) dictates that each person described "shall make available to the public on the Internet Web site of such person" the conflict minerals information required by Exchange Act Section 13(p)(1)(A).[27]

B. Summary of the Proposed Rules

We proposed rules to apply to certain issuers that file reports with us under Exchange Act Sections 13(a)[28] or 15(d).[29] Based on the Conflict Minerals Statutory Provision, we proposed a disclosure requirement for conflict minerals that would divide into three

[15] *See* Exchange Act Section 1502(c)(1)(B)(i) (stating that the Secretary of State, in consultation with the Administrator of the United States Agency for International Development, shall submit to Congress a plan to "promote peace and security" in the Covered Countries).

[16] *See* 156 *Cong. Rec.* S3976 (daily ed. May 19, 2010) (statement of Sen. Feingold) ("Mr. President, I am pleased to be an original cosponsor of two amendments to the Restoring American Financial Stability Act that seek to ensure there is greater transparency around how international companies are addressing issues of foreign corruption and violent conflict that relate to their business. Creating these mechanisms to enhance transparency will help the United States and our allies more effectively deal with these complex problems, at the same time that they will also help American consumers and investors make more informed decisions.").

[17] *See, e.g.*, letters from Aditi Mohapatra of Calvert Asset Management Company, Inc. on behalf of 49 investors, including the Social Investment Forum and Interfaith Center of Corporate Responsibility (Mar. 2, 2011) ("SIF I"); Boston Common Asset Management, LLC, Calvert Asset Management Co., Inc., Interfaith Center on Corporate Responsibility, Jesuit Conference of the United States, Marianist Province of the US, Mercy Investment Services, Inc., Missionary Oblates of Mary Immaculate, Responsible Sourcing Network, Sustainalytics, Trillium Asset Management, and Tri-State Coalition for Responsible Investment (Feb. 1, 2012) ("SIF II"); Calvert Investments (Oct. 18, 2011) ("Calvert"); General Board of Pension and Health Benefits of The United Methodist Church (Mar. 7, 2011) ("Methodist Pension"); State Board of Administration of Florida (Feb. 3, 2011) ("FRS"); and Teachers Insurance and Annuity Association and College Retirement Equities Fund (Mar. 2, 2011) ("TIAA–CREF"). *See also* letters from Catholic Relief Services (Feb. 8, 2011) ("CRS I") ("We submit these comments with the hope the SEC will consider the need of investors to access information to make sound business decisions that reflect both their social and their financial concerns."); Enough Project (Mar. 31, 2011) ("Enough Project II") (stating that advancing the "goal of resolving a humanitarian crisis that continues to cause countless deaths and unimaginable suffering" is "of great interest to many, including investors"); Senator Richard J. Durbin and Representative Jim McDermott (Feb. 28, 2011) ("Sen. Durbin/Rep. McDermott") (suggesting that the provision's purposes were both to end conflict in the DRC and to provide current information for investors, and the latter purpose is identical to the purpose of requiring the disclosure of other information in an issuer's the periodic reports) and Senator Patrick Leahy, Senator Christopher Coons, Congressman Howard Berman, Congressman Jim McDermott, Congressman Donald Payne, Congressman Gregory Meeks, and Congressmember Karen Bass (Feb. 16, 2012) ("Sen. Leahy *et al.*") (asserting that an issuer's conflict minerals information is "critical to both investors and to capital formation" because "when a publicly traded company relies on an unstable black market for inputs essential to manufacturing its products it is of deep material interest to investors").

[18] The term "person described" is defined in Exchange Act Section 13(p)(2) as one who is required to file reports under Exchange Act Section 13(p)(1)(A), and for whom the conflict minerals are necessary to the functionality or production of a product manufactured by such person. Exchange Act Section 13(p)(1)(A) does not provide a definition but refers back to Exchange Act Section 13(p)(2).

[19] Exchange Act Section 13(p)(2)(B).

[20] *See* Exchange Act Section 13(p)(1)(E) (stating that each issuer "shall make available to the public on the Internet Web site of such [issuer] the information disclosed under" Exchange Act Section 13(p)(1)(A)).

[21] *See* Exchange Act Section 13(p)(1)(A)(i).

[22] *See id.* (requiring in the Conflict Minerals Report "a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such [conflict] minerals, which measures shall include an independent private sector audit of such report"). The Conflict Minerals Statutory Provision assigns certain responsibilities to other federal agencies. In developing our proposed rules, our staff has consulted with the staff of these other agencies in developing our proposed rules. These agencies include, including the Government Accountability Office (the "GAO"), which is headed by the Comptroller General of the United States, and the United States Department of State.

[23] *See* Exchange Act Section 13(p)(1)(A)(ii) (stating that the issuer must provide a description of the "entity that conducted the independent private sector audit in accordance with" Exchange Act Section 13(p)(1)(A)(i)").

[24] As noted in Exchange Act Section 13(p)(1)(B), if an issuer is required to provide a Conflict Minerals Report that includes an independent private sector audit, that issuer "shall certify the audit" and that certified audit "shall constitute a critical component of due diligence in establishing the source and chain of custody of such minerals."

[25] The term "DRC conflict free" is defined in Exchange Act Section 13(p)(1)(A)(ii) and Exchange Act Section 13(p)(1)(D). Exchange Act Section 13(p)(1)(A)(ii) defines "DRC conflict free" as "the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the" Covered Countries. Similarly, Exchange Act Section 13(p)(1)(D) defines "DRC conflict free" as products that do "not contain conflict minerals that directly or indirectly finance or benefit armed groups in the" Covered Countries. We note that the definitions in the two sections are slightly different in that Exchange Act Section 13(p)(1)(A)(ii) refers to "minerals" without any limitation, whereas Exchange Act Section 13(p)(1)(D) refers specifically to "conflict minerals." We believe, based on the totality of the Conflict Minerals Statutory Provision, that "DRC conflict free" is meant to refer only to "conflict minerals," as that term is defined in Section 1502(e)(4) of the Act, that directly or indirectly finance or benefit armed groups in the Covered Countries, and not to all minerals that directly or indirectly finance or benefit armed groups in the Covered Countries.

[26] *See* Exchange Act Section 13(p)(1)(A)(ii).

[27] *See* Exchange Act Section 13(p)(1)(E).

[28] 15 U.S.C. 78m(a).

[29] 15 U.S.C. 78o(d).

steps. The first step would have required an issuer to determine whether it was subject to the Conflict Minerals Statutory Provision. An issuer would have only been subject to the Conflict Minerals Statutory Provision if it was a reporting issuer for which conflict minerals were "necessary to the functionality or production of a product manufactured" [30] or contracted to be manufactured by such person. If an issuer did not meet that definition, the issuer was not required to take any action, make any disclosures, or submit any reports. If, however, an issuer met this definition, that issuer would move to the second step.

The second step would have required the issuer to determine after a reasonable country of origin inquiry whether its conflict minerals originated in the Covered Countries. If the issuer determined that its conflict minerals did not originate in the Covered Countries, the issuer was to disclose this determination and the reasonable country of origin inquiry it used in reaching this determination in the body of its annual report. The issuer also would have been required to provide on its Internet Web site its determination that its conflict minerals did not originate in the Covered Countries, disclose in its annual report that the disclosure was posted on its Internet Web site, and disclose the Internet address on which this disclosure was posted. It would further have been required to maintain records demonstrating that its conflict minerals did not originate in the Covered Countries. Such an issuer would not have any further disclosure or reporting obligations with regard to its conflict minerals.

If, however, the issuer determined that its conflict minerals did originate in the Covered Countries, if it was unable to conclude that its conflict minerals did not originate in the Covered Countries, or if it determined that its conflict minerals were from recycled or scrap sources, the issuer would have been required to disclose this conclusion in its annual report. Also, the issuer would have been required to note that the Conflict Minerals Report, which included the certified independent private sector audit report, was furnished as an exhibit to the annual report; furnish the Conflict Minerals Report; make available the Conflict Minerals Report on its Internet Web site; disclose that the Conflict Minerals Report was posted on its Internet Web site; and provide the Internet address of that site. This issuer would then have moved to the third step.

Finally, the third step would have required an issuer with conflict minerals that originated in the Covered Countries, or an issuer that was unable to conclude that its conflict minerals did not originate in the Covered Countries, to furnish a Conflict Minerals Report. The proposed rules would have required an issuer to provide, in its Conflict Minerals Report, a description of the measures it had taken to exercise due diligence on the source and chain of custody of its conflict minerals, which would have included a certified independent private sector audit of the Conflict Minerals Report that identified the auditor and was furnished as part of the Conflict Minerals Report. Further, the issuer would have been required to include in the Conflict Minerals Report a description of its products manufactured or contracted to be manufactured containing conflict minerals that it was unable to determine did not "directly or indirectly finance or benefit armed groups" in the Covered Countries. The issuer would identify such products by describing them in the Conflict Mineral Report as not "DRC conflict free." [31] If any of its products contained conflict minerals that did not "directly or indirectly finance or benefit" these armed groups, the issuer would be permitted to describe such products in the Conflict Mineral Report as "DRC conflict free" whether or not the minerals originated in the Covered Countries. In addition, the issuer would have been required to disclose in the Conflict Minerals Report the facilities used to process those conflict minerals, those conflict minerals' country of origin, and the efforts to determine the mine or location of origin with the greatest possible specificity.

The proposed rules would have allowed for different treatment of conflict minerals from recycled and scrap sources. An issuer with such conflict minerals would have been required to furnish a Conflict Minerals Report that described the measures taken to exercise due diligence in determining that its conflict minerals were from recycled or scrap sources and to provide the reasons for believing, based on its due diligence, that its conflict minerals were from recycled or scrap sources. Such an issuer would also have been required to obtain a certified independent private sector audit of the Conflict Minerals Report.

C. Summary of Comments on the Proposed Rules

The Proposing Release requested comment on a variety of significant aspects of the proposed rules. The original comment period in the Proposing Release was to end on January 31, 2011. Prior to that date, however, we received requests for an extension of time for public comment on the proposal to allow for, among other matters, the collection of information and to improve the quality of responses.[32] On January 28, 2011, we extended the comment period for the proposal from January 31, 2011 to March 2, 2011.[33] Additionally, in response to suggestions from commentators,[34] we held a public roundtable on October 18, 2011 ("SEC Roundtable") at which invited participants, including investors, affected issuers, human rights organizations, and other stakeholders, discussed their views and provided input on issues related to our required rulemaking.[35] In conjunction with the SEC Roundtable, we requested further comment.[36] We received approximately 420 individual comment letters in response to the proposed rules, with approximately 145 of those letters being received after the SEC Roundtable, and over 40 letters regarding the Conflict Minerals Statutory Provision prior to the

[30] Exchange Act Section 13(p)(2).

[31] The definition of the term "DRC conflict free" in our proposed rules would be identical to the definition in Exchange Act Section 13(p)(1)(D).

[32] *See* letters from Advanced Medical Technology Association, Aerospace Industries Association, American Association of Exporters and Importers, American Automotive Policy Council, Business Alliance for Customs Modernization, IPC—Association Connecting Electronics Industries Joint Industry Group, National Association of Manufacturers, National Electrical Manufacturers Association, National Foreign Trade Council, National Retail Federation, Retail Industry Leaders Association, Semiconductor Equipment and Materials International, TechAmerica, USA*ENGAGE, and U.S. Chamber of Commerce (Dec. 16, 2010) ("Advanced Medical Technology Association *et al.*"); Jewelers Vigilance Committee, American Gem Society, Manufacturing Jewelers & Suppliers of America, Jewelers of America, and Fashion Jewelry & Accessories Trade Association (Jan. 10, 2011) ("JVC *et al.* I"); National Mining Association (Jan. 3, 2011) ("NMA I"); National Stone, Sand Gravel Association (Jan. 13, 2011) ("NSSGA"); Representative Spencer Bachus (Jan. 25, 2011) ("Rep. Bachus"); Robert D. Hormats, Under Secretary of State for Economic, Energy, and Agricultural Affairs, and Maria Otero, Democracy and Global Affairs (Jan. 25, 2011) ("State I"); and World Gold Council (Jan. 7, 2011) ("WGC I").

[33] Conflict Minerals, Release No. 34–63793 (Jan. 28, 2011) [76 FR 6110].

[34] *See, e.g.*, letter from United States Chamber of Commerce (Feb. 28, 2011) ("Chamber I").

[35] *See* Press Release, Securities and Exchange Commission, SEC Announces Agenda and Panelists for Roundtable on Conflict Minerals (Oct. 14, 2011), *available at http://www.sec.gov/news/press/2011/2011-210.htm.*

[36] Roundtable on Issues Relating to Conflict Minerals, Release No. 34–65508 (Oct. 7, 2011) [76 FR 63573].

proposed rules.[37] We also received approximately 13,400 form letters from those supporting "promptly" implementing a "strong" final rule regarding the Conflict Minerals Statutory Provision,[38] with approximately 9,700 of those letters requesting some specific requirements in the final rule,[39] and two petitions supporting the proposed amendments with an aggregate of over 25,000 signatures.

The comment letters came from corporations, professional associations, human rights and public policy groups, bar associations, auditors, institutional investors, investment firms, United States and foreign government officials,[40] and other interested parties and stakeholders. In general, most commentators supported the human rights objectives of the Conflict Minerals Statutory Provision and the proposed rules.[41] As discussed in greater detail throughout this release, however, many of these commentators provided recommendations for revising the proposed rules and suggested modifications or alternatives to the proposal. Only a few commentators generally opposed the Conflict Minerals Statutory Provision and/or our adoption of any rule based on the provision.[42] One commentator recommended that the proposed rules be withdrawn entirely "and that the potential costs, supply chain complexities, and other practical obstacles to implementation be more fully analyzed before new rules are proposed."[43]

Also, although they may have offered their support of the human rights concerns underlying the Conflict Minerals Statutory Provision and the proposed rules, some commentators were concerned about potentially negative effects of the Conflict Minerals Statutory Provision and the resulting rule. In this regard, some of those commentators argued that the provision and/or rule could lead to a *de facto* boycott or embargo on conflict minerals from the Covered Countries,[44] other of these commentators suggested that the

[37] To facilitate public input on rulemaking required by the Act, the Commission provided a series of email links, organized by topic, on its Web site at *http://www.sec.gov/spotlight/regreformcomments.shtml*. The comments relating to the Conflict Minerals Statutory Provision are located at *http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specialized-disclosures.shtml* ("Pre-Proposing Release Web site"). These comments were received before we made public the Proposing Release or proposed rules and are separate from the comments we received after we published the Proposing Release and proposed rules, which are located at *http://www.sec.gov/comments/s7-40-10/s74010.shtml* ("Post-Proposing Release Web site"). Many commentators provided comments on both the pre- and post-Proposing Release Web sites. Generally, our references to comment letters refer to the comments on the post-Proposing Release Web site. When we refer to a comment letter from the Pre-Proposing Release Web site, however, we make that clear in the footnote.

[38] *See* form letters A (urging us to institute "strong rules"), B (urging that the final rule not allow the legislation's intent to be compromised and to keep the "LEGISLATION STRONG" (emphasis in original)), E (indicating "deep disappointment and concern" that the final rule had not been adopted, and urging us to "release a strong, final rule"), F (urging us to "promptly issue strong final regulations"), G (stating that delays in adopting a final rule will "significantly hinder progress toward a legitimate mining sector in eastern" DRC, and urging us to "urgently release final regulations on conflict minerals"), H (calling on us to "release a strong, final rule as soon as possible"), and I (urging us to "issue strong final rules as soon as possible").

[39] *See* form letters A (stating that the final rule should, among other requirements, include gold and metals mining companies, apply to all possible companies, require that conflict minerals disclosures be filed, include strong and defined due diligence, and define recycled metals as 100% post-consumer metals), G (stating that the final rule should "incorporate the UN Group of Experts and OECD due diligence guidelines' concept of mitigation"), H (stating that the final rule should, among other requirements, reject any delays or phased-in implementation, adopt the "OECD due diligence standard," have equal reporting for all conflict minerals, include all companies regardless of size, define terms narrowly, define the reasonable country of origin inquiry, have issuers file reports, and not include a *de minimis* category for conflict minerals), and I (stating that the final rule must, among other requirements, reject an indeterminate origin category, define the reasonable country of origin standard, and adopt the "OECD Due Diligence standard").

[40] Among the foreign officials to provide comment letters was the DRC's Minister of Mines. *See* letters from Martin Kabwelulu, Minister of Mines, Democratic Republic of the Congo (July 15, 2011) ("DRC Ministry of Mines I"); Martin Kabwelulu, Minister of Mines, Democratic Republic of the Congo (Oct. 15, 2011) ("DRC Ministry of Mines II"); and Martin Kabwelulu, Minister of Mines, Democratic Republic of the Congo (Nov. 8, 2011) ("DRC Ministry of Mines III").

[41] *See, e.g.*, letters from Advanced Medical Technology Association, American Apparel & Footwear Association, American Association of Exporters and Importers, Consumer Electronics Association, Consumer Electronics Retailers Coalition, Emergency Committee for American Trade, IPC-Association Connecting Electronics Industries, Joint Industry Group, National Association of Manufacturers, National Foreign Trade Council, National Retail Federation, Retail Industry Leaders Association, TechAmerica, and USA Engage (Mar. 2, 2011) ("Industry Group Coalition I") (stating its "support [for] the underlying goal of Sec. 1502 to prevent the atrocities occurring" in the Covered Countries); American Bar Association (Jun. 20, 2011) ("ABA") (stating that it "supports and endorses the humanitarian efforts to end the armed conflict in the eastern Democratic Republic of the Congo"); Chamber I (stating that it "supports the fundamental goal, as embodied in Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ('Dodd-Frank Act'), of preventing the exploitation of conflict minerals for the purpose of financing human rights violations within the Democratic Republic of Congo"); National Association of Manufacturers (Mar. 2, 2011) ("NAM I") (stating its "support the underlying goal of Sec. 1502 to address the atrocities occurring in the" Covered Countries); and World Gold Council (Feb. 28, 2011) ("WGC II") (stating that it "believes it is important to state [its] support for the humanitarian goals of Section 1502").

[42] *See, e.g.*, letters from Michael Beggs (Jan. 12, 2012) ("Beggs"), Charles Blakeman (Oct. 9, 2011) ("Blakeman I"), Gary P. Bradley (Sept. 19, 2011) ("Bradley"), Joseph Cummins (Dec. 20, 2011) ("Cummins"), Walter Grail (Oct. 1, 2011) ("Grail"), Kirtland C. Griffin (Jun. 16, 2011) ("Griffin"), Clark Grey Howell (Sep. 20, 2011) ("Howell"), Edward Lynch (Dec. 16, 2011) ("Lynch"), and Melanie Matthews (Sep. 19, 2011) ("Matthews").

[43] *See* letter from Chamber I. *See also* letters from Chamber II (reiterating the withdrawal request from its initial comment letter and requesting we open a second comment period regarding the proposed rules), Chamber III (requesting that we allow companies additional time for commenting on the proposed rules), and United States Chamber of Commerce (Jul. 11, 2012) ("Chamber IV") (requesting that we re-propose the rule and re-open the comment period).

[44] *See, e.g.*, letters from AngloGold Ashanti Limited (Jan. 31, 2011) ("AngloGold"), Bureau d'Etudes Scientifiques et Techiques (Dec. 26, 2011) ("BEST II"), Competitive Enterprise Institute (Mar. 2, 2011) ("CEI I"), Competitive Enterprise Institute (Aug. 22, 2011) ("CEI II,"), Fédération des Enterprises du Congo (Oct. 28, 2011) ("FEC II"), Générale des Coopératives Minières du Sud Kivu (Apr. 8, 2011) ("Gecomiski"), IPC—Association Connecting Electronics Industries (Mar. 2, 2011) ("IPC I"), ITRI Ltd. (Feb. 25, 2011) ("ITRI II"), London Bullion Market Association (Mar. 2, 2011) ("LBMA I"), London Bullion Market Association (Aug. 5, 2011) ("LBMA II"), Minister of Energy and Minerals of the United Republic of Tanzania (May 23, 2011) ("Tanzania I"), Ministry of Mines and Energy of the Republic of Burundi (May 12, 2011) ("Burundi"), North Kivu Artisanal Mining Cooperatives Representative (Mar. 1, 2011) ("Comimpa"), Pact Inc. (Mar. 2, 2011) ("Pact I"), Pact Inc. (Oct. 13, 2011) ("Pact II"), Representative Christopher J. Lee (Feb. 3, 2011) ("Rep. Lee"), Société Minière du Maniema SPRL (Mar. 21, 2012) ("Somima"), Verizon Communications (Jun. 24, 2011) ("Verizon"), and WGC II. *But see* letters from Enough Project (Mar. 2, 2011) ("Enough Project I") ("Enough notes that critics of the legislation are quick to predict that private sector investors and companies may walk away from the Congo if faced with meaningful due diligence and reporting requirements. On the contrary, Congo's mineral reserves are too great for world markets to ignore."), International Corporate Accountability Roundtable (Aug. 24, 2011) ("ICAR II") (recognizing that "[c]ritics of the law are arguing that whatever its intentions, it will in practice end the trade in minerals mined in the east of Congo," and that, although "mineral exports from the region have dropped significantly in recent months, and that this has forced many artisanal miners to seek alternative livelihoods," which "has serious implications for miners and their families," the "downturn stems from a six month suspension of mining and trading activities imposed by the Congolese government and an overly restrictive interpretation of Dodd Frank by industry associations" and the "idea that the current hiatus is a permanent shut-down of the trade is misplaced, however."), Andrew Matheson (Oct. 26, 2011) ("Matheson II") ("No such embargo exists, nor is an embargo contemplated by the multi-stakeholder group, the EICC/GeSI initiative, or ITRI. Import statistics show that minerals continue to be sourced in substantial volumes from the DRC, for example tantalum ores going into China."), and Sen. Durbin/Rep. McDermott ("NGO experts in Congo note that only approximately one percent of the Congolese workforce depends on mining, so even if a de facto ban came to pass—which we doubt—the economic impact would not be as great as commonly assumed.").

provision and/or rule could compel speech in a manner that violates the First Amendment,[45] and at least one such commentator indicated that the final rule would adversely affect employment in the United States.[46] One commentator, however, suggested that there could be some "business benefits" from complying with the final rule beyond the humanitarian benefits discussed by Congress.[47] This commentator argued that such benefits could include eliminating any competitive disadvantage to companies already engaged in ensuring their conflict mineral purchases do not fund conflict in the DRC, providing an opportunity to improve a company's existing risk management and supply chain management, stimulating innovation, supporting companies' requests for conflict minerals information from suppliers through legal mandate, and preparing companies to meet a new generation of expectations for greater supply chain transparency and accountability.[48]

We have reviewed and considered all of the comments that we received relating to the rulemaking. The final rule reflects changes from the proposed rules made in response to many of these comments. As discussed throughout this release, we are adopting final rules designed to provide flexibility to issuers to reduce their compliance costs. At the same time, our final rules retain the requirements from our proposed rules that create the disclosure regime mandated by Congress by means of Exchange Act reporting requirements. We discuss our revisions with respect to each proposed rule amendment in more detail throughout this release.

D. Summary of Changes to the Final Rule

We are adopting a three-step process, as proposed, but some of the mechanisms within the three steps have been modified in response to comments. We recognize that the final rule will impose significant compliance costs on companies who use or supply conflict minerals, and in modifying the rule we tried to reduce the burden of compliance in areas in which we have discretion while remaining faithful to the language and intent of the Conflict Minerals Statutory Provision that Congress adopted. A flowchart presenting a general overview of the conflict minerals rule that we are adopting is included following the end of this section. The chart is intended merely as a guide, however, and issuers should refer to the rule text and the preamble's more complete narrative description for the requirements of the rule.

The first step continues to be for an issuer to determine whether it is subject to the requirements of the Conflict Minerals Statutory Provision. Pursuant to the Conflict Minerals Statutory Provision, the Commission is required to promulgate regulations requiring certain conflict minerals disclosures by any "person described," which, under the Conflict Minerals Statutory Provision, includes one for whom "conflict minerals are necessary to the functionality or production of a product manufactured by such person".[49] As in our proposal, under the final rule this includes issuers whose conflict minerals are necessary to the functionality or production of a product manufactured or contracted by that issuer to be manufactured.[50] If an issuer does not meet this definition, the issuer is not required to take any action, make any disclosures, or submit any reports under the final rule. If, however, an issuer meets this definition, that issuer moves to the second step.

In the final rule, some aspects of the first step differ from the proposed rules based on comments we received. Consistent with the proposal, the final rule does not define the phrases "contract to manufacture," "necessary to the functionality" of a product, and "necessary to the production" of a product. In response to comments, however, we provide additional guidance for issuers to consider regarding whether those phrases apply to them.[51] The guidance states that whether an issuer will be considered to "contract to manufacture" a product depends on the degree of influence it exercises over the materials, parts, ingredients, or components to be included in any product that contains conflict minerals or their derivatives. An issuer will not be considered to "contract to manufacture" a product if it does no more than take the following actions: (1) The issuer specifies or negotiates contractual terms with a manufacturer that do not directly relate to the manufacturing of the product (unless it specifies or negotiates taking these actions so as to exercise a degree of influence over the manufacturing of the product that is practically equivalent to contracting on terms that directly relate to the manufacturing of the product); (2) the issuer affixes its brand, marks, logo, or label to a generic product manufactured by a third party; or (3) the issuer services, maintains, or repairs a product manufactured by a third party.

Similarly, the determination of whether a conflict mineral is deemed "necessary to the functionality" or "necessary to the production" of a product depends on the issuer's particular facts and circumstances, as discussed in more detail below. But to assist issuers in making their determination, we provide guidance for issuers. In determining whether a conflict mineral is "necessary to the functionality" of a product, an issuer should consider: (1) Whether the conflict mineral is intentionally added to the product or any component of the product and is not a naturally-occurring by-product; (2) whether the conflict mineral is necessary to the product's generally expected function, use, or purpose; and (3) if conflict mineral is incorporated for purposes of ornamentation, decoration or embellishment, whether the primary purpose of the product is ornamentation or decoration.

In determining whether a conflict mineral is "necessary to the production" of a product, an issuer should consider: (1) Whether the conflict mineral is intentionally included in the product's production process, other than if it is included in a tool, machine, or equipment used to produce the product (such as computers or power lines); (2) whether the conflict mineral is included in the product; and (3) whether the conflict mineral is necessary to produce the product. In this regard, we are modifying our guidance from the proposal such that, for a conflict mineral to be considered "necessary to the production" of a product, the mineral must be both contained in the product and necessary to the product's production. We do not consider a conflict mineral "necessary to the production" of a product if the conflict mineral is used as a catalyst, or

[45] *See, e.g.*, letters from Taiwan Semiconductor Manufacturing Company Ltd. (Jan. 27, 2011) ("Taiwan Semi"), Tiffany & Co. (Feb. 22, 2011) ("Tiffany"), and Washington Legal Fund (Mar. 30, 2011) ("WLF").

[46] *See* letter from Rep. Lee ("Ultimately, these new regulations may cost U.S. jobs and send them overseas.").

[47] *See* letter from Green Research (Jan. 27, 2012) ("Green II"). *See also* letter from Green Research (Oct. 29, 2011) ("Green I") (stating that, although "[i]t seems clear that, by most accounting, there are costs of compliance" of the Conflict Minerals Statutory Provision, "there are benefits as well").

[48] *See id.*

[49] Exchange Act Section 13(p)(2).

[50] *See* Exchange Act Section 13(p)(1)(ii) (requiring a person described to include a description of certain of the person's products that were manufactured by the person, or were contracted by the person to be manufactured).

[51] In the Proposing Release, although we did not provide guidance for the other phrases, we provided some guidance for the phrase "necessary to the production" of a product. As discussed below, we are revising the guidance for this phrase.

in a similar manner in another process, that is necessary to produce the product but is not contained in that product.

Further, in a change from the proposal and in response to comments suggesting that including mining would expand the statutory mandate, the final rule does not treat an issuer that mines conflict minerals as manufacturing those minerals unless the issuer also engages in manufacturing. Additionally, the final rule exempts any conflict minerals that are "outside the supply chain" prior to January 31, 2013. Under the final rule, conflict minerals are "outside the supply chain" if they have been smelted or fully refined or, if they have not been smelted or fully refined, they are outside the Covered Countries. In response to comments, the final rule allows issuers that obtain control over a company that manufactures or contracts for the manufacturing of products with necessary conflict minerals that previously had not been obligated to provide a specialized disclosure report for those minerals to delay reporting on the acquired company's products until the end of the first reporting calendar year that begins no sooner than eight months after the effective date of the acquisition.

As suggested by commentators, the final rule modifies the proposal as to the location, timing, and status of any conflict minerals disclosures and any Conflict Minerals Report. The final rule requires an issuer to provide the conflict minerals disclosures that would have been in the body of the annual report in the body of a new specialized disclosure report on a new form, Form SD. An issuer required to provide a Conflict Minerals Report will provide that report as an exhibit to the specialized disclosure report. Additionally, based on comments that it will reduce the burdens on supply chain participants, the final rule requires that the conflict minerals information in the specialized disclosure report and/or in the Conflict Minerals Report cover the calendar year from January 1 to December 31 regardless of the issuer's fiscal year end, and the specialized disclosure report covering the prior year must be provided each year by May 31. Further, in a change from the proposal, urged by multiple commentators, the final rule requires Form SD, including the conflict minerals information therein and any Conflict Minerals Report submitted as an exhibit to the form, to be "filed" under the Exchange Act and thereby subject to potential Exchange Act Section 18 liability. The proposal would have required the information to be "furnished."

The second step continues to require an issuer to conduct a reasonable country of origin inquiry regarding the origin of its conflict minerals. Consistent with the proposal, and the position of certain commentators,[52] the final rule does not prescribe the actions for a reasonable country of origin inquiry that are required, as the required inquiry depends on each issuer's facts and circumstances. However, in a change from the proposed rules, to clarify the scope of the required inquiry as requested by certain other commentators,[53] the final rule provides general standards applicable to the inquiry. Specifically, the final rule provides that, to satisfy the reasonable country of origin inquiry requirement, an issuer must conduct an inquiry regarding the origin of its conflict minerals that is reasonably designed to determine whether any of its conflict minerals originated in the Covered Countries or are from recycled or scrap sources, and must perform the inquiry in good faith. The final rule requires an issuer that determines that its conflict minerals did not originate in the Covered Countries or did come from recycled or scrap sources to disclose in its specialized disclosure report its determination and in its specialized disclosure report briefly describe the reasonable country of origin inquiry it used in reaching the determination and the results of the inquiry. The requirement for an issuer to briefly describe its inquiry and the results of the inquiry is a change from the disclosure required in the proposed rules.

Also, in a change from the proposal, the final rule modifies the trigger for determining whether or not an issuer is required to proceed to step three under the rule. The proposed rules would have required an issuer to conduct due diligence on the source and chain of custody of its conflict minerals and provide a Conflict Minerals Report if, based on its reasonable country of origin inquiry, it determined that its conflict minerals originated in the Covered Countries or was unable to determine that its conflict minerals did not originate in the Covered Countries, or if its conflict minerals came from recycled or scrap sources. Under the final rule, an issuer must exercise due diligence on the source and chain of custody of its conflict minerals and provide a Conflict Minerals Report if, based on its reasonable country of origin inquiry, the issuer knows that it has necessary conflict minerals that originated in the Covered Countries and did not come from recycled or scrap sources, or if the issuer has reason to believe that its necessary conflict minerals may have originated in the Covered Countries and may not have come from recycled or scrap sources.

As an exception to this requirement, however, an issuer that must conduct due diligence because, based on its reasonable country of origin inquiry, it has reason to believe that its necessary conflict minerals may have originated in the Covered Countries and may not have come from recycled or scrap sources is not required to submit a Conflict Minerals Report if, during the exercise of its due diligence, it determines that its conflict minerals did not, in fact, originate in the Covered Countries, or it determines that its conflict minerals did, in fact, come from recycled or scrap sources. Such an issuer is still required to submit a specialized disclosure report disclosing its determination and briefly describing its inquiry and its due diligence efforts and the results of that inquiry and due diligence efforts, which should demonstrate why the issuer believes that the conflict minerals did not originate in the Covered Countries

[52] Some commentators agreed that, to allow for greater flexibility, the reasonable country of origin inquiry standard should either not be defined or that only general guidance should be provided. *See, e.g.*, letters from Apparel & Footwear Association (Mar. 2, 2011) ("AAFA"); AngloGold; ArcelorMittal (Oct. 31, 2011) ("ArcelorMittal"); Industry Group Coalition I; IPC I; Information Technology Industry Council (Feb. 24, 2011) ("ITIC I"); International Precious Metals Institute (Jan. 19, 2011) ("IPMI I"); Jewelers Vigilance Committee, American Gem Society, Manufacturing Jewelers & Suppliers of America, Jewelers of America, and Fashion Jewelry & Accessories Trade Association (Mar. 2, 2011) ("JVC *et al.* II"); NAM I, Retail Industry Leaders Association and Consumer Electronics Retailers Coalition (Mar. 2, 2011) ("RILA–CERC"); Semiconductor Industry Association (Mar. 2, 2011) ("Semiconductor"); SIF I; TriQuint Semiconductor, Inc. (Jan. 26, 2011) ("TriQuint I"); and WGC II.

[53] Some commentators argued that either the reasonable country of origin inquiry standard should be defined or that there should specific guidance regarding the standard. *See, e.g.*, letters from Business Roundtable (Mar. 2, 2011) ("Roundtable"), CRS I, Department of State (Mar. 24, 2011) ("State II"), EARTHWORKS' No Dirty Gold Campaign (Mar. 2, 2011) ("Earthworks"), Enough Project I, Ethical Metalsmiths (Feb. 28, 2011) ("Metalsmiths"), General Board of Church and Society of the United Methodist Church (Apr. 19, 2012) ("Methodist Board"), Global Witness (Feb. 28, 2011) ("Global Witness I"), Howland Greene Consultants LLC (Jan. 28, 2011) ("Howland"), International Conference of the Great Lakes Region (Jan. 31, 2011) ("ICGLR"), National Association of Evangelicals (Feb. 17, 2012) ("Evangelicals"), New York City Bar Association (Jan. 31, 2011) ("NYCBar I"), New York City Bar Association (Feb. 8, 2012) ("NYCBar II"), Personal Care Products Council (Mar. 1, 2011) ("PCP"), Presbyterian Church USA (Feb. 23, 2012) ("Presbyterian Church II"), Semiconductor Equipment and Materials International (Feb. 15, 2011) ("SEMI"), Sen. Durbin/Rep. McDermott, Tantalum-Niobium International Study Center (Jan. 27, 2011) ("TIC"), Twenty-four organizations of the Multi-Stakeholder Group (Mar. 2, 2011) ("MSG I"), and World Evangelical Alliance (Feb. 17, 2012) ("Evangelical Alliance").

or that they did come from recycled or scrap sources. On the other hand, if, based on its reasonable country of origin inquiry, an issuer has no reason to believe that its conflict minerals may have originated in the Covered Countries, or, based on its reasonable country of origin inquiry, an issuer reasonably believes that its conflict minerals are from recycled or scrap sources, the issuer is not required to move to step three. In another change from the proposal, the final rule does not require an issuer to retain reviewable business records to support its reasonable country of origin conclusion, although maintenance of appropriate records may be useful in demonstrating compliance with the final rule, and may be required by any nationally or internationally recognized due diligence framework applied by an issuer.

As noted above, if the issuer knows that it has necessary conflict minerals that originated in the Covered Countries, or if the issuer has reason to believe that its necessary conflict minerals may have originated in the Covered Countries and may not have come from recycled or scrap sources, the issuer must move to the third step. The third step, consistent with the proposal, requires such an issuer to exercise due diligence on the source and chain of custody of its conflict minerals and provide a Conflict Minerals Report describing its due diligence measures, among other matters. As noted above, however, the final rule requires an issuer to provide its Conflict Minerals Report as an exhibit to its specialized disclosure report on Form SD, instead of as an exhibit to its annual report on Form 10–K, Form 20–F, or Form 40–F, as proposed.

Generally, the content of the Conflict Minerals Report is substantially similar to the proposal. One modification from the proposal, based on comments we received, is that the final rule requires an issuer to use a nationally or internationally recognized due diligence framework, if such a framework is available for the specific conflict mineral. We are persuaded by commentators that doing so will enhance the quality of an issuer's due diligence, promote comparability of the Conflict Minerals Reports of different issuers, and provide a framework by which auditors can assess an issuer's due diligence.[54] This requirement should make the rule more workable and less costly than if no framework was specified. Presently, it appears that the only nationally or internationally recognized due diligence framework available is the due diligence guidance approved by the Organisation for Economic Co-operation and Development ("OECD").[55]

As proposed, the final rule requires an independent private sector audit of an issuer's Conflict Minerals Report. However, in response to comments, we modified the proposal such that the final rule specifies an audit objective. The audit's objective is to express an opinion or conclusion as to whether the design of the issuer's due diligence measures as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is in conformity with, in all material respects, the criteria set forth in the nationally or internationally recognized due diligence framework used by the issuer, and whether the issuer's description of the due diligence measures it performed as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is consistent with the due diligence process that the issuer undertook. Also, consistent with the proposal, the final rule refers to the audit standards established by the GAO. The GAO staff has indicated to our staff that the GAO does not intend to establish new standards for the Conflict Minerals Report audit. Instead, the GAO plans to look to its existing Government Auditing Standards ("GAGAS"), which is commonly referred to as "the Yellow Book."[56]

Unlike the proposed rule, which would have required descriptions in the Conflict Minerals Report of an issuer's products that "are not 'DRC conflict free,'" where "DRC conflict free" means that they "do not contain minerals that directly or indirectly finance or benefit armed groups in the" Covered Countries, the final rule requires descriptions in the Conflict Minerals Report of an issuer's products "that have not been found to be 'DRC conflict free.'" We believe this change will lead to more accurate disclosure.

As suggested by a number of commentators, the final rule also modifies the proposal by providing a temporary transition period for two years for all issuers and four years for smaller reporting companies.[57] During this period, issuers may describe their products as "DRC conflict undeterminable" if they are unable to determine that their minerals meet the statutory definition of "DRC conflict free" for either of two reasons: First, they proceeded to step three based upon the conclusion, after their reasonable country of origin inquiry, that they had conflict minerals that originated in the Covered Countries and, after the exercise of due diligence, they are unable to determine if their conflict minerals financed or benefited armed groups in the Covered Countries; or second, they proceeded to step three based upon the conclusion, after their reasonable country of origin inquiry, that they had a reason to believe that their necessary conflict minerals may have originated in the Covered Countries and may not have come from recycled or scrap sources and the information they gathered as a result of their subsequently required exercise of due diligence failed to clarify the conflict minerals' country of origin, whether the conflict minerals financed or benefited armed groups in those countries, or whether the conflict minerals came from recycled or scrap sources. These issuers will have already conducted a reasonable country of origin inquiry, and their undeterminable status would be based on the information they were able to gather from their exercise of due diligence. However, if these products also contain conflict minerals that the issuer knows directly or indirectly financed or benefited armed groups in the Covered Countries, the issuer may not describe those products as "DRC conflict undeterminable." Also, during the transition period, issuers with products that may be described as "DRC conflict undeterminable" are not required to have their Conflict Minerals Report audited. Such issuers, however, must still file a Conflict Minerals Report describing their due diligence, and must additionally describe the steps they have taken or will take, if any, since the end of the period covered in their most recent prior Conflict Minerals Report, to mitigate the risk that their necessary conflict minerals benefit armed groups,

[54] The proposed rules would not have required the use of a particular due diligence framework, but the Proposing Release indicated that an issuer whose conduct conformed to a nationally or internationally recognized set of standards of, or guidance for, due diligence regarding its conflict minerals supply chain would provide evidence that the issuer used due diligence in its Conflict Minerals Report.

[55] *See OECD, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2011), *available at http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/46740847.pdf.*

[56] *See U.S. Gov't Accountability Office, GAO–12–331G, Government Auditing Standards 2011 Revision* (Dec. 2011), *available at http://www.goo.gov/assets/590/587281.pdf.*

[57] "Smaller reporting company" is defined in Rule 12b-2 [17 CFR 240.12b-2] under the Exchange Act.

including any steps to improve their due diligence.

This temporary provision will apply for the first two reporting calendar years after effectiveness of the final rule for all issuers that are not smaller reporting companies, and for the first four reporting calendar years after effectiveness of the final rule for smaller reporting companies. We believe it is appropriate to allow a two-year temporary period, in recognition that, as commentators noted, the processes for tracing conflict minerals through the supply chain must develop further to make such determinations for the issuer community at large. Also, we believe it is appropriate to allow an additional two years to this temporary period for smaller reporting companies because, as commentators noted, smaller companies may face disproportionally higher burdens than larger companies and a longer temporary period may help alleviate some of those burdens. After the four-year period for smaller reporting companies and two-year period for all other issuers, issuers that have proceeded to step three but are unable to determine that their conflict minerals did not originate in the Covered Countries or are unable to determine that their conflict minerals that originated in the Covered Countries did not directly or indirectly finance or benefit armed groups must describe their products containing those conflict minerals as not having been found to be "DRC conflict free."

Unlike the proposed rules, the final rule requires issuers with necessary conflict minerals exercising due diligence regarding whether their conflict minerals are from recycled or scrap sources to conform the due diligence to a nationally or internationally recognized due diligence framework, if one is available for a particular recycled or scrap conflict mineral. A gold supplement to the OECD's due diligence guidance has been approved by the OECD.[58] This gold supplement is presently the only nationally or internationally recognized due diligence framework for any conflict mineral from recycled or scrap sources of which we are aware. Therefore, we anticipate that issuers will use the OECD gold supplement to conduct their due diligence for recycled or scrap gold. We are not aware that the OECD or any other body has a similar recycled or scrap due diligence framework for the other conflict minerals. Issuers with conflict minerals without a nationally or internationally recognized due diligence framework are still required to exercise due diligence in determining that their conflict minerals were from recycled or scrap sources. The due diligence that must be exercised regarding such conflict minerals focuses only on whether those conflict minerals are from recycled or scrap sources. In such circumstances where a nationally or internationally recognized due diligence framework becomes available for any such conflict mineral, issuers will be required to utilize that framework in exercising due diligence to determine that conflict minerals are from recycled or scrap sources.

[58] *See OECD, Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Supplement on Gold* (2012), *available at http://www.oecd.org/corporate/guidelinesformultinationalenterprises/FINAL%20Supplement%20on%20Gold.pdf.*

E. Flowchart Summary of the Final Rule

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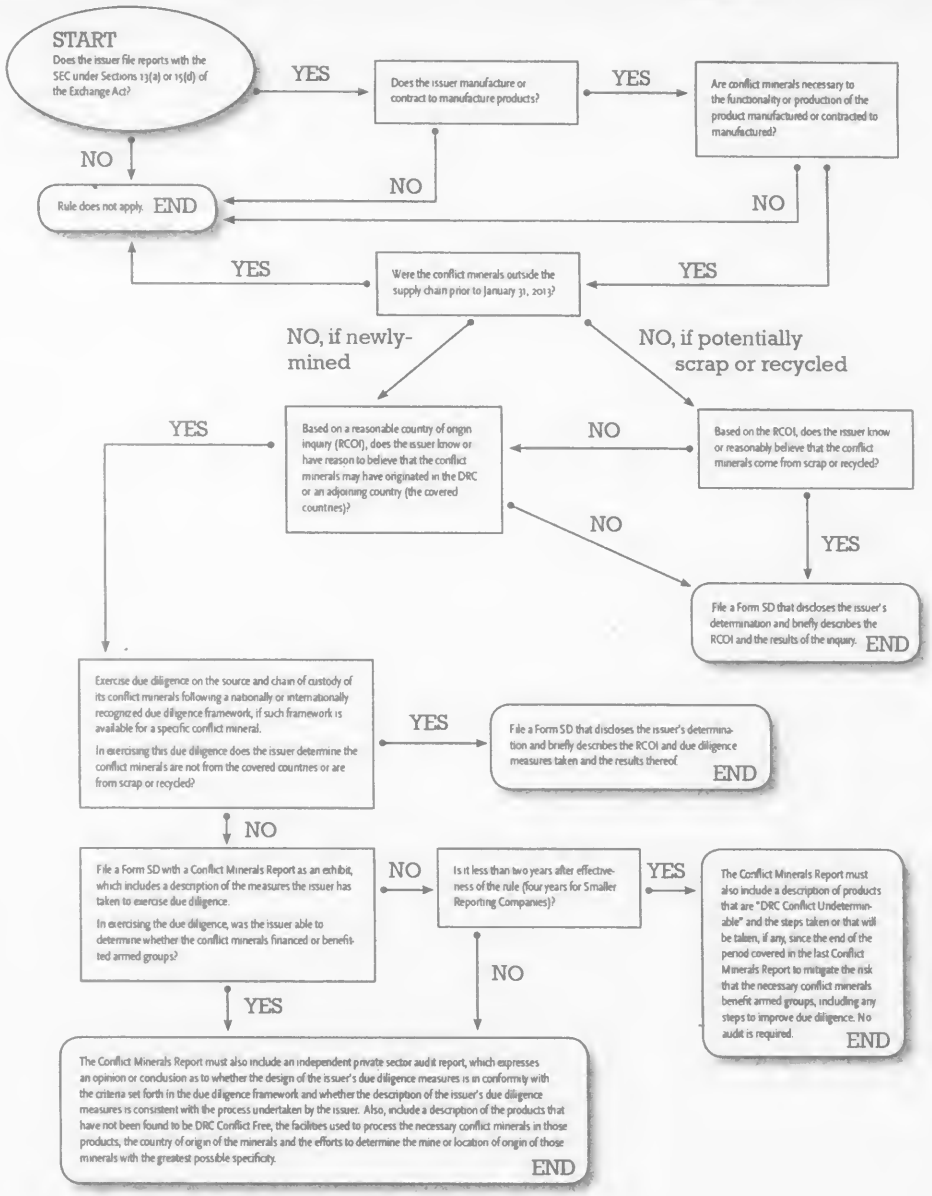

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II. Discussion of the Final Rule

A. "Conflict Minerals" Definition

1. Proposed Rules

The Conflict Minerals Statutory Provision defines the term "conflict mineral" as cassiterite, columbite-tantalite, gold, wolframite, or their derivatives, or any other minerals or their derivatives determined by the Secretary of State to be financing conflict in the Covered Countries.[59] We used the same definition of this term in the proposed rules. As we discussed in the Proposing Release, cassiterite is the metal ore that is most commonly used to produce tin, which is used in alloys, tin plating, and solders for joining pipes and electronic circuits.[60] Columbite-tantalite is the metal ore from which tantalum is extracted. Tantalum is used in electronic components, including mobile telephones, computers, videogame consoles, and digital cameras, and as an alloy for making carbide tools and jet engine components.[61] Gold is used for making jewelry and is used in electronic, communications, and aerospace equipment.[62] Finally, wolframite is the metal ore that is used to produce

[59] Section 1502(e)(4) of the Act. Presently, the Secretary of State has not designated any other mineral as a conflict mineral. Therefore, the conflict minerals include only cassiterite, columbite-tantalite, gold, wolframite, or their derivatives.

[60] Tin Statistics and Information, *U.S. Geological Survey, available at http://minerals.usgs.gov/minerals/pubs/commodity/tin/.*

[61] Niobium (Columbium) and Tantalum Statistics and Information, *U.S. Geological Survey, available at http://minerals.usgs.gov/minerals/pubs/commodity/niobium.*

[62] Gold Statistics and Information, *U.S. Geological Survey, available at http://minerals.usgs.gov/minerals/pubs/commodity/gold.*

tungsten, which is used for metal wires, electrodes, and contacts in lighting, electronic, electrical, heating, and welding applications.[63] Based on the many uses of these minerals, we expect the Conflict Minerals Statutory Provision to apply to many companies and industries and, thereby, the final rule to apply to many issuers.

2. Comments on the Proposed Rules

Several commentators requested that the final rule set forth the specific conflict derivatives that would trigger the rule's disclosure and reporting obligations.[64] Many of these commentators recommended that the final rule limit the derivatives of columbite-tantalite, cassiterite, and wolframite to tantalum, tin, and tungsten, respectively,[65] unless the State Department determines subsequently that additional specific minerals or their derivatives are financing or benefitting armed groups.[66] One of these commentators pointed out that such a limit is appropriate because, although conflict minerals have other derivatives, tantalum, tin, and tungsten are the only economically significant derivatives of the conflict minerals.[67] For example, one commentator noted that oxygen and iron are derivatives of wolframite that could be subject to the final rule, but wolframite is not currently a significant commercial source for oxygen or iron.[68] Another commentator noted that niobium is a derivative of columbite-tantalite that, absent clarification to the contrary, could be subject to the final rule as well.[69] Some commentators, however, asserted that the final rule should not solely be limited to tantalum, tin, tungsten, or gold.[70]

One commentator recommended that the definition of "conflict mineral" not include organic metal compounds formed from a conflict mineral metal derivative, such as tin and tungsten, because these substances are no longer metals or alloys and "use of these chemical compounds is too attenuated from the original source of the mineral."[71] According to the commentator, these organometallic compounds, which include catalysts, stabilizers, and polymerization aids, are commodity chemicals used in the production of raw materials such as silicones, polyurethanes, vinyls, and polyesters. For example, the commentator noted that tin is used in a reaction with chlorine gas, after which the intermediate tin tetrachloride compound undergoes further chemical reactions with any number of organic substrates to produce an organotin compound with the final compounds becoming substances such as stannous octoate, monobutyl tin trichloride, and dioctyltin dilaurate. These substances contain tin but have several organic groups chemically bound to the tin nucleus and are compounds that are materially and chemically distinct from metallic tin. According to the commentator, the use of organotin in many manufacturing sectors has not yet been recognized by manufacturers, supply chains, or regulators, which may increase costs of the final rule if organic tin compounds are included in the definition of "conflict minerals."

In addition, a number of commentators recommended that the final rule selectively use the term "conflict mineral" because not doing so would unfairly stigmatize the four minerals and unjustifiably hurt some companies' reputations.[72] These commentators noted that the term "conflict mineral" in the proposed rules provides no clear distinction between the four named minerals and their derivatives that did not benefit or finance armed groups, and those that did finance or benefit armed groups. Specifically, one of these commentators noted, "refer[ring] to all cassiterite, wolframite, gold, and tantalum in the world, regardless of its origin and relationship to conflict actors" as "conflict minerals," imposes "a reputational taint on these entire industries," and "makes it highly challenging for companies in these industries to communicate effectively with investors and the public."[73] Commentators suggested that we limit the final rule's definition of "conflict minerals" only to minerals that financed or benefited armed groups and that the final rule use another name to describe minerals that did not finance or benefit armed groups, such as "potential conflict minerals," "suspect conflict minerals," "subject minerals," or "covered minerals."[74] Additionally, for the same reasons, some commentators indicated that the final rule should change the names of the required headings from "Conflict Minerals Disclosure" to "Country of Origin Disclosure" and change the name of the Conflict Minerals Report to "Report on Minerals Sourced from Central Africa."[75]

3. Final Rule

After considering the comments, we are revising the proposal in the final rule. We are clarifying our position as to which derivatives are conflict minerals, which appears consistent with the views of various stakeholders,[76]

[63] Tungsten Statistics and Information, *U.S. Geological Survey, available at http://minerals.usgs.gov/minerals/pubs/commodity/tungsten.*

[64] *See, e.g.*, letters from American AAFA, Global Tungsten & Powders Corp. (Mar. 1, 2011) ("Global Tungsten I"), Industry Group Coalition I, IPC I, IPC—Association Connecting Electronics Industries (Nov. 1, 2011) ("IPC II"), Materion Corporation (Nov. 1, 2011) ("Materion"), National Retail Federation (Nov. 1, 2011) ("NRF II"), PCP, Robert W. Row (Jan. 18, 2011) ("Row"), SEMI, and Society of the Plastics Industry Inc. (Nov. 9, 2011) ("SPI").

[65] Gold is produced in its metallic form and has no derivatives.

[66] *See, e.g.*, letters from AAFA, IPC II, NRF II, PCP, and SPI.

[67] *See* letters from IPC II and NRF II. *See also* Transcript of SEC Roundtable, Section 0039 Lines 9–10 ("MR. MATHESON: The economic interest is in the three Ts plus gold.").

[68] *See* letter from SEMI.

[69] *See* letter from Row.

[70] *See, e.g.*, letters from BC Investment Management Corporation (Mar. 28, 2011) ("BCIMC") and Save the Congo (Nov. 1, 2011) ("Save").

[71] *See* letter from SPI.

[72] *See, e.g.*, letters from Advanced Medical Technology Association (Feb. 28, 2011) ("AdvaMed I"), Barrick Gold Corporation (Feb. 28, 2011) ("Barrick Gold"), Cleary Gottlieb Steen & Hamilton LLP (Mar. 2, 2011) ("Cleary Gottlieb"), Global Tungsten I. JVC *et al.* II, Malaysia Smelting Corporation (Jan. 26, 2011) ("MSC I"), National Association of Manufacturers (Nov. 1, 2011) ("NAM III"), Niotan Inc. (Jan. 30, 2011) ("Niotan I"), Niotan Inc. (Mar. 21, 2011) ("Niotan II"), National Mining Association (Mar. 2, 2011) ("NMA II"), SEMI, Tanzania I, TIC, and WGC II. *See also* M)B Consulting (Apr. 28, 2011) ("M)B I") (arguing that the Conflict Minerals Statutory Provision is unclear as to whether the definition of "conflict minerals" refers to columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives, per se, originating from the Covered Countries, or columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives originating from the Covered Countries and that do not directly or indirectly finance or benefit armed groups in the Covered Countries).

[73] *See* letter from Niotan II.

[74] *See* letters from Cleary Gottlieb, Niotan II, SEMI, and TIC.

[75] *See* letters from Barrick Gold and Niotan I.

[76] *See, e.g.*, letter from H.E. Ambassador Liberata Mulamula, International Conference on the Great Lakes Region, Angel Gurría, Secretary-General, Organisation for Economic Co-operation and Development, and Fred Robarts, Coordinator, United Nations Group of Experts on the Democratic Republic of the Congo (Jul. 29, 2011) ("OECD I") ("We consider that the OECD and UN GoE due diligence recommendations, as integrated into the framework of the ICGLR Regional Initiative against the Illegal Exploitation of Natural Resources and the Regional Certification Mechanism, can be used by persons subject to Section 1502 of the Dodd-Frank Act ("issuers") to reliably determine whether the tin, tantalum, tungsten or gold in their products originate from the DRC or adjoining countries, and if so, to determine the facilities used to process those minerals, the country of origin, and the mine or location of origin with the greatest possible specificity, and describe the products manufactured or contracted to be manufactured that are not DRC conflict free."); *OECD, Due Diligence Guidonce for Responsible Supply Choins of Minerols from Conflict-Affected ond High-Risk Areos, 12 (2011), available at http://www.oecd.org/daf/internationalinvestment/*

including at least one co-sponsor of the legislation and other members of Congress.[77] As a commentator suggested, our failure in the proposal to specify the 3T derivatives (tantalum, tin, and tungsten, which are known as the "3Ts") would have introduced too much ambiguity in our rule,[78] which would have expanded the Conflict Mineral Provision's reach, cost, and complexity without increasing its effectiveness.[79] The term "conflict mineral" in the final rule is defined to include cassiterite, columbite-tantalite, gold, wolframite, and their derivatives, which are limited to the 3Ts, unless the Secretary of State determines that additional derivatives are financing conflict in the Covered Countries, in which case they are also considered "conflict minerals;" or any other minerals or their derivatives determined by the Secretary of State to be financing conflict in the Covered Countries.

Additionally, despite the suggestion by certain commentators that we limit the definition of the term "conflict mineral" to minerals that financed or benefited armed groups, the final rule continues to use the term "conflict mineral" to refer to columbite-tantalite, cassiterite, gold, wolframite, and their derivatives, and any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Covered Countries whether or not they actually financed or benefited armed groups. We believe this approach is appropriate because it is consistent with the use of that term in the Conflict Minerals Statutory Provision and to change the definition of the term for the final rule could cause confusion among interested parties between the use of the term in the statutory provision and the use of the term in the final rule. However, issuers whose conflict minerals did not finance or benefit armed groups may describe their products containing those minerals as "DRC conflict free" in their specialized disclosure report, provided that the issuer is able to determine on the basis of due diligence conducted in accordance with a nationally or internationally recognized due diligence framework that such products are "DRC conflict free" as defined in the final rule.

B. Step One—Issuers Covered by the Conflict Mineral Provision

1. Issuers That File Reports Under the Exchange Act

a. Proposed Rules

As we discussed in the Proposing Release, we recognize there is some ambiguity as to whom the Conflict Minerals Statutory Provision applies given that the provision states that the Commission shall promulgate regulations for any "person described"[80] and that a "person is described" if "conflict minerals are necessary to the functionality or production of a product manufactured by such person."[81] Therefore, the Conflict Minerals Statutory Provision could be interpreted to apply to a wide range of private companies not previously subject to our disclosure and reporting rules. Given the provision's legislative background, its statutory location, and the absence of Congressional direction to apply the provision to companies not previously subject to those rules,[82] however, we believe the more appropriate interpretation is that the rules apply only to issuers that file reports with the Commission under Section 13(a) or Section 15(d) of the Exchange Act, and that is what we proposed.[83] Also, consistent with the statutory language, our proposed rules would have applied equally to domestic companies, foreign private issuers, and smaller reporting companies.

guidelinesformultinationalenterprises/46740847.pdf (discussing due diligence as a basis for responsible global supply chain management of "tin, tantalum, tungsten, their ores and mineral derivates, and gold"); Final Report of the United Nations Group of Experts on the Democratic Republic of the Congo, Nov. 29, 2010 [S/2010/596] (stating that relevant individuals and entities should establish effective systems of control and transparency over the mineral supply chain, the nature of which will vary according to the mineral being traded, with the gold supply chain exhibiting characteristics different to those for tin, tantalum, and tungsten, and according to the position of the individual or entity in the supply chain); Enough Project, *From Mine to Mobile Phone: The Conflict Minerals Supply Chain* (Nov. 10, 2009) *available at http://www.enoughproject.org/files/publications/minetomobile.pdf* (indicating its desire to increase transparency in the supply chains for tin, tantalum, and tungsten, or the 3Ts, as well as gold, which are key elements of electronics products including cell phones and personal computers and are the principal source of revenue for armed groups and military units that prey on civilians in eastern Congo, and the 3Ts are produced from mineral ores, including tin from cassiterite, tungsten from wolframite, and tantalum from columbite-tantalite, known throughout Congo as coltan); and Global Witness, *Do No Harm: Excluding conflict minerals from the supply chain*, 2 (July 2010), *available at http://www.globalwitness.org/sites/default/files/pdfs/do_no_harm_global_witness.pdf* (stating that "the warring parties [in the DRC] finance themselves via control of most of the mines in [eastern DRC] that produce tin, tantalum and tungsten ores and gold"). *See also* State Department, *Statement Concerning Implementation of Section 1502 of the Dodd-Frank Legislation Concerning Conflict Minerals Due Diligence*, 1 (July 15, 2011), *available at http://www.state.gov/documents/organization/168851.pdf* (noting that the State Department "is undertaking a number of actions to address the problem of conflict minerals—or the exploitation and trade of gold, columbite-tantalite (coltan), cassiterite (tin), wolframite (tungsten), or their derivatives—sourced from the eastern" DRC that have "helped to fuel the conflict in the eastern DRC").

[77] *See* letters from Representative Mark E. Amodei (Dec. 20, 2011) ("Rep. Amodei") (referring to "tungsten"); Representatives Howard L. Berman, Donald M. Payne, and Christopher H. Smith (Nov. 8, 2010) (Pre-Proposing Release Web site) ("Rep. Berman *et al.* pre-proposing") ("Section 1502 was designed to limit the ability of armed groups in the Democratic Republic of Congo (DRC) to profit from the illicit mining of tin ore, coltan, gold, and other mineral resources that eventually end up in computers, cell phones, and other products."); Representatives Howard L. Berman, Donald M. Payne, Jim McDermott, Karen Bass, and Barney Frank (Sep. 23, 2011) ("Rep. Berman *et al.*"); Representative Renee L. Ellmers (Dec. 13, 2011) ("Rep. Ellmers") (referring to "tungsten"); Rep. Lee (referring to gold, tin, tantalum, and tungsten as "conflict minerals," by stating that "[f]or years, minerals such as gold and other raw materials commonly used to produce tin, tantalum, and tungsten have been mined and sold illegally by rebel groups in parts of the Democratic Republic of the Congo (DRC) and neighboring countries," and that "[t]hese 'conflict minerals' have fueled decades of fighting in central Africa."); Representative Tim Murphy (Dec. 29, 2011) ("Rep. Murphy") (referring to "tungsten"); and Senator Barbara Boxer, Senator John Boozman, Senator Christopher A. Coons, Senator Patrick J. Leahy, Senator Frank R. Lautenberg, and Senator Jeff Merkley (Oct. 18, 201) ("Sen. Boxer *et al.* I") ("The purpose of Sec. 1502 is to create transparency and accountability in the mineral supply chain in the DRC. Minerals from the DRC—which include tin, tantalum, tungsten and gold—are commonly used in products such as cellphones, laptops and jewelry.").

[78] *See* letter from SEMI.

[79] *See* letters from IPC II and NRF II.

[80] *See* Exchange Act Section 13(p)(1)(A).

[81] *See* Exchange Act Section 13(p)(2)(B).

[82] *See* H.R. Rep. No. 111–517, Joint Explanatory Statement of the Committee of Conference, Title XV, "Conflict Minerals," at 879 (Conf. Rep.) (June 29, 2010) ("The conference report requires disclosure to the SEC by all persons otherwise required to file with the SEC for whom minerals originating in the Democratic Republic of Congo and adjoining countries are necessary to the functionality or production of a product manufactured by such person.").

[83] Exchange Act Section 13(a) requires issuers with classes of securities registered under Exchange Act Section 12 [15 U.S.C. 78l] to file periodic and other reports. *See* 15 U.S.C. 78m. Exchange Act Section 15(d) requires issuers with effective registration statements under the Securities Act of 1933 (the "Securities Act") to file reports similar to Exchange Act Section 13(a) for the fiscal year within which such registration statement became effective. *See* 15 U.S.C. 78n. Therefore, if our proposed rules did not include issuers required to file reports under Exchange Act Section 15(d), some issuers who file annual reports may not otherwise be required to comply with our proposed conflict minerals rules.

b. Comments on the Proposed Rules

i. Issuers That File Reports Under Sections 13(a) and 15(d) of the Exchange Act

Many commentators addressing the issue agreed with the proposal that the final rule should apply to issuers that file reports under Sections 13(a) and 15(d) of the Exchange Act and not to private companies or individuals.[84] Some of these and other commentators acknowledged, however, that not including individuals and private companies in the final rule could unfairly burden Sections 13(a) and 15(d) issuers and put them at a competitive disadvantage by increasing their costs.[85] On the other hand, some of these commentators noted that not including private companies and individuals in the final rule may not unduly burden Sections 13(a) and 15(d) issuers because the commercial pressure on private companies by issuers that need this information for their reports and by the public in general demanding that issuers make this information available could be sufficient enough for the private companies to provide voluntarily their conflict minerals information as standard practice.[86] Another commentator argued that the effects of the final rule on competition "are likely to be benign."[87] This commentator asserted that "conflict minerals disclosure costs will not increase the cost of being a publicly traded company by a significant percentage" and that being able to declare a company's products as "DRC conflict free" could become a competitive advantage.[88] Further, in response to our request for comment in the Proposing Release, all four commentators that discussed the issue agreed that an issuer with a class of securities exempt from Exchange Act registration pursuant to Exchange Act Rule 12g3–2(b)[89] should not be subject to the final rule.[90] One commentator recommended "that entities with Over-The-Counter American Depository Receipts (OTC ADRS) that file an annual report with the SEC should also be required to file a 'Conflict Minerals Disclosure' report."[91]

Some commentators stated that the final rule should not necessarily require private companies to submit to us their conflict minerals information, but the final rule should provide mechanisms that allow private companies to report voluntarily on their conflict minerals in a manner similar to Sections 13(a) and 15(d) issuers,[92] which could include working with other agencies that regulate non-reporting companies to have those agencies require their filers to provide similar conflict minerals information.[93] Moreover, the State Department commented that it would encourage private companies not subject to the final rule to disclose voluntarily conflict minerals information.[94] Other commentators disagreed with the proposed rules and indicated that the final rule should apply to more than just issuers that file reports under Sections 13(a) and 15(d) of the Exchange Act.[95] A comment letter submitted jointly by two of the co-sponsors of the legislation stated that their "intent was for the requirements of Section 1502 to apply to all companies that fall under the jurisdiction of the SEC, including those who issue classes of securities otherwise exempt from reporting."[96]

ii. Smaller Reporting Companies

Many commentators agreed that the final rule, as we proposed, should not exempt smaller reporting companies.[97] In this regard, one commentator noted that, although there would be additional costs for smaller reporting companies to comply with the rules, the increased costs will apply also to larger companies.[98] Another commentator asserted that compliance costs for small issuers "will be relatively modest" due to their smaller scale and lower complexity of their businesses.[99] One commentator did not believe that the proposed rules would impose higher costs on smaller companies significant enough to justify an exemption because smaller reporting companies would have fewer products to track than a larger company, which would decrease their compliance costs.[100] The commentator based its belief on the fact that, although it was a small human rights group with a modest budget, it regularly undertakes field investigations and supply chain research that is very similar to the due diligence measures it recommended the Commission adopt. According to this commentator, if it is able to perform due diligence with a small staff, so too can a smaller reporting company.

Some commentators noted that exempting smaller reporting companies from the final rule could increase the burdens on larger reporting companies because the larger reporting companies may be less able to require their smaller reporting company suppliers to provide the conflict minerals information needed by the larger reporting companies.[101] One of these commentators noted also that permitting limited disclosure and reporting obligations for smaller companies is unlikely to reduce significantly their burdens because larger companies would likely impose contractual obligations on them to track and provide their conflict minerals information for the larger companies.[102]

Other commentators supported exempting smaller reporting companies because these companies would be less

[84] *See, e.g.*, letters from AngloGold; Arkema, Inc. (Mar. 1, 2011) ("Arkema"); Calvert; Cleary Gottlieb; Communications and Information Network Association of Japan, Japan Auto Parts Industries Association, Japan Business Machine and Information System Industries Association, Japan Electronics and Information Technology Industries Association, The Japan Electrical Manufacturers' Association, Japan Machinery Center for Trade and Investment (Mar. 2, 2011) ("Japanese Trade Associations"); CRS I; Earthworks; Howland; IPC I; JVC *et al.* II; KEMET Corporation (Nov. 1, 2011) ("Kemet"); PCP; Rockefeller Financial Assel Management (Mar. 1, 2011) ("Rockefeller"); SIF I; State II; TIC; and TriQuint I.

[85] *See, e.g.*, letters from Howland, IPC I, ITIC I, NMA II, National Retail Federation (Mar. 2, 2011) ("NRF I"); TIC; and TriQuint I.

[86] Letter from Howland (noting that "private companies (non reporters) will likely need to provide the same [conflict minerals] information to their customers who will need the information for their reports," and that providing conflict minerals information is "likely" to "become a de facto standard similar to RoHS (EU Restriction of hazardous Substances) for electronics") and TIC ("Further, provided that the regulations apply to large and small issuers, they will form a critical mass which will, in practice, create sufficient commercial pressure on private companies and individuals who manufacture products involving potential conflict materials. Noncompliant companies will be unable to withstand the political and consumer pressures. Accordingly, there is no need for the SEC to seek to expand its jurisdiction.").

[87] *See* letter from Green II.

[88] *Id.*

[89] 17 CFR 240.12g3–2(b).

[90] *See* Cleary Gottlieb, JVC *et al.* II, New York State Bar Association (Mar. 1, 2011) ("NY State Bar"), and SIF I.

[91] *See* letter from Calvert.

[92] *See* letters from Earthworks and TriQuint I.

[93] *See* letter from TriQuint I.

[94] *See* letter from State II.

[95] *See, e.g.*, letters from Catholic Charities Diocese of Houma-Thibodaux (Apr. 21, 2011) ("Catholic Charities"), International Corporate Accountability Roundtable and Global Witness (Nov. 1, 2011) ("ICAR *et al.* II"), ITIC I, NRF I, Sen. Durbin/Rep. McDermott, Sisters of Good Shepherd (Apr. 8, 2011) ("Good Shepherd"), TIC, and Tiffany.

[96] *See* letter from Sen. Durbin/Rep. McDermott.

[97] *See, e.g.*, letters from BCIMC, Calvert, CRS I, Earthworks, Global Witness I, Howland, IPC I, JVC *et al.* II, Rockefeller, Sen. Durbin/Rep. McDermott, SIF I, State II, TIAA–CREF, TIC, and TriQuint I.

[98] *See* letter from Howland.

[99] *See* letter from Green II. *See also* letter from ICAR *et al.* II (stating that "because these issuers are smaller, it stands to reason that they will have fewer products that contain conflict minerals, thus reducing the amount of products that must undergo a reasonable country of origin inquiry and supply chain due diligence").

[100] *See* letter from Global Witness I.

[101] *See, e.g.*, letters from IPC I and TriQuint I.

[102] *See* letters from IPC I.

able to compel their suppliers to provide conflict minerals information due to their lack of leverage,[103] and because it would be more expensive for smaller reporting companies to comply with the rule relative to their revenues than for other companies.[104] However, one commentator argued that, although such issuers may lack leverage, this disadvantage may be reduced through the influence exerted over their suppliers by larger issuers that use the same supplier base and that have more leverage to request such information.[105] Some commentators argued that smaller reporting companies should be allowed to phase-in the rules or that the implementation date of the final rule should be deferred for them.[106]

iii. Foreign Private Issuers

A number of commentators believed that the final rule should not exempt foreign private issuers.[107] As one commentator noted,[108] exempting foreign private issuers from the final rule could increase domestic issuers' burdens by making it very difficult for them to compel their foreign private issuer suppliers to provide conflict minerals information. As another commentator noted,[109] exempting foreign private issuers from the final rule could also result in a competitive disadvantage for domestic issuers because foreign private issuers would not be subject to the final rule. Further, this commentator indicated that not exempting foreign private issuers could actually motivate foreign companies to advocate for similar conflict minerals regulations in their home jurisdictions to reduce any competitive disadvantages they may have with companies from their jurisdictions that do not register with us. Finally, the commentator suggested that exempting foreign private issuers may hurt conflict minerals supply chain transparency, which would be contrary to the intent of Congress.

Only one commentator, a foreign private issuer, stated specifically that foreign private issuers should be exempt from the final rule.[110] This commentator argued that any Congressional intent to give laws extraterritorial effect must be clearly expressed and stated, which the Conflict Minerals Statutory Provision fails to do. Also, the commentator noted that the proposed rules would violate international principles of diplomatic comity and could put diplomats from countries with foreign private issuers in jeopardy. Another commentator suggested that, if the final rule would cause "more than an insignificant number of foreign private issuers to leave the U.S. markets or not to enter the U.S. markets," we should consider exempting all or some foreign private issuers from the final rule.[111] A further commentator stated that, although it recommended that the final rule not exempt foreign private issuers, it expects that the final rule "will represent just one more strong disincentive for such issuers to access the U.S. markets."[112]

c. Final Rule

After considering the comments, we are adopting the final rule as proposed. Therefore, the final rule applies to any issuer that files reports with the Commission under Section 13(a) or Section 15(d) of the Exchange Act, including domestic companies, foreign private issuers, and smaller reporting companies. We believe the statutory language is clear on this point and believe that it only applies to issuers that file reports with the Commission under Section 13(a) or Section 15(d) of the Exchange Act. There is no clear indication that Congress intended to cover issuers other than those that file such reports. Although we appreciate the views expressed in the comment letter submitted jointly by two of the co-sponsors of the legislation,[113] the legislative history only refers to companies that file with or report to the Commission or that are listed on a United States stock exchange.[114] The location of the statute adopted by Congress in the section of the Exchange Act dealing with reporting issuers reflects a more limited scope, as well.[115]

The statute is silent with respect to any distinction among issuers based on the issuer's size or domesticity. Although not specifically in the context of smaller reporting companies or foreign private issuers, some commentators suggested that we use our general exemptive authority under Exchange Act Section 36(a)[116] to exempt certain classes of companies from full and immediate compliance with the disclosures required by the Conflict Minerals Statutory Provision.[117] The only limiting factor in the Conflict Minerals Statutory Provision itself as to the type of issuer to which it applies is based on whether conflict minerals are "necessary to the functionality or production" of products manufactured or contracted by the issuer to be manufactured.[118] Moreover, Congress included a specific provision for Commission revisions and waivers to the reporting obligation that requires the President to determine such waiver or revision to be in the national security interest and limits such a Commission exemption to two years. In our view, the high standard set for this statutory waiver, as well as its limited duration, evinces a congressional intent for the Conflict Minerals Statutory Provision to apply broadly and exempting large categories of issuers would be inconsistent with this intent. We also recognize that section 1502 is not simply a disclosure obligation for issuers, but a comprehensive legislative scheme that contemplates coordinated

[103] *See, e.g.*, letters from ABA, JVC *et al.* II, and Society of Corporate Secretaries and Governance Professionals (Mar. 3, 2011) ("Corporate Secretaries I").

[104] *See* letter from Corporate Secretaries I and Howland.

[105] *See* letter from Green II.

[106] *See, e.g.*, letters from ABA, Howland, and JVC *et al.* II.

[107] *See, e.g.*, letters from AngloGold, BCIMC, Calvert, CRS I, Earthworks, Global Witness I, Howland, JVC *et al.* II, NEI Investments (Mar. 2, 2011) ("NEI"), NY State Bar, SIF I, State II, TIAA–CREF, TriQuint I, WGC II, and WLF.

[108] *See* letter from TriQuint I.

[109] *See* letter from NEI.

[110] *See* letter from Taiwan Semi.

[111] *See* letter from ABA.

[112] *See* letter from NY State Bar.

[113] *See* letter from Sen. Durbin/Rep. McDermott.

[114] *See* H.R. Rep. No. 111–517, Joint Explanatory Statement of the Committee of Conference, Title XV, "Conflict Minerals," at 879 (Conf. Rep.) (June 29, 2010) ("The conference report requires disclosure to the SEC by all persons otherwise required to file with the SEC for whom minerals originating in the Democratic Republic of Congo and adjoining countries are necessary to the functionality or production of a product manufactured by such person."); 156 *Cong. Rec.* S3976 (daily ed. May 19, 2010) (statement of Sen. Feingold) (stating that the "Brownback amendment was narrowly crafted" and, in discussing the provision, referring only to "companies on the U.S. stock exchanges"); 156 *Cong. Rec.* S3865–66 (daily ed. May 18, 2010) (stating that the Conflict Minerals Statutory Provision "is a narrow SEC reporting requirement" and referring only to "SEC reporting requirements" in discussing the provision); and 156 *Cong. Rec.* S3816–17 (daily ed. May 17, 2010) (statement of Sen. Durbin) (stating that the provision "would require companies listed on the New York Stock Exchange to disclose in their SEC filings").

[115] *See* Exchange Act Section 13 entitled "Periodical and Other Reports."

[116] 15 U.S.C. 78mm(a) ("[T]he Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this chapter or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.").

[117] *See, e.g.*, letters from Davis Polk & Wardwell LLP (Mar. 2, 2011) ("Davis Polk"); National Cable & Telecommunications Association (Oct. 31, 2011) ("NCTA"); Representatives Spencer Bachus, Gary G. Miller, Chairman, Robert J. Dold, and Steve Stivers (Jul. 28, 2011) ("Rep. Bachus *et al.*") Verizon; and Wilmer Cutler Pickering Hale and Dorr LLP Hale on behalf of IPC (Jun. 2, 2011) ("WilmerHale").

[118] Exchange Act Section 13(p)(2)(B).

action by a number of federal agencies aimed at making public information about conflict minerals from the Covered Countries.[119] We are concerned that any broad categories of exemptions would be inconsistent with this scheme and the statutory objective of reducing the use of conflict minerals from the Covered Countries that contribute to conflict.[120] Congress chose to pursue this goal through the implementation of a comprehensive disclosure regime. In order to allow the provision to have the effect we understand Congress intended, we believe our rules must be consistent with the statutory language and not exempt broad categories of issuers from its application. Thus, we are not exempting smaller reporting companies or foreign private issuers.

Additionally, it is unclear whether exempting smaller reporting companies in particular would significantly reduce their burdens because smaller reporting companies could still be required to track and provide their conflict minerals information for larger issuers.[121] Moreover, to the extent there are benefits to smaller companies from an exemption, such an exemption could increase the burden on larger companies that rely on smaller reporting company suppliers to provide conflict minerals information needed by the larger reporting companies.

Further, as discussed in greater detail below, the final rule temporarily will permit all issuers that are unable to determine that their conflict minerals did not originate in the Covered Countries or that are unable to determine that their conflict minerals that originated in the Covered Countries did not directly or indirectly finance or benefit armed groups to describe their products as "DRC conflict undeterminable," and temporarily will not require such issuers to obtain an independent private sector audit of their Conflict Minerals Report with respect to those minerals. This temporary accommodation will be available to all issuers for the first two years of reporting under the final rule. The final rule extends that period for smaller reporting companies for an additional two years, providing a temporary four-year provision for smaller reporting companies. This approach is consistent with some commentators' recommendations as to the applicability of the reporting requirement to smaller reporting companies.[122]

Similarly, we are not exempting foreign private issuers because we do not believe that it would give effect to Congressional intent of the provision. As commentators noted, exempting foreign private issuers could make it difficult for issuers to compel their foreign private issuer suppliers to provide conflict minerals information, result in a competitive disadvantage for domestic issuers, and hurt conflict minerals supply chain transparency.[123] Also, we note that including foreign private issuers in the final rule does not give the Conflict Minerals Statutory Provision an extraterritorial effect because it applies only to foreign private issuers that enter the securities markets of the United States.

2. "Manufacture" and "Contract to Manufacture" Products

a. Proposed Rules

The Conflict Minerals Statutory Provision applies to any person for whom conflict minerals are necessary to the functionality or production of a product manufactured by that person. The proposed rules would likewise have applied to reporting persons for whom conflict minerals are necessary to the functionality or production of products they manufacture. We did not define the term "manufacture" in the proposed rules, because we believed the term to be generally understood.[124]

In addition, based on the text of the Conflict Minerals Statutory Provision as well as statutory intent, the proposed rules would also have applied to issuers that contract to manufacture products. As discussed in the Proposing Release, one section of the Conflict Minerals Statutory Provision defines a "person described" as one for which conflict minerals are "necessary to the functionality or production of a product manufactured by such a person," [125] while another section of the provision requires an issuer to describe "the products manufactured or *contracted to be manufactured* that are not DRC conflict free" [emphasis added] in its Conflict Mineral Report.[126] The absence of the phrase "contract to manufacture" from the "person described" definition raised some question as to whether the requirements apply equally to those who manufacture products themselves and those who contract to have their products manufactured by others. Based on the totality of the provision, however, we expressed in the Proposing Release our belief that the legislative intent was for the provision to apply both to issuers that directly manufacture products and to issuers that contract the manufacturing of their products for which conflict minerals are necessary to the functionality or production of those products. The proposed rules, therefore, would have applied equally to issuers that manufacture products and to issuers that "contract to manufacture" their products. We noted that this approach would allow the "contracted to be manufactured" language to have effect in the Conflict Minerals Report.

In the Proposing Release, we explained that the proposed rules would apply to issuers that contract for the manufacturing of products over which they had any influence regarding the manufacturing of those products. As proposed, they also would have applied to issuers selling generic products under their own brand name or a separate

[119] Sections 1502(c) and (d) of the Act. We recognize that Congress also required the Comptroller General to periodically report on, among other things, publicly available information regarding persons who are "not required to file reports * * * pursuant to Section 13(p)(1)(A)" and who manufacture products for which "conflict minerals are necessary to the functionality or production." Section 1502(d)(2)(C). We interpret this provision to require reporting by the Comptroller General on persons—such as private companies not subject to our disclosure and reporting rules—who are not subject to the requirements of the Conflict Minerals Statutory Provision even though conflict minerals may be necessary to the functionality or production of their products. Any issuers that receive waivers or revisions pursuant to Section 13(p)(3) would also be included.

[120] *See* letters from Global Witness I and State II and Transcript of SEC Roundtable on Conflict Minerals, Section 141 (Oct. 18, 2011) (Statement of Tim Mohin), *available at http://www.sec.gov/spotlight/conflictminerals/conflictmineralsroundtable101811-transcript.txt* (stating that although no single company working alone can determine whether minerals in its products supported armed groups, large and small companies working together can make such a determination), *id.* at 22 (Statement of Bennett Freeman) (arguing that all companies across the value and supply chain should be covered by the rule because disclosures by all companies are important to investors). *See also id.* at 62, 92, and 103 (Statements of Andrew Matheson, Benedict S. Cohen, and Representative James McDermott, respectively) (assuming that small issuers would be covered by the rule).

[121] *See* letters from IPC I.

[122] *See* letter from Howland (stating that, although "[t]here will be additional costs that may be proportionally higher for small companies, but increased costs will also apply to large firms," a way that the final rule can "mitigate the cost is to phase in the acceptable level of rigor for due diligence over several years and based on company size"). *See also* letter from JVC *et al.* II (stating that, "[w]ith respect to smaller reporting companies, it is reasonable to assume that the costs of compliance may disproportionately harm them by comparison with any concomitant benefit in achieving the statutory goals, since these companies lack the leverage to pressure suppliers and smelters to certify regarding the source of a particular conflict mineral," so "we believe it would be appropriate to allow smaller reporting companies even more time in which to adapt the results of these broader global initiatives to their individual facts and circumstances").

[123] *See* letters from NEI and TriQuint I.

[124] For example, the Second Edition of the Random House Webster's Dictionary defines the term to include the "making goods or wares by hand or machinery, esp. on a large scale." *Random House Webster's Dictionary 403* (2d ed. 1996).

[125] Exchange Act Section 13(p)(2)(B).

[126] Exchange Act Section 13(p)(1)(A)(ii).

brand name that they had established, regardless of whether those issuers had any influence over the manufacturing specifications of those products, as long as an issuer had contracted with another party to have the product manufactured specifically for that issuer. We did not, however, propose that the rules would apply to retail issuers that sell only the products of third parties if those retailers had no contract or other involvement regarding the manufacturing of those products, or if those retailers did not sell those products under their brand name or a separate brand they had established and did not have those products manufactured specifically for them.

b. Comments on the Proposed Rules

i. "Manufacture"

Many commentators agreed with the proposed rules that the final rule should not define the term "manufacture" because that term is generally understood.[127] Many other commentators, however, believed that the final rule should define the term,[128] and most of these commentators provided their recommendations for the definition. A number of commentators indicated that the definition should mirror the North American Industry Classification System ("NAICS"),[129] which classifies entities as manufacturers if they engage in the mechanical, physical, or chemical transformation of materials, substances, or components into new products from raw materials that are products of agriculture, forestry, fishing, mining, or quarrying.

Some commentators stated that the final rule should define the term inclusively or broadly so as to include all steps in the supply chain, from mining to manufacturing the product, because otherwise it would become exponentially more difficult for manufacturing issuers downstream in the supply chain to comply with the final rule.[130] One commentator indicated that the term should include all steps from mining, refining, and production to the importing, exporting, or sale of ingredients, materials, and/or processes.[131] A few commentators indicated that the final rule should provide a definition consistent with the U.S. Controlled Substances Act, which includes the production, preparation, assembling, propagation, combination, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin.[132] One of these commentators stated that such a consistent definition would include the "production, preparation, assembling, combination, compounding, or processing of ingredients, materials, and/or processes such that the final product has a name, character, and use, distinct from the original ingredients, materials, and/or processes."[133] One commentator asserted that the definition should include any entity "involved in the process of changing a product * * * from one form to another."[134] One commentator suggested that the definition "should be tailored only to include OEM's and those who design and specify bills of materials for products with control over the procurement or fabrication of the same products' bill of materials and specification of the constituent materials of the components."[135] One commentator urged us to provide clear guidance indicating that real estate development does not constitute manufacturing.[136]

ii. "Contract to Manufacture"

Not all commentators agreed on whether the final rule should include an issuer that contracts to manufacture a product. However, many commentators that agreed that the final rule should include an issuer that contracts to manufacture a product, or did not agree but argued in the alternative, recommended that an issuer should be required to have some amount of control or influence over the manufacturing process before the final rule considers that issuer to be contracting to manufacture a product.[137] A number of commentators suggested the level of control necessary to be considered contracting to manufacture a product under the final rule. In this regard, some commentators suggested that only an issuer with direct, close, active, and/or substantial involvement or control in the sourcing of materials, parts, ingredients, or components to be included in its products or in the manufacturing of those products should meet the minimum control threshold necessary to be considered contracting to manufacture a product.[138] One commentator recommended that an issuer should be considered to be contracting to manufacture a product only if it exercises "a sufficient level of influence, involvement or control over the process to be able to control, in a meaningful manner, the use of conflict minerals, or to evaluate and influence the use of conflict minerals."[139] Some commentators asserted that the minimum control threshold should be met only if the issuer explicitly specifies the inclusion of conflict minerals in the product.[140] Another commentator advised that the contracting activities that should trigger conflict minerals reporting should include designing the product, controlling the approved materials or vendor lists for the product, and including the issuer's name on the product.[141]

Some of these commentators, as well as others, asserted that an issuer should not be considered to meet the control threshold to the extent that the product is not manufactured to meet an issuer's custom specifications, but rather is manufactured to meet industry-standard specifications common to the issuer's competitors generally.[142] For example, a group of jewelry industry commentators argued in one letter that a jewelry retail issuer ordering products from jewelry manufacturers should not be considered contracting to manufacture for those products if the retail issuer specifies only weight, karat, or other indicators of

[127] *See, e.g.*, letters from ABA, Global Witness I, Howland, NYCBar I, NYCBar II, State II, TIC, and United States Steel Corporation (Mar. 4, 2011) ("US Steel").

[128] *See, e.g.*, letters from American Association of Exporters and Importers (Jan. 21, 2011) ("AAEI"); AngloGold; Columban Center for Advocacy and Outreach, Leadership Conference of Women Religious, Sisters of Mercy of the Americas—Institute Justice Team, Missionary Oblates, and Maryknoll Office for Global Concerns (Mar. 2, 2011) ("Columban Center *et al.*"); CTIA—The Wireless Association (Mar. 1, 2011) ("CTIA"); Earthworks; Enough Project I; International Corporate Accountability Roundtable, Enough Project, and Global Witness (Sep. 23, 2011) ("ICAR *et al.* I"); MetalSmiths; NAM I; NEI; NMA II; RILA–CERC; SIF I; TriQuint I; and WGC II.

[129] *See* letters from AAEI, AngloGold, BCE Inc. (Oct. 31, 2011) ("BCE"), Canadian Wireless Telecommunications Association (Oct. 28, 2011) ("CWTA"), CTIA, NAM I, NCTA, NMA II, RILA–CERC, and WGC II.

[130] *See* letters from Columban Center *et al.*, Metalsmiths, and TriQuint I.

[131] *See* letter from Earthworks.

[132] *See* letters from Enough Project I and SIF I.

[133] See letter from Enough Project I (citing to its earlier letter submitted Sep. 24, 2010 on the Pre-Proposing Release Web site).

[134] *See* letter from Jeffrey Trott (Jan. 31, 2011) ("Trott").

[135] *See* letter from Retail Industry Leaders Association (Nov. 1, 2011) ("RILA").

[136] *See* letter from National Association of Real Estate Investment Trusts (Nov. 23, 2011) ("NAREIT").

[137] *See, e.g.*, letters from AdvaMed I, AT&T Inc. (Mar. 9, 2011) ("AT&T"), Chamber I, Cleary Gottlieb, Consumer Electronics Retailers Coalition (Nov. 1, 2011) ("CERC"), Industry Group Coalition I, IPC I, IPC II, JVC *et al.* II, NAM I, NCTA, Niotan I, NMA II, NRF I, NRF II, PCP, RILA, Roundtable, SEMI, TIAA–CREF, and TriQuint I.

[138] *See* letters from AT&T, CERC, Corporate Secretaries I, CTIA, JVC *et al.* II, NCTA, NRF I, RILA, and Verizon.

[139] *See* letter from ABA.

[140] *See* letters from NAM I and SEMI

[141] *See* letter from TriQuint I.

[142] *See* letters from AngloGold, AT&T, BCE, JVC *et al.* II, NCTA, and RILA–CERC.

quality.[143] As another example, a mobile phone service provider asserted that it should not be considered contracting to manufacture its mobile phones even though it specifies to its manufacturers that the phones must be compatible with their networks and have certain cosmetic design requirements.[144]

Some commentators suggested that the final rule should not consider an issuer to be contracting to manufacture products if the issuer is selling products under its own brands, labels, trademarks, or licenses if it had little or no influence in manufacturing those products.[145] Other commentators recommended that the final rule should consider such issuers to be contracting to manufacture those products.[146] One commentator asserted that generic products should be held to the same standard as branded products and that the final rule should avoid using any definitions that create a perverse incentive for an issuer to work with special purpose entities designed to follow the technical requirements of the law but evade its intent.[147] Another commentator suggested that the final rule should apply to issuers selling generic products under their own name or a separate brand name, but not to retailers who do not do so and have no influence over the manufacturing of products they sell.[148]

Some commentators recommended that an issuer should be considered to be contracting to manufacture a product only if the issuer has a direct contractual relationship with the manufacturer of the product to be sold by the issuer, the issuer has substantial control over the manufacturer and the material specifications of the product and specifies the conflict minerals to be used in the product, the product will be manufactured exclusively for the issuer, and the product will be sold by the issuer under its own brand name or a brand name owned by the issuer or exclusively licensed to the issuer by the owner of the brand.[149] One of these commentators went on to assert that an issuer should not be considered to be exerting "substantial control" over manufacturing by "merely attaching a brand label to a generic good, contracting for the exclusive distribution of goods, or specifying the form, fit or function of a product," and should not be considered to be contracting to manufacture a product solely by "attaching a brand label to a generic good, contracting for the exclusive distribution of goods, or specifying the form, fit or function of a product."[150]

Other commentators stressed that the final rule should not apply to any issuer contracting to manufacture its products.[151] These commentators argued generally that the statute does not include an issuer that contracts to manufacture its products because the phrase does not appear in the subsection of the Conflict Minerals Statutory Provision discussing a "person described." Instead, the phrase appears only in the subsection that describes the disclosures required in a Conflict Minerals Report. Therefore, Congress's intent in including the phrase was only to ensure that a manufacturer otherwise subject to the Conflict Minerals Statutory Provision could not intentionally evade its reporting obligation merely by distancing itself, through contracting, from the manufacturing process.[152]

c. Final Rule

i. "Manufacture"

After considering the comments, we are modifying the proposed rules, in part. The final rule, as proposed, applies to any issuer for which conflict minerals are necessary to the functionality or production of a product manufactured or contracted by that issuer to be manufactured. The final rule does not define the term "manufacture" because we continue to believe, as discussed in the Proposing Release, that the term is generally understood. We note, however, that we do not consider an issuer that only services, maintains, or repairs a product containing conflict minerals to be "manufacturing" a product;[153] this interpretation is not a change from the Proposing Release, but a clarification in response to comments.[154]

We believe narrowing or expanding the definition of "manufacture" as suggested by some commentators would be inconsistent with the language and framework of Section 1502. For example, the NAICS definition, which a number of commentators suggested, appears to exclude any issuer that manufactures a product by assembling that product out of materials, substances, or components that are not in raw material form. Such a definition would exclude large categories of issuers that manufacture products through assembly, such as certain auto and electronics manufacturers, whom we believe are intended to be covered by the Conflict Minerals Statutory Provision. As another example, the manufacturing definition put forth by one commentator appears to include "importing, exporting, or sale of conflict minerals,"[155] which would expand the definition to include issuers that clearly do not manufacture products. Also, many of the other suggested definitions simply expound upon the generally understood meaning of the term, which we do not believe we need to define.

ii. "Contract to Manufacture"

Consistent with the proposal, the final rule applies to any issuer for which conflict minerals are necessary to the functionality or production of a product contracted by that issuer to be manufactured, including conflict minerals in a component of a product. In general, the question of whether an issuer contracts to manufacture a product will depend on the degree of influence exercised by the issuer on the manufacturing of the product based on the individual facts and circumstances surrounding an issuer's business and industry. The final rule does not define when an issuer contracts to manufacture a product because, although we believe this concept is intuitive at a basic level, after considering comments and attempting to develop a precise definition, we concluded that, for "contract to manufacture" to cover issuers operating in the wide variety of the impacted industries and structured

[143] *See* letter from JVC *et al.* II.

[144] *See* letter from AT&T. *See also* letter from BCE (stating that the commentator, a distributor of a wide range of telecommunications and electronic products supplied by hundreds of manufacturers, "exerts no substantial control over the design or the technical features of those products or any control, direct or indirect, over the supply chains, which may be quite complex, of such manufacturers," and its "sole input into the manufacturing process relates to providing brand name manufacturers with certain technical specifications to ensure compliance with applicable Canadian regulatory standards or to requesting special product features, cosmetic in nature, to meet Canadian consumer market demands").

[145] *See* letters from AT&T, BCE, Cleary Gottlieb, CTIA, Industry Group Coalition I, JVC *et al.* II, NAM I, NCTA, and NRF I.

[146] *See* letters from Enough Project I, Howland, NEI, SIF I, State II, and TriQuint I.

[147] *See* letter from AxamTrade (Feb. 10, 2011) ("Axam").

[148] *See* letter from NYCBar II.

[149] *See* letters from CERC and RILA.

[150] *See* letter from RILA.

[151] *See, e.g.*, letters from BCE, CERC, CTIA, Davis Polk, NCTA, RILA–CERC, TIC, and United States Telecom Association (Mar. 2, 2011) ("US Telecom").

[152] *See* letters from AT&T, CTIA, and RILA–CERC.

[153] *See* letter from JVC *et al.* II (commenting that "certain assembly and repair functions commonly performed by jewelry retailers" should not be defined as manufacturing).

[154] *See, e.g.*, letter from ABA (commenting that the Commission "should, either in the final rule or in the corresponding adopting release, provide additional guidance as to activities that will not be considered to be the manufacturing of a product for the purposes of the rule").

[155] *See* letter from Earthworks.

in various manners, any definition of that term would be so complicated as to be unworkable. We do, however, provide guidance below on some general principles that we believe are relevant in determining whether an issuer should be considered to be contracting to manufacture a product.

As a threshold matter, consistent with the proposal, we believe the statutory intent to include issuers that contract to manufacture their products is clear based on the statutory obligation for issuers to describe in their Conflict Minerals Reports products that are manufactured and contracted to be manufactured that do not meet the definition of "DRC conflict free." [156] We recognize that commentators asserted that the statute does not include an issuer that contracts to manufacture its products and that the sole intent behind including the phrase in the provision was to keep manufacturers from intentionally evading reporting requirements by contracting the manufacturing of their products to third parties. Nonetheless, Exchange Act Section 13(p)(1)(A)(ii) requires issuers that must file a Conflict Minerals Report to describe their "products manufactured *or contracted to be manufactured* that are not DRC conflict free" (emphasis added). In our view, the inclusion of products that are "contracted to be manufactured" in this requirement indicates that Congress intended the Conflict Mineral Statutory Provision to apply to such products, and including issuers who contract to manufacture their products in the scope of the rule effectuates this intent. We believe our reading is more consistent with the statute than the alternative reading—that Congress required a description of products that were "contracted to be manufactured" and were not "DRC conflict free," but did not require issuers that contracted to manufacture products to determine whether a Conflict Minerals Report was required to be filed. This would be internally inconsistent. It would significantly undermine the purpose of the statutory provision to fail to apply it to issuers that contract to manufacture their products.

As another threshold matter, we believe the phrase "contract to manufacture" captures manufacturers that contract the manufacturing of components of their products. Generally, we believe that manufacturing issuers that contract the manufacturing of certain components of their products should, for purposes of the Conflict Minerals Statutory Provision, be viewed as responsible for the conflict minerals in those products to the same extent as if they manufactured the components themselves. We believe it is inconsistent with the Conflict Minerals Statutory Provision to allow these manufacturers to avoid the final rule's requirements by contracting out the manufacture of components in their products that contain conflict minerals. As two of the co-sponsors of the Conflict Minerals Statutory Provision noted, "[m]any companies use component parts from any one of several suppliers when assembling their products" to "help drive down the price for parts through competition," but "[i]t is of paramount importance that this business model choice not be used as a rationale to avoid reporting and transparency." [157]

In the proposal, we expressed our belief that an issuer that does not manufacture a product itself but that has "any" influence over the product's manufacturing should be considered to be contracting to manufacture that product. Also, we expressed our belief that an issuer that offers a generic product under its own brand name or a separate brand name should be considered to be contracting to manufacture that product so long as the issuer had contracted to have the product manufactured specifically for itself. We had believed that these issuers should have been considered to be contracting those products to be manufactured because the issuers would implicitly influence the manufacturing of the products. However, we are persuaded by commentators that this level of control set forth in the Proposing Release was "overbroad" and "confusing" and would impose on such an issuer "significant," "unrealistic," and "costly" burdens.[158]

Consistent with our approach in the Proposing Release, we believe that "contract to manufacture" is intended to include issuers that have some actual influence over the manufacturing of their products. However, we have modified our view as to the circumstances under which an issuer is considered to be contracting to manufacture a product. An issuer is considered to be contracting to manufacture a product depending on the degree of influence it exercises over the materials, parts, ingredients, or components to be included in any product that contains conflict minerals or their derivatives. The degree of influence necessary for an issuer to be considered to be contracting to manufacture a product is based on each issuer's individual facts and circumstances. However, based on comments we received, we believe an issuer should not be viewed for the purposes of the Conflict Minerals Statutory Provision as contracting to manufacture a product if its actions involve no more than:

(a) Specifying or negotiating contractual terms with a manufacturer that do not directly relate to the manufacturing of the product, such as training or technical support, price, insurance, indemnity, intellectual property rights, dispute resolution, or other like terms or conditions concerning the product, unless the issuer specifies or negotiates taking these actions so as to exercise a degree of influence over the manufacturing of the product that is practically equivalent to contracting on terms that directly relate to the manufacturing of the product; or

(b) Affixing its brand, marks, logo, or label to a generic product manufactured by a third party; or

(c) Servicing, maintaining, or repairing a product manufactured by a third party.

For example, we agree with commentators that an issuer that is a service provider that specifies to a manufacturer that a cell phone it will purchase from that manufacturer to sell at retail must be able to function on a certain network does not in-and-of-itself exert sufficient influence to "contract to manufacture" the phone for purposes of the final rule. Under the proposed rules, however, such an issuer may have reached the "any" influence threshold. Conversely, we do not agree with commentators that an issuer must have "substantial" influence or control over the manufacturing of a product before the issuer is considered to be contracting to manufacture that product.[159] Such a standard would significantly limit the coverage of the Conflict Minerals Statutory Provision for issuers that contract to manufacture products, and we do not believe that such a narrow scope is consistent with the intent of the Conflict Minerals Statutory Provision. For example, if there are specifications made by an issuer to a manufacturer that it contracts with for the inclusion of a particular conflict mineral in the product, the

[156] *See* Exchange Act Section 13(p)(1)(A)(ii).

[157] *See* letter from Senator Richard J. Durbin and Representative Jim McDermott (Oct. 4, 2010) (Pre-Proposing Release Web site) ("Sen. Durbin/Rep. McDermott pre-proposing").

[158] *See, e.g.*, letters from ABA, AT&T, Corporate Secretaries I, Davis Polk, and Verizon. *See also* letter from NRF I (stating that our proposed approach would be "draconian").

[159] *See, e.g.*, letters from AT&T, Corporate Secretaries I, CTIA, JVC *et al.* II, NRF I, and Verizon.

issuer might not be viewed as exerting "substantial" influence on the overall manufacturing of the product. However, we would view such an issuer as covered under the final rule as contracting to manufacture the product. In addition, we disagree with commentators that suggested that the final rule should apply only to issuers that explicitly specify that conflict minerals be included in their products.[160] We believe this is too narrow an interpretation of the statutory provision and, read in this manner, the statute would be illogical. For example, as commentators argued, Congress inserted "contract to manufacture" in the disclosure of products to prevent manufacturers from skirting the disclosure requirements by contracting to manufacture certain products. However, if "contract to manufacture" is not included in the definition of "person described," an issuer may evade the statute by contracting its manufacturing to a third party. Therefore, an issuer would never be required to disclose its minerals because the issuer would not qualify for steps two and three.

Moreover, in contrast to our approach in the Proposing Release, we do not consider an issuer to be contracting to manufacture a product for the purposes of our rule solely if it offers a generic product under its own brand name or a separate brand name without additional involvement by the issuer. We are persuaded by commentators that such an issuer would not necessarily exert a sufficient degree of influence on the manufacturer to be considered as contracting to manufacture the product for purposes of the Conflict Minerals Statutory Provision. As one commentator noted, it seems that such a relationship between an issuer and manufacturer is better characterized as one in which the manufacturer is using the issuer as a "sales channel" as opposed to one in which the issuer is "outsourcing manufacturing to" the manufacturer.[161] Such a relationship limits the issuer's influence on the product's manufacturing to the extent that it puts the issuer in a similar position to that of a pure retailer. One commentator noted that the purposes of the Conflict Minerals Statutory Provision are not served by classifying such an issuer as contracting to manufacture a product.[162] We agree. However, an issuer with generic products that include its brand name or a separate brand name and that has involvement in the product's manufacturing beyond only including such brand name would need to consider all of the facts and circumstances in determining whether its influence reaches such a degree so as to be considered contracting to manufacture that product.

3. Mining Issuers as "Manufacturing" Issuers

a. Proposed Rules

Under the proposed rules, we would have considered an issuer that mines conflict minerals to be manufacturing those minerals and an issuer contracting for the mining of conflict minerals to be contracting for the manufacture of those minerals. In this regard, we proposed in an instruction to the rules that mining issuers be considered to be manufacturing conflict minerals when they extract those minerals.[163] We did, however, request comment on this point.

b. Comments on the Proposed Rules

A number of commentators stated specifically that the final rule should consider any issuer that mines conflict minerals as "manufacturing" those conflict minerals as "products."[164] A few commentators noted that mining issuers should be included as manufacturers because they begin the conflict minerals supply chain and other reporting issuers must rely on them for information.[165] As such, without the final rule including mining issuers, other issuers would have a very difficult time complying with the rules, which would eliminate transparency from the supply chain and undermine the provision.[166]

Other commentators indicated that the final rule should not treat mining issuers as manufacturers of the conflict minerals they extract.[167] Some of these commentators argued that the final rule should incorporate the NAICS definition of "manufacturing," which they noted does not include mining as a type of manufacturing activity.[168] Certain commentators noted that mining of conflict minerals, especially gold, shares no characteristics with the manufacturing of products.[169] Finally, some commentators asserted that Congress did not intend to include mining issuers as manufacturers based on previous versions of the Conflict Minerals Statutory Provision, legislative statements, and a plain reading of the statute.[170] As some of these commentators noted, the Conflict Minerals Statutory Provision was preceded by other legislative proposals that were drafted to include mining issuers, but the Conflict Minerals Statutory Provision was not drafted in such a manner.[171] One such commentator indicated that these previous bills "explicitly applied not only to companies using covered minerals in their manufacturing processes, but also to persons engaged in 'the commercial exploration, extraction, importation, exportation, or sale' of the covered minerals."[172] According to the commentator, the fact that Congress chose not to include extraction activities in the Conflict Minerals Statutory Provision demonstrates that Congress's intent was not to have the Conflict Minerals Statutory Provision include mining as manufacturing.

c. Final Rule

After considering the comments, we are modifying the proposal. We do not consider an issuer that mines or contracts to mine conflict minerals to be manufacturing or contracting to manufacture those minerals unless the issuer also engages in manufacturing, whether directly or indirectly through contract, in addition to mining. In this regard, we do not believe that mining is "manufacturing" based on a plain reading of the provision. We agree with the commentators concerned that the statutory language does not explicitly include mining anywhere in the Conflict Minerals Statutory Provision and including mining would expand the statutory mandate. The Conflict Minerals Statutory Provision does not specifically refer to mining and, as one

[160] *See, e.g.*, letters from NAM I and SEMI.

[161] *See* letter from AT&T.

[162] *See* letter from Cleary Gottlieb.

[163] *See* Industry Guide 7 [17 CFR 229.802(g)] (implying that companies may "produce" minerals from a mining reserve).

[164] *See, e.g.*, letters from Bario-Neal Jewelry (Mar. 1, 2011) ("Bario-Neal"); Brilliant Earth, Inc. (Feb. 28, 2011) ("Brilliant Earth"); CRS I; Earthworks; Electronics TakeBack Coalition (Mar. 2, 2011) ("TakeBack"); Enough Project I; Enough Project (Nov. 2, 2011) ("Enough Project IV"); Global Tungsten I; Hacker Jewelers, Designers & Goldsmiths, Inc. (Mar. 1, 2011) ("Hacker Jewelers"); Hoover & Strong, Inc. (Mar. 1, 2011) ("Hoover & Strong"); ICAR *et al.* I; NEI; Niotan I; NYCBar I; SIF I; State II; TIAA–CREF; TriQuint I; and U.S. Steel.

[165] *See* letters from Global Witness I and TriQuint I (noting that mining companies do, in fact, engage in a transformative process such that they transform natural resources into ores, which should be considered "manufacturing").

[166] *See* letter from Enough Project I.

[167] *See, e.g.*, letters from ABA, AngloGold, Barrick Gold, Cleary Gottlieb, ITRI Ltd. (Jan. 27, 2011) ("ITRI I"), NAM III, NMA II, Vale S.A. (Mar. 3, 2011) ("Vale"), and WGC II.

[168] *See* letters from AngloGold and WGC II.

[169] *See* letters from AngloGold and Barrick Gold.

[170] *See* letters from AngloGold, NMA II, National Mining Association (Nov. 1, 2011) ("NMA III"), and Vale.

[171] *See, e.g.*, letters from AngloGold and NMA II.

[172] Letter from NMA II (referring to S. 891 and S.A. 2707 (2009)).

commentator noted, "[t]o extend the terms 'manufacture' of a 'product' to include the mining of conflict minerals contorts the plain meaning of those terms." [173]

As discussed by commentators, legislative history demonstrates that Congress did not intend to include issuers that solely mine conflict minerals in the Conflict Minerals provision because it removed references to such activities from prior versions of the provision. For example, one commentator in two comment letters noted that prior versions of the Conflict Minerals Statutory Provision explicitly applied to anyone either using covered minerals in their manufacturing processes or engaging in "the commercial exploration, extraction, importation, exportation or sale of the covered minerals." [174] However, the final version of the Conflict Minerals Statutory Provision omits any reference to extraction-related activities and refers solely to manufacturing.[175] As this commentator stated, Congress's omission of mining activities evidences its intent "to address the manufacturing of goods which use or contain, as opposed to the extracting and processing of, the covered minerals." [176] Therefore, based on both the plain reading of the provision and the legislative history of the provision, we are persuaded that it would be inconsistent with the language in the Conflict Minerals Statutory Provision to include mining issuers as manufacturing issuers under the final rule unless the mining issuer engages in manufacturing, either directly or through contract, in addition to mining.

4. When Conflict Minerals Are "Necessary" to a Product

The Conflict Minerals Statutory Provision requires us to promulgate regulations requiring that any "person described" disclose annually whether conflict minerals that are "necessary" originated in the Covered Countries and, if so, submit to us a Conflict Minerals Report.[177] The provision further states that a "person is described" if "conflict minerals are necessary to the functionality or production of a product manufactured by such person." [178] The provision, however, provides no additional explanation or guidance as to the meaning of "necessary to the functionality or production of a product." Likewise, we did not propose to define when a conflict mineral is necessary to the functionality or production of a product. We did, however, request comment on whether and how our rules should define this phrase and we provided some guidance as to the meaning of "necessary to the production of a product."

a. Proposed Rules

Although we did not propose to define "necessary to the functionality or production" in the rules, we noted in the Proposing Release that, if a mineral is necessary, the product was included within the scope of the rules without regard to the amount of the mineral involved. Further, we indicated in the Proposing Release that a conflict mineral would be considered necessary to the production of a product if the conflict mineral was intentionally included in a product's production process and was necessary to that process, even if that conflict mineral was not ultimately included anywhere in the product. On the other hand, as proposed, a conflict mineral necessary to the functionality or production of a physical tool or machine used to produce a product would not be considered necessary to the production of that product, even if that tool or machine was necessary to producing the product. For example, if an automobile containing no conflict minerals was produced using a wrench that contains or was itself produced using conflict minerals necessary to the functionality or production of that wrench, the proposed rules would not consider the conflict minerals in that wrench necessary to the production of the automobile.

That the conflict minerals must be "necessary to the functionality or production" of an issuer's products is the only limiting factor in the Conflict Minerals Statutory Provision.[179] The provision has no materiality thresholds for disclosure based on the amount of conflict minerals an issuer uses in its manufacturing processes. Therefore, we did not propose to include a materiality threshold for the disclosure or reporting requirements in the proposed rules. We did, however, request comment in the Proposing Release as to whether there should be a *de minimis* threshold in our rules based on the amount of conflict minerals used by an issuer in a particular product or in its overall enterprise and, if so, whether such a threshold would be consistent with the Conflict Minerals Statutory Provision.

b. Comments on the Proposed Rules

Many commentators suggested that the final rule explicitly define the phrase, "necessary to the functionality or production of a product," [180] while other commentators indicated that the final rule should not define the phrase.[181] Several commentators suggested possible definitions.[182] One commentator noted that manufacturers make certain deliberate choices about products, such as how they look, function, perform, cost, or are supplied, so when there has been a choice to incorporate conflict minerals into a product, the final rule should consider the conflict minerals "necessary" to the product because the designer has deemed them to be so.[183] Another commentator was concerned that the proposed rules did not provide any guidance as to either the phrase "necessary to the functionality or production" or the term "product." [184] As such, this commentator noted that the proposed rules could apply to financial products that are backed by gold or other mineral commodities, such as futures contracts for gold bullion, shares in mutual funds that invest in gold mining stocks, or gold bullion storage agreements with vault services providers.

i. "Necessary to the Functionality"

A number of different commentators indicated that a conflict mineral should be considered "necessary to the functionality" of a product if that conflict mineral is intentionally added to the product.[185] Of these commentators, however, many were open to other potential requirements. For example, many commentators

[173] *See* letter from AngloGold.

[174] *See* letters from NMA II and NMA III. These letters discuss two legislative proposals introduced in the Senate in 2009 that were similar to the Conflict Minerals Statutory Provision. *See* Congo Conflict Minerals Act of 2009, S. 891, 111th Cong. (2009) and S.A. 2707, 111th Cong. (2009). Both of these earlier conflict minerals proposals explicitly applied to companies using conflict minerals in their manufacturing processes and also to persons engaged in "the commercial exploration, extraction, importation, exportation, or sale" of conflict minerals.

[175] *See* letters from NMA II.

[176] *Id.*

[177] Exchange Act Section 13(p)(1)(A).

[178] Exchange Act Section 13(p)(2)(B).

[179] Exchange Act Section 13(p)(2)(B).

[180] *See, e.g.*, letters from CRS I, Davis Polk, Earthworks, Enough Project I, FRS, Howland, ICAR *et al.* I, MSG I, NRF I, PCP, Give Peace A Deadline (Jan. 21, 2011) ("Peace"), SEMI, SIF I, TIC, Tiffany, TriQuint I, and US Steel.

[181] *See, e.g.*, letters from Cleary Gottlieb, Global Witness I, ITIC I, State II, and WGC II.

[182] *See, e.g.*, letters from AAEI, AAFA, Bario-Neal, Brilliant Earth, CRS I, Davis Polk, Earthworks, Enough Project I, Hacker Jewelers, Hoover & Strong, Howland, MSG I, NAM I, Niotan I, NMA II, NRF I, PCP, Peace, SEMI, Sen. Durbin/Rep. McDermott, SIF I, TIAA–CREF, TIC, TriQuint I, and US Steel.

[183] *See* letter from Matheson II.

[184] *See* letter from Tiffany.

[185] *See, e.g.*, letters from AAEI, Bario-Neal, Brilliant Earth, Hacker Jewelers, Hoover & Strong, Howland, ITIC I, NRF I, NYCBar II, SEMI, Sen. Durbin/Rep. McDermott, TIAA–CREF, and WGC II.

suggested further requirements in addition to, or instead of, being intentionally added before a conflict mineral should be considered "necessary to the functionality" of a product. Many of these commentators indicated that a conflict mineral must be intentionally added and/or necessary either for the product's use, purpose, or marketability, financial success, or some combination thereof.[186] A few commentators asserted that a conflict mineral must be intentionally added and essential to the product's function.[187] One commentator stated that a conflict mineral must be intentionally added and have a concentration in the product that exceeds 1,000 ppm per homogeneous material.[188]

Only a few commentators proposed guidance as to when a conflict mineral would be considered "intentionally added" to a product, and they differed on when a conflict mineral should be considered "intentionally added." One commentator stated that a conflict mineral should not be considered intentionally added if it was unilaterally included in a sub-component acquired by the issuer from a sub-contractor.[189] Two of the co-sponsors of the Conflict Minerals Statutory Provision, however, took the opposite position and stated that a conflict mineral should be considered intentionally added if it is intentionally added in sub-components that an issuer contracts to manufacture through third parties or subsidiaries.[190] Several commentators agreed that a conflict mineral occurring naturally in a product should not be considered intentionally added to that product.[191]

Instead of being intentionally added to a product, some commentators provided other bases for concluding that a conflict mineral is "necessary to the functionality" of a product. Some commentators indicated that a conflict mineral should be considered "necessary to the functionality" of a product if that conflict mineral is necessary for the product's basic function.[192] Other commentators stated that the basic function test would be unworkable because there is no meaningful distinction between a product's basic and auxiliary functions.[193] Some commentators stated that a conflict mineral should be considered "necessary to the functionality" of a product if that conflict mineral is required either for the financial success or marketability of the product.[194] One commentator noted that "necessary to the functionality" should be defined broadly enough that it encompasses uses necessary to the product's economic utility,[195] while others disagreed due to the subjective nature of what provides economic utility to a product.[196] In this regard, one commentator asserted that a conflict mineral should be considered "necessary to the functionality" of a product if the issuer "uses" conflict minerals in any manner in a product, regardless of how those conflict minerals relate to the product's function, because any other test would be too subjective.[197]

ii. "Necessary to the Production"

Many commentators agreed that a conflict mineral should be considered "necessary to the production" of a product if it is intentionally added to the production process, and should not be considered "necessary to the production" of a product if it is unintentionally added to a product or naturally occurring in a product.[198] Some commentators agreed with the proposal to consider such conflict minerals "necessary to the production" of a product even if the minerals are washed away or consumed in the production process and do not end up in the product, such as with a catalyst.[199] As one of these commentators suggested as an example, a "catalyst used to make a substance or a die containing [conflict mineral] metals used to make a part" should be considered "necessary to the production" of the product using that part because the "part is made with direct involvements of the [conflict mineral] metal and then the part/material is used in the product," even if the conflict mineral does not end up in the product.[200] Other commentators, however, did not believe that conflict minerals used in the production of a product should be considered necessary to that production process if they are washed away or consumed in the process.[201] As one of these commentators pointed out, it would be "impossible for a retailer to know whether his supplier's supplier's supplier used and washed away a conflict mineral" because "there is no meaningful measurement capability or audit trail, especially as a product moves through dozens of suppliers in a supply chain."[202]

A number of commentators addressed whether a conflict mineral necessary to the production of the tools, machines, or similar equipment that are used to produce an issuer's product should be considered "necessary to the production" of the issuer's product.[203] The large majority of these commentators, including those from industry associations,[204] a multi-stakeholder group representing both human rights organizations and industry,[205] and institutional investors,[206] agreed with the proposed rules that such tools, machines, and other production equipment should not be considered necessary to the production of the issuer's products.[207] A small number of commentators disagreed and stated that such tools, machines, or similar equipment should be considered necessary to the production of an issuer's product.[208] One of these commentators specified

[186] *See*, e.g., letters from AAEI, Bario-Neal, Brilliant Earth, Earthworks, Enough Project I, Hacker Jewelers, Hoover & Strong, MSG I, Peace, and SIF I, and TIAA–CREF.

[187] *See*, e.g., letters from Howland, NAM I, and NRF I.

[188] *See* letter from TriQuint I.

[189] *See* letter from SEMI.

[190] *See* letter from Sen. Durbin/Rep. McDermott.

[191] *See* letters from ITIC I, PCP, and Sen. Durbin/Rep. McDermott.

[192] *See* letters from AAFA, NYCBar I, and WGC II. *See also* letter from NYCBar II (stating that a "component in a product necessary to its functionality if it is needed for either its basic function or another commercially valuable function of that product," and stating that it does not "believe that 'basic function' in this regard needs to be defined since it will differ for each product").

[193] *See* letters from NEI, SEMI, and TIC.

[194] *See*, e.g., letters from Enough Project I, MSG I, Peace, and TIAA–CREF.

[195] *See* letter from CRS I (suggesting "that 'necessary to the functionality or production of a product' be defined broadly enough that it encompasses uses necessary to the economic utility and/or marketability of that product").

[196] *See*, e.g., letters from NRF I and SEMI.

[197] *See* letter from Kemet.

[198] *See*, e.g., letters from ITIC I, Global Witness I, Japanese Trade Associations, NYCBar I, PCP, SEMI, Sen. Durbin/Rep. McDermott, and TIC.

[199] *See*, e.g., letters from Howland, MSG I, Niotan I, PCP, SEMI, and TriQuint I.

[200] *See* letter from Howland.

[201] *See, e.g.*, letters from Industry Group Coalition I, IPC II, NAM I, Griffin Teggeman (Dec. 16, 2010) ("Teggeman"), and WGC II.

[202] *See* letter from Teggeman.

[203] *See, e.g.*, letters from AAFA, Industry Group Coalition I, IPC I, ITIC I, Japanese Trade Associations, NAM I, NEI, Niotan I, Refractory Metals Association (Feb. 28, 2011) ("RMA"), SEMI, SIF I, TIAA–CREF, TIC, and TriQuint I.

[204] *See*, e.g., letters from AAFA, Industry Group Coalition I, IPC I, ITIC I, Japanese Trade Associations, NAM I, RMA, SEMI, and TIC.

[205] *See* letter from MSG I (stating that "when conflict minerals are present in tooling or other production machinery, they should not be considered to be necessary to production of the product"). The letter from MSG was signed by a number of human rights groups, including Enough Project, Free the Slaves, and Friends of the Congo, among others.

[206] *See, e.g.*, letters from NEI, SIF I, and TIAA–CREF.

[207] *See, e.g.*, letters from AAFA, Industry Group Coalition I, IPC I, ITIC I, Japanese Trade Associations, NAM I, NEI, RMA, SEMI, SIF I, TIAA–CREF, and TIC.

[208] *See* letters from Niotan I and TriQuint I.

that tools, machines, or similar equipment purchased going forward should be considered necessary to the production of the issuer's product, although an issuer's existing production equipment should not be deemed necessary to production.[209] Another commentator stated that production equipment should not be considered necessary to the production of an issuer's products unless the issuer intentionally and explicitly required the producer of the tools, machines, or other production equipment to include conflict minerals.[210]

In this regard, one commentator stated that the final rule should not consider any indirect equipment, such as computers or power lines, as necessary to production.[211] Another commentator indicated that conflict minerals used in products that are "not intended to be sold into commerce," such as those utilized solely for research and development purposes, components provided at cost on a business-to-business basis, or products or components used only for engineering or testing purposes, should not be considered necessary to the production of the product that is ultimately placed in the stream of commerce.[212]

iii. *De Minimis* Threshold

We received mixed comments regarding whether the final rule should have a *de minimis* threshold exception, with some commentators opposed to a *de minimis* exception,[213] and other commentators supporting it.[214] Some commentators provided a legal basis for including a *de minimis* exception despite the lack of a *de minimis* exception in the Conflict Minerals Statutory Provision.[215] Generally, these commentators asserted that, as long as legislation does not forbid establishing a *de minimis* threshold, an agency's regulations may allow for one. Also, one commentator noted that we have "inherent authority to employ *de minimis* exceptions to avoid unreasonable and absurd results in crafting [the] final rule," which is "inherent and clearly established by precedent."[216]

Some commentators provided recommendations on possible *de minimis* thresholds. Two commentators suggested that there should be a *de minimis* exception if the cost of the conflict minerals in an issuer's products make up less than 1% of the issuer's consolidated total production costs.[217] Other commentators recommended a *de minimis* exception for trace, nominal, or insignificant amounts of conflict minerals in an issuer's products.[218] One commentator suggested a *de minimis* exception when the end product derived from conflict minerals reflects less than a certain percentage of the value of the product, such as if the value was 5% or less of the total manufacturing costs.[219] Another commentator recommended a *de minimis* exception relating to the inability of an issuer to determine the origin of its minerals, such as allowing that issuer's product to be considered "DRC conflict free" where the issuer is unable to determine the origin of only 5% of the product's minerals.[220] One commentator noted that the final rule should permit a *de minimis* exception, but indicated that the value used for the *de minimis* exception should be based on how the phrase "necessary to the functionality or production" of a product is to be defined in the final rule.[221] Another commentator recommended that the final rule permit a *de minimis* exception for products containing less that 0.1% by weight of a conflict mineral.[222] One commentator provided three possible *de minimis* scenarios in which an issuer would be excepted from reporting, specifically: If an issuer's conflict minerals comprised less than 0.1% of a component or product, if an issuer's global usage of conflict minerals comprised less than 0.01% of its materials, or if an issuer comprised the bottom 20% of its industry's conflict minerals use.[223]

c. Final Rule

After considering the comments, we are adopting a final rule that, like the proposed rules, does not define when a conflict mineral is "necessary to the functionality" of a product or when it is "necessary to the production" of a product.[224] However, as we did in the Proposing Release, we are providing guidance regarding the interpretation of these phrases. The guidance is modified to a degree from the guidance in the Proposing Release based on comments we received. Whether a conflict mineral is deemed "necessary to the functionality" of a product or "necessary to the production" of product depends on the issuer's particular facts and circumstances, but there are certain factors we believe issuers should consider in making their determinations.

As described below, in determining whether its conflict minerals are "necessary to the functionality" of a product, an issuer should consider: (a) Whether a conflict mineral is contained in and intentionally added to the product or any component of the product and is not a naturally-occurring by-product; (b) whether a conflict mineral is necessary to the product's generally expected function, use, or purpose; or (c) if a conflict mineral is incorporated for purposes of ornamentation, decoration or embellishment, whether the primary purpose of the product is ornamentation or decoration. Based on the applicable facts and circumstances, any of these factors, either individually or in the aggregate, may be determinative as to whether conflict minerals are "necessary to the functionality" of a given product. In determining whether its conflict minerals are "necessary to the production" of a product, an issuer should consider whether a conflict mineral is contained in the product and intentionally added in the product's production process, including the production process of any component of the product; and whether the conflict mineral is necessary to produce the product. We describe changes to our guidance regarding "necessary to the functionality" and "necessary to the production" below.

[209] *See* letter from TriQuint I.

[210] *See* letter from SEMI.

[211] *See* letter from Howland.

[212] *See* letter from ITIC I. *See also* letter from TechAmerica (Nov. 1, 2011) ("Industry Group Coalition II") (suggesting that the final rule should exclude "research and development equipment made available on a business-to-business basis from the scope of the rule").

[213] *See, e.g.*, letters from Calvert, Earthworks, Episcopal Conference of Catholic Bishops of the DRC (Nov. 8, 2011) ("CENCO II"), Global Witness I, Howland, Matheson II, NEI, NYCBar I, NYCBar II, Rep. Berman *et al.*, SIF I, State II, and Trott.

[214] *See, e.g.*, letters from AAFA, AdvaMed I, AngloGold, Chamber I, Davis Polk, IPC I, IPC II, IPMI I, NAM I, NRF I, PCP, Rep. Bachus *et al.*, Roundtable, SEMI, Teggeman, TIC, and WGC II.

[215] *See* letters from Materion, NAM I, and NRF I.

[216] *See* letter from Materion.

[217] *See* letters from AngloGold and WGC II.

[218] *See* letters from Davis Polk, NRF I, and Roundtable.

[219] *See* letter from TIC.

[220] *See* letter from IPMI I.

[221] *See* letter from SEMI (stating that, if the phrase was limited to materials explicitly or intentionally added to a product or caused to be added to a product, the *de minimis* threshold should be one gram per year of necessary minerals, but if the final rule included a "more conservative" meaning of the phrase, a higher *de minimis* should be used, such as 0.1% of the weight of any particular component acquired as a whole by the issuer).

[222] *See* letter from IPC I.

[223] *See* letter from NAM I.

[224] As a threshold matter, we believe that the Conflict Minerals Statutory Provision requires separate consideration as to whether a conflict mineral is "necessary to the production" of a product from whether a conflict mineral is "necessary to the functionality" of the product, because the Conflict Minerals Statutory Provision includes both phrases. *See infra* Part II.B.4.c.iii. *See also* Exchange Act Sections 13(p)(1)(A) and 13(p)(2).

i. Contained in the Product

After considering the comments and reviewing the Conflict Minerals Statutory Provision, as described below, we are persuaded that only a conflict mineral that is contained in the product should be considered "necessary to the functionality or production" of that product. We believe this approach is appropriate in light of the Conflict Minerals Statutory Provision's statutory construction. As discussed above, the Conflict Minerals Statutory Provision requires issuers with conflict minerals "necessary to the functionality or production" of a product manufactured or contracted by the issuer to be manufactured that originated in the Covered Countries to provide a Conflict Minerals Report.[225] The provision includes two distinct subsections, Exchange Act Section 13(p)(1)(A)(i) and Exchange Act Section 13(p)(1)(A)(ii), regarding the information required in that Conflict Minerals Report. Generally, Exchange Act Section 13(p)(1)(A)(i) deals with an issuer's description of its due diligence measures on the source and chain of custody of its conflict minerals, including the independent private sector audit, and Exchange Act Section 13(p)(1)(A)(ii) requires the issuer's description of its products that have not been found to be "DRC conflict free." The Conflict Minerals Statutory Provision defines "DRC conflict free" to mean "products that do not *contain* minerals that directly or indirectly finance or benefit armed groups" in the Covered Countries.[226] The use of the term "contain" indicates that the disclosures required under Exchange Act Section 13(p)(1)(A)(ii) are limited to issuers with conflict minerals actually contained in their products.[227] We believe it is appropriate to include this limitation in interpreting when a conflict mineral is necessary to the functionality or production of a product.

We note that Exchange Act Section 13(p)(1)(A)(i) does not include a similar limitation that the product must "contain" the necessary conflict minerals. As a result, it is possible to interpret the Conflict Minerals Statutory Provision such that the term "contain" in Exchange Act Section 13(p)(1)(A)(ii) does not mean that a conflict mineral must be included in the product for it to be "necessary to the functionality or production" of the product. However, we do not believe that such an interpretation would be the proper construction. Following that approach, the provision could be interpreted to require issuers with conflict minerals that are "necessary to the functionality or production" of a product but are not included in that product to submit an audited Conflict Minerals Report describing their due diligence, as required under Exchange Act Section 13(p)(1)(A)(i), but not describing any products produced using those minerals that directly or indirectly financed or benefited armed groups in the Covered Countries as having not been found to be "DRC conflict free" because the conflict minerals are not "contained" in the product.

We do not believe, however, that such an interpretation is the better construction. It would mean that the Conflict Minerals Statutory Provision envisions a situation in which an issuer with a conflict mineral that is "necessary to the functionality or production" of its product originated in the Covered Countries and benefited armed groups in those countries would be required to submit a Conflict Minerals Report describing its due diligence on the source and chain of custody of that mineral but would not have to describe its products as having not been found to be "DRC conflict free." We believe the better interpretation that gives meaning to the term "contain" is that only conflict minerals contained in the product would be considered "necessary" to that product, so only those minerals trigger the requirement to conduct a reasonable country of origin inquiry.

Additionally, we do not believe the final rule should include conflict minerals "necessary to the functionality or production" of a product that are not contained in the product because we appreciate commentators' concerns that the application of the provision to minerals that do not end up in the product is especially challenging. As noted above, commentators were mixed in their views regarding how the rule should treat catalysts and other conflict minerals necessary to the production of a product that do not appear in the product. However, we note that there are products where a catalyst is used and is not completely washed away.[228] In those situations, the product contains a necessary conflict mineral that is necessary to its production and is subject to the final rule.

ii. Intentionally Added

Although commentators did not agree on an exact definition, most commentators from across the spectrum agreed that a conflict mineral should be considered "necessary to the functionality or production" of a product for the purposes of the Conflict Minerals Statutory Provision if, at a minimum, it was intentionally added to the product or production process.[229] While we are not defining the phrase, we agree that being intentionally added, rather than being a naturally-occurring by-product, is a significant factor in determining whether a conflict mineral is "necessary to the functionality or production" of a product. This is true regardless of who intentionally added the conflict mineral to the product so long as it is contained in the product.

In this regard, we note that one commentator asserted that a conflict mineral should not be considered "intentionally added" by an issuer "if it is present in a sub-component acquired by the issuer based on a unilateral decision of the supplier or a sub-contractor, or a party further upstream in the supply chain."[230] We disagree. As two of the co-sponsors of the provision asserted, determining whether a conflict mineral is considered "necessary" to a product should not depend on whether the conflict mineral is added directly to the product by the issuer or whether it is added to a component of the product that the issuer receives from a third party. Instead, the issuer should "report on the totality of the product and work with suppliers to comply with the requirements."[231] Therefore, in determining whether a conflict mineral is "necessary" to a product, an issuer must consider any conflict mineral contained in its product, even if that conflict mineral is only in the product because it was included as part of a component of the product that was

[225] *See* Exchange Act Section 13(p)(1)(A).

[226] *Id.* (emphasis added). *See also* Section 1502(e)(4) of the Act (defining the phrase in the same manner as Exchange Act Section 13(p)(1)(A)(ii), except that Section 1502(e)(4) of the Act refers to "conflict minerals" instead of just "minerals").

[227] We note that the Second Edition of the Random House Webster's Dictionary defines "contain" to include the "to hold within a volume or area." *Random House Webster's Dictionary, 142* (2d ed. 1996).

[228] *See* letters from Industry Group Coalition I and NAM I (referring specifically to situations in which catalysts are used to chemically react with and produce products, and trace levels of the catalyst are found in the reacted manufactured product, but the catalysts do not contribute to the performance of the product).

[229] *See, e.g.*, letters from AAEI, Bario-Neal, Brilliant Earth, Earthworks, Enough Project I, Global Witness I, Hacker Jewelers, Hoover & Strong, Howland, ITIC I, Japanese Trade Associations, MSG I, Niotan I, NRF I, Peace, PCP, SEMI, Sen. Durbin/Rep. McDermott, SIF I, TIAA–CREF, TriQuint I, and WGC II.

[230] *See* letter from SEMI.

[231] *See* letter from Sen. Durbin/Rep. McDermott (indicating that a car manufacturer must report on any conflict minerals in the car's radio, even if there are no conflict minerals elsewhere in the car).

manufactured originally by a third party.

iii. "Necessary to the Functionality"

In addition to being contained in the product and intentionally added, another factor in determining whether its conflict minerals are "necessary to the functionality" of a product is whether the conflict mineral is necessary to the product's generally expected function, use, or purpose. Some commentators suggested that we limit an issuer's consideration of whether its conflict minerals are "necessary to the functionality" of a product to the "basic function" or "economic utility" tests. However, we believe limiting a determination to those tests would not provide greater certainty or clarity to issuers required to make such determinations. As one commentator noted, "the distinction between a 'basic function' and an ancillary function is murky and undefinable." [232] Similarly, as another commentator noted, "[e]conomic utility is very subjective and it can be the unforeseen consequence of a derivative buried deep within a sub-component." [233] Therefore, we believe these tests are so subjective as to be mostly unworkable. We believe it is more appropriate instead to focus on a product's generally expected function, use, or purpose, recognizing that there are situations in which a product has multiple generally expected functions, uses, and purposes. In such situations, a conflict mineral need only be necessary for one such function, use, or purpose to be necessary to the product as a whole. For example, a smart phone has multiple generally expected functions, uses, and purposes, such as making and receiving phone calls, accessing the internet, and listening to stored music. If a conflict mineral is necessary to the function, use, or purpose of any one of these, it is necessary to the functionality of the phone.

Another factor in determining whether its conflict minerals are "necessary to the functionality" of a product is whether the conflict mineral is incorporated for purposes of ornamentation, decoration, or embellishment. If a primary purpose of the product is mainly ornamentation or decoration, it is more likely that a conflict mineral added for purposes of ornamentation, decoration or embellishment is "necessary to the functionality" of the product. For example, the gold in a gold pendant hanging on a necklace is necessary to the functionality of the pendant because it is incorporated for purposes of ornamentation, decoration, or embellishment, and a primary purpose of the pendant is ornamentation or decoration. Conversely, if a conflict mineral is incorporated into a product for purposes of ornamentation, decoration, or embellishment, and the primary purpose of the product is not ornamentation or decoration, it is less likely to be "necessary to the functionality" of the product. As one commentator noted, "if, for example, gold is used in an article as an ancillary feature [of a product] strictly for purposes of ornamentation, then it is unrelated to the functionality of the product and would be exempt from the reporting requirements of the statute." [234] We would agree that these facts would tend to indicate that the conflict mineral is not necessary to the functionality of the product, provided that the primary purpose of the product is not for ornamentation or decoration. Even so, this would only be one factor among all the facts and circumstances in the issuer's overall determination as to whether the conflict mineral is necessary to the functionality of the product.

iv. "Necessary to the Production"

As with determining whether a conflict mineral is "necessary to the functionality" of a product, determining whether a conflict mineral is "necessary to the production" of a product involves consideration of an issuer's particular facts and circumstances. As noted above, the conflict mineral must be contained in the product to trigger the determination of whether the conflict mineral is "necessary to the production" of the product. Consistent with this approach, we do not consider a conflict mineral used as a catalyst or in another manner in the production process of a product to be "necessary to the production" of the product if that conflict mineral is not contained in the product, even though, based on the facts and circumstances, the conflict mineral would have otherwise been considered "necessary to the production" of the product had the conflict mineral been included in the product. As one commentator noted for gold, and we believe this is applicable for the other conflict minerals as well, the "use of gold as a catalyst in producing products which do not in themselves contain gold will broaden the reach of the regulations beyond what Section 1502 envisaged." [235] We do, however, consider a conflict mineral used as a catalyst or in another manner in the production process of a product to be "necessary to the production" of the product if that conflict mineral otherwise is necessary to the production of the product and is contained in any amount, including trace amounts, in the product.[236]

As we indicated in the Proposing Release, we continue to believe that a conflict mineral in a physical tool or machine used to produce a product does not fall under the "necessary to the production" language in the Conflict Minerals Statutory Provision.[237] One commentator asserted that the language in the Conflict Minerals Statutory Provision is intended to cover conflict minerals in tools or machines that are necessary for the production of a product and, "[i]n the absence of such specificity, the rule will fail to ensure reporting on the use of such tools or catalysts, thus leaving out a significant market for the minerals and undermining the purpose of the law." [238] We do not believe that a conflict mineral in a tool or machine is captured by the Conflict Minerals Statutory Provision because, although the conflict mineral may be included in the tool or machine, it is the tool or machine and not the conflict mineral that is necessary to the production.[239] Additionally, the tool or machine is

[232] *See* letter from TIC.

[233] *See* letter from SEMI.

[234] *See* letter from NRF I.

[235] *See* WGC II.

[236] We note that this interpretation continues to bring catalysts within the scope of the reporting requirements when they are necessary to the production of the product. We understand that not all catalysts are washed away in the production process, and the remaining minerals may not be "necessary to the functionality" of the product. *See* letters from Industry Group Coalition I and NAM I (referring specifically to situations in which catalysts are used to chemically react with and produce products, and trace levels of the catalyst are found in the reacted manufactured product, but the catalysts do not contribute to the performance of the product).

[237] However, the issuer that manufactures or contracts to manufacture the tool or machine would likely come within the "necessary to the production" or "necessary to functionality" language.

[238] *See* letter from Niotan I.

[239] As described above, we consider a conflict mineral that is "necessary to the functionality" of a component product also to be "necessary to the functionality" of any subsequent product that incorporates the component product. We recognize that this could be seen as a two-step analysis, and thus it could be asserted that the conflict mineral in the component product is not necessary to the functionality of the subsequent product. We disagree with this view, however, because a component added to a subsequent product becomes part of that subsequent product, which removes any segregation from the component and the subsequent product and makes the conflict mineral directly necessary to the functionality of the subsequent product.

unlikely to be contained in the final product.

Like tools and machines, indirect equipment used to produce a product, such as computers and power lines, does not bring the product that is produced with the equipment into the "necessary to the production" language.[240] We do not consider a conflict mineral necessary to the functionality or production of such indirect equipment to be necessary to the production of the product because that conflict mineral is only tangentially necessary for production of the product. Similarly, we do not require issuers to report on the conflict minerals in materials, prototypes, and other demonstration devices containing or produced using conflict minerals that are necessary to the functionality or production of those items because we do not consider those items to be products. Once an issuer enters those items in the stream of commerce by offering them to third parties for consideration, the issuer will be required to report on any conflict minerals necessary to the functionality or production of those products.

v. De Minimis Threshold

Finally, after considering the comments, the final rule does not include a *de minimis* exception. The statute itself does not contain a *de minimis* exception, and for several reasons we believe it would be contrary to the Conflict Minerals Statutory Provision and Congressional purpose to include one in the final rule. First, we note that the Conflict Minerals Statutory Provision does include an express limiting factor—namely that a conflict mineral must be "necessary to the functionality or production" of an issuer's product to trigger any disclosure regarding those conflict minerals.[241] As discussed above, this standard focuses on whether the conflict mineral is "necessary" to a product's functionality or production; it does not focus on the amount of a conflict mineral contained in the product. We believe that Congress understood, in selecting the standard it did, that a conflict mineral used in even a very small amount could be "necessary" to the product's functionality or production. If it had intended that the provision be limited further, so as not to apply to a *de minimis* use of conflict minerals, we think Congress would have done so explicitly. In this regard, we note that in Section 1504 of the Act, which adds Exchange Act Section 13(q) as part of the same title (Title XV) of the Act ("Miscellaneous Provisions"), Congress did explicitly include a *de minimis* threshold for the requirement to disclose certain payments by resource extraction issuers.[242]

In addition, we believe that the purpose of the Conflict Minerals Statutory Provision would not be properly implemented if we included a *de minimis* exception in our final rule. As the State Department noted in its comment letter, "[i]n light of the nature" of the conflict minerals, they are often used in products "in very limited quantities," so including a *de minimis* threshold "could have a significant impact on" the final rule.[243] Consistent with the views of the State Department, we believe Congress intended the disclosure provisions to apply to the use of even small amounts of conflict minerals originating in the Covered Countries.

We are cognizant of the fact that, by not including a *de minimis* exception, even minute or trace amounts of a conflict mineral could trigger disclosure obligations.[244] However, a *de minimis* amount of conflict minerals triggers disclosure obligations only if those conflict minerals are necessary for the functionality or production of a product, and we understand that there are instances in which only a minute amount of conflict minerals is necessary for the functionality or production of a product. Therefore, consistent with the proposal, our final rule applies to issuers for which any conflict minerals are necessary to the functionality or production of a product manufactured or contracted by the issuer to be manufactured regardless of the amount of the conflict mineral.

We recognize that not including a *de minimis* exception in the final rule will be more costly for issuers than if we included one. As described above, however, we are of the view that Congress intended not to provide for a *de minimis* exception, and including one in the final rule would therefore thwart, rather than advance, the provision's purpose. Further, we believe focusing on whether the mineral was intentionally added addresses some of the concerns regarding *de minimis* amounts of minerals. For example, according to one commentator, a number of metal alloys, including the high volume materials of cold rolled steel, hot rolled steel, and stainless steel, contain tin only as a contaminant, such that it is not part of the specification of these alloys.[245] Therefore, the tin in these alloys is not intentionally added, and we do not consider the tin "necessary to the functionality or production" of any product containing those alloys.

C. Location, Status, and Timing of Conflict Minerals Information

Once it is determined that conflict minerals are necessary to the functionality or production of a product manufactured or contracted by the issuer to be manufactured, the issuer will have to submit conflict minerals information in accordance with the final rule.

1. Location of Conflict Minerals Information

a. Proposed Rules

Our proposed rules would have required issuers to provide their disclosure about conflict minerals in their annual reports on Form 10–K for a domestic issuer,[246] Form 20–F for a foreign private issuer,[247] and Form 40–F for a Canadian issuer that files under the Multijurisdictional Disclosure System,[248] with their Conflict Minerals Reports as an exhibit to their annual report.[249] Section 1502 requires issuers to disclose information about their conflict minerals annually, but does not otherwise specify where this disclosure must be located, either in terms of which form or in terms of where within a particular form. Our proposed rules would have required this disclosure in the existing Form 10–K, Form 20–F, or Form 40–F annual report because issuers were already required to file these reports so we believed this approach would be less burdensome than requiring a separate annual report.

[240] However, the issuer that manufactures or contracts to manufacture the indirect equipment would likely come within the definition of either "necessary to the functionality" or "necessary to the production" for the indirect equipment.

[241] *See* Exchange Act Sections 13(p)(1)(A) and 13(p)(2)(B).

[242] *See* Section 1504 of the Act and Exchange Act Section 13(q). Exchange Act Section 13(q)(1)(C) states that "the term 'payment,' means a payment that is made to further the commercial development of oil, natural gas, or minerals; and not *de minimis*."

[243] *See* State II ("In light of the nature in which the covered minerals are often used in products, i.e. often in very limited quantities, such a change could have a significant impact on the proposed regulations. A *de minimis* threshold should not be considered under current circumstances.").

[244] *See* letters from Chamber I and NRF I.

[245] See letter from Claigan Environmental Inc. (Dec. 16, 2011) ("Claigan III").

[246] 17 CFR 249.310.

[247] 17 CFR 249.220f.

[248] 17 CFR 249.240f.

[249] In the Proposing Release, we indicated that, by requiring an issuer to provide its Conflict Minerals Report as an exhibit to its annual report, the proposed rules would enable anyone accessing the Commission's Electronic Data Gathering, Analysis, and Retrieval system (the "EDGAR" system) to determine quickly whether an issuer furnished a Conflict Minerals Report with its annual report.

To facilitate locating the conflict minerals disclosure within the annual report without over-burdening investors with extensive information about conflict minerals in the body of the report, our proposed rules would have required issuers to include brief conflict minerals disclosure under a separate heading entitled "Conflict Minerals Disclosure" and more extensive information in a separate exhibit to the annual report.

We proposed to require that an issuer disclose in its annual report under a separate heading, entitled "Conflict Minerals Disclosure," its determination as to whether any of its conflict minerals originated in the Covered Countries, based on its reasonable country of origin inquiry, and, for its conflict minerals that did not originate in the Covered Countries, a brief description of the reasonable country of origin inquiry it conducted in making such a determination. The proposed rules would not have required an issuer that determined that its conflict minerals did not originate in the Covered Countries, based on its reasonable country of origin inquiry, to provide any further disclosures. We also proposed that an issuer include brief additional disclosure in the body of the annual report if the issuer's conflict minerals originated in the Covered Countries or if the issuer could not determine that its conflict minerals did not originate in the Covered Countries, based on its reasonable country of origin inquiry. As proposed, these rules would have required an issuer to disclose that its conflict minerals originated in the Covered Countries, or that it was unable to conclude that its conflict minerals did not originate in the Covered Countries, that its Conflict Minerals Report had been furnished as an exhibit to the annual report, that the Conflict Minerals Report, including the certified independent private sector audit, was publicly available on the issuer's Internet Web site, and the issuer's Internet address on which the Conflict Minerals Report and audit report were located.

The Conflict Minerals Statutory Provision requires that each issuer make its Conflict Minerals Report available to the public on the issuer's Internet Web site.[250] Consistent with the statute, we proposed rules to require an issuer to make such a report, including the certified audit report, available to the public by posting the text of the report on its Internet Web site. As proposed, the rules would require that the text of the Conflict Minerals Report remain on the issuer's Web site at least until it filed its subsequent annual report. Although the proposed rules would have required an issuer that furnished a Conflict Minerals Report to provide some disclosures in the body of its annual report regarding that report, we would not have required that an issuer post this disclosure on its Web site. We believed this was appropriate because any information disclosed in the body of the annual report would also be included in the Conflict Minerals Report, which would have been required to be posted on the issuer's Internet Web site.

b. Comments on the Proposed Rules

We received mixed comments on the proposal. While many commentators believed that the final rule should not require an issuer's conflict minerals information to be provided in that issuer's annual report,[251] other commentators believed that an issuer's conflict minerals information should be provided in that issuer's annual report, as proposed.[252] Commentators that did not want the conflict minerals information included in the annual report generally agreed that the information should be provided either in a newly created report or form, or in a current report on Form 8–K[253] or Form 6–K,[254] instead.[255] A small number of commentators stated that an issuer's conflict minerals information should be provided solely on its Internet Web site.[256] Some commentators suggested that the final rule should allow issuers to submit their conflict minerals information on a separate form or in a current report, noting that the Conflict Minerals Statutory Provision does not require explicitly that the information be submitted in a Form 10–K, Form 20–F, or Form 40–F annual report.[257] As one commentator noted, this requirement contrasts with the one in Section 1503 of the Act,[258] which states that mine safety disclosure be provided in "each periodic report filed with the Commission under the securities laws."[259] Therefore, these commentators reasoned that if Congress intended the Conflict Minerals Statutory Provision to require an issuer to provide the conflict minerals information in the annual report on Forms 10–K, 20–F, or 40–F, Congress would have used language similar to that in Section 1503.

Certain commentators asserted that the subject matter underlying the conflict minerals information is both very specialized and substantively different from the financial and business information in the annual report on Forms 10–K, 20–F, or 40–F.[260] Some of these commentators stated that the existing Exchange Act reporting system is designed to provide investors with material information from a financial perspective, whereas the Conflict Minerals Statutory Provision uses the securities disclosure laws to provide conflict mineral supply chain information for the purpose of stopping the humanitarian crisis in the Covered Countries.[261] Commentators suggested that the processes with which to obtain and provide conflict minerals information should be different from those processes developed for current year-end reporting.[262]

Other commentators argued that the disclosures required by the final rule should be treated no differently than other disclosures required by the Exchange Act.[263] In this regard, one such commentator agreed that the final rule should require that an issuer's conflict minerals information be included in the issuer's annual report because such a requirement is inherent in the policy goals underlying the Conflict Minerals Statutory Provision and would foster consistency in the form, location, and timing of the information.[264] Similarly, another such commentator stated that not requiring

[250] *See* Exchange Act Section 13(p)(1)(E), which is entitled "Information Available to the Public" and states that "[e]ach person described under paragraph (2) shall make available to the public on the Internet Web site of such person the information disclosed by such person under subparagraph (A)."

[251] *See, e.g.*, letters from AdvaMed I, AngloGold, Barrick Gold, Cleary Gottlieb, Corporate Secretaries I, CTIA, Davis Polk, Ford Motor Company (Mar. 2, 2011) ("Ford"), Industry Group Coalition I, ITIC I, Japanese Trade Associations, JVC *et al.* II, NAM I, NAM III, NCTA, NMA II, NY State Bar, Roundtable, SEMI, Taiwan Semi, and Tiffany.

[252] *See, e.g.*, letters from Earthworks, Enough Project I, Global Witness I, Methodist Pension, Peace, and TIAA–CREF.

[253] 17 CFR 249.308.

[254] 17 CFR 249.306.

[255] *See, e.g.*, letters from AdvaMed I, AngloGold, Barrick Gold, Cleary Gottlieb, Davis Polk, Ford, ITIC I, JVC *et al.* II, NAM I, NMA II, NY State Bar, and Taiwan Semi.

[256] *See* letters from Corporate Secretaries I, CTIA, NCTA, and Tiffany.

[257] *See, e.g.*, letters from AngloGold, ITIC I, JVC *et al.* II, and NAM I. Exchange Act Section 13(p)(1)(A) requires only that issuers "disclose annually" their conflict minerals information.

[258] Section 1503 of the Act.

[259] *See* letter from AngloGold.

[260] *See, e.g.*, letters from Barrick Gold, CEI I, Cleary Gottlieb, Davis Polk, Ford, ITIC I, JVC *et al.* II, NAM I, NMA II, NY State Bar, PCP, Taiwan Semi, and SEMI.

[261] *See, e.g.*, letters from CEI I, NY State Bar, and Taiwan Semi.

[262] *See* letters from Davis Polk and NAM I.

[263] *See* letters from CRS I, Global Witness I, Methodist Pension, Sen. Durbin/Rep. McDermott, and SIF I.

[264] *See* letter from Global Witness I.

conflict minerals information in the annual report on Forms 10–K, 20–F, or 40–F would inhibit the public's ability to monitor an issuer's use of conflict minerals and allow issuers to hide their conflict minerals information.[265] In this regard, a number of commentators believed that there is little or no difference in the purposes of the Conflict Minerals Statutory Provision and the rest of the Exchange Act, in that both require the disclosure of meaningful supply chain and reputational information about an issuer for the benefit of investors.[266] For example, the co-sponsors of the legislation stated explicitly that the purposes of the Conflict Minerals Statutory Provision and the rest of the Exchange Act are "very much the same" because they both "'assure a stream of current information about an issuer for the benefit of purchasers * * * and for the public.'" [267] As another example, a commentator asserted that "conflict minerals disclosures are material to investors and will inform and improve an investor's ability to assess social (i.e., human rights) and reputational risks in an issuer's supply chain." [268]

Some commentators were concerned about providing conflict minerals information in the annual report on Forms 10–K, 20–F, or 40–F due to the timing of filing an annual report.[269] These commentators noted that the increased burden on issuers in collecting and reporting conflict minerals information could cause those issuers to be unable to file their annual reports in a timely manner. Some commentators offered an alternative scheme in which an issuer would be permitted to provide its conflict mineral information on either a new report or form, an amended annual report, or a current report on Form 8–K or Form 6–K within a certain number of days following the end of the issuer's fiscal year.[270] A few of these commentators [271] pointed out that the Commission permits delays in providing certain information on an annual report, such as with prospective incorporation by reference of information from an issuer's proxy statement under General Instruction G.(3) of Form 10–K [272] and prospective incorporation by reference of separate financial statements of unconsolidated entities under Item 3–09 of Regulation S–X.[273] Commentators proposed a variety of time periods, including 120, 150, and 180 days after an issuer's fiscal year-end, in which an issuer could be required to provide its conflict minerals information as part of its annual report.[274] Similarly, as discussed in greater detail below, some commentators suggested that the final rule should consider a single start and end date for the reporting period for all companies, regardless of their particular fiscal year,[275] and one of these commentators recommended that this one year period coincide with the calendar year.[276]

Additionally, some commentators were concerned about the liability of the principal executive offers, principal financial officers, and auditors who must certify an annual report under Sections 302 [277] and 906 [278] of the Sarbanes-Oxley Act if the rule requires that an issuer provide its conflict minerals information in its filed annual report.[279] In this regard, one commentator stated that, if the final rule requires an issuer to provide conflict minerals information in its annual report, the Commission should amend rules 13a–14(a) and (b) [280] and 15d–14(a) and (b) [281] under the Exchange Act to acknowledge that the various officer certifications required by those rules do not extend to any conflict minerals information provided either in or as an exhibit to the annual report.[282] Another commentator stated that, if we required conflict minerals disclosure in the existing annual reports, we should include "a clear statement in the rules or the adopting release that the officer certifications required to be included as exhibits to the existing annual reports would not apply to the conflict minerals disclosure." [283] Also, some commentators were concerned about the negative effects that providing the information in the annual report on Forms 10–K, 20–F, or 40–F would have on form or other eligibility, incorporation by reference into Securities Act filings, and home country reporting in the case of foreign private issuers.[284]

Some commentators indicated that, regardless of where the information was provided, they wanted the conflict minerals information in a location that was easily available to the public,[285] or on the Web sites of both the issuer and the Commission.[286] In this regard, certain commentators recommended that the final rule require an issuer to post its Conflict Minerals Reports and/or its audit reports on its Internet Web site, as we proposed.[287] However, some of these commentators suggested that the final rule should require an issuer to keep that information on its Internet Web site longer than until the issuer filed its subsequent annual report.[288] Other commentators noted that the final rule should not require an issuer to post its audit report online [289] because, as one of the commentators noted,[290] such

[265] *See* letter from Peace.

[266] *See, e.g.*, letters from CRS I, FRS, Global Witness I, Methodist Pension, Sen. Durbin/Rep. McDermott, Sen. Leahy *et al.*, SIF I, and SIF II.

[267] *See* letter from Sen. Durbin/Rep. McDermott.

[268] *See* letter from SIF I.

[269] *See, e.g.*, letters from AngloGold, Cleary Gottlieb, CTIA, Ford, ITIC I, NAM I, NY State Bar, Roundtable, and SEMI.

[270] *See* letters from AngloGold, Cleary Gottlieb, CTIA, IPC I, ITIC I, JVC *et al.* II, NAM I, NY State Bar, Roundtable, and SEMI.

[271] *See* letters from Cleary Gottlieb and NY State Bar.

[272] General Instruction G.(3) of Form 10–K [17 CFR 249.310].

[273] Item 3–09 of Regulation S–X [17 CFR 210.3–09].

[274] *See* letters from AngloGold, CTIA, ITIC I, NAM I, Roundtable, and SEMI.

[275] *See* letters from Advanced Micro Devices, Inc., Africa Faith and Justice Network, Boston Common Asset Management, LLC, Calvert Asset Management Co., Inc., Congo Global Action, Enough Project, Falling Whistles, Free the Slaves, Future 500, General Electric Company, Global Witness, Hewlett-Packard Company, Interfaith Center on Corporate Responsibility, Jantzi-Sustainalytics, Jesuit Conference, Jewish World Watch, Mercy Investment Services, Inc., Microsoft Corporation, Royal Philips Electronics, Trillium Asset Management, Unity Minerals, US SIF: The Forum for Sustainable and Responsible Investment (Aug. 22, 2011) ("MSG II") and State II.

[276] *See* letter from MSG II ("We respectfully request that the SEC rule synchronize the timing for the information contained in the Conflict Minerals Reports from all issuers on a calendar year basis. The MSG recommends that all issuers begin exercising and reporting due diligence on the source and chain of custody for the subject minerals used in their products on a common calendar date.").

[277] Public Law 107–204, 116 Stat. 745, Sec. 302 (2002).

[278] Public Law 107–204, 116 Stat. 745, Sec. 906 (2002).

[279] *See, e.g.*, letters from ITIC I, NMA II, and Taiwan Semi.

[280] Rule 13a–14(a) [17 CFR 240.13a–14(a)] and Rule 13a–14(b) [17 CFR 240.13a–14(b)].

[281] Rule 15d–14(a) [17 CFR 240.15d–14(a)] and Rule 15d–14(b) [17 CFR 240.15d–14(b)].

[282] *See* letter from NY State Bar.

[283] *See* letter from Cleary Gottlieb.

[284] *See, e.g.*, letters from Barrick Gold, Cleary Gottlieb, Corporate Secretaries I, Davis Polk, ITIC I, NMA II, NY State Bar, and WGC II. *But see* letter from Global Witness I (stating that conflict minerals information should be incorporated by reference into Securities Act filings).

[285] *See, e.g.*, letters from Episcopal Conference of Catholic Bishops of the DRC (Apr. 5, 2011) ("CENCO I") and Good Shepherd.

[286] *See, e.g.*, letter from Catholic Charities.

[287] *See* letters from CRS I, Douglas Hileman Consulting LLC (Oct. 31, 2011) ("Hileman Consulting"), Howland, NEI, SEMI, SIF I, and TriQuint I.

[288] *See* letters from Hileman Consulting (suggesting "more than the proposed one year"), NEI (suggesting "issuers to post several years worth of reports on their Web sites"), SIF I (suggesting that an "issuer should be required to keep posted its Conflict Minerals Report and audit reports on its Internet Web site for five years"), and TriQuint I (suggesting that an issuer's Conflict Minerals Reports should be posted on its Web site "for 10 years after the issuer's products were last sold on the open market").

[289] *See* letters from AngloGold and NMA II.

[290] *See* letter from AngloGold.

a requirement would increase costs without increasing benefits.

Finally, some commentators suggested that the final rule should address how an issuer must handle a situation in which it acquires or otherwise obtains control over a company that manufactures or contracts to manufacture products with conflict minerals necessary to the functionality or production of products that previously had not been obligated to provide conflict minerals information to us.[291] These commentators noted that the acquired company may not have any processes in place to determine the origin of conflict minerals in its products and, therefore, the acquiring issuer would most likely need a "reasonable amount of time" [292] to establish those processes before it could provide an accurate specialized disclosure report that included the acquired company's supply chain. Some commentators recommended that the issuer not be required to report on the products manufactured by the acquired company until the end of the first reporting period that begins no sooner than eight months after the effective date of the acquisition.[293] One commentator suggested that the issuer not be required to report on the products manufactured by the acquired company until the end of the first reporting period that begins no sooner than 18 months from the date of the acquisition.[294] Another commentator recommended that the issuer not be obligated to report with respect to the products manufactured by or for the acquired entity "until the first fiscal year beginning after the fiscal year in which the acquisition is consummated."[295]

c. Final Rule

After considering the comments, we are revising the proposed rules to require that an issuer provide its conflict minerals information in a new report on a new Exchange Act form. As proposed, however, the final rule requires an issuer to provide its Conflict Minerals Report as an exhibit, and not in the body of the new report. In this regard, we continue to believe that providing the Conflict Minerals Report as an exhibit to the specialized disclosure report will enable anyone accessing the EDGAR system to determine quickly whether an issuer provided a Conflict Minerals Report with its specialized disclosure report.

We proposed requiring disclosure regarding conflict minerals in an issuer's annual report because we believed that this approach would be less burdensome than requiring that an issuer provide a separate report. Based on the comments we received, however, it appears that issuers will find it less burdensome to provide their conflict minerals information on a new report that is separate from the annual report and due later than the annual report. For example, one commentator explained that "between an issuer's fiscal year end and the date the issuer is required to file its audited annual financial statements, the issuer's accounting and financial reporting teams focus their resources on preparing the issuer's annual report," so "[r]equiring the conflict minerals disclosure to be furnished at the same time as the issuer's Exchange Act annual report would put further strain on these resources at a time when they are likely already to be operating near full capacity." [296] Another commentator noted that issuers are going to be required to utilize "significantly different processes to comply with the new reporting requirement that are outside the scope of processes developed for regular year-end reporting, and it may be a burden to complete the necessary inquiry and due diligence pertaining to conflict minerals on the same timetable as" an annual report.[297]

We considered commentators' arguments that it would be easier for investors to locate the information in Forms 10–K, 20–F, and 40–F. We believe, however, that new Form SD should provide ready access to the information. Indeed, it may be easier for investors to find the information when it is included in the new Form SD, rather than as one of potentially dozens of exhibits in a voluminous Form 10–K, Form 20–F, or Form 40–K.[298] Therefore, the final rule requires an issuer with conflict minerals necessary to the functionality or production of a product it manufactures or contracts to be manufactured to provide us a specialized disclosure report on Form SD by May 31 of each year, reporting on the preceding calendar year. The specialized disclosure report is due later than when an annual report is due for calendar year end issuers so as not to interfere with such issuer's preparation of its Exchange Act annual report, as requested by a number of commentators.[299] Also, as discussed in greater detail below, the final rule requires each issuer to provide its conflict minerals information for each calendar year, rather than its fiscal year.

We agree with the comments we received that a reasonable amount of additional time to submit the conflict minerals information is appropriate where an issuer acquires or otherwise obtains control over a company that manufactures or contracts to manufacture products with conflict minerals necessary to the functionality or production of those products that previously had not been obligated to provide conflict minerals information to us. We have added an instruction to the final rule to reflect this delay. Therefore, the final rule allows an issuer to delay the initial reporting period on the products manufactured by the acquired company until the first calendar year beginning no sooner than eight months after the effective date of the acquisition. This option appears to be a reasonable approach based on some of the comments we received.[300] We note that a shorter period, such as requiring an issuer to report with respect to the products manufactured by or for the acquired entity during the first fiscal year beginning after the fiscal year in which the acquisition is consummated, may leave an issuer that acquires a company late in the year with an insufficient amount of time to establish

[291] *See, e.g.*, letters from ABA, Industry Group Coalition I, Industry Group Coalition II, NAM I, and Semiconductor.

[292] Letter from Semiconductor.

[293] *See* letters from Industry Group Coalition I (suggesting an eight month lead-in period because it is similar to the time that will elapse between the adoption of final rules implementing the Act and the commencement of the reporting period applicable to calendar-year filers, and that time period is necessary to allow sufficient time for the acquiring issuer to implement its conflict minerals reasonable inquiry and due diligence processes throughout the supply chain of the acquired firm), NAM I (same), and Semiconductor (same).

[294] *See* letter from Industry Group Coalition II. *See also* letters from Industry Group Coalition I, NAM I, and Semiconductor.

[295] *See* letter from ABA.

[296] Letter from AngloGold.

[297] Letter from NAM I.

[298] Under the proposed rules, an issuer would have been required to furnish its conflict minerals information in its annual report on Form 10–K, Form 20–F or Form 40–F. As such, investment companies that are registered under the Investment Company Act of 1940 [15 U.S.C. 80a *et seq.*] ("registered investment companies") would not have been subject to the disclosure requirement because those companies are not required to file Form 10–K, Form 20–F or Form 40–F. Our decision to require this disclosure in a new form is not intended to change the scope of companies subject to the disclosure requirement. Therefore, consistent with the proposal, registered investment companies that are required to file reports on Form N–CSR or Form N–SAR pursuant to Rule 30d–1 under the Investment Company Act (17 CFR 270.30d–1) will not be subject to the final rule.

[299] *See, e.g.*, letters from AngloGold, Cleary Gottlieb, CTIA, Ford, ITIC I, NAM I, NY State Bar, Roundtable, and SEMI.

[300] *See, e.g.*, letters from Industry Group Coalition I, Industry Group Coalition II, NAM I, and Semiconductor.

systems to gather and report on the conflict minerals information.

Additionally, we are modifying the proposed rules regarding how long an issuer must keep its conflict minerals disclosure or its Conflict Minerals Report available on the issuer's Internet Web site to reflect that the information is not to be included in an issuer's annual report on Form 10–K, Form 20–F, or Form 40–K. The proposed rules would have required an issuer to keep its conflict minerals information on its Internet Web site until its subsequent annual report was filed. We intended this period to last only one year because, whether or not the issuer had any conflict minerals information to provide in its subsequent annual report, the issuer had to file the subsequent annual report one year after its prior annual report or cease to be a reporting issuer. However, with the final rule requiring an issuer to provide its conflict minerals information in a specialized disclosure report on Form SD, the period between specialized disclosure reports may be more than one year if an issuer has no reportable conflict minerals in its subsequent calendar year. If we did not modify the proposed rules, such an issuer may have been required to keep its conflict minerals information on its Internet Web site for more than one year, possibly indefinitely. Therefore, the final rule specifies that an issuer must make its conflict minerals disclosure or its Conflict Minerals Report available on the issuer's Internet Web site for one year. In response to concerns expressed by commentators that the information should be required to be mandated longer, we note that the issuer's Form SD with the Conflict Minerals Report will be available on EDGAR indefinitely, so the information will continue to be widely available.

In another release we are issuing today, we are requiring issuers to disclose certain resource extraction payment information on Form SD.[301] Because of the order of the releases, we are adopting the form in this release and amending it in the resource extraction release. We intend, however, for the form to be used equally for these two separate disclosure requirements.

2. "Filing" of Conflict Minerals Information

a. Proposed Rules

The proposed rules would have required an issuer's conflict minerals information to be provided in the issuer's annual report on Form 10–K, Form 20–F, or Form 40–F, as applicable, and the Conflict Minerals Report to be included as an exhibit to the issuer's annual report. Certain proposed item requirements would have instructed an issuer to furnish its Conflict Minerals Report as an exhibit to its annual report. Additionally, as proposed, an issuer's Conflict Minerals Report, which would have included the independent private sector audit report, would not be "filed" for purposes of Section 18 of the Exchange Act and thus would not be subject to potential liability of that section of the Exchange Act, unless the issuer stated explicitly that the Conflict Minerals Report and the independent private sector audit report were filed under the Exchange Act. Instead, these documents would only have been furnished to the Commission. Similarly, as proposed, the rules would not have considered the Conflict Minerals Report and the independent private sector audit report to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the issuer specifically incorporated them by reference into the documents. As noted above and in the Proposing Release, furnishing the Conflict Minerals Report would not have subjected the issuer to Section 18 liability,[302] but the issuer would still have had liability for its conflict minerals information. Under Exchange Act Section 13(p)(1)(C), a failure to comply with the Conflict Minerals Statutory Provision would have rendered the issuer's due diligence process "unreliable," and, therefore, the Conflict Minerals Report would "not satisfy" the proposed rules.[303] In this regard, as proposed, an issuer that failed to comply with the proposed rules would have been subject to liability for violations of Exchange Act Sections 13(a) or 15(d), as applicable.[304]

b. Comments on the Proposed Rules

A number of commentators stated specifically that the final rule should, as proposed, require an issuer to "furnish" rather than "file" its conflict minerals information.[305] Many of these commentators believed that the nature and purpose of the conflict minerals disclosure is qualitatively different from the other disclosure required under Exchange Act Section 13 and the conflict minerals information is not material to investors.[306] As one commentator explained, "[n]othing in the statute itself suggests that the 'reasonable' investor would find this information to be important in deciding whether to buy or sell" an issuer's securities, which is "the touchstone of materiality under the federal securities laws."[307] However, this commentator acknowledged that "socially conscious investors might well factor this information into an investment decision."[308] Some commentators asserted that the conflict minerals information is different from other information in required filings, so the conflict minerals information should be "furnished."[309] Other commentators noted that, if the conflict minerals information is material to a reasonable person's investment decision, it would have to be disclosed in an issuer's filings even without the Conflict Minerals Statutory Provision, so any other information regarding conflict minerals should be "furnished."[310] Another commentator recommended that the conflict minerals information should be "furnished" because, whereas the data used to generate the financial statements in issuers' "filed" periodic reports are generally within their control and subject to internal controls, issuers would be required to rely on third parties (suppliers, smelters, etc.) for their conflict minerals data that are mostly beyond the issuer's control.[311]

Some commentators argued that the conflict minerals information should be "furnished" so that Exchange Act Section 18 liability would not attach to the conflict minerals information.[312] One of these commentators asserted that Section 18 liability should not be available because there is no indication that Congress intended for an issuer's conflict minerals information to be subject to such liability.[313] In this regard, some commentators contended that, if "furnished," issuers' conflict minerals information would still receive significant attention and scrutiny, and the issuers' disclosures regarding this information will still be subject to liability sufficient enough to deter

[301] Disclosure of Payments by Resource Extraction Issuers, Release No. 34–67717 (Aug. 22, 2012).

[302] 15 U.S.C. 78r.

[303] *See* Exchange Act Section 13(p)(1)(C).

[304] 15 U.S.C. 78m(a) and 15 U.S.C. 78o(d).

[305] *See, e.g.*, letters from AngloGold, Barrick Gold, Cleary Gottlieb, Corporate Secretaries I, Deloitte & Touche LLP (Mar. 2, 2011) ("Deloitte"), Ford, ITIC I, JVC *et al.* II, NAM III, NMA II, NY State Bar, Taiwan Semi, and WGC II.

[306] *See, e.g.*, letters from AngloGold, Barrick Gold, Cleary Gottlieb, Ford, ITIC I, JVC *et al.* II, NMA II, NY State Bar, and Taiwan Semi.

[307] *See* letter from JVC *et al.* II.

[308] *See id.*

[309] *See, e.g.*, letters from AngloGold, Barrick Gold, Cleary Gottlieb, Ford, ITIC I, JVC *et al.* II, NMA II, NY State Bar, and Taiwan Semi.

[310] *See* letter from AngloGold and NMA II.

[311] *See* letter from Ford.

[312] *See* letters from Barrick Gold, Cleary Gottlieb, NMA II, Society of Corporate Secretaries and Governance Professionals (Aug. 16, 2011) ("Corporate Secretaries III"), and WGC II.

[313] *See* letter from the WGC II.

abuse.[314] The commentators pointed out that issuers would still be liable for any materially false or misleading statements under the antifraud provisions of the federal securities laws, including, Section 10(b) of the Exchange Act and Rule 10b–5 there under.[315] They indicated further that failure to comply with the Conflict Minerals Statutory Provision would render the issuer's due diligence "unreliable" and, therefore, the Conflict Minerals Report would not satisfy the final rule, which would subject the issuer to liability for violations of Exchange Act Sections 13(a) or 15(d), as applicable.[316]

Conversely, other commentators indicated that the final rule should require an issuer to "file" its conflict minerals information.[317] Two of the co-sponsors of the statutory provision noted that Congress intended for an issuer's conflict minerals information, particularly the Conflict Minerals Report, to be "filed" rather than "furnished" so that the information would be subject to the liability provisions in Section 18 of the Exchange Act and, thereby, allow for private sector remedies for false and misleading statements.[318] These co-sponsors asserted that, in the Proposing Release, we incorrectly reasoned that the Conflict Minerals Statutory Provision's requirement that an issuer "submit" its Conflict Minerals Report means that Congress intended that the information be "furnished" instead of "filed." They noted that the term "furnish" is included throughout the Act 41 times, but that term is "expressly not used in Section 1502," which demonstrates that "Congress intended for the word 'submit' to be synonymous with 'filed,' not 'furnished.'" [319]

Similarly, another comment letter written by other members of Congress also emphasized that it was Congress's legislative intent to the Conflict Minerals Report be "filed" not "furnished." [320] The letter stated that it was made clear "during the legislative process, meetings with the SEC, and in written comments to the Commission that Section 1502 was designed as a transparency measure to provide investors and the public the information needed to make informed choices." [321] Therefore, according to the letter, "[p]rotecting investor interests by making companies liable for fraudulent or false reporting of conflict minerals is critical—so the reports must be 'filed,' not 'furnished.'" [322]

Further commentators asserted that a plain reading of the Conflict Minerals Statutory Provision demonstrates that Congress intended that the term "submit" to mean "file." [323] The commentators argued that "submit" means "file" in the provision because new Exchange Act Section 13(p)(2)(A) states that conflict minerals disclosure is required if conflict minerals are necessary to the functionality or production of a product manufactured by a person described and the person described is required to "file" reports with us pursuant to the Conflict Minerals Statutory Provision. Also, one of the commentators noted that the term "furnish" is not in the text of the provision.[324]

Additionally, some commentators asserted that requiring the conflict minerals information be "filed" would benefit investors by making an issuer's conflict minerals information more transparent, accessible, accurate, and complete. In this regard, one of these commentators suggested that requiring the conflict minerals information to be "filed" would allow for private rights of action, which would permit investors to seek remedies for material misstatements regarding conflict minerals disclosures, and provide an incentive for issuers and others to conduct an appropriate due diligence.[325] Another commentator noted that requiring issuers to "file" their conflict minerals information "promotes greater transparency, makes Section 1502 more effective," and helps "facilitate access to this information."[326] In a further comment letter, a group of investors indicated that requiring issuers to "file" their conflict minerals information would "allow investors greater assurance that conflict minerals disclosure is as comprehensive, transparent and accurate as possible."[327]

Finally, some commentators argued that the conflict minerals information is material and, therefore, should be "filed." [328] A group of investors in one comment letter noted that the conflict minerals information is material to an investor in evaluating its investment decision, so the information should be "filed." [329] Specifically, the letter stated that "[g]iven the materiality of the data in evaluating a company's risk, we urge the Commission to require all information outlined in the proposed rule to be filed in the body of the annual report rather than furnished as an exhibit." [330] Also, in another comment letter, an institutional investor indicated that the conflict minerals information is material to an investment decision and, therefore, "as material information[,] this report should be filed, not furnished as proposed by the Commission." [331] Moreover, one commentator argued that allowing the conflict minerals information to be "furnished" instead of "filed" would "send a regrettable signal that the Commission believes these disclosures to be of lesser importance at the very moment that issuers, regulators, investors, and governments around the world are looking to the Commission to help establish the way forward," which would "scale back the vigor of issuer compliance and undermine the entire purpose of the statute" and "undermine the goals of ending the resource-related violence in the DRC and providing meaningful and reliable disclosures to the American consumer and investor." [332]

c. Final Rule

Although the proposal would have required the conflict minerals information to be "furnished," after considering the comments, the final rule we are adopting requires issuers with necessary conflict minerals to "file" the conflict minerals information provided in their specialized disclosure reports, including any Conflict Minerals Reports and independent private sector audit reports.[333] As discussed above, commentators disagreed as to whether the required information should be "furnished" or "filed," [334] and in our

[314] *See* letters from Barrick Gold, Ford, and JVC *et al.* II.

[315] *See* letters from Barrick Gold and JVC *et al.* II.

[316] *See* letters from Ford and JVC *et al.* II.

[317] *See, e.g.*, letters from Bario-Neal, Brilliant Earth, Columban Center *et al.*, Earthworks, Enough Project I, Global Witness I, Hacker Jewelers, Hoover & Strong, Metalsmiths, Sen. Durbin/Rep. McDermott, SIF II, TakeBack, TIAA–CREF, and World Vision US and World Vision DRC (Feb. 21, 2012) ("World Vision II").

[318] *See* letter from Sen. Durbin/Rep. McDermott.

[319] *See id.*

[320] *See* letter from Sen. Leahy *et al.*

[321] *Id.*

[322] *Id.*

[323] *See* letters from Global Witness I and Enough Project I.

[324] *See* letter from Global Witness I.

[325] *See id.*

[326] *See* letter from Enough Project I.

[327] *See* letter from SIF II.

[328] *See* letters from Global Witness I, SIF II, and TIAA–CREFF.

[329] *See* letter from SIF II.

[330] *Id.*

[331] *See* letter from TIAA–CREF.

[332] *See* letter from Global Witness I.

[333] 15 U.S.C. 78r.

[334] *Compare* letters from AngloGold, Barrick Gold, Cleary Gottlieb, Corporate Secretaries I, Deloitte, Ford, ITIC I, JVC *et al.* II, NAM III, NMA II, NY State Bar, Taiwan Semi, and WGC II (supporting a requirement to "furnish" the disclose), *with* letters from Bario-Neal, Brilliant Earth, Columban Center *et al.*, Earthworks, Enough Project I, Global Witness I, Hacker Jewelers, Hoover

Continued

view the Conflict Minerals Provision is ambiguous on this question. In reaching our conclusion that the information should be "filed" instead of "furnished," we note particularly that although Section 13(p)(1)(a) states that a Conflict Minerals Report should be "submitted" to the Commission, the definition of a "person described," who is required to submit a report, uses the term "file." This reference in the statute indicates that the reports should be filed.

Additionally, commentators asserted that allowing the information to be "furnished" would diminish the importance of the information,[335] and that requiring the information to be "filed" would enhance the quality of the disclosures.[336] Some commentators argued that the conflict minerals information should not be treated as of lesser importance than other required disclosures,[337] and another commentator indicated specifically that the conflict minerals information is qualitatively similar to disclosures that are required to be "filed." [338]

Other commentators supporting the proposal that the disclosure be "furnished" argued that the information is not material to investors,[339] while some argued that it was.[340] Given the disagreement, and that materiality is a fact-specific inquiry, we are not persuaded that this is a reason to provide that the information should be "furnished." Additionally, we appreciate the comments that the conflict minerals information should be "furnished" because issuers should not be held liable for the information when they are required to rely on third parties for their conflict minerals data and direct knowledge of relevant facts may not be available to them.[341] We note, however, that section 18 does not create strict liability for filed information. Rather, it states that a person shall not be liable for misleading statements in a filed document if it can establish that it acted in good faith and had no knowledge that the statement was false or misleading.[342]

Moreover, as discussed below, the final rule will include a transition period in which issuers that are required to perform due diligence and are unable to determine that their conflict minerals did not originate in the Covered Countries or unable to determine that their conflict minerals that originated in the Covered Countries did not directly or indirectly finance or benefit armed groups in the Covered Countries may describe their products with such conflict minerals as "DRC conflict undeterminable." We believe this period will allow issuers sufficient time to obtain more data on, and control over, their supply chain through revised contracts with suppliers and smelter verification confirmations, thereby mitigating this liability concern.[343]

3. Uniform Reporting Period

a. Proposed Rules

The Conflict Minerals Statutory Provision requires, and we proposed to require, that issuers provide their initial conflict minerals disclosure and, if necessary, their initial Conflict Minerals Report after their first full fiscal year following the adoption of our final rule.[344] The report would be required to cover that first full fiscal year.

b. Comments on the Proposed Rules

We included a request for comment asking whether our rules should allow individual issuers to establish their own criteria for determining which reporting period to cover in any required conflict minerals disclosure or Conflict Minerals Report, provided that the issuers are consistent and clear with their criteria from year-to-year. Some commentators agreed that the final rule should allow individual issuers flexibility in choosing the appropriate criteria for determining the reporting period in which conflict minerals disclosures are made, provided that the issuer's methodology is clear.[345] Other commentators, however, asserted that the final rule should require that the conflict minerals reporting period correspond to the issuer's fiscal year in its annual report.[346]

We did not request comment specifically on whether an issuer's conflict minerals reporting period should correspond to an issuer's fiscal year. Even so, some commentators indicated that an issuer's annual reporting period for conflict minerals disclosure should not be based on its fiscal year but, instead, should be based on a one-year period that is the same for all issuers.[347] One of these commentators recognized that "synchronizing the timing for the information* * *from all issuers on a calendar year basis* * *would offer integrity and consistency throughout the various supply chains" and because "component manufacturers and others through the supply chain provide products for many customers who have different fiscal years, it would be more efficient and more accurate if the whole supply chain worked towards a common deadline." [348] Another commentator noted that a uniform calendar year reporting period "would clarify the reporting obligations, level the playing field among the various companies, and provide a clearer date of implementation for due diligence and related initiatives in the region." [349] A further commentator asserted that a "single reporting date will allow for

& Strong, Metalsmiths, Sen. Durbin/Rep. McDermott, SIF II, TakeBack, TIAA–CREF, and World Vision II (supporting a requirement to "file" the disclosure).

[335] *See* letter from Global Witness I.

[336] *See* letters from Enough Project I and SIF II.

[337] See letter from Global Witness I.

[338] See Sen. Durbin/Rep. McDermott.

[339] See letters from AngloGold, Barrick Gold, Cleary Gottlieb, Corporate Secretaries I, Deloitte, Ford, ITIC I, JVC *et al.* II, NAM III, NMA II, NY State Bar, Taiwan Semi, and WGC II.

[340] *See* letters from Sen. Leahy *et al.*, SIF I, SIF II, and TIAA–CREF.

[341] *See* letter from Ford.

[342] Exchange Act Section 18(a) provides: "Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant." A plaintiff asserting a claim under Section 18 would need to meet the elements of the statute to establish a claim, including reliance and damages. In addition, we note that issuers that fail to comply with the final rule could also be violating Exchange Act Sections 13(a) and (p) and 15(d), as applicable. Issuers would also be subject to potential liability under Exchange Act Section 10(b) [15 U.S.C. 78j] and Rule 10b–5 [17 CFR 240.10b–5], promulgated thereunder, for any false or misleading material statements in the information disclosed pursuant to the rule.

[343] As discussed above, requiring the disclosure in a new form, rather than in issuers' Exchange Act annual reports, should alleviate some commentators' concerns about the disclosure being subject to the officer certifications required by Rules 13a–14 and 15d–14 under the Exchange Act.

[344] *See* Exchange Act Section 13(p)(1)(A) (stating that an issuer must "disclose annually, beginning with the [issuer's] first full fiscal year that begins after the date of promulgation of [our] regulations").

[345] *See* letters from Howland, IPC I, and NMA II.

[346] See letters from AngloGold and TIC.

[347] *See* letters from IPC II; Matheson II; MSG II; Multi-Stakeholder Group comprised of 29 issuers, non-governmental organizations, and investors (Nov. 10, 2011) ("MSG III"); and State II.

[348] Letter from MSG II. *See also* letter from MSG III.

[349] Letter from State II.

increased efficiency and thus lower costs, without reducing the effectiveness of the regulations."[350]

c. Final Rule

After considering the comments, the final rule will require each issuer to provide its conflict minerals information on a calendar year basis regardless of any particular issuer's fiscal year end.[351] The final rule requires an issuer to provide its annual conflict minerals information in its specialized disclosure report on Form SD for every calendar year from January 1 to December 31 and the specialized disclosure report will be due to the Commission on May 31 of the following year. In this regard, the first reporting period for all issuers will be from January 1, 2013 to December 31, 2013, and the first specialized disclosure report must be filed on or before May 31, 2014.

We agree with the commentators that explained that burdens on participants in the supply chain could be reduced if our final rule adopted a uniform reporting period. This requirement allows component suppliers that are part of a manufacturer's supply chain to provide reports to their upstream purchasers regarding the conflict minerals in their components only once a year. Otherwise, if the due date of the Conflict Minerals Report was tied to an issuer's fiscal year end, as proposed, component suppliers could have to provide reports regarding the conflict minerals in their components on a continuous basis throughout the year because their customers may have different fiscal year ends. If a component supplier has numerous purchasers, it might have to provide separate reports regarding the conflict minerals in its components every month, or even more often, which could be very burdensome and costly.[352]

Additionally, requiring a uniform May 31 due date for the specialized disclosure report responds to concerns raised by certain industry commentators that there would not be sufficient time in the period between the end of an issuer's fiscal year until its annual report is due to gather, report on, and have audited their conflict minerals information, as discussed above.[353] The specialized disclosure report will be due later than an Exchange Act annual report is due for calendar year end issuers so as not to interfere with an issuer's preparation of its Exchange Act annual report, as requested by commentators. Also, the final rule will require each issuer to provide its conflict minerals information for each calendar year, rather than its fiscal year. The May 31 due date is approximately 150 days after the calendar year end, which is consistent with a commentator's suggested due date for an issuer to provide us with its conflict minerals information.[354]

4. Time Period for Providing Conflict Minerals Information

a. Proposed Rules

The Conflict Minerals Statutory Provision requires issuers to provide the specified disclosure with respect to necessary conflict minerals "in the year for which such reporting is required."[355] We proposed that the date an issuer takes possession of a conflict mineral would determine which reporting year that issuer would have to provide its required conflict minerals information. Also, if an issuer contracted the manufacturing of a product in which a conflict mineral is necessary to the production of that product, but the conflict mineral would not be included in the product, the issuer would, under the proposal, have used the date it takes possession of the product to determine which reporting year the issuer would have to provide the required conflict minerals information.

b. Comments on the Proposed Rules

Some commentators suggested that, as proposed, an issuer should be required to provide its conflict minerals information in the reporting period during which the issuer took possession of its conflict minerals.[356] Other commentators recommended, however, that the final rule should use some other determining factor.[357] Some commentators did not provide alternative factors to consider in determining for which annual reporting period an issuer must report its conflict minerals information, but stated only that an issuer should be allowed the flexibility to establish its own criteria for determining when an issuer would be required to provide information on the conflict minerals it obtained.[358] Other commentators provided alternative factors, such as the year in which the mineral is purchased, the year the issuer takes possession and ownership of the mineral, the year the mineral is processed, or the year the product containing conflict minerals is produced or placed on the market.[359]

c. Final Rule

After considering the comments, the final rule is revised from the proposal such that possession is not the determining factor for deciding for which reporting year an issuer has to provide its required conflict minerals information. We are making this revision because we agree, as one commentator noted, that the "statutory requirement to report is triggered not by acquisition or possession of conflict minerals."[360] Instead, the final rule provides that an issuer must provide its required conflict minerals information for the calendar year in which the manufacture of a product that contains any conflict minerals is completed, irrespective of whether the issuer manufactures the product or contracts to have the product manufactured.[361] We believe this approach is appropriate because it should be relatively easy for an issuer to identify when the manufacture of a product is completed, as the issuer has a certain amount of control over this decision. Thus, this approach also allows issuers some flexibility in determining the reporting period. For example, if an issuer completes the manufacture of a product with conflict minerals necessary to the functionality or production of that product on December 30, 2018, the issuer must provide a specialized disclosure report regarding the conflict minerals in that product for the 2018 calendar year. However, if that issuer completes the manufacture of that same product on January 2, 2019, the issuer must provide a specialized disclosure

[350] Letter from IPC II.

[351] We are aware that Exchange Act Section 13(p)(1)(A) requires that we promulgate regulations requiring any "person described" to disclose annually its conflict minerals information, "beginning with the person's first full fiscal year that begins after the date of promulgation of such regulations." The Conflict Minerals Statutory Provision does not tie any required conflict minerals information to an issuer's annual report or its audited financial statements. Therefore, although the provision requires an issuer to begin reporting after an issuer's full fiscal year has cycled through, there is no requirement for the final rule's reporting period to correspond to an issuer's fiscal year.

[352] *See* letter from MSG II.

[353] *See, e.g.*, letters from AngloGold, Cleary Gottlieb, CTIA, Ford, ITIC I, NAM I, NY State Bar, Roundtable, and SEMI.

[354] *See* letter from AngloGold (suggesting that an issuer be required to provide its conflict minerals information on a Form 8–K or Form 6–K "within 150 calendar days after the issuer's fiscal year-end").

[355] Exchange Act Section 13(p)(1)(A).

[356] *See, e.g.*, letters from Cleary Gottlieb, ITIC I, and WGC II.

[357] *See, e.g.*, letters from AngloGold, NAM I, RJC, and TIC.

[358] *See, e.g.*, letters from Howland, IPC I, and NMA II.

[359] *See, e.g.*, letters from AngloGold, NAM I, RJC, and TIC.

[360] *See* letter from NAM I.

[361] *See id.* (recommending that, "[i]f the rule specifies a reporting trigger, it should be producing or placing on the market a product containing conflict minerals").

report regarding the conflict minerals in that product for the 2019 calendar year.

This timeframe is the same for an issuer that contracts the manufacturing of its products. An issuer that contracts the manufacturing of a product must provide its required conflict minerals information for the calendar year in which the issuer's contract manufacturer completes the manufacturing of product. For example, if an issuer's contractor completes the manufacturing of the product with conflict minerals necessary to the functionality or production of that product on December 30, 2018, the issuer must provide a specialized disclosure report regarding the conflict minerals in that product for the 2018 calendar year, even if the issuer does not receive the product until January 2, 2019. However, if that issuer's contractor completes the manufacturing of that same product on January 2, 2019, the issuer must provide a specialized disclosure report regarding the conflict minerals in that product for the 2019 calendar year.

This outcome is the same for an issuer that manufactures the product using a component product with conflict minerals necessary to the functionality of the product that is manufactured by an independent third party. If the manufacturer of the product completes the product that incorporates the component product with necessary conflict minerals on December 30, 2018, the issuer that manufactured the product must provide a specialized disclosure report regarding the conflict minerals in that product for the 2018 calendar year. However, the reporting period of the independent third party manufacturer of the component product, if it is a reporting issuer, is not determined by when the manufacturing of the subsequent product containing its component product is completed. Instead, the reporting period for that component product manufacturing issuer is determined by when it completes the manufacturing of the component product. Therefore, an issuer that completes the manufacture of a component product on December 30, 2018, must provide a specialized disclosure report regarding the conflict minerals in that completed component product for the 2018 calendar year.

5. Conflict Minerals Already in the Supply Chain

a. Proposed Rules

The proposed rules did not discuss specifically how an issuer would handle any conflict minerals already in the supply chain at the time our final rule takes effect, including existing stockpiles of conflict minerals. The Proposing Release, however, requested comment on this point.

b. Comments on the Proposed Rules

Almost all commentators that discussed the topic recommended that an issuer's existing stockpile of conflict minerals should be exempt from the final rule.[362] One commentator explained, that "[c]ategorizing existing stock as 'conflict' simply because the mineral was mined before SEC rules have been agreed and published serves no purpose in furthering the aims of the legislation and would cause serious financial loss to the holders of that stock[pile]." [363] In this regard, one commentator asserted that "[s]tockpiled minerals may have originated in mines that support the conflict; however, it would be impractical to ask companies to trace the origin of these minerals." [364] Another commentator argued specifically that, if the final rule causes owners to dispose of their existing conflict minerals inventory because they are unable to determine that they are "DCR conflict free," the cost of the rule would increase "dramatically." [365]

Panelists discussed this issue further at the SEC Roundtable. Some panelists explained that there are stocks of metals and other materials stored throughout the world in warehouses and vaults by many individuals and institutions that are already past the point in the supply chain at which they could contribute to conflict.[366] One panelist representing a human rights group appeared to acknowledge that stockpiled conflict minerals stored outside the Covered Countries would not contribute to conflict in the Covered Countries.[367] Another panelist asserted that a stockpile "exemption is essential for both existing unsmelted mineral and refined metal stocks held by industry, metal warehouses, investors and even in US Government stockpile," because the "value of current tin stocks is probably around US$7billion, generally with non-specific mine origin," so not exempting such minerals would lead to "market disruption and financial losses on this potentially unsaleable material." [368]

Many commentators suggested different requirements for when a conflict mineral should be considered stockpiled and, therefore, excluded from the final rule. A number of commentators recommended that the final rule should exempt any conflict minerals mined prior to the adoption of the final rule.[369] One commentator noted, however, that "the date of extraction is not generally recorded or known for minerals purchased from artisanal miners." [370] Some commentators asserted that the final rule should exempt any conflict minerals smelted or refined by a certain date [371] because, as one of these commentators indicated, "[e]ach metal batch produced by a smelter will possess a dated certificate of analysis which may be considered as the production date."[372] Similarly, another commentator recommended that stockpiled gold that "has been fully refined before the effective date" of the final rule be exempted.[373] In this regard, one commentator suggested that the final rule exclude "inventory produced before the date on which Dodd-Frank 1502 will first apply to the issuer." [374] Another commentator "proposed that the effective date of disclosure requirement on metal should be for ingot produced [one] year after the effective date" of the final rule.[375]

A few commentators urged that the final rule exempt any conflict minerals outside the Covered Countries by July 15, 2010.[376] One commentator suggested

[362] *See, e.g.*, letters from AAEI; AngloGold; ArcelorMittal; Arkema; Cleary Gottlieb; CTIA; Davis Polk; Earthworks; Enough Project I; Enough Project IV; Global Tungsten I; Global Tungsten & Powders Corp. (Oct. 13, 2011) ("Global Tungsten II"); Howland; Industry Group Coalition I; ICAR *et al.* II; IPC I; IPMI I; ITIC I; ITRI I; ITRI Ltd. (Oct. 19, 2011) ("ITRI III"); ITRI Ltd. (Oct. 31, 2011) ("ITRI IV"); Japanese Trade Associations; Jean Goldschmidt International SA (Feb. 14, 2011) ("JGI"); JVC *et al.* II; Jewelers Vigilance Committee, American Gem Society, Manufacturing Jewelers & Suppliers of America, Jewelers of America, and Fashion Jewelry & Accessories Trade Association (Nov. 1, 2011) ("JVC *et al.* III"); Kemet; Kuala Lumpur Tin Market (Jan. 17, 2011) ("Kuala Tin"); LBMA I; Metal Solutions Corporation (Dec. 28, 2010) ("Solutions"); MSG III; NAM I; NEI; NMA II; NMA III; Pact II; PCP; Responsible Jewellery Council (Feb. 25, 2011) ("RJC I"); RMA; SEMI; Signet Jewelers Ltd. (Nov. 1, 2011) ("Signet"); Somima; TIAA–CREF; SIF I; and WGC II.

[363] Letter from ITRI I.

[364] Letter from Enough Project I.

[365] See letter from Claigan Environmental Inc. (Oct. 28, 2011) ("Claigan I").

[366] *See* Transcript of SEC Roundtable on Conflict Minerals, Sections 0171–0174 (Oct. 18, 2011), *available athttp://www.sec.gov/spotlight/conflictminerals/conflictmineralsroundtable101811-transcript.txt.*

[367] *See id.* at Section 0172 lines 19–23 (stating that "there's a truth to the fact that if something is stockpiled out of the region, and it's being held somewhere else, does it really get at what the intent of the law is").

[368] *See id.* at Section 0118 lines 8–15. *See also* letter from ITRI III.

[369] *See, e.g.*, letters from AAEI, Davis Polk, ITIC I, Kemet, MSG III, RJC I, RMA, and WGC II.

[370] *See* letter from ITRI I.

[371] *See* letters from ITRI I, LBMA I, and Signet.

[372] *See* letter from ITRI I.

[373] *See* letter from LBMA I.

[374] *See* letter from ArcelorMittal.

[375] *See* letter from ITRI III.

[376] *See* letters from Earthworks and SIF I.

that conflict minerals should be exempt if, by January 1, 2013, those minerals are included in components or products already incorporated in finished goods in a supplier's inventory or are included in parts or components included in the repair or maintenance of products.[377] One commentator recommended that the final rule should exempt gold in the issuer's possession by, or extracted before, the effective date of the final rule.[378] Another commentator asserted that the final rule should exempt any conflict mineral that an issuer took possession of before the first full fiscal year following the adoption of the final rule.[379] This commentator suggested also that the final rule should not require reporting on conflict minerals in an issuer's supply chain that have been manufactured prior to the beginning of the issuer's first reporting year. One commentator asserted that the final rule should exclude, as of the date of the effectiveness of the final rule, "gold bars in storage at the central banks," "bars marked with the London Bullion Marketers Association (LBMA) stamp," and "gold coins issued by governments or other entities."[380] One commentator recommended that the final rule include a 24-month "grace period" that would permit the "sale of existing stockpiles of minerals that have already been mined and have been sitting in warehouses" in the DRC.[381]

c. Final Rule

After considering the comments, the final rule excludes any conflict minerals that are "outside the supply chain" prior to January 31, 2013. The final rule considers conflict minerals to be "outside the supply chain" only in the following instances: After any columbite-tantalite, cassiterite, and wolframite minerals have been smelted; after gold has been fully refined; or after any conflict mineral, or its derivatives, that have not been smelted or fully refined are located outside of the Covered Countries.

We are aware that these existing stockpiles could have financed or benefited armed groups in the Covered Countries. However, once those minerals are smelted, refined, or outside of the Covered Countries, it appears unlikely that they could further finance or benefit armed groups. Therefore, applying the final rule to these already-stockpiled minerals would not further the purpose of the Conflict Minerals Statutory Provision because those minerals would not contribute to further conflict. Similarly, requiring issuers to determine the origin and chain of custody of these minerals that may have been extracted prior to the passage of the Conflict Minerals Statutory Provision, could result in undue costs if the minerals could not be sold, as suggested by one commentator.[382]

We considered exempting stockpiled conflict minerals that were extracted before a date certain, as one commentator recommended.[383] We decided not to do so, however, because, as another commentator noted, the date of extraction is not generally recorded or known for minerals from artisanal miners.[384] Further, if the final rule exempts conflict minerals extracted at a date certain, the rule would not necessarily account for payments illegally demanded by armed groups of those that transport conflict minerals through remote areas of the DRC. Instead, we believe that the proper point to use for ensuring that a conflict mineral is truly stockpiled is the smelting or primary refining date because the dates of these actions are more likely to be reliably recorded.[385] Similarly, as is true with smelted or refined conflict minerals, conflict minerals stockpiled outside the Covered Countries would not contribute to conflict in the Covered Countries.[386] Therefore, the final rule exempts any conflict minerals outside the Covered Countries as well.

We recognize that there may be situations in which conflict minerals are past the point in the supply chain where they are able to be used to finance or benefit armed groups, but these minerals have yet to be stored outside the Covered Countries,[387] smelted, or refined. Even so, we believe that smelting, refining, or being outside the Covered Countries marks the first opportunity in the supply chain that offers reliable proof that the conflict minerals will no longer benefit or finance armed groups. We note, however, that market participants may need additional time to move their stockpiles outside the Covered Countries or have those stockpiles smelted or refined. Therefore, to accommodate this timing constraint, the final rule provides transition relief to permit market participants sometime after the final rule becomes effective to move, smelt, or refine any existing stocks of conflict minerals without having to comply with the rule's requirements.

6. Timing of Implementation

a. Proposed Rules

The Conflict Minerals Statutory Provision states that issuers must disclose their conflict minerals information annually beginning with the issuer's first full fiscal year that begins after the date of promulgation of our final rule.[388] Therefore, the proposed rules would have included neither a transition period for issuers unable to determine that their conflict minerals did not originate in the Covered Countries or unable to determine that their conflict minerals that originated in the Covered Countries did not directly or indirectly finance or benefit armed groups, nor a general delay of the rules. We requested comment, however, regarding whether we should provide a transition period or a delay.

b. Comments on the Proposed Rules

In response to our request for comment, a number of commentators stated that the final rule should not permit any general delay or specific phase-in period for issuers to provide their conflict minerals information.[389] A number of other commentators, however, indicated that the final rule should allow for some type of delay or

[377] *See* letter from NAM I.

[378] *See* letter from AngloGold.

[379] *See* letter from SEMI.

[380] *See* letter from NMA III.

[381] *See* letter from Charles F. Blakeman (Mar. 15, 2012) ("Blakeman III") (arguing overall that no final rule should be adopted, but seeking a 24-month grace period for the sale of existing stockpiles of conflict minerals, in the alternative, should the Commission adopt a final rule). *See also* letter from Charles Blakeman (Nov. 17, 2011) ("Blakeman II") (recommending a grace period for conflict minerals already, but not specifying a length of time for the grace period).

[382] *See* letter from Claigan I.

[383] *See* letter from ITIC I.

[384] *See* letter from ITRI I.

[385] *Id.*

[386] *See* Transcript of SEC Roundtable on Conflict Minerals, at Section 0172 lines 19–23.

[387] For example, a stockpile of conflict minerals could be stored in a warehouse in a DRC country that is insulated from and is beyond the reach of any armed group, so these conflict minerals would not contribute to conflict.

[388] Exchange Act Section 13(p)(1)(A).

[389] *See, e.g.*, letters from Catholic Charities; Earthworks; Global Witness I; Good Shepherd; ICAR *et al.* II; Larry Cox of Amnesty International, Lisa Shannon of A Thousand Sisters, John Bradshaw of Enough Project, Karen Stauss of Free the Slaves, Corinna Gilfillan of Global Witness, Arvind Ganesan of Human Rights Watch, Tzivia Schwartz Getzug of Jewish World Watch, Morton Halperin of Open Society Policy Center, Rabbi David Saperstein of Religious Action Center of Reform Judaism, Kent Hill of World Vision (Mar. 1, 2011) ("Amnesty *et al.*"); Rep. Berman *et al.*; Sen. Boxer *et al.* I; Senators Barbara Boxer, Frank R. Lautenberg, Barbara A. Mikulski, Sheldon Whitehouse and Ron Wyden (Feb. 16, 2012) ("Sen. Boxer *et al.* II"); Sen. Durbin/Rep. McDermott; Delly Mawazo Sesete (Dec. 19, 2011) ("Sesete"); State II; Synergie des Femmes Pour les Victimes des Violences Sexuelles (Mar. 7, 2011) ("Synergie"); World Vision US (Jul. 8, 2011) ("World Vision I"); and World Vision II.

phase-in period.[390] Some of the commentators specified that there should be a phase-in for only certain categories of issuers, such as foreign private issuers, accelerated filers, and smaller reporting companies.[391] Other commentators recommended that the final rule should include a phase-in period but did not provide any details for implementing such a mechanism.[392]

Some commentators asserted that the effectiveness of the final rule should be delayed for all issuers until either the Comptroller General has established auditing standards and/or the State Department has developed its conflict minerals map and its strategy to address linkages between human rights abuses and conflict minerals.[393] Other commentators stated that the final rule's effectiveness for all issuers should be delayed for two to five years after promulgation for issuers to set up traceability systems in the Covered Countries and clear mineral stockpiles from the supply chain.[394] One commentator stated that we should establish a general reporting delay for one year following promulgation of the final rule to allow issuers the opportunity to eliminate conflict minerals from their products and, during this time, issuers would not be required to provide conflict minerals information.[395] Another commentator recommended a one-year general phase-in of the final rule "so that a thorough and reliable traceability process can be instituted."[396] In this regard, one commentator indicated that the "private sector is moving forward on this issue," and that one company "aims to have built the first verifiably conflict free microprocessor" by 2013.[397] Another commentator suggested that the final rule "set clear and specific dates for when company reporting will take effect," because "using benchmarks or trigger points will prolong the uncertainty that is causing so much trouble and suffering."[398]

A number of commentators recommended and described specific phase-in periods that focused on issuers unable to determine the origins of their conflict minerals.[399] Although each of these approaches varied to some degree, they all provided that, for a certain number of years after adoption of the final rule, an issuer unable to determine its conflict minerals' origins must disclose this fact, but would not be required to describe the products containing these conflict minerals as not "DRC conflict free." Some of these commentators recommended that we require an issuer, during a phase-in period, to describe its conflict minerals policy, its reasonable country of origin inquiry, the conflict minerals in its supply chains, and/or certain other information.[400] A few commentators indicated that we should phase-in the final rule for particular issuers based on the issuer's position in supply chain, so that an issuer closer in position to the mine or smelter would have to disclose more information regarding its conflict minerals.[401] One commentator recommended that the final rule permit a three-year phase-in period in which all issuers would be required only to receive certifications from their first-tier suppliers during the first year after promulgation, identify the smelters used to process their conflict minerals in the second year, and fully implement the rules in the third year.[402]

Many commentators, including industry associations, corporations, human rights groups, institutional investors, members of Congress, and individuals, agreed that all conflict minerals should be treated equally, as proposed.[403] Some commentators asserted that gold should be treated differently than the other three conflict minerals because of its unique qualities, and the OECD had not approved the supplement to its due diligence guidance specifically for gold,[404] which at the time of the Proposing Release was scheduled to be published by the end of 2011. Subsequent commentators noted that the OECD's gold supplement would not be finalized until sometime in 2012,[405] and some commentators suggested that the final rule's application to gold be delayed until the OECD has adopted its gold supplement.[406] At present, the final gold supplement has been approved by the OECD.[407] One of the commentators suggested that the final rule be delayed for gold until the beginning of an issuer's first full fiscal year following adoption and issuance of the OECD's gold supplement.[408] Another one of the commentators argued that any "effort to establish credible and effective due diligence systems in the absence of OECD guidance will be stymied by the lack of a widely accepted base for responsible sourcing."[409] One commentator, however, asserted that the final rule should not be delayed for gold regardless of whether the OECD's gold supplement has been completed.[410] This commentator argued that, even if the OECD's gold supplement has not been completed when an issuer's reporting period begins, the issuer

[390] *See, e.g.*, letters from AAEI; AAFA; AdvaMed I; AngloGold; Arkema; Barrick Gold; BEST II; Boeing Company (Oct. 18, 2011) ("Boeing"); Bureau d'Etudes Scientifiques et Techiques (Mar. 10, 2011) ("BEST I"); Chamber I; Corporate Secretaries I; CTIA; Davis Polk; Fédération des Enterprises du Congo (Feb. 25, 2011) ("FEC I"); Howland; Industry Group Coalition I; IPC I; ITIC I; ITRI I; ITRI II; ITRI IV; JGI; JVC *et al.* II; JVC *et al.* III; Medtronic, Inc. (Mar. 2, 2011) ("Medtronic"); Malaysia Smelting Corporation (Oct. 25, 2011) ("MSC II"); NAM I; National Association of Manufacturers (Jul. 26, 2011) ("NAM II"); NEI; NRF I; Pact I; PCP; Plexus (Feb. 25, 2011) ("Plexus"); Representative Mark S. Critz (Feb. 29, 2012) ("Rep. Critz"); RILA; RMA; Roundtable; Solutions; Somima; Taiwan Semi; TechAmerica, Professional Services Council, National Defense Industrial Association, American Council of Engineering Companies, Aerospace Industries Association, and U.S. Chamber of Commerce (Nov. 28, 2011) ("CODSIA"); TIC; TriQuint I; TriQuint Semiconductor Manufacturing Company, Ltd. (Mar. 2, 2011) ("TriQuint II"); and WGC II.

[391] *See* letters from AngloGold, Howland, and Taiwan Semi.

[392] *See, e.g.*, letters from AAEI, AAFA, Arkema, BEST I, Chamber I, Davis Polk, FEC I, ITRI I, JGI, Medtronic, Solutions, MSC I, NEI, Pact I, Rep. Critz, and RMA.

[393] *See* letters from Barrick Gold, Corporate Secretaries I, NRF I, Roundtable, and WGC II.

[394] *See, e.g.*, letters from AdvaMed I, Arkema, BEST II, FEC I, IPC I, ITRI I, ITRI II, ITRI IV, JVC *et al.* II, NAM I, Plexus, and TriQuint II.

[395] *See* letter from PCP.

[396] *See also* letter from Somima.

[397] *See* letter from Senator Jeff Merkley and Representatives Peter DeFazio, Earl Blumenauer, Kurt Schrader, and Suzanne Bonamici (May 17, 2012) ("Sen. Merkley *et al.*"). *See also* letter from Enough Project (Aug. 10, 2011) ("Enough Project III") (providing a link to an article that "details current efforts on the ground in response to Section 1502").

[398] *See* letter from BEST II.

[399] *See, e.g.*, letters from AdvaMed I, CTIA, Industry Group Coalition I, IPC I, ITIC I, JVC *et al.* II, and NAM I.

[400] *See* letters from AdvaMed I, Industry Group Coalition I, and NAM I.

[401] *See* letters from NRF I and Teggeman.

[402] *See* letter from TriQuint II.

[403] *See, e.g.*, letters from Bario-Neal, Brilliant Earth, Calvert, Catholic Charities, CRS I, Earthworks, Enough Project I, Metalsmiths, Good Shepherd, Hacker Jewelers, Hoover & Strong, Howland, IPC I, ITRI I, NAM I, Niotan I, Peace, Rep. Berman *et al.*, Sen. Durbin/Rep. McDermott, SIF I, State II, TakeBack, and TIAA–CREF.

[404] *See, e.g.*, letters from AngloGold, IPMI I, JVC *et al.* II, LBMA II, NMA II, Tiffany, TriQuint I, and WGC II.

[405] *See* letters from Government of Canada, Foreign Affairs and International Trade (Dec. 23, 2011) ("Canada"); JVC *et al.* III; Signet; World Gold Council, London Bullion Market Association, and Responsible Jewellery Council (Oct. 28, 2011) ("WGC *et al.* I"); and World Gold Council, London Bullion Market Association, and Responsible Jewellery Council (Dec. 9, 2011) ("WGC *et al.* II").

[406] *See, e.g.*, letters from Boeing, JVC *et al.* III, Signet, World Gold Council (Jun. 20, 2011) ("WGC III"), WGC *et al.* I, and WGC *et al.* II.

[407] *See OECD, Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Supplement on Gold* (2012), *available at http://www.oecd.org/corporate/guidelinesformultinationalenterprises/FINAL%20Supplement%20on%20Gold.pdf.*

[408] *See* letter from WGC *et al.* II.

[409] *See* letter from JVC *et al.* III.

[410] *See* letter from ICAR *et al.* II.

would still be able to apply the OECD's core due diligence framework to gold.

The commentators that advocated treating gold differently from the other conflict minerals comprise mostly gold, mining, and jewelry companies or associations. Of these commentators, only one indicated that the final rule should initially be more stringent with issuers using gold because 80% of the funds generated by conflict minerals for armed groups come from gold.[411] The other commentators indicated that the final rule should be more lenient for gold and that we should defer full incorporation of gold into the final rule because such a large percentage of gold coming from the DRC is illegally exported that it will require greater time and effort to make the gold supply chain transparent than it will for the other conflict minerals.[412] One commentator was concerned that, until a more transparent supply chain is developed, the final rule would stigmatize gold and thereby harm that mineral's ability to be used as a hedge and damage the global financial economy because so many companies would not be able to determine the origin of their gold.[413] Finally, a few commentators stated that the final rule should permit issuers to exclude certain information from public dissemination regarding the storage and transportation routes of gold for security reasons.[414]

c. Final Rule

After considering the comments, the final rule will not provide a general delay of effectiveness, nor will the proposal be withdrawn and re-proposed. Although many commentators advocated that the final rule include an extended general delay of the rule's effectiveness, we do not believe this approach would appropriately implement Congress's directive in the Conflict Minerals Statutory Provision. The provision states when an issuer must begin to report on its conflict minerals. Congress directed us to promulgate regulations requiring any "person described" to disclose annually "beginning with the person's first full fiscal year that begins after the date of promulgation of such regulations."[415] Additionally, it is not clear that a general delay of the final rule is necessary or appropriate. As noted by two of the co-sponsors of the statutory provision, conflict minerals legislation was first considered in 2008, the Conflict Minerals Statutory Provision was over a year old at the time of the letter, and many issuers have been working with various groups in developing supply chain tracing for years.[416] Therefore, under the final rule, most issuers with necessary conflict minerals will be required to file a specialized disclosure report on or before May 31, 2014 containing conflict minerals disclosure for the initial reporting period that will extend from January 1, 2013 to December 31, 2013.

Since Congress adopted the Conflict Minerals Statutory Provision in July 2010, we have sought comment on our implementation of the provision, including our proposal, and have provided opportunities for commentators to provide their input, both before and after the rules were proposed. As noted above, we extended the comment period for the rule proposal and convened an October 2011 roundtable at the request of commentators. We have continued to receive comment letters through August 2012, all of which we have considered. Some commentators have provided responses to other commentators, particularly on the Economic Analysis. This robust, public, and interactive debate has allowed us to more fully consider how to develop our final rule. Additionally, as discussed further in the Economic Analysis section, below, we have considered and analyzed the numerous comments received regarding the costs and complexities of the statute and proposed rule, and have taken them into account in the final rule. Overall, we believe interested parties have had sufficent opportunity to review the proposed rules, as well as the comment letters, and to provide views on the proposal, other comment letters, including data to inform our consideration of the final rule. Accordingly, we do not believe that withdrawal of the proposed rule and re-proposal is necessary.

While the final rule does not include a general delay for the reasons noted, we acknowledge that there are legitimate concerns about the feasibility of preparing the required disclosure in the near term because of the stage of development of the supply chain tracing mechanisms. In order to address these concerns, rather than providing an extended general delay of effectiveness, the final rule includes a targeted and temporary provision intended to help issuers address some of the burdens and costs of compliance with the final rule. For all issuers, this period will last two years, including issuers' 2013 and 2014 reporting periods, but will not be permitted for the reporting period beginning January 1, 2015. For smaller reporting companies, this period will last four years, including issuers' 2013 through 2016 reporting periods, but will not be permitted for the reporting period beginning January 1, 2017. We note that, although some commentators recommended that there be no such transition period and other commentators recommended that such a transition period be permitted for either a shorter or longer amount of time, a number of commentators appeared to suggest that a transition period through 2014 would be appropriate to allow the necessary traceability systems in the Covered Countries to be established.[417] Issuers taking advantage of this temporary category are still be required to conduct due diligence and prepare and file a Conflict Minerals Report, and are required to disclose in their Conflict Mineral Report all steps taken by such issuer, if any, since the issuer's last such report to mitigate the risk that its necessary conflict minerals benefit armed groups, including any steps to improve its due diligence.

As discussed in greater detail below, the final rule provides a temporary "DRC conflict undeterminable" category for a two-year period for all issuers and a four-year period for smaller reporting companies. This category is available for issuers that proceed to step three but are unable to determine, after exercising their required due diligence,[418] whether

[411] *See* letter from TriQuint I.

[412] *See* letters from AngloGold, IPMI I, JVC *et al.* II, NMA II, and WGC II.

[413] *See* letter from WGC II.

[414] *See* letters from NMA II, NAM III, and WGC II.

[415] *See* Exchange Act Section 13(p)(1)(A).

[416] *See* letter from Sen. Durbin/Rep. McDermott.

[417] *See, e.g.*, letters from AdvaMed I (recommending an "unknown determination" transition period at least through 2014), FEC I ("Disclosure of minerals mined could be mainly conflict free for 2014 and finally the companies could successfully report to the Securities and Exchange Commission in 2015."), JVC *et al.* II (urging "the Commission to adopt a calibrated 'phase-in' disclosure approach spanning the period from April 15, 2011 (the statutorily-prescribed effective date of the Commission's implementing rules) through at least early 2014, to afford all affected issuers a minimum two-year transition period before becoming obligated to furnish an audited CMR"), Plexus (suggesting that a "phase in compliance schedule of at least 2 years is needed in order to provide time for the due diligence systems to be set-up, most importantly on the ground in the DRC," but even "this would be a significant challenge"), Verizon (recommending "delaying the full applicability of the due diligence requirements of the Conflict Minerals Report until after fiscal 2014, to allow the DRC Zone countries to develop the traceability protocols and related infrastructure required in order to supply Conflict Free Smelters"), and WilmerHale ("After fiscal year 2014, when sufficient infrastructure is expected to have been developed to permit companies to determine the source of all their conflict minerals, the 'indeterminate source' category would no longer be available.").

[418] As discussed in greater detail below, issuers are required to exercise due diligence on the source

Continued

their conflict minerals originated in the Covered Countries or whether their conflict minerals that originated in the Covered Countries directly or indirectly finance or benefit armed groups in the Covered Countries.

The final rule permits any such issuer for purposes of the conflict minerals disclosure to describe its products with such conflict minerals as "DRC conflict undeterminable," unless those products also include other conflict minerals that directly or indirectly financed or benefited armed groups in the Covered Countries. Further, although issuers with "DRC conflict undeterminable" products are required to provide a Conflict Minerals Report that describes, among other matters, the measures taken by the issuer to exercise due diligence on the source and chain of custody of the conflict minerals, during the temporary period they will not have to provide an independent private sector audit of that report. We believe that not requiring an independent private sector audit of the Conflict Minerals Report during the temporary period is appropriate because an audit of the design of an issuer's due diligence that results in an undeterminable conclusion would not appear to have a meaningful incremental benefit.

D. Step Two—Determining Whether Conflict Minerals Originated in the Democratic Republic of the Congo or Adjoining Countries and the Resulting Disclosure

Once an issuer determines that conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by the issuer, the Conflict Minerals Statutory Provision requires the issuer to determine whether those conflict minerals originated in the Covered Countries.[419] If so, the issuer must submit a Conflict Minerals Report concerning those conflict minerals that originated in the Covered Countries,[420] and make that report available on its Internet Web site.[421] To determine whether their conflict minerals originated in the Covered Countries, so as to determine whether they must exercise due diligence on the source and chain of custody of those minerals and provide a Conflict Minerals Report, the final rule requires issuers with necessary conflict minerals to conduct a reasonable country of origin inquiry.

1. Reasonable Country of Origin Inquiry

a. Proposed Rules

We proposed that an issuer would be required to disclose whether it has necessary conflict minerals that originated in the Covered Countries based on its "reasonable country of origin inquiry." Our proposed rules did not specify, however, what constituted a reasonable country of origin inquiry. Rather than describing what a reasonable country of origin inquiry would entail, we indicated that such a determination would depend on each issuer's particular facts and circumstances. In this regard, we noted that the reasonable country of origin inquiry requirement was not meant to suggest that issuers would have to determine with absolute certainty whether their conflict minerals originated in the Covered Countries as we have often stated that a reasonableness standard is not the same as an absolute standard.[422]

b. Comments on the Proposed Rules

One commentator indicated that the final rule should not include a reasonable country of origin inquiry for determining whether an issuer's conflict minerals originated in the Covered Countries.[423] This commentator objected to the use of a reasonable country of origin inquiry because it believed that the origin of a product should be determined based on where the product is produced rather than where the minerals in the product were mined. Another commentator recommended that the final rule not require issuers to make any reasonable country of origin inquiry at all if they determine, based on whatever means they believe appropriate, that their conflict minerals did not originate in the Covered Countries, provided they disclose this fact.[424] Many other commentators on this subject agreed that the proposed rules' reasonable country of origin inquiry approach is appropriate.[425] Some of these commentators disagreed, however, on the meaning and application of the standard. Some such commentators asserted that a reasonable country of origin standard should be equivalent to the due diligence standard required for the Conflict Minerals Report.[426] Others suggested that the reasonable country of origin standard should conform, at least in part, to international standards,[427] such as the "preliminary review" in the OECD guidance.[428]

Many commentators agreed that the final rule should not define the reasonable country of origin standard, or should provide only general guidance regarding the standard, so that the rules would allow for greater flexibility to evolve as processes improved.[429] Some of these commentators provided examples of the general guidance that

and chain of custody of their conflict minerals and potentially provide a Conflict Minerals Report if, following their reasonable country of origin inquiry, they know they have conflict minerals from the Covered Countries and not from recycled or scrap sources, or they have reason to believe that their conflict minerals may have originated in the Covered Countries and may not have come from recycled or scrap sources. Only after these issuers have exercised their required due diligence may they use the "DRC conflict undeterminable" alternative if they are still unable to determine that their conflict minerals originated in the Covered Countries or, if they determine that their minerals did originate in the Covered Countries, but they are unable to determine that their conflict minerals directly or indirectly financed or benefited armed groups in the Covered Countries.

[419] *See* Exchange Act Section 13(p)(1)(A).

[420] *See id.*

[421] *See* Exchange Act Section 13(p)(1)(D).

[422] *Cf.* Foreign Corrupt Practices Act (the "FCPA"), 15 U.S.C. 78m(b)(7) and Exchange Act Section 13(b)(7), which states that "the terms 'reasonable assurances' and 'reasonable detail' mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." The release further cites to the conference committee report on amendments to the *FCPA*, *Cong. Rec.* H2116 (daily ed. Apr. 20, 1988), which states the reasonableness "standard 'does not connote an unrealistic degree of exactitude or precision,'" but instead "'contemplates the weighing of a number of relevant factors, including the cost of compliance.'"

[423] *See* letter from Teggeman.

[424] *See* letter from Roundtable (stating that the "Conflict Minerals Statutory Provision requires issuers to disclose 'whether' their conflict minerals originated in the Covered Countries, and, in the case of a positive determination, to provide a Conflict Minerals Report," and it "does not impose any obligation on an issuer who determines that the conflict minerals did not originate in the Covered Countries to make any disclosure beyond that fact, nor does it specify how the issuer is to determine that the conflict minerals did not originate in the Covered Countries").

[425] *See, e.g.*, letters from AAFA, AngloGold, ArcelorMittal, Barrick Gold, Boeing, Chamber I, Cleary Gottlieb, CRS I, Enough Project I, Evangelical Alliance, Evangelicals, Global Witness I, Howland, ICGLR, Industry Group Coalition I, IPC I, IPMI I, ITIC I, JVC *et al.* II, LBMA I, Metalsmiths, Methodist Board, MSG I, NAM I, NEI, NMA II, NYCBar I, NYCBar II, RILA–CERC, SEMI, Semiconductor, SIF I, SIF II, PCP, Presbyterian Church II, Sen. Durbin/Rep. McDermott, State II, TIAA–CREF, TIC, TriQuint I, and WGC II.

[426] *See* letters from Metalsmiths and Sen. Durbin/Rep. McDermott.

[427] *See* letters from CRS I and IPMI I.

[428] *See* letter from IPMI I (stating that "the OECD advocates an initial determination of origin inquiry"). *See also OECD, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 33 (2011), *available at http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/46740847.pdf*. ("This Guidance applies to actors operating in a conflict-affected and high-risk area, or potentially supplying or using tin (cassiterite), tantalum (tantalite) or tungsten (wolframite), or their smelted derivates, from a conflict-affected and high-risk area. Companies should preliminarily review their mineral or metal sourcing practices to determine if the Guidance applies to them.").

[429] *See, e.g.*, letters from AAFA, AngloGold, ArcelorMittal, Industry Group Coalition I, IPC I, IPMI I, ITIC I, JVC *et al.* II, NAM I, RILA–CERC, Semiconductor, SIF I, TriQuint I, and WGC II.

the final rule could include while still allowing flexibility.[430] For example, some commentators suggested that we indicate that the reasonable country of origin inquiry could differ among issuers based on their size, products, and relationships with suppliers.[431] In addition, one commentator recommended that the final rule should clarify that a "reasonable person" standard applies to the reasonable country of origin standard.[432] As a further example, some commentators sought flexibility for the reasonable country of origin standard that permits some combination of reasonable supplier declarations, contractual obligations, risk-based follow-up, and/or smelter validations.[433] One commentator asserted that an issuer's reasonable country of origin inquiry should be conducted under a reasonable care standard that requires "more than a passive acceptance by the filer of information provided by their suppliers," which does not "mandate that an issuer always reach the legally correct conclusion, but does require sufficient investigation by an issuer to support reasonable cause to believe in the conclusion."[434]

Some commentators asserted that the final rule should define or provide specific guidance on what constitutes a "reasonable country of origin inquiry," although many of these commentators did not provide suggested definitions or guidance.[435] A few commentators argued, however, that any definition or guidance in the final rule should make clear that a reasonable country of origin standard should not be an absolute standard.[436] One commentator suggested that the reasonable country of origin inquiry standard should require an issuer to take "sufficient steps to accurately determine and disclose whether its conflict minerals originate from the DRC," and the commentator, therefore, recommended that an issuer should disclose the steps it undertook to complete its inquiry.[437]

A large number of commentators suggested that, as part of a reasonable country of origin standard, the final rule should permit an issuer to rely on reasonable representations from suppliers and/or smelters.[438] Other commentators recommended, however, that written representations could provide only some evidence in making a reasonable country of origin inquiry but should not, by themselves, satisfy the reasonable country of origin inquiry standard.[439] Some of these commentators provided examples of other evidence an issuer could use in addition to written representations in satisfying a reasonable country of origin standard, including contractually obligating suppliers to source only from conflict-free smelters, conducting spot checks of suppliers and smelters to verify they are obtaining conflict minerals from only conflict-free sources, disclosing publicly the smelters used and the processes undertaken to ensure that only conflict-free minerals are used, and/or determining that there is no contrary evidence or "red flags" that would cast doubt on the minerals' origins.[440] Some commentators suggested that an issuer should be able to rely on representations from smelters only if the smelter was designated "compliant" by nationally or internationally recognized standards.[441] A few commentators, however, asserted that smelters and refiners are unable to verify the country of origin of the minerals they process at the present time.[442] One commentator argued that an issuer should be able to rely on reasonable representations "one or two steps up the supply chain," but that these representations should be made public.[443]

Commentators were almost evenly split about whether the final rule should allow an issuer to use qualifying or explanatory language in concluding whether its conflict minerals originated in the Covered Countries.[444] Some of the commentators that believed the final rule should permit some qualification or explanation, however, qualified their recommendations.[445]

c. Final Rule

After considering the comments, we are adopting the final rule regarding the reasonable country of origin inquiry substantially as proposed, but with some modification. The final rule does not specify what steps and outcomes are necessary to satisfy the reasonable country of origin inquiry requirement because, as stated in the Proposing Release, such a determination depends on each issuer's particular facts and circumstances. A reasonable country of origin inquiry can differ among issuers based on the issuer's size, products, relationships with suppliers, or other factors.[446] Further, as we stated in the Proposing Release, we continue to believe that the steps necessary to constitute a reasonable country of origin inquiry depend on the available infrastructure at a given time. As commentators noted, such an approach

[430] *See, e.g.*, letters from Industry Group Coalition I, IPC I, ITIC I, NAM I, RILA–CERC, and SIF I.

[431] *See* letters from IPC I and ITIC I.

[432] *See* letter from RILA–CERC.

[433] *See, e.g.*, letters from Industry Group Coalition I and NAM I.

[434] *See* letter from Enough Project IV.

[435] *See, e.g.*, letters from CRS I, Earthworks, Enough Project I, Evangelical Alliance, Evangelicals, Global Witness I, Howland, ICGLR, IPC I, IPMI I, Metalsmiths, Methodist Board, MSG I, NYCBar I, NYCBar II, PCP, Presbyterian Church II, Roundtable, SEMI, Sen. Durbin/Rep. McDermott, State II, and TIC.

[436] *See* letters from Chamber I, Cleary Gottlieb, and NAM I.

[437] *See* letter from SIF II.

[438] *See, e.g.*, letters from AngloGold, Arkema, Cleary Gottlieb, Global Tungsten I, Global Tungsten II, Howland, ICGLR, IPC I, IPC II, NAM I, NEI, NMA II, PCP, RILA, Roundtable, SEMI, Taiwan Semi, TIAA–CREF, TIC, TriQuint I, US Telecom, and WGC II.

[439] *See, e.g.*, letters from CTIA, Enough Project I, Global Witness I, Howland, IPMI I, ITIC I, MSG I, NYCBar II, Sen. Durbin/Rep. McDermott, SIF I, and TIC.

[440] *See, e.g.*, letters from Enough Project I, Global Witness I, IPMI I, and MSG I.

[441] *See* letters from Howland, Enough Project I, ITIC I, MJB Consulting (May 30, 2011) ("MJB III"), MSG III, NYCBar II, SIF I, and TIC.

[442] *See* letters from Nordic Sun Worldwide Ltd. (Mar. 17, 2012) ("Nordic Sun") (stating that, before smelter verification schemes can be relied upon, "a more scientific component must be added," and that only "the addition of a low acquisition cost mineral analyzer with a reasonably detailed geologic mineralization fingerprinting capability that include GPS location data and certification tag data in a tamper-proof format will add the necessary missing step to all the 3T minerals and smelter certification systems") and Southern Africa Resource Watch (Apr. 4, 2012) ("SARW") (stating that any scheme that "essentially depends on assurances from refining and smelting facilities will not be helpful"). *But see* letter from iTSCi Programme Governance Committee (Apr. 14, 2012) ("iTSCi") (refuting the letter from Nordic Sun).

[443] *See* letter from Hileman Consulting.

[444] Some commentators asserted that such language should be permitted. *See* letters from AngloGold, Cleary Gottlieb, Howland, NAM I, NMA II, and WGC II. Others took the opposite view. *See* letters from CRS I, Earthworks, Global Witness I, NEI, and State II.

[445] *See* letters from Howland (stating that an issuer should be able to use qualifying language only if it knows that 80% or more of its conflict minerals did not originate from the Covered Countries), MSG I (stating that qualifying language is not relevant as long as an issuer discloses the manner in which it determined its reasonable country of origin inquiry), NAM I (stating that qualifying language should be permitted only when there is appropriate information to support the conclusion), NMA II (same), and TriQuint I (stating that the final rule should allow qualifying language when an issuer concludes that its conflict minerals are not "DRC conflict free," but should not allow such a qualification if it states that its conflict minerals are, in fact, "DRC conflict free").

[446] As we indicated in the Proposing Release, although a reasonable country of origin inquiry may be based on a particular issuer's size, products, relationships with suppliers, or another factor, an issuer may not conclude that, because of the large (or small) amount of conflict minerals it uses in its products or the large (or small) number of products that include conflict minerals, it is unreasonable for that issuer to conduct any inquiry into the origin of its conflict minerals. Instead, that issuer must make some inquiry into the origin of its conflict minerals.

allows the final rule to be flexible and evolve with available tracing processes.

Even though the final rule does not specify the steps necessary to satisfy the reasonable country of origin inquiry requirement, the final rule includes general standards governing the inquiry and the steps required as a result of the inquiry. First, the final rule provides that, to satisfy the reasonable country of origin inquiry requirement, an issuer's reasonable country of origin inquiry must be reasonably designed to determine whether the issuer's conflict minerals did originate in the Covered Countries, or did come from recycled or scrap sources, and it must be performed in good faith. The proposed rules did not discuss the design of an issuer's reasonable country of origin inquiry or an issuer's performance in carrying out its reasonable country of origin inquiry. We believe providing these standards in the rule will facilitate compliance with the rule by providing guidance to issuers about what is required to satisfy the reasonable country of origin inquiry. In this regard, we note that one commentator stated that "[i]t is essential, in order to make the implementation of 1502 practical and cost effective, that the concept of reasonableness, and good faith efforts" be recognized in the final rule.[447] Further, we believe the notion of good faith performance is important so that an issuer will not be able to establish a reasonably designed inquiry but subsequently fail to undertake the steps necessary to carry out the actual inquiry.

Although we do not prescribe the steps constituting a reasonable country of origin inquiry, we do view an issuer as satisfying the reasonable country of origin inquiry standard if it seeks and obtains reasonably reliable representations indicating the facility at which its conflict minerals were processed and demonstrating that those conflict minerals did not originate in the Covered Countries or came from recycled or scrap sources. These representations could come either directly from that facility or indirectly through the issuer's immediate suppliers, but the issuer must have a reason to believe these representations are true given the facts and circumstances surrounding those representations. An issuer must also take into account any applicable warning signs or other circumstances indicating that its conflict minerals may have originated in the Covered Countries or did not come from recycled or scrap sources.[448] An issuer would have reason to believe representations were true if a processing facility received a "conflict-free" designation by a recognized industry group that requires an independent private sector audit of the smelter, or an individual processing facility, while it may not be part of the industry group's "conflict-free" designation process, obtained an independent private sector audit that is made publicly available. An issuer's policies with respect to the sourcing of conflict minerals will generally form a part of the issuer's reasonable country of origin inquiry, and therefore would generally be required to be disclosed in the issuer's Form SD.

Moreover, the issuer is not required to receive representations from all of its suppliers. The standard focuses on reasonable design and good faith inquiry. Therefore, if an issuer reasonably designs an inquiry and performs the inquiry in good faith, and in doing so receives representations indicating that its conflict minerals did not originate in the Covered Countries, the issuer may conclude that its conflict minerals did not originate in the Covered Countries, even though it does not hear from all of its suppliers, as long as it does not ignore warning signs or other circumstances indicating that the remaining amount of its conflict minerals originated or may have originated in the Covered Countries. For example, we would agree that, "if reasonable inquiry has been made, and if no evidence of [Covered Country] origin has arisen, and if the origin of only a small amount of gold were still unknown, a manufacturer should be allowed to declare that its gold is not from the [Covered Countries] and is DRC conflict free."[449]

The reasonable country of origin inquiry is consistent with the supplier engagement approach in the OECD guidance where issuers use a range of tools and methods to engage with their suppliers.[450] The results of the inquiry may or may not trigger due diligence. This is the first step issuers take under the OECD guidance to determine if the further work outlined in the OECD guidance—due diligence—is necessary. The Conflict Minerals Statutory Provision specifically contemplates due diligence, which goes beyond inquiry and involves further steps to establish the truth or accuracy of relevant information, by requiring a description of the measures the issuer took to exercise due diligence on the source and chain of custody of the minerals. The Conflict Minerals Statutory Provision specifically notes that due diligence includes the audit discussed below.

Second, the final rule establishes a different standard from that included in the proposal for determining whether due diligence on the conflict minerals' source and chain of custody and a Conflict Minerals Report is required after the reasonable country of origin inquiry. The proposed rules would have required an issuer to conduct due diligence and provide a Conflict Minerals Report if, based on its reasonable country of origin inquiry, the issuer determined that its conflict minerals originated in the Covered Countries, the issuer was unable to determine that its conflict minerals did not originate in the Covered Countries, or the issuer determined that its conflict minerals came from recycled or scrap sources. Under the proposal, issuers could only avoid providing a Conflict Minerals Report if they could prove a negative—that their conflict minerals did not originate in the Covered Countries. This approach would arguably be more burdensome than necessary to accomplish the purpose of the statutory provision. The reasonable country of origin inquiry standard does not require an issuer to determine to a

[447] *See* letter from ITRI IV (emphasis in original).

[448] As discussed below, this approach is consistent with the OECD's due diligence guidance, which states that issuers should preliminarily review their sourcing practices to determine if their due diligence guidance applies, and provides non-exclusive examples of situations that it states should trigger the guidance. *See* OECD, *OECD Due Diligence Guidonce for Responsible Supply Choins of Minerals from Conflict-Affected ond High-Risk Areos* (2011), *ovoiloble ot http://www.oecd.org/dof/internotionolinvestment/guidelinesformultinotionolenterprises/46740847.pdf. See olso OECD, Due Diligence Guidonce for Responsible Supply Choins of Minerols from Conflict-Affected ond High-Risk Areos: Supplement on Gold* (2012), *ovoiloble ot http://www.oecd.org/corporote/guidelinesformultinotionolenterprises/FINAL%20Supplement%20on%20Gold.pdf.*

[449] *See* letter from IPMI I. Commentators opining on whether the statutory language requiring due diligence and a Conflict Minerals Report applies only to issuers that know that their conflict minerals originated in the Covered Countries or whether that statutory language applies also to issuers that are unable to determine that their conflict minerals did not originate in the Covered Countries did not necessarily discuss this topic in relation to conflict minerals from recycled or scrap sources.

[450] In June 2012, the OECD issued a report regarding implementation of the OECD guidance. *See OECD, Downstream Inplementotion of the OECD Due Diligence Guidonce for Responsible Supply Choins of Minerols from Conflict-Affected ond High-Risk Areos, Cycle 2 Interim Progress Report on the Supplement on Tin, Tontolum, ond Tungsten Finol Droft* (June 2012), *ovoiloble ot http://www.oecd.org/investment/guidelinesformultinotionolenterprises/Downstreom%20cycle%202%20report%20-%20Edited%20Finol%20-%201%20June.pdf.* This additional guidance includes sample letters to suppliers and customers regarding the use of conflict minerals.

certainty that all its conflict minerals did not originate in the Covered Countries because the standard required is a reasonable inquiry, and requiring a certainty in this setting would not be reasonable and may impose undue costs.[451]

Under the final rule, if (i) an issuer determines that, based on its reasonable country of origin inquiry, its necessary conflict minerals did not originate in the Covered Countries or did come from recycled or scrap sources, or (ii) based on its reasonable country of origin inquiry, the issuer has no reason to believe that its conflict minerals may have originated in the Covered Countries or the issuer reasonably believes that its conflict minerals are from recycled or scrap sources, the issuer is not required to exercise due diligence on its conflict minerals' source or chain of custody or file a Conflict Minerals Report with respect to such conflict minerals. Instead, the issuer only is required, in the body of its specialized disclosure report, to disclose its determination and briefly describe the reasonable country of origin inquiry it undertook in making its determination and the results of the inquiry it performed.

Conversely, an issuer must exercise due diligence on its conflict minerals' source and chain of custody and provide a Conflict Minerals Report if the issuer knows that it has necessary conflict minerals that originated in the Covered Countries and did not come from recycled or scrap sources. In addition, if, based on its reasonable country of origin inquiry, the issuer has reason to believe that its necessary conflict minerals may have originated in the Covered Countries (and may not have come from recycled or scrap sources), the issuer must also exercise due diligence on the source and chain of custody of its conflict minerals. If, however, as a result of that due diligence, such an issuer determines that its conflict minerals did not originate in the Covered Countries or that its conflict minerals did come from recycled or scrap sources, no Conflict Minerals Report is required, but the issuer is required, in the body of its specialized disclosure report, to disclose its determination and briefly describe its due diligence and the results of the due diligence. If, based on its due diligence, the issuer determines that its conflict minerals did originate in the Covered Countries, and did not come from recycled or scrap sources, the issuer is required to submit a Conflict Minerals Report. If, based on its due diligence, the issue cannot determine the source of its conflict minerals, it is also required to submit a Conflict Minerals Report.

This revised approach does not require an issuer to prove a negative to avoid moving to step three, but it also does not allow an issuer to ignore or be willfully blind to warning signs or other circumstances indicating that its conflict minerals may have originated in the Covered Countries. This approach appears consistent with the "reason-to-believe approach" provided by one commentator.[452] Also, as some commentators noted,[453] this approach is consistent with the OECD's due diligence guidance, which states that issuers "should preliminarily review their mineral or metal sourcing practices to determine if the [due diligence] Guidance applies to them."[454] In its due diligence guidance, the OECD provides non-exclusive examples of circumstances, or red flags, that it states should trigger its guidance.[455] One example of a circumstance that, absent other information, should provide an issuer with reason to believe that its conflict minerals may have originated in the Covered Countries is if an issuer becomes aware that some of its conflict minerals were processed by smelters that sourced from many countries, including the Covered Countries, but the issuer is unable to determine whether the particular minerals it received from such a "mixed smelter" were from the Covered Countries.[456]

We appreciate that commentators differ in their views as to when due diligence and, potentially, a Conflict Minerals Report is required under the language of the Conflict Minerals Statutory Provision. The provision requires issuers to provide a Conflict Minerals Report if their conflict minerals "did originate" in the Covered Countries but does not address how to determine whether the minerals "did originate" in those countries.[457] The final rule adopts the reasonable country of origin inquiry as the procedure for making this determination. Some commentators argued that the statutory language should be read to require that only an issuer that knows, after conducting its reasonable country of origin inquiry, that its conflict minerals originated in the Covered Countries must perform due diligence and provide a Conflict Minerals Report.[458] Alternatively, other commentators argued that the provision should be read to require issuers that are unable to determine that their conflict minerals did *not* originate in the Covered Countries to perform due diligence and potentially submit a Conflict Minerals Report.[459] We believe the approach that is most consistent with the statutory language and its purposes, however, is to require any issuer that, after the reasonable country of origin inquiry, knows that its minerals originated in the Covered Countries and did not come from recycled or scrap sources to perform due diligence regarding those

[451] As discussed below, certainty also is not required for the due diligence inquiry.

[452] *See* letter from Tiffany ("A better way to address this issue would be to impose the obligation to submit a conflict minerals report on only those companies that actually have a reason to believe that they use gold (or some other 'conflict mineral') that does, in fact, originate in the DRC or surrounding countries (the 'reason-to-believe approach').").

[453] *See* letters from Enough Project I (stating that, through its reasonable country of origin inquiry, "an issuer should identify red flags that would alert it to the possibility that the minerals in its products support conflict in the DRC and adjoining countries," and citing to the OECD's due diligence guidance), Global Witness I (stating that an issuer should "[r]eview for and consider 'red flags' indicating possible sourcing from Covered Countries," and citing to the OECD's due diligence guidance), and IPMI I ("The OECD's new international standard for an initial inquiry is a specific point where harmonization will be particularly advantageous, while conforming well to the direction of Congress for a reasonable country of origin inquiry. Like Congress, the OECD advocates an initial determination of origin inquiry: 'Companies should preliminarily review their mineral or metal sourcing practices to determine if the Guidance applies to them.'").

[454] *See OECD, OECD Due Diligence Guidonce for Responsible Supply Choins of Minerols from Conflict-Affected ond High-Risk Areos, 33* (2011), *ovoiloble ot http://www.oecd.org/dof/internotionolinvestment/guidelinesformultinotionolenterprises/46740847.pdf.*

[455] *See id.* (providing a number of examples, including whether conflict minerals are claimed to originate from a country that has limited known reserves of the conflict mineral in question) and *OECD, Due Diligence Guidonce for Responsible Supply Chains of Minerols from Conflict-Affected ond High-Risk Areos: Supplement on Gold* (2012), *ovoiloble ot http://www.oecd.org/corporate/guidelinesformultinotionolenterprises/FINAL%20Supplement%20on%20Gold.pdf.* The gold supplement also addresses circumstances triggering due diligence for gold claimed to have come from recycled or scrap sources.

[456] This scenario is consistent with the OECD due diligence framework's statement that "tracing minerals in a company's possession are generally unfeasible after smelting, with refined metals entering the consumer market as small parts of various components in end products." *See OECD, OECD Due Diligence Guidonce for Responsible Supply Choins of Minerols from Conflict-Affected and High-Risk Areos,* 33 (2011), *ovoilable ot http://www.oecd.org/dof/internotionolinvestment/guidelinesformultinotionolenterprises/46740847.pdf.*

[457] *See* Exchange Act Section 13(p)(1)(A) (stating that "in cases in which such conflict minerals *did originote* in the" Covered Countries (emphasis added), the issuer must "submit to the Commission" a Conflict Minerals Report).

[458] *See, e.g.*, letters from AngloGold, Clearly Gottlieb, NAM I, and Tiffany.

[459] *See, e.g.*, letters from NEI, NYCBar I, and NYCBar II.

minerals and submit a Conflict Minerals Report. In addition, any issuer that, after conducting its reasonable country of origin inquiry, has reason to believe that its minerals may have originated in the Covered Countries, and may not have come from recycled or scrap sources must perform due diligence. If, as a result of that due diligence, such an issuer determines that its conflict minerals did not originate in the Covered Countries or did come from recycled or scrap sources, no Conflict Minerals Report is required (although, as discussed below, such due diligence, and the results thereof, must be disclosed in the body of such issuer's specialized disclosure report, together with the description of such issuer's reasonable country of origin inquiry). Otherwise, such an issuer must submit a Conflict Minerals Report. We are adopting this approach in the final rule.

Interpreting the Conflict Minerals Statutory Provision to require due diligence only if an issuer has affirmatively determined that its conflict minerals originated in the Covered Countries and does not come from recycled or scrap sources would undermine the goals of the statute. For instance, if we allowed an issuer to stop its inquiry after learning that its necessary conflict minerals came from a smelter that includes minerals from the Covered Countries and other sources without knowing if its particular minerals came from the Covered Countries, there would be an incentive for issuers to avoid learning the ultimate source of the minerals. Thus, although we realize our approach will be more costly than only requiring due diligence and, potentially, a Conflict Minerals Report if the issuer has affirmative knowledge that its minerals came from the Covered Countries, in our view, requiring further steps by issuers that have reason to believe that they have necessary conflict minerals that may have originated in the Covered Countries is necessary to carry out the requirements contemplated by the statute. Moreover, this approach strikes a more appropriate balance than requiring an issuer to prove a negative—that their necessary conflict minerals did not originate in the Covered Countries—which would be even more costly.

Alternatively, the Conflict Minerals Statutory Provision could be interpreted to require all issuers to determine whether their conflict minerals originated in the Covered Countries through the exercise of due diligence. This inquiry could be quite costly, especially in a situation in which an issuer is unable to determine that a very small amount of its overall conflict minerals did not originate in the Covered Countries or come from recycled or scrap sources. While such an interpretation of the provision is plausible and, in fact, was suggested by two of the co-sponsors of the provision as the accurate interpretation of the Conflict Minerals Statutory Provision,[460] we do not believe that approach is necessary to achieve Congress's goal. Instead, we believe the reasonable country of origin inquiry standard provides a clearer way for issuers to make the necessary determination and does so in a manner that significantly reduces burdens and is more cost-effective. Although the reasonable country of origin inquiry will impose costs on issuers, we believe the costs are lower than those that would be incurred if issuers were always required to perform due diligence.

Finally, we note that an issuer conducting an appropriate reasonable country of origin inquiry may not be able to determine to a certainty the origin of all its conflict minerals or whether they came from recycled or scrap sources. A certainty is not required to satisfy the reasonable country of origin inquiry standard. Disclosure indicating that the determination is uncertain is unnecessary. Consistent with this approach, issuers may explicitly state that, if true, their reasonable country of origin inquiry was reasonably designed to determine whether the conflict minerals did originate in the Covered Countries or did not come from recycled or scrap sources and was performed in good faith, and the issuer's conclusion that the conflict minerals did not originate in the Covered Countries or came from recycled or scrap sources was made at that reasonableness level.

2. Disclosures in the Body of the Specialized Disclosure Report

a. Proposed Rules

Under the proposed rules, an issuer would have been required to make a reasonable country of origin inquiry as to whether its conflict minerals originated in the Covered Countries. After the reasonable country of origin inquiry, if an issuer concluded that its conflict minerals did not originate in the Covered Countries, the issuer would have been required to disclose its conclusion in the body of its annual report and on its Internet Web site.[461] Also, the proposed rules would have required that such an issuer disclose in the body of its annual report and on its Internet Web site the reasonable country of origin inquiry it used in making that determination. The proposed rules would not, however, have required an issuer that, after its reasonable country of origin inquiry, determined that its conflict minerals did not originate in the Covered Countries to disclose the actual countries from which the conflict minerals originated. The issuer would have been required to provide in the body of the annual report the Internet address on which the disclosure was posted and retain the information on the Web site at least until the issuer's subsequent annual report was filed. Finally, the issuer would have been required to maintain reviewable business records in support of its negative determination. The issuer, however, would not have been required to make any other disclosures with regard to the conflict minerals that did not originate in the Covered Countries.

Alternatively, if an issuer determined through its reasonable country of origin inquiry that any of its conflict minerals originated in the Covered Countries, or if the issuer was unable to determine after a reasonable country of origin inquiry that its conflict minerals did not originate in the Covered Countries, the proposed rules would have required the issuer to disclose this result in the body of its annual report and disclose that the Conflict Minerals Report was furnished as an exhibit to its annual report. Additionally, the issuer would have been required to make available its Conflict Minerals Report on its Internet Web site until its subsequent annual report was filed, disclose in the body of its annual report that the Conflict Minerals Report was posted on its Internet Web site, and provide the Internet address on which the Conflict Minerals Report was located.[462] Under the proposed rules, such an issuer would have been required to post the Conflict Minerals Report on its Internet Web site, but the issuer would not have had to post any of the disclosures it provided in the body of its annual report on its Web site.

b. Comments on the Proposed Rules

Almost all of those that commented on this point believed that the final rule should require some very brief

[460] *See* letter from Sen. Durbin/Rep. McDermott ("The proposed rule differentiates between the country of origin inquiry and the due diligence involved in determining the source and chain of custody of conflict minerals, indicating that the former could be 'less exhaustive.' This is a misreading of our intent—we see no difference in the effort that should be exercised in each case.").

[461] *See* Exchange Act Section 13(p)(1)(E). The issuer would be required to keep this information on its Internet Web site until it filed its subsequent annual report.

[462] *See* Exchange Act Section 13(p)(1)(E).

discussion of the conflict minerals information in the body of the annual report.[463] Some commentators indicated, however, that an issuer should not have to provide any disclosure in the body of the annual report,[464] and one commentator stated that an issuer should not have to describe the findings of its Conflict Minerals Report in the body of the annual report.[465] Other commentators remarked that the full text of the Conflict Minerals Report could be provided as an exhibit to an issuer's annual report.[466] In contrast, a few commentators asserted that an issuer should be required to include its full country of origin disclosure and the full text of its Conflict Minerals Report in the body of the annual report.[467]

A number of commentators agreed that, as proposed, an issuer with conflict minerals that did not originate in the Covered Countries should be required to disclose its reasonable country of inquiry because not requiring such disclosure would undercut the essential purpose of the Conflict Minerals Statutory Provision.[468] A number of other commentators, however, disagreed,[469] and some of these commentators justified their position by noting that the Conflict Minerals Statutory Provision does not require such disclosure and asserted that such disclosure would not serve any constructive purpose.[470] Also, of the many commentators that discussed this topic,[471] one asserted that an issuer with no conflict minerals from the Covered Countries should be required to disclose the name of the country from which its conflict minerals' originated so that investors could determine the veracity of the conclusion.[472]

Most of the commentators that discussed the topic agreed that, as proposed, an issuer should be required to maintain reviewable business records when it determines that its conflict minerals did not originate in the Covered Countries.[473] These commentators disagreed, however, about the length of time that the final rule should require the records be kept. The suggested durations ranged from one year to a period covering the duration of the law.[474] In addition, some commentators recommended that the final rule clarify the meaning of "reviewable business records."[475] There were a few commentators, however, that did not believe that the final rule should require an issuer to retain reviewable business records at all because such a requirement is not in the Conflict Minerals Statutory Provision, an issuer should be permitted to create its own records as it does for the financial and other information in its annual reports, and such a rule would provide an independent books and records requirement that goes beyond the Conflict Minerals Statutory Provision.[476]

c. Final Rule

After considering the comments, we are modifying the proposal regarding the substantive disclosures in the body of the specialized disclosure report, in part. An issuer that determines that, following its reasonable country of origin inquiry, its conflict minerals did not originate in the Covered Countries or came from recycled or scrap sources or has no reason to believe that its necessary conflict minerals may have originated in the Covered Countries or may not be from recycled or scrap sources, is required to make certain disclosures in the body of its specialized disclosure report on Form SD,[477] under the "Conflict Minerals Disclosure" heading. This requirement is generally consistent with the proposal, except that the proposal required due diligence regarding conflict minerals from recycled or scrap sources. An issuer determining that its conflict minerals that did not originate in the Covered Countries or that came from recycled or scrap sources or that has no reason to believe that its necessary conflict minerals may have originated in the Covered Countries or may not be from recycled or scrap sources must disclose its determination and results and provide a brief description of the inquiry it undertook and the results and provide a link to its Internet Web site where the disclosure is publicly available. However, in a change from the proposal, the final rule requires such an issuer to provide a brief description of the results of the inquiry it performed to demonstrate the basis for concluding that it is not required to submit a Conflict Minerals Report.

As discussed above, we note that there may be instances in which an issuer determines, based on its reasonable country of origin inquiry, that it has reason to believe it has conflict minerals that may have originated in the Covered Countries and may not be from recycled or scrap sources and, therefore, must exercise due diligence on the source and chain of custody of the conflict minerals. If, at any point during the exercise of that due diligence, the issuer determines that its conflict minerals did not originate in the Covered Countries or came from recycled or scrap sources, the issuer is not required to submit a Conflict Minerals Report. The issuer, however, is still required to submit a specialized disclosure report disclosing its determination and briefly describing the reasonable country of origin inquiry and the due diligence efforts it exercised and the results of the inquiry and due diligence efforts to demonstrate why the issuer believes that the conflict minerals did not originate in the Covered Countries or came from recycled or scrap sources.

We note the views of some commentators that requiring issuers to describe their reasonable country of origin inquiry would impose costs neither justified nor required by the provision. Also, we note that the Conflict Minerals Statutory Provision requires only that a "person described" disclose annually "whether conflict minerals that are necessary * * * did originate in the Democratic Republic of the Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country,

[463] *See, e.g.*, letters from AngloGold, Howland, NEI, NY State Bar, SEMI, SIF I, and TriQuint I.

[464] *See* letters from ITIC I and WGC II.

[465] *See* letter from NY State Bar.

[466] *See* letters from Ford, NEI, and WGC II.

[467] *See* letters from CRS I and Earthworks.

[468] *See, e.g.*, letters from CRS I, Earthworks, Hileman Consulting, Methodist Pension, MSG I, NEI, TIC, Tiffany, and TriQuint I.

[469] *See, e.g.*, letters from AngloGold, Cleary Gottlieb, Howland, NMA II, NY State Bar, SEMI, and WGC II.

[470] *See* letters from Cleary Gottlieb, NY State Bar, and SEMI.

[471] *See, e.g.*, letters from AngloGold, Global Tungsten I, Howland, IPC I, ITRI I, JVC *et al.* II, NAM I, NEI, NMA II, RMA, SEMI, State II, TIC, TriQuint I, and WGC II.

[472] *See* letter from SIF I. *See also* letter from State II (noting that such a requirement would encourage issuers to establish due diligence procedures across their conflict mineral supply chains regardless of the minerals' country of origin).

[473] *See, e.g.*, letters from AngloGold, Columban Center *et al.*, CRS I, Hileman Consulting, Earthworks, Global Witness I, Howland, ICGLR, JVC *et al.* II, Kemet, MSG I, NEI, NMA II, Sen. Durbin/Rep. McDermott, SIF I, State II, TIAA–CREF, TIC, TriQuint I, and WGC II.

[474] Suggested durations included, "multiple years," "a sufficiently long period of time," "as long as their home jurisdictions (of foreign private issuers) require," "for the duration of the law," one year, two years, three years, five years, seven years, and 10 years. *See, e.g.*, letters from AngloGold, Columban Center *et al.*, CRS I, Earthworks, Global Witness I, Hileman Consulting, Howland, ICGLR, Kemet, MSG I, NEI, NMA II, Sen. Durbin/Rep. McDermott, SIF I, State II, TIC, TriQuint I, Trott, and WGC II.

[475] *See* letters from JVC *et al.* II and TIC.

[476] *See* letters from Cleary Gottlieb, NAM I, SEMI, and Tiffany.

[477] As discussed above, the final rule will require that all disclosure be in the body of the issuer's specialized disclosure report on new Form SD instead of its annual report.

submit to the Commission a report."[478] Therefore, the Conflict Minerals Statutory Provision only explicitly requires an issuer to provide additional disclosure if the issuer determines that its conflict minerals did originate in the Covered Countries.[479]

We believe, however, that requiring an issuer to provide a brief description of the reasonable country of origin inquiry it undertook is appropriate despite the additional costs associated with providing such a description. As discussed above, the reasonable country of origin inquiry is not a prescriptive standard and does not require certainty. As a result, there will likely be variation in the approaches taken by issuers. Consequently, we believe it is appropriate to require disclosure regarding the reasonable country of origin inquiry so that interested parties can evaluate "the degree of care" the issuer used in making its negative determination,[480] and it will "help ensure credibility of issuer disclosure."[481] Also, although the Conflict Minerals Statutory Provision does not explicitly require an issuer to provide further disclosure if the issuer determines that its conflict minerals did not originate in the Covered Countries, the provision does not provide that such disclosures cannot be required. Therefore, we believe that requiring this disclosure is permitted as well as appropriate.

As described above, the final rule does not prescribe particular steps or require an issuer to establish to a certainty that its minerals did not originate in the Covered Countries or come from recycled or scrap sources. Instead, the final rule relies on a reasonable design and good faith execution approach. Requiring an issuer to briefly describe the results of the inquiry it performed is intended to enable stakeholders to assess the issuer's reasonable country of origin design and its efforts in carrying out that design. Also, this disclosure is intended to allow stakeholders to form their own views on the reasonableness of the issuer's efforts. Based on this information, stakeholders could advocate for different processes for individual issuers if they believe it is necessary.[482] In addition, it is expected that reasonable country of origin inquiry processes will change over time based both on improved supply chain visibility and the results of an issuer's prior year inquiry. Requiring an issuer to provide a brief description of the results of its inquiry, therefore, will allow stakeholders to track that progress and advocate for different procedures if they think it is necessary.

We have decided, however, not to adopt the proposed requirement for an issuer to maintain reviewable business records supporting its conclusion that its conflict minerals did not originate in the Covered Countries based on its reasonable country of origin. The Conflict Minerals Statutory Provision does not require an issuer to maintain reviewable business records to support its determination of the source of its conflict minerals. In addition, there does not appear to be a need for the rule to require that an issuer maintain such records. As one commentator noted, issuers "provide vast amounts of material information in, for example, Management's Discussion and Analysis in periodic reports, for which the SEC does not impose specific record retention requirements for maintaining the source materials used to generate the disclosures."[483] Therefore, we believe that it is unnecessary for us to require an issuer to maintain reviewable business records, although maintenance of appropriate records may be useful in demonstrating compliance with the final rule, and may be required by any nationally or internationally recognized due diligence framework applied by an issuer.

Also, in contrast to the proposal, we are not requiring an issuer to disclose in either its specialized disclosure report or its annual report, under a separate heading entitled "Conflict Minerals Disclosure," whether any of its necessary conflict minerals originated in the Covered Countries or did not come from recycled or scrap sources or that the issuer was unable to determine that its conflict minerals did not originate in the Covered Countries or come from recycled or scrap sources. Under the proposal, an issuer required to provide a Conflict Minerals Report, including an issuer required to provide a Conflict Minerals Report because its conflict minerals came from the recycled or scrap sources, would have been required to disclose in the body of its annual report that it furnished a Conflict Minerals Report as an exhibit to its annual report, that the Conflict Minerals Report and certified independent private sector audit report were available on its Internet Web site, and the Internet address where the Conflict Minerals Report and audit report were located. Instead, to reduce some costs and burdens to issuers, the final rule only requires an issuer required to provide a Conflict Minerals Report to disclose in its specialized disclosure report, under a separate heading entitled "Conflict Minerals Disclosure," that a Conflict Minerals Report is provided as an exhibit to its specialized disclosure report and to disclose a link to its Internet Web site where the Conflict Minerals Report is publicly available.

The final rule does not require an issuer to disclose in the body of its specialized disclosure report the reason that the issuer is providing a Conflict Minerals Report because that information will be disclosed by the issuer in the Conflict Minerals Report. Requiring that information also in the body of the specialized disclosure report would be redundant and unnecessary. Similarly, the final rule does not require an issuer to disclose in its specialized disclosure report that it has provided an audit report or a certification of the audit, if applicable, because the audit report and certification would be part of the Conflict Minerals Report already, so specifically mentioning the audit report or certification here is not necessary and may be confusing.

E. Step Three—Conflict Minerals Report's Content and Supply Chain Due Diligence

The Conflict Minerals Statutory Provision requires an issuer that determines that its necessary conflict minerals originated in the Covered Countries to submit a Conflict Minerals Report.[484] The Conflict Minerals Report must include, among other matters, a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of its conflict minerals, which measures "shall include an independent private sector audit" of the Conflict Minerals Report.[485] In this regard, the Conflict Minerals Statutory Provision states also

[478] *See* Exchange Act Section 13(p)(1)(A).

[479] *See, e.g.*, letter from Cleary Gottlieb. This commentator argued "an issuer that concludes it has necessary conflict minerals that did *not* (emphasis in original) originate in the Covered Countries must only disclose that conclusion—there is no requirement in the Dodd-Frank Act for disclosure of the inquiry process the issuer undertook in coming to that conclusion," because the provision "only provides for increased disclosure requirements * * * once an issuer has affirmatively determined that its necessary conflict minerals originated in a DRC country." *Id.*

[480] *See* letter from MSG I.

[481] *See* letter from NEI.

[482] In this regard, an issuer's description of the results of the reasonable country of origin inquiry should make clear why it determined that its conflict minerals did not originate in the Covered Countries. This is also the case for issuers that must disclose their reasonable country of origin inquiry and due diligence efforts if they determine, following their due diligence, that their conflict minerals did not originate in the Covered Countries or did come from recycled or scrap sources.

[483] *See* letter from NAM I.

[484] *See* Exchange Act Section 13(p)(1)(A).

[485] *See* Exchange Act Section 13(p)(1)(A)(i).

that the issuer submitting the Conflict Minerals Report "shall certify the audit * * * that is included in such report" and such a certified audit "shall constitute a critical component of due diligence in establishing the source and chain of custody of such minerals." [486] Also, the Conflict Minerals Statutory Provision requires that the Conflict Minerals Report must provide a description of the products "manufactured or contracted to be manufactured that are not 'DRC conflict free,'" the entity that conducted the independent private sector audit, the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.[487]

1. Content of the Conflict Minerals Report

a. Proposed Rules

The proposed rules would have required an issuer to exercise due diligence on the source and chain of custody of its conflict minerals that it was unable to determine, based on its reasonable country of origin inquiry, did not originate in the Covered Countries and to describe those due diligence measures in its Conflict Minerals Report. Consistent with the Conflict Minerals Statutory Provision,[488] we proposed to require that the description of the measures taken by an issuer to exercise due diligence on the source and chain of custody of its conflict minerals would include a certified independent private sector audit conducted in accordance with the standards established by the Comptroller General of the United States.[489] The proposed rules also stated that the audit would constitute a critical component of due diligence.[490] To implement the Conflict Minerals Statutory Provision's requirement that an issuer "certify the audit," [491] we proposed that an issuer would be required to certify that it obtained an independent private sector audit of its Conflict Minerals Report,[492] and we proposed that an issuer would provide this certification in that report. Further, as required by the Conflict Minerals Statutory Provision,[493] we proposed that the rules would require descriptions, in the Conflict Minerals Report, of an issuer's products that are not "DRC conflict free," the facilities used to process those conflict minerals, the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

The Conflict Minerals Statutory Provision uses the phrase "facilities used to process the conflict minerals," which we noted in the Proposing Release would appear to refer to the smelter or refinery through which the issuer's minerals passed. We noted also that the Conflict Minerals Statutory Provision states that products are "DRC conflict free" when those products do not contain conflict minerals that directly or indirectly finance or benefit armed groups.[494] The Proposing Release also noted that Section 1502(e)(3) of the Act defines the term "armed group" as "an armed group that is identified as perpetrators of serious human rights abuses in the annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961," [495] as they relate to the Covered Countries ("Country Reports").[496] Our proposed rules included a cross reference to that definition to provide guidance.

Under the proposed rules, an issuer that was unable to determine that its conflict minerals did not originate in the Covered Countries would have been required to furnish a Conflict Minerals Report to the same extent as an issuer with conflict minerals that originated in the Covered Countries. We recognized that an issuer unable to determine that its conflict minerals did not originate in the Covered Countries may not be able to determine to a certainty whether any of its products are or are not "DRC conflict free," insofar as its initial effort to determine the origin of the conflict minerals in those products under the reasonable country of origin inquiry was inconclusive and its subsequent due diligence on the source and chain of custody of such minerals was also inconclusive. Consistent with Exchange Act Section 13(p)(1)(A)(ii), we proposed that an issuer unable to determine that its conflict minerals did not originate in the Covered Countries would be required to describe all of its products that contain such conflict minerals and identify these products as "not DRC conflict free" [497] because the issuer would not have determined that the products satisfied the statutory definition of "DRC conflict free"—that the products do "not contain conflict minerals that directly or indirectly finance or benefit armed groups in the" Covered Countries. The proposed rules would have allowed an issuer to provide additional disclosure explaining, for example, that although these products were categorized as not "DRC conflict free" in compliance with the proposed rules implementing the Conflict Minerals Statutory Provision and the statutory definition of "DRC conflict free," the issuer had been unable to determine the source of the conflict minerals, including whether the conflict minerals in these products actually benefited or financed armed groups in the Covered Countries. Also, such an issuer would have been required to describe, to the extent known after conducting due diligence, the facilities used to process those conflict minerals and the efforts to determine the mine or location of origin with the greatest possible specificity.[498]

Any issuer with products considered not "DRC conflict free" would have been required to provide a description of those products in its Conflict Minerals Report. That description would have been based on the issuer's individual facts and circumstances so that the description sufficiently identified the products or categories of products. For example, an issuer could disclose each model of a product containing conflict minerals that directly or indirectly financed or benefited armed groups in the Covered Countries, each category of a product containing such conflict minerals, the specific products containing such conflict minerals that were produced during a specific time period, that all its

[486] *See* Exchange Act Section 13(p)(1)(B).

[487] *See* Exchange Act Section 13(p)(1)(A)(ii).

[488] See Exchange Act Sections 13(p)(1)(A)(i) and 13(p)(1)(B).

[489] See Exchange Act Section 13(p)(1)(A).

[490] *See* Exchange Act Section 13(p)(1)(B).

[491] *See id.*

[492] As discussed in the Proposing Release, alternatively, one could interpret this language to mean that an issuer must ensure that the audit it obtained is accurate, but such an interpretation would appear to mean that an issuer must review the audit of its Conflict Minerals Report, which the issuer created originally. We did not propose this approach.

[493] *See* Exchange Act Section 13(p)(1)(A)(ii).

[494] *See* Exchange Act Sections 13(p)(1)(A)(ii) and 13(p)(1)(D).

[495] 22 U.S.C. 2151n(d) and 2304(b).

[496] Section 1502(e)(3) of the Act.

[497] If any products contained both conflict minerals that did not originate in the Covered Countries and conflict minerals that the issuer was unable to determine did not originate in the Covered Countries, the issuer, under the proposal, would be required to classify those products as not "DRC conflict free." Similarly, if any of an issuer's products contained conflict minerals that did not originate in the Covered Countries, that the issuer was unable to determine did not originate in the Covered Countries, or that originated in the Covered Countries but did not directly or indirectly finance or benefit armed groups in the Covered Countries, and also contained conflict minerals that originated in the Covered Countries and that directly or indirectly financed or benefited armed groups in the Covered Countries, the issuer would be required to classify those products as not "DRC conflict free."

[498] We recognized that such an issuer would not be able to provide the country of origin of those minerals, so the proposed rules would not require this information.

products contain such conflict minerals, or another such description depending on the issuer's facts and circumstances.

As proposed, our rules would have required an issuer to furnish, as part of its Conflict Minerals Report, the audit report prepared by the independent private sector auditor and the identity of the auditor.[499] We noted that, while one might read the statutory language to suggest that only the issuer's certification of the audit, and not the audit report itself, is required to be submitted, we preliminarily believed that approach was not the better reading of the Conflict Minerals Statutory Provision. As noted above, the Conflict Minerals Statutory Provision emphasizes that the independent audit is a "critical component of due diligence." In light of the importance of this audit report to the proposed reporting requirements and the statutory language, we proposed to require that the audit report be furnished with the Conflict Minerals Report.

Proposed Item 4(a) of Form 10–K (referring to proposed Instruction 2 to Item 104 of Regulation S–K), proposed Instruction 3 to Item 16 of Form 20–F, and proposed Instruction 3 to General Instruction B(16) of Form 40–F would have provided that the Conflict Minerals Report, which would include the audit report, would not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the issuer specifically incorporated it by reference. For example, if an issuer incorporated by reference its annual report into a Securities Act registration statement, that issuer would not also automatically incorporate the Conflict Minerals Report into that Securities Act document. Also, in such a situation, the independent private sector auditor would not have assumed expert liability and the issuer would not,[500] therefore, have been required to file a consent from that auditor unless the issuer specifically incorporated by reference the Conflict Minerals Report into the Securities Act registration statement.

b. Comments on the Proposed Rules

A number of commentators agreed with the proposed rules' requirement that an issuer unable to determine that its conflict minerals did not originate in the Covered Countries be required to describe its products as not "DRC conflict free" in its Conflict Minerals Report.[501] In one comment letter, five senators stated that Congress did not intend for the Conflict Minerals Statutory Provision to allow issuers to report that the origins of their conflict minerals was undeterminable.[502] Instead, the letter argued that Congress "intended and directed" the final rule to require that, if an issuer "cannot affirm that the minerals are 'conflict-free,' the only other conclusion that could be reported would be that the product may contain materials that directly or indirectly finance armed groups in the DRC."[503] In another comment letter, members of Congress asserted that conflict minerals information that does "not clearly list a company's activities and rules allowing a category of 'indeterminate' would undermine congressional intent."[504]

Other commentators indicated, however, that the final rule should not require an issuer unable to determine that its conflict minerals did not originate in the Covered Countries to state that its conflict minerals are not "DRC conflict free" either on a temporary or permanent basis.[505] Some commentators who are members of Congress requested that we consider, as an alternative to the proposed rules, "phasing-in implementation to allow for materials of indeterminate origin currently in the supply chain to be properly classified."[506] In another letter, members of Congress suggested that the final rule create a temporary classification for minerals of an indeterminate origin that would exempt companies with such minerals from the requirement to provide a Conflict Minerals Report.[507] Some commentators suggested that such issuers should be required to state that its products with such conflict minerals are not "DRC conflict free" after a certain number of years.[508] Some commentators asserted that the proposed rules would violate the First Amendment because, among other reasons, the rules would compel speech that is not of a commercial nature, which is different from other corporate disclosures, and would require some issuers, such as those unable to determine that their conflict minerals did not originate in the Covered Countries, to provide false, stigmatizing information.[509]

Some commentators urged that an issuer unable to determine that its conflict minerals did not originate in the Covered Countries should not be required to submit a Conflict Minerals Report that is audited by an independent private sector auditor.[510] As one commentator asserted, the provision "does not require an issuer that has been unable to determine (after proper inquiry) the source of its conflict minerals * * * to provide a Conflict Minerals Report," because the "statute uses the phrase 'in cases in which such conflict minerals *did originate* in [a DRC country],' as the trigger for providing a Conflict Minerals Report" (emphasis and bracket in original).[511]

One commentator, in two separate letters, disagreed with this position, however, and stated that any issuer that is unable to determine that its conflict minerals did not originate in the Covered Countries must be required to submit an audited Conflict Minerals Report to support its conclusion.[512] Another commentator recommended that the final rule allow issuers to provide annual, unaudited conflict minerals disclosure that would identify the issuer's products that the issuer "reasonably believes may contain 'conflict minerals;'" indicate that the origin of these minerals is indeterminate and explain why the minerals origin is indeterminate; identify and disclose the issuer's involvement in any governmental, semi-governmental, and private sector diligence initiatives; and describe the measures the issuer has undertaken to develop a management

[499] Our proposal to require the issuer to identify the certified independent private sector auditor would satisfy Exchange Act Section 13(p)(1)(A)(ii), which states that the issuer must provide a description of "the entity that conducted the independent private sector audit in accordance with clause (i)."

[500] *See* Rule 436 of Regulation C [17 CFR 230.436].

[501] *See, e.g.*, letters from CRS I, Earthworks, Evangelical Alliance, Evangelicals, Howland, Methodist Board, NEI, Presbyterian Church II, Rep. Berman *et al.*, Sen. Boxer *et al.* II, Sen. Durbin/Rep. McDermott, State II, and World Vision II.

[502] *See* letter from Sen. Boxer *et al.* II.

[503] *Id.*

[504] *See* letter from Sen. Leahy *et al.*

[505] *See, e.g.*, letters from AdvaMed I, Cleary Gottlieb, IPC I, ITRI I, JVC *et al.* II, NAM I, NAM III, Rep. Bachus *et al.*, Rep. Critz, Rep. Ellmers, Rep. Murphy, TIAA–CREF, Tiffany, TriQuint I, and WGC II.

[506] *See* letters from Rep. Critz, Rep. Ellmers, and Rep. Murphy.

[507] *See* letter from Rep. Bachus *et al.*

[508] *See* letters from IPC I, SIF I, TIAA–CREF, and TriQuint I.

[509] *See* letters from Taiwan Semi, Tiffany, and WLF.

[510] *See, e.g.*, letters from AngloGold, Cleary Gottlieb, NAM I, and Tiffany.

[511] *See* letter from Cleary Gottlieb.

[512] *See* letters from NYCBar I ("We also believe the rules should require reporting firms that cannot, after due diligence, determine the origin of the materials used in their products to submit a Conflict Minerals Report and an independent audit of such report to ensure such issuers cannot easily avoid their obligations and disclosure requirements prescribed by these rules.") and NYCBar II ("The rules should require reporting firms that cannot, after due diligence, determine the origin of the materials used in their products to submit a Conflict Minerals Report and an independent audit of such report to ensure such issuers cannot easily avoid their obligations and disclosure requirements prescribed by the rules.").

due diligence system covering its supply chain for each conflict mineral.[513] One commentator asserted that investors would have "insufficient material information to evaluate a company's supply chain risk" if the final rule allowed issuers to declare their conflict minerals from an indeterminate origin "without describing the steps they have taken to make their determination," and recommended that the final rule "require reporting to be sufficiently detailed to inform investors of the steps an issuer has taken to determine whether the minerals the issuer purchases come from the DRC or an adjoining country."[514]

Although we did not propose to require any type of physical label on a product, one commentator stated that it is essential for the final rule to mandate that an issuer with products containing conflict minerals that did not finance or benefit an armed group label those products as "DRC conflict free."[515] Many commentators, however, remarked that an issuer should not be required to physically label its products.[516] Some commentators asserted that an issuer should be permitted to describe its products as "DRC conflict free" only if the issuer sources its conflict minerals in those products from the Covered Countries and those conflict minerals did not finance or benefit armed groups.[517] Another commentator added specifically that products should be labeled as "DRC conflict free" only if either they are not from the Covered Countries or do not directly or indirectly support armed groups in the Covered Countries.[518] Also, all commentators that discussed the subject agreed that the final rule should, as proposed, allow issuers to provide additional disclosure in describing any of their products that have not been found to be "DRC conflict free"[519]

A number of commentators mentioned that the final rule should, as proposed, require an issuer to disclose the facilities, countries of origin, and efforts to determine the mine or location of origin only for its conflict minerals that directly or indirectly financed or benefited armed groups in the Covered Countries.[520] A few commentators suggested that all issuers with conflict minerals originating in the Covered Countries, including issuers with conflict minerals that did not directly or indirectly finance or benefit armed groups in the Covered Countries and issuers with conflict minerals that did directly or indirectly finance or benefit armed groups in the Covered Countries, should be required to disclose the facilities, countries of origin, and efforts to determine the mine or location of origin of those conflict minerals.[521] Two commentators further recommended that all issuers with conflict minerals, regardless of whether the minerals originated within or without of the Covered Countries, should be required to disclose the facilities, countries of origin, and efforts to determine the mine or location of origin of those conflict minerals.[522]

Some commentators agreed that the final rule should, as proposed, require an issuer to disclose only the efforts to determine the conflict minerals' mine or location of origin with the greatest possible specificity.[523] Other commentators suggested going further and requiring an issuer to disclose the actual mine or location of origin with the greatest possible specificity.[524] Still other commentators argued that the final rule should not require issuers to include specific supply chain information, such as conflict mineral sources, quantities, transit routes, or store houses because such disclosures could hurt an issuer's competitive advantage or subject the issuer or its employees to violence.[525] Alternatively, these commentators recommended that the rule allow for generic descriptions or approximate geographic locations or permit an issuer to redact sensitive or secure information.[526]

A number of commentators indicated that an issuer should, as proposed, "certify the audit" by certifying that it obtained an independent private sector audit.[527] Many of these commentators, plus some others, remarked that these certifications should either not be signed or, if they are required to be signed, be signed by the issuer or by an individual on behalf of the issuer and not in any individual capacity.[528] In contrast, one commentator recommended that an issuer's senior management or executive officers in some manner certify the independent private sector audit,[529] another commentator asserted that it is "essential that there be CEO level involvement in the filing of the disclosures in order to make sure that companies do not simply 'game the system,'"[530] and a further commentator argued that the "certification of an audit will make little sense unless the signatories verify on a quarterly basis that certain minimal standards have been maintained by the auditors."[531] One commentator asserted that certifying the audit is unnecessary because the audit report will be submitted to the Commission in the Conflict Minerals Report.[532] This commentator and another stated that requiring an issuer to certify the audit would prevent an issuer from stating that its products are "DRC conflict free" because no issuer could be so certain of that conclusion that its officers would certify the audit.[533] One commentator suggested that no liability should be assigned to individuals that may sign the certifications "unless the situation involves a knowing and willful intent to mislead."[534]

Some commentators agreed that the audit report should, as proposed, be included as part of the Conflict Minerals Report.[535] Other commentators recommended that an issuer's audit report should not be submitted as part of the Conflict Minerals Report because such a requirement would increase audit costs without providing comparable benefits.[536] Certain commentators opposed having to make the audit report public and suggested instead that issuers provide the audit

[513] *See* letter from Signet.

[514] *See* letter from SIF II.

[515] *See, e.g.*, letter from Catholic Relief Services of St. Cloud, Minnesota (Apr. 14, 2011) ("CRS I—St. Cloud").

[516] *See, e.g.*, letters from Columban Center *et al.*, Howland, Industry Group Coalition I, ITIC I, Japanese Trade Associations, MSG I, NAM I, and SIF I.

[517] *See* letters from ITRI III, MSG I, and SIF I.

[518] *See* letter from State II.

[519] *See* letters from Howland, IPC I, NMA II, SEMI, TriQuint I, and WGC II.

[520] *See, e.g.*, letter from AngloGold, Barrick Gold, Cleary Gottlieb, Howland, IPC I, JVC *et al.* II, NAM I, NMA II, and WGC II.

[521] *See* letters from MSG I, NEI, SIF I, and TriQuint I.

[522] *See* letters from Earthworks and Trott.

[523] *See, e.g.*, letters from AngloGold, Barrick Gold, JVC *et al.* II, NAM I, TriQuint I, and WGC II.

[524] *See, e.g.*, letters from CRS I, Howland, ICGLR, NEI, State II (acknowledging that, as a best practices approach, an issuer should make every effort to include specific information regarding the mine), TakeBack, and Trott (stating that the final rule should require an issuer to provide as much information as possible regarding its conflict minerals' mine or location of origin).

[525] *See* letters from Barrick Gold, Global Tungsten II, IPMI I, NMA II, NMA III, and TIC.

[526] *See* letters from Barrick Gold, NMA II, and TIC.

[527] *See, e.g.*, letters from Barrick Gold, Cleary Gottlieb, Ford, ICGLR, ITIC I, NAM I, NY State Bar, and WGC II.

[528] *See, e.g.*, letters from AngloGold, Barrick Gold, Cleary Gottlieb, Ford, Howland, JVC *et al.* II, NAM I, NEI, and WGC II.

[529] *See* letter from Grant Thornton LLP (Mar. 2, 2011) ("Grant Thornton").

[530] *See* letter from TakeBack.

[531] *See* letter from SARW.

[532] *See* letter from TIC.

[533] *See* letters from Teggeman and TIC.

[534] *See* letters from Cleary Gottlieb and NMA II.

[535] *See, e.g.*, letters from Howland, NEI, and Sen. Durbin/Rep. McDermott.

[536] *See* letters from AngloGold and WGC II.

report to the Commission confidentially, allow for sensitive portions to be redacted, or provide it to the Commission with the Commission making it available to the public only in hardcopy form at the Commission's headquarters.[537] Similarly, one commentator objected to requiring an issuer to post the audit report on the issuer's Internet Web site as long as the Conflict Minerals Report describes the audit report,[538] whereas another commentator argued that the final rule should require an issuer to post the audit report on an issuer's Web site.[539]

Some commentators indicated that, as proposed, an audit report should not be deemed incorporated by reference into any filing under the Securities Act or Exchange Act unless the issuer specifically incorporates the audit into such a filing.[540] A few commentators further suggested that an auditor should not be considered an "expert" under Rule 436 of the Securities Act and recommended that audit reports submitted in subsequent years be able to build off prior audit reports to eliminate duplicative work and, thereby, reduce costs.[541] One commentator went further and suggested that any issuer with a recognized supply chain tracking process should not be required to obtain an audit of its Conflict Minerals Report.[542]

Some commentators requested that the final rule define how an issuer would "directly or indirectly finance or benefit an armed group." [543] Some of these commentators and others recommended that the Country Reports not be the basis for the Commission's final rule because those reports are not sufficiently specific with respect to which groups it labels as "armed groups" such that it is unclear whether the DRC army would be considered an "armed group." [544] For example, one commentator submitted an article arguing that the Conflict Minerals Statutory Provision "targets units of the Congolese army as much as it does militias precisely because the army is comprised largely of ex-rebels, is the major player in the conflict minerals trade and regularly commits appalling crimes against the civilian population." [545] Another commentator, however, stated that if the final rule defined "armed group" using the Country Reports, it would exclude the ex-militia groups that joined the DRC armed forces but continue to contribute to conflict and commit human rights violations.[546] One commentator recommended that the final rule define "armed group" using the OECD's definition for that term.[547] Another commentator suggested that the final rule apply only to issuers that are "directly funding the conflict (or who knowingly indirectly fund the conflict)." [548] One commentator recommended that the final rule define "indirect financing" of an armed group to include "[a]ny way in which an illegitimate armed group profits from the mining, sale, transportation or taxation of minerals or mineral derivatives." [549] Some commentators asserted that the final rule should clarify the definition of an "armed group" or disclose the steps issuers must take to verify whether their conflict minerals benefited armed groups.[550] Other commentators suggested that the definition of "armed group" in the final rule should not refer to the "most recently issued" version of the Country Reports "for the year the annual report is due" because the most recently issued version of the Country Reports may not be published for the year the annual report is due.[551]

c. Final Rule

The final rule requires any issuer that, after its reasonable country of origin inquiry, knows that its conflict minerals originated in the Covered Countries and did not come from recycled or scrap sources to provide a Conflict Minerals Report that includes a description of the measures the issuer has taken to exercise due diligence on the source and chain of custody of those conflict minerals. It also requires an issuer that, after its reasonable country of origin inquiry, had reason to believe that its minerals may have originated in the Covered Countries and may not have come from recycled or scrap sources and, after the exercise of due diligence, still has reason to believe that its minerals may have originated in the Covered Countries and may not have come from recycled or scrap sources, to provide a Conflict Minerals Report that includes a description of the measures the issuer has taken to exercise due diligence on the source and chain of custody of those conflict minerals.

Additionally, in circumstances in which an independent private sector audit is required, the final rule requires, as proposed, that an issuer include a certified independent private sector audit conducted in accordance with the standards established by the Comptroller General of the United States as part of its due diligence on the source and chain of custody of its conflict minerals. Further, the final rule states that, as proposed, the audit constitutes a critical component of due diligence. To implement the Conflict Minerals Statutory Provision's requirement that issuers "certify the audit," [552] as proposed, an issuer must certify that it obtained an independent private sector audit of its Conflict Minerals Report and include that certification in the Conflict Minerals Report.[553] While we did not specify this in the Proposing Release or proposed rules, in response to commentators' concerns, the final rule clarifies that the issuer's audit certification need not be signed by an officer. Instead, the certification takes the form of a statement in the Conflict Minerals Report that the issuer obtained an independent private sector audit.

The final rule also requires, unless an issuer's products are "DRC conflict free," the Conflict Minerals Report to include a description of the facilities used to process those conflict minerals, the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity. As noted in the Proposing Release, we believe that the phrase in the Conflict Minerals Statutory Provision, "facilities used to process the conflict minerals," refers to the smelter or refinery through which the issuer's minerals pass. One commentator pointed out that smelting and refining processes are not similar.[554] Smelting refers to the

[537] *See, e.g.*, letters from Barrick Gold, Materials Management Corporation (Jan. 13, 2011) ("Materials I"), NAM I, and NMA II.

[538] *See* letter from ITIC I.

[539] *See* letter from Columban Center *et al.*

[540] *See, e.g.*, letters from Barrick Gold, Cleary Gottlieb, Corporate Secretaries I, NY State Bar, and WGC II.

[541] *See* letters from NY State Bar and WGC II.

[542] *See* letter from TIC.

[543] *See, e.g.*, letters from NMA II, Peace, and WGC II.

[544] *See* letters from ITRI I, NMA II, NYCBar I, and Peace. *See also* letter from NYCBar II (stating specifically that the final rule should include "the Congolese military (FARDC) in its definition of 'armed group'").

[545] *See* letter from ICAR II.

[546] *See* letter from Save.

[547] *See* letter from Pact II.

[548] *See* letter from CEI I.

[549] *See* letter from Peace.

[550] *See, e.g.*, letters from CRS I—St. Cloud, ITRI I, NMA II, NYCBar I, Peace, and TIC.

[551] *See, e.g.*, letters from ITRI I and TIC.

[552] Exchange Act Section 13(p)(1)(B).

[553] We are not adopting the alternative interpretation of the Conflict Minerals Statutory Provision that an issuer must ensure that the audit it obtained is accurate. The Conflict Minerals Report contains management's assertions related to compliance with this rule; the third-party audit is designed to attest to certain of those assertions. Given this relationship, there does not appear to be a need to have management assert to the accuracy of the audit.

[554] Letter from ITRI I. In the Proposing Release, we stated that columbite-tantalite, cassiterite, and

conversion of the mineral ore into its metal form, but the metal still contains many impurities that must be removed by refining the metal. Columbite-tantalite, cassiterite, and wolframite are mined only as ores and are smelted into their metal derivatives. Gold, however, is mined in its metallic form because it is found that way naturally. Therefore, gold does not have to be smelted into a metal, but does have to be refined to remove any impurities. In both instances, however, we recognize that as a practical matter it is very difficult, if not impossible, to trace conflict minerals to their mine or other location of origin after columbite-tantalite, cassiterite, and wolframite have been smelted initially and after gold has been refined initially other than through the smelter or refinery.

Exchange Act Section 13(p)(1)(A)(ii) also requires an issuer with conflict minerals originating in the Covered Countries to submit a Conflict Minerals Report that includes a description of the issuer's products "that are not DRC conflict free." [555] The Conflict Minerals Statutory Provision does not define "not DRC conflict free," but instead defines "DRC conflict free." [556] Products are considered "DRC conflict free" under Exchange Act Section 13(p)(1)(A)(ii) if they "*do not* contain minerals that directly or indirectly finance or benefit armed groups in the" Covered Countries. (Emphasis added).[557] As discussed above, under the proposed rules' approach, an issuer with a product containing conflict minerals of an undeterminable origin cannot know that its product is "DRC conflict free;" that is, the issuer cannot know that its product "do[es] not contain conflict minerals that directly or indirectly finance or benefit armed groups in the" Covered Countries, so the issuer would have to describe the product as "not 'DRC conflict free.'"

A commentator raised concerns that this approach could lead to incorrect and misleading disclosures and could unfairly punish companies that lack complete visibility into their supply chains.[558] The commentator noted that it could turn out that, upon further investigation of the minerals' origins, the minerals were not from the Covered Countries or did not finance or benefit armed groups, in which case the products made with solely those minerals would be "DRC conflict free." Of course, we are concerned that any disclosure requirement results in accurate disclosure. At the same time, we are cognizant of our responsibility to fulfill Congress's directive in Section 1502 and to remain faithful to the language of the statute, and promulgating rules that provide an incentive for issuers to avoid determining the origins of the conflict minerals that they use could undermine the reporting system that Congress has established in Section 13(p) of the Exchange Act. Accordingly, we have modified the final rule to address the commentator's concerns while remaining faithful to the language and intent of the statute.

As described above, during a temporary period, instead of requiring issuers that have proceeded to step three that are unable to determine that their conflict minerals did not originate in the Covered Countries, that their conflict minerals that originated in the Covered Countries did not directly or indirectly finance or benefit armed groups, or that their conflict minerals came from recycled or scrap sources to describe their products as "not 'DRC conflict free,'" the final rule permits such issuers to describe products containing those conflict minerals as "DRC conflict undeterminable." An issuer with products that are "DRC conflict undeterminable" is required to exercise due diligence on the source and chain of custody of its conflict minerals and submit a Conflict Minerals Report describing its due diligence; the steps it has taken or will take, if any, since the end of the period covered in its most recent prior Conflict Minerals Report to mitigate the risk that its necessary conflict minerals benefit armed groups, including any steps to improve its due diligence; the country of origin of the conflict minerals, if known; the facilities used to process the conflict minerals, if known; and the efforts to determine the mine or location of origin with the greatest possible specificity, if applicable.[559] Such an issuer is not, however, required to obtain an independent private sector audit of that Conflict Minerals Report. We are permitting this temporary category to address concerns of many industry commentators that supply chain due diligence mechanisms have not yet been established; [560] and, therefore, many issuers will not be able to readily determine whether their conflict minerals did not originate in the Covered Countries, did not finance or benefit armed groups, or did come from recycled or scrap sources. This temporary category should allow issuers time to establish supply chain due diligence mechanisms to determine whether their minerals originated in the Covered Countries, directly or indirectly financed or benefited armed groups in the Covered Countries, or came from recycled or scrap sources.

This additional time should also decrease the possibility that issuers that might ultimately be able to determine that their necessary minerals did not originate in the Covered Countries, did not finance or benefit armed groups, or came from recycled or scrap sources would initially be required to report that their products have not been found to be "DRC conflict free" simply because they had not yet been able to determine the minerals' origins or whether they were from recycled or scrap sources. By decreasing this possibility, the temporary category will lead to more accurate disclosure. We believe this approach will allow the final rule to more appropriately target the population of issuers from which Congress intended to require this disclosure and will allow time for processes to be put in place so that issuers may be able to determine the origin of their conflict minerals.

The "undeterminable" reporting alternative, however, is only permitted temporarily. For all issuers, this alternative will be permitted during the first two reporting cycles following the effectiveness of the final rule, which includes the specialized disclosure reports for 2013 through 2014. For smaller reporting companies, this alternative will be permitted during the first four reporting cycles following the

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wolframite are smelted into their component metals whereas gold is refined, and we indicated that both processes are substantially similar such that, when we would refer to smelting a conflict mineral, those references were intended to include the refining of gold.

[555] *See* Exchange Act Section 13(p)(1)(A)(ii).

[556] *See id.* and Exchange Act Section 13(p)(1)(D).

[557] Exchange Act Section 13(p)(1)(A)(ii). Also, although similar, the definition of "DRC conflict free" under Exchange Act Section 13(p)(1)(D) is slightly different than the definition under Exchange Act Section 13(p)(1)(A)(ii). Exchange Act Section 13(p)(1)(D) states that "a product may be labeled as 'DRC conflict free' if the product does not contain minerals that directly or indirectly finance or benefit armed groups in the" Covered Countries.

[558] *See* letter from Tiffany.

[559] We recognize that an issuer that is unable to determine the origin of its conflict minerals, or unable to determine whether its conflict minerals came from recycled or scrap sources, may not also be able to determine the processing facility of those conflict minerals and will not be able to determine the minerals' country of origin. Therefore, these issuers only have to describe the processing facilities if they are known to the issuer and do not have to disclose the country of origin. Also, an issuer that is unable to determine whether its conflict minerals came from recycled or scrap sources does not have to describe its efforts to determine the mine or location of origin with the greatest possible specificity because issuers with conflict minerals from recycled or scrap sources are not required to determine the mine or location of origin.

[560] *See, e.g.*, letters from CTIA, FEC I, JVC *et al.* II, NAM III, NRF I, Roundtable, and WilmerHale.

effectiveness of the final rule, which includes the specialized disclosure reports for 2013 through 2016. Beginning with the third reporting period, from January 1, 2015 to December 31, 2015, for all issuers and the fifth reporting period, from January 1, 2017 to December 31, 2017, for smaller reporting companies, every such issuer will have to describe products in its Conflict Minerals Report as having "not been found to be 'DRC conflict free.'" Also, issuers will be required to make such a disclosure even if they proceed to step three and are unable to determine that their conflict minerals did not originate in the Covered Countries, that their conflict minerals that originated in the Covered Countries did not directly or indirectly finance or benefit armed groups, or that their conflict minerals came from recycled or scrap sources. These issuers will also be required to provide an independent private sector audit of their Conflict Minerals Report.[561]

While this disclosure is required after the temporary period, even when issuers are unable to determine the origin of their conflict minerals, we have changed the language of the disclosure from the proposal to address concerns raised about the accuracy of the disclosure required in these circumstances. In our view, it is accurate to describe such products as having "not been found to be 'DRC conflict free.'" "DRC conflict free" is a defined term in the statute, meaning that the product "do[es] not contain conflict minerals that directly or indirectly finance or benefit armed groups in the" Covered Countries. An issuer that does not know that its conflict minerals did not originate in the Covered Countries, that its conflict minerals that originated in the Covered Countries did not finance or benefit armed groups, or that the minerals came from recycled or scrap sources cannot accurately state that its conflict minerals have been found to meet this definition; therefore, its products have not been found to be "DRC conflict free" as defined in the statute.

Additionally, under the final rule, as proposed, issuers can add disclosure or clarification. This allows issuers to include the statutory definition of "DRC conflict free" in the disclosure to make clear that "DRC conflict free" has a very specific meaning, or to otherwise address their particular situation.[562] We also believe that the revised disclosure that the products "have not been found to be 'DRC conflict free'" mitigates concerns expressed by some commentators that the Proposing Release's specific required language, "are not 'DRC conflict free,'" would impose an unfair stigma, particularly on issuers that did not know whether their minerals directly or indirectly financed or benefited armed groups in the Covered Countries.

Although it does not appear that any individual commentator suggested the exact approach we are adopting, this approach incorporates suggestions from various commentators. One commentator recommended that we adopt a "phase-in or transitional approach in order to address the substantial practical difficulties issuers currently face in seeking to trace the origins of conflict minerals included in their products and to determine if these minerals are or are not 'DRC conflict free.'"[563] This commentator's recommendation was for the final rule to include a phase-in period through 2014 in which any issuer with conflict minerals for which the issuer was unable to determine their origin would describe the conflict minerals as from an "indeterminate source" and would be permitted, instead of providing a Conflict Minerals Report, to disclose its conflict minerals policy and provide a statement that, due to the lack of current infrastructure, it is not possible to determine the origin of its conflict minerals. The commentator recommended that the "indeterminate source" category would be available only through 2014. Another commentator recommended that the final rule allow a similar phase-in period through 2014 in which issuers would be permitted to use an "unknown determination" category in which such issuers would be required only to disclose their conflict minerals policy, reasonable country of origin inquiry, and the conflict minerals used in their supply chain.[564]

Other commentators recommended similar temporary approaches for conflict minerals when an issuer could not determine the origin of its conflict minerals.[565] In this regard, one commentator noted that, "requiring issuers that are unable to determine that the conflict mineral in their products did not originate in the Covered Countries to submit a Conflict Minerals Report providing the required information that is available to them, is reasonable."[566] Also, one commentator recognized that, during the initial period after the rule is finalized, it expected that some conflict minerals would be of unknown origin, and issuers with those conflict minerals should, among other information, disclose "any progress made in the reporting year toward determination of origin."[567] Finally, some commentators suggested that smaller reporting companies should be allowed to phase-in or that the implementation of the final rule should be deferred for them.[568]

Based on the comments we have received, we believe that permitting all issuers to describe their products as "DRC conflict undeterminable" for a two-year period is appropriate to allow viable tracking systems to be put in place in the Covered Countries and throughout supply chains and avoid a *de-facto* embargo on conflict minerals from the Covered Countries. We also believe that allowing this category for a two-year period will avoid a situation in which virtually all issuers would describe their products as having not

[561] As noted below, an issuer exercising due diligence to determine whether a conflict mineral is from a recycled or scrap source is not required to obtain an independent private sector audit of its Conflict Minerals Report, regarding that conflict mineral, if there is no nationally or internationally recognized due diligence framework for that recycled or scrap conflict mineral.

[562] For example, in addition to the disclosure in the Conflict Minerals Report, the issuer could state: "The following is a description of our products that have not been found to be "DRC conflict free" (where 'DRC conflict free' is defined under the federal securities laws to mean that a product does not contain conflict minerals necessary to the functionality or production of that product that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country)." Alternatively, an issuer that is still unable to determine the origin of some of its conflict minerals after the two-year or four-year period, might state: "We have been unable to determine the origins of some of our conflict minerals. Because we cannot determine the origins of the minerals, we are not able to state that products containing such minerals do not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country. Therefore, under the federal securities laws we must describe the products containing such minerals as having not been found to be 'DRC conflict free.' Those products are listed below."

[563] *See* letter from WilmerHale.

[564] *See* letter from AdvaMed I.

[565] *See, e.g.*, letters from TIAA–CREF ("Where the source of minerals cannot be confirmed, we believe it would be most accurate to allow companies to use indeterminate language such as 'may not be DRC conflict free,' but not language that would suggest a presumption that minerals would be conflict free absent specific evidence to the contrary. Moreover, over time the information systems necessary to trace these minerals will likely improve. We suggest that, after a reasonable time interval, the SEC consider reviewing whether a higher standard might be warranted.") and TriQuint I (recommending that the final rule "allow companies to label their products as 'May Not Be DRC Conflict Free' until such a time when it is expected that companies will be able to purchase processed conflict minerals from smelters that have been validated as 'DRC conflict free'").

[566] *See* letter from ABA.

[567] *See* letter from SIF I.

[568] *See, e.g.*, letters from Howland and JVC *et al.* II.

been found to be "DRC conflict free," simply because they could not determine the origin of their conflict minerals, which would render that disclosure less meaningful.[569] Similarly, we believe that allowing smaller reporting companies four years to describe their products as "DRC conflict undeterminable" is appropriate because these issuers may lack the leverage to obtain detailed information regarding the source of a particular conflict mineral.[570]

We do not, however, believe that a permanent "DRC conflict undeterminable" category would be consistent with the language in the statute, and we believe it would undermine the overall goals of Section 1502. Such an approach might create incentives for issuers not to exercise care in identifying the origins of their necessary conflict minerals. Also, we do not believe that, after the temporary reporting period, the number of issuers that would describe their products as having not been found to be "DRC conflict free" would be so substantial as to render the disclosure meaningless because, based on our review of the comments, it appears that there should be systems in place at that time on which issuers could rely to determine whether their conflict minerals originated in the Covered Countries and, if so, whether they contributed to conflict. Overall, we believe that the change from "not 'DRC conflict free'" to having "not been found to be 'DRC conflict free,'" the ability to add additional explanation and disclosure, and the periods for the "DRC conflict undeterminable" category will provide issuers who are initially unable to determine that their conflict minerals did not originate in the Covered Countries or unable to determine that their conflict minerals that originated in the Covered Countries did not directly or indirectly finance or benefit armed groups in the Covered Countries means to make their disclosure while still accomplishing the goals that Congress intended when it required the disclosure of products that are not "DRC conflict free."

We believe that this approach also responds to the First Amendment concerns raised by the commentators. As to the concern that the rule impermissibly compels speech that is not of a commercial nature, we presume that Congress acted constitutionally when it passed the statute.[571] And, as discussed above, we believe that the changes made in the final rule mitigate the concern that the rule compels speech that may be false or unfairly stigmatizing for some issuers. The requirement that issuers that know or have reason to believe that their conflict minerals may have originated in the Covered Countries but that cannot determine the origin or cannot determine whether they financed or benefited armed groups state that their products have not been found to be "DRC conflict free" compels an accurate disclosure in light of the statutory definition of "DRC conflict free." Moreover, the use of this revised language, the ability of issuers to add additional explanation and disclosure, and the provision of a temporary "undeterminable" period all represent accommodations to ensure that the rule is appropriately tailored to lessen the impact on First Amendment interests while still accomplishing Congress's objective.

We note that many commentators appeared to believe that the proposed rules would require that an issuer physically label its products as "DRC conflict free" or not "DRC conflict free."[572] Although we used the term "label" in the Proposing Release, we did so in the context of the disclosure required in the annual report. The final rule does not require a physical label on any product. Instead, the final rule requires that an issuer describe in its Conflict Minerals Reports any products that have not been found to be "DRC conflict free," as defined in the final rule. Also, consistent with the proposal, the final rule permits issuers the flexibility to describe their products based on each issuer's individual facts and circumstances. We believe this flexibility is important because, as one commentator noted, an issuer is in the best position to know its products and to describe them in terms commonly understood within its industry.[573] Also, to remedy any confusion in the Proposing Release, an issuer with products that are "DRC conflict free" does not have to describe those products in the Conflict Minerals Report in any manner. An issuer with such products may describe them in its specialized disclosure report as "DRC conflict free" if it chooses to do so, provided, the products do not contain any conflict minerals that directly or indirectly financed or benefited armed groups in the Covered Countries.

The Conflict Minerals Statutory Provision requires the State Department to "produce a map of mineral-rich zones, trade routes, and areas under the control of armed groups" in the Covered Countries.[574] Also, the Conflict Minerals Statutory Provision requires the State Department to submit to Congress a strategy to address the linkages between human rights abuses, armed groups, mining of conflict minerals, and commercial products that contains a "plan to provide guidance to commercial entities seeking to exercise due diligence on and formalize the origin and chain of custody of conflict minerals used in their products and on their suppliers to ensure that conflict minerals used in the products of such suppliers do not directly or indirectly finance armed conflict or result in labor or human rights violations."[575] Some commentators have suggested that we delay the implementation of the final rule until the State Department's map and/or strategy have been published,[576] or that we should allow an issuer to rely on the State Department's map for its conflict minerals information.[577]

The State Department has published a conflict minerals map already.[578] Also, we understand that the State Department has developed guidance for commercial entities seeking to exercise due diligence on and formalize the origin and chain of custody of conflict minerals used in their products and on their suppliers.[579] Even so, it does not

[569] *See, e.g.*, letters from AdvaMed I, ITIC I, and ITRI II.

[570] *See* letters from ABA, Corporate Secretaries I, and JVC *et al.* II. *But see* letter from Green II (arguing that, although smaller reporting companies may lack leverage, this disadvantage may be reduced through the influence exerted over their suppliers by larger issuers that use the same supplier base and that have more leverage to request such information.).

[571] *See Nebraska* v. *EPA*, 331 F.3d 995, 997 (DC Cir. 2003) ("Agencies do not ordinarily have jurisdiction to pass on the constitutionality of federal statutes.") (citing *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 215 (1994)); *Todd* v. *SEC*, 137 F.2d 475, 478 (6th Cir. 1943) (same); *William J. Habermon*, 53 SE.C. 1024, 1029 n.14 (1998) ("[W]e have no power to invalidate the very statutes that Congress has directed us to enforce.") (citing *Milton J. Wallace*, 45 SE.C. 694, 697 (1975); *Walston & Co.*, 5 SE.C. 112, 113 (1939)).

[572] *See, e.g.*, letters from Howland, Industry Group Coalition I, Japanese Trade Associations, MSG I, NAM I, and SIF I.

[573] *See* letter from WGC II.

[574] Section 1502(c)(2) of the Act.

[575] Section 1502(c)(1) of the Act.

[576] *See, e.g.*, letters from Barrick Gold, Corporate Secretaries I, NRF I, and WGC II.

[577] *See, e.g.*, letters from AngloGold and NRF I.

[578] *See State Department, Humonitarion Informotion Unit, Democrotic Republic of the Congo Minerol Exploitotion by Armed Groups Map* (Jun. 14, 2011), *ovoilable ot https://hiu.stote.gov/Products/DRC_MineralExploitotion_2010Jun28_HIU_U182.pdf.*

[579] *See State Deportment, Bureou of Ecanomic, Energy, ond Business Affoirs, Stotement Concerning Implementation of Section 1502 of the Dodd-Fronk Legislotion Concerning Conflict Minerols Due Diligence* (July 15, 2011), *ovoilable at http://www.stote.gov/e/eb/diomonds/docs/168632.htm.*

appear that either the State Department's map or guidance is necessary for complying with the final rule. First, it does not appear that Congress intended that they be necessary to comply with our rule. The map and guidance requirements are located in a part of Section 1502 that is not incorporated into the Exchange Act and that part of Section 1502 is directed solely to agencies other than the Commission.[580] Therefore, although they may be related to our final rule, it does not appear that the map and guidance were intended to have direct impact on the rule.

Also, we do not believe that an issuer must rely solely on the State Department's map or guidance for determining whether its conflict minerals contributed to conflict in the Covered Countries because other resources are available. For example, as discussed above, the OECD has developed an internationally recognized system of due diligence that an issuer can use as guidance in exercising its due diligence. The OECD's due diligence guidance does not rely on or incorporate the State Department map and guidance referenced in the Conflict Minerals Statutory Provision in determining the steps an issuer must take to exercise due diligence. However, as discussed above, due to the stage of development of the supply chain tracing mechanisms, we recognize that there are concerns about obtaining this information reliably in the near term. Therefore, we are providing this targeted and temporary period in the final rule.

The final rule requires, as proposed, an issuer with conflict minerals that originated in the Covered Countries to determine whether those minerals directly or indirectly financed or benefited armed groups in the Covered Countries. The Conflict Minerals Statutory Provision states that products are "DRC conflict free" when those products do not contain conflict minerals that "directly or indirectly finance or benefit armed groups" in the Covered Countries.[581] Section 1502(e)(3) of the Act defines the term "armed group" as "an armed group that is identified as perpetrators of serious human rights abuses in the annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961,"[582] as they relate to the Covered Countries.[583] The final rule includes, as proposed, a cross reference to that definition to provide guidance to issuers. This cross reference, however, removes the phrases "most recently issued" and "for the year the annual report is due" to address the concerns of commentators.[584] The final rule mirrors the Conflict Minerals Statutory Provision in its definition of "armed group" and does not include any extraneous phrases that were included in the proposal.

The Conflict Minerals Statutory Provision assigns to the State Department the authority to identify perpetrators of serious human rights abuses in that agency's annual Country Reports, and we lack the authority and expertise to provide further guidance or qualify the State Department's conclusions in this area. We note that some commentators indicated that we should consider products containing conflict minerals obtained from mines not controlled by armed groups when purchased to be considered "DRC conflict free" even if those mines subsequently come under the control of armed groups.[585] We agree and consider products "DRC conflict free" if, when the conflict minerals contained in those products are purchased and transported through the supply chain from the mine to the issuer, those conflict minerals do not directly or indirectly finance or benefit armed groups in the Covered Countries, even if some point in that supply chain subsequently becomes controlled by an armed group. For example, if an issuer's conflict minerals are purchased from a mine that does not directly or indirectly finance or benefit armed groups in the Covered Countries when they are purchased, but the next day that mine is taken over by an armed group and the armed group takes the money previously provided to the miner from the issuer to purchase the conflict minerals that already left the mine, the products containing those conflict minerals may be considered "DRC conflict free," even though the money used to purchase the conflict minerals does, in fact, benefit that armed group subsequently.

2. Due Diligence Standard in the Conflict Minerals Report

We have interpreted the Conflict Minerals Statutory Provision as requiring an issuer to exercise due diligence based on the provision's requirement that an issuer describe the due diligence it exercised on the source and chain of custody of its conflict minerals.[586] In addition, the provision requires that an issuer include an independent private sector audit of the Conflict Minerals Report as a "critical component of due diligence."[587] Under Exchange Act Section 13(p)(1)(C), the Commission may determine an issuer's independent private sector audit or other due diligence processes to be unreliable and any Conflict Minerals Report that relies on such unreliable due diligence process would not satisfy the statute's reporting requirement.[588]

a. Proposed Rules

The proposed rules would have required an issuer to use due diligence regarding the supply chain determinations[589] in its Conflict Minerals Report. Other than requiring that the due diligence be reliable, the proposed rules would not have dictated the standard for, or otherwise provided guidance concerning, the due diligence that an issuer would be required to use in making such determinations. Instead, the proposed rules would have required an issuer to disclose the due diligence it used in making its determinations, such as whether it used any nationally or internationally recognized standards or guidance for supply chain due diligence.

In the Proposing Release, we noted our belief that the statutory provision contemplates that an issuer must use due diligence in its supply chain determinations. Although we did not propose to establish any particular conduct requirements, we believed that due diligence would be required to be exercised and information about what conduct the issuer exercised in its due diligence regarding its supply chain determinations was relevant to determine the extent of the issuer's due diligence. As proposed, the rules, therefore, would require issuers to describe the due diligence used in making these determinations. In particular, we noted that we would have expected that an issuer whose conduct conformed to a nationally or internationally recognized set of standards of, or guidance for, due diligence regarding its conflict minerals supply chain determinations would provide evidence that it used due

[580] The map and guidance requirements are in Section 1502(c) of the Act, but only Section 1502(b) of the Act actually amends the Exchange Act and directs the Commission to promulgate rules.

[581] *See* Exchange Act Sections 13(p)(1)(A)(ii) and 13(p)(1)(D).

[582] 22 U.S.C. 2151n(d) and 2304(b).

[583] Section 1502(e)(3) of the Act.

[584] *See, e.g.*, letters from ITRI I and TIC.

[585] *See, e.g.*, letters from AAEI, IPC I, and NRF I.

[586] Exchange Act Section 13(p)(1)(A)(i).

[587] Exchange Act Section 13(p)(1)(B).

[588] Exchange Act Section 13(p)(1)(C).

[589] We refer to the "supply chain determinations" as an issuer's determinations regarding the source and chain of custody of its conflict minerals, the facilities used to process those minerals, the country of origin of those minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

diligence in making those determinations.

b. Comments on the Proposed Rules

Some commentators believed that the Conflict Minerals Statutory Provision expressly requires an issuer to exercise due diligence on the source and chain of custody of its conflict minerals.[590] One commentator noted that nothing in the statute gives us explicit authority to develop due diligence guidance.[591] Another commentator asserted that Congress intended the Conflict Minerals Statutory Provision to require due diligence only on the source and chain of custody of conflict minerals mined in the DRC and on the transportation routes through which such minerals pass in countries adjoining the DRC.[592] This commentator claimed that Congress did not intend for the Conflict Minerals Statutory Provision to require due diligence on the source and chain of custody of minerals mined in the adjoining countries and recommended that the final rule not require such due diligence.

Many commentators supported our proposal to not prescribe any specific due diligence requirements and allow an issuer to have flexibility in developing its due diligence measures based on the issuer's own facts and circumstances.[593] A number of these commentators, however, suggested that the final rule provide guidance as to what would be considered acceptable due diligence.[594] Many other commentators recommended that the final rule provide a definition of or prescribe specific guidance for any required due diligence.[595] Some of these commentators reasoned that the final rule should prescribe a specific due diligence standard so that an issuer will be unable to "engage in a type of 'forum shopping'" for the least burdensome standard and so that each issuer's due diligence measures will be consistent, accurate, and reliable.[596] Other commentators suggested that the final rule should prescribe a safe harbor for an issuer's conduct allowing an issuer to avoid any undue or impractical requirements set forth by independent private sector auditors.[597] While we did not propose to require satisfaction of a particular set of standards, we requested comment on whether we should.

A number of commentators suggested that the final rule should refer to, incorporate, or require the use of national or international standards or guidance in some manner, such as accepting an issuer's due diligence as reliable if that issuer used a national or international standard or guidance, considering national or international due diligence standards or guidance when developing the final rule, or requiring an issuer to use a national or international due diligence framework for that due diligence to be considered reliable.[598] Some commentators did not believe the final rule should require that an issuer use any particular national or international due diligence standard.[599] Other commentators recommended against incorporating voluntary international standards, such as the OECD due diligence framework, into the final rule or suggested that we identify and assess the potential latent risks and/or impacts to industry and auditors related to codifying voluntary industry standards, such as the OECD due diligence framework, into the final rule.[600] Some commentators specifically referenced the due diligence framework developed by the OECD in discussing what they believed the final rule should consider as acceptable due diligence.[601] One commentator recommended that the final rule not only refer to the OECD due diligence framework, but also should require issuers to disclose the steps that they took to complete the OECD due diligence.[602]

Some commentators recommended that a due diligence standard should not require an absolute standard of care.[603] Instead, these commentators suggested either a "reasonable care" or a "commercially practicable efforts" standard that would encompass contractual obligations, risk-based programs, and industry-wide processes, but not necessarily include the identification of all the parties in the supply chain or the determination of every mineral used for manufactured items. Some commentators recommended that an issuer's due diligence should be presumed reliable if the issuer performs some or all of the following steps: uses information from an industry-wide process, creates a conflict minerals policy that requires conflict-mineral free provisions in all contracts, conducts supply chain risk assessments, requires suppliers to push policies upstream and transmit information downstream, establishes policies and procedures to remediate instances of non-conformity of policy, obtains independent third party audits, and publishes its supply chain findings.[604] Similarly, other commentators indicated that due diligence should be presumed reliable if these conditions are met, but only if the issuer requires upstream and downstream due diligence and describes that due diligence.[605] Other commentators suggested that the due diligence standard in the final rule should be commensurate with the issuer's position in the supply chain such that the due diligence requirement for an issuer would be less rigorous the

[590] *See, e.g.*, letters from NEI ("We agree that issuers should be required to use due diligence, as proposed."), Presbyterian Church USA (Feb. 15, 2012) ("Presbyterian Church I") (stating that the Conflict Minerals Statutory Provision "requires due diligence"), Sen. Durbin/Rep. McDermott (stating that "Section 1502 requires companies to exercise strict due diligence to determine the source of conflict minerals in their products"), and State II ("It is unclear how a reasonable conflict minerals determination can be made without due diligence given the complexity of the region and the risk of fraud.").

[591] *See* letter from TriQuint I. This commentator suggested that the Commission work with other government agencies to establish rules that govern what due diligence processes are reliable.

[592] *See* letter from Minister of Energy and Minerals of the United Republic of Tanzania (May 23, 2011) ("Tanzania II").

[593] *See, e.g.*, letters from AAEI, AngloGold, Cleary Gottlieb, Industry Group Coalition Group I, IPC I, ITIC I, ITRI I, Japanese Trade Associations, NAM I, NEI, Niotan II, NMA II, NRF I, RILA, RILA–CERC, RMA, Roundtable, Sen. Durbin/Rep. McDermott, TriQuint I, and WGC II.

[594] *See, e.g.*, letters from AAEI, Cleary Gottlieb, Earthworks, Howland, IPC I, ITIC I, ITRI I, NAM I, NEI, NMA II, NRF I, RILA, Sen. Durbin/Rep. McDermott, and WGC II.

[595] *See, e.g.*, letters from Arkema, Earthworks, Enough Project I, CENCO I, CODSIA, Global Witness I, Howland, ICAR *et al.* II, Materials I, Andrew Matheson (Mar. 2, 2011) ("Matheson I"), MSG I, NYCBar I, Rep. Berman *et al.*, SEMI, SIF I, State I, State II, and WGC *et al.* I.

[596] *See* letters from Global Witness I and ICAR *et al.* II.

[597] *See, e.g.*, letters from ArcelorMittal, Chamber I, ITIC I, Materials I, NAM I, NRF I, and RILA.

[598] *See, e.g.*, letters from Arkema, CODSIA, Earthworks, Enough Project I, Global Witness I, Howland, ICAR *et al.* II, IPC I, ITIC I, ITRI I, Matheson I, MSG I, NEI, NYCBar I, Rep. Berman *et al.*, SEMI, Sen. Durbin/Rep. McDermott, SIF I, State I, State II, WGC II, and WGC *et al.* I.

[599] *See, e.g.*, letters from Cleary Gottlieb, NAM I, NMA II, and WGC II.

[600] *See* letters from Auditing Roundtable, Inc. (Oct. 31, 2011) ("ARI") and Board of Environmental, Health & Safety Auditor Certifications (Oct. 31, 2011) ("BEAC").

[601] *See, e.g.*, letters from Arkema, Boeing, CODSIA, Earthworks, Enough Project I, Evangelical Alliance, Evangelicals, Global Witness I, ICAR *et al.* II, ITRI I, ITRI IV, Matheson I, Methodist Board, MSG I, NEI, NYCBar I, NYCBar II, Presbyterian Church II, Rep. Berman *et al.*, Sen. Durbin/Rep. McDermott, SEMI, SIF I, SIF II, State I, State II, and WGC II, and WGC *et al.* I.

[602] *See* letter from SIF II.

[603] *See, e.g.*, letters from AAEI, Chamber I, CRS I, Industry Group Coalition I, ITIC I, and NAM I.

[604] *See, e.g.*, letters from AAEI, Global Witness I, Industry Coalition Group II, NAM I, and NRF I. These steps are similar to the steps in the Annex I of the OECD's due diligence guidance.

[605] *See, e.g.*, letters from Earthworks, Enough Project I, MSG I, and SIF I. The upstream and downstream due diligence that would be required by these commentators is similar to the upstream and downstream due diligence described in the Supplement on Tin, Tantalum, and Tungsten to the OECD's due diligence guidance.

farther that issuer's position in the supply chain is from the mine or other location of origin.[606]

In the Proposing Release, we requested comment as to whether the final rule should prescribe different due diligence measures for gold because of any unique characteristics of the gold supply chain. In response, most commentators that discussed this point agreed that the due diligence required for gold should be the same as the due diligence required for the other three conflict minerals.[607] Two commentators, however, stated that gold is unique among the four conflict minerals so the due diligence requirements for it should be different than for the other minerals.[608] As discussed above, a few commentators further recommended that the final rule permit issuers to exclude certain information from public dissemination regarding the storage and transportation routes of gold for security reasons.[609]

In the Proposing Release, we also requested comment as to whether the final rule should state that an issuer is permitted to rely on the reasonable representations of its smelters or any other actor in the supply chain, provided there is a reasonable basis to believe the representations of the smelters or other parities. A number of commentators suggested, in response, that the final rule should allow an issuer to rely on reasonable representations from suppliers and/or smelters in satisfying their due diligence requirement.[610] Some of these commentators, however, explained that such written representations must be accompanied by additional processes, such as industry-wide smelter verification programs, before they could be relied upon.[611] One commentator recommended that the final rule should allow due diligence to be satisfied if an issuer includes obligations in its supply contracts and receives reasonable representations from its suppliers regarding the conflict-free nature of the minerals.[612]

c. Final Rule

After considering the comments, we are revising the final rule. The final rule requires that an issuer describe the due diligence it exercised in determining the source and chain of custody of its conflict minerals. The final rule requires that an issuer's due diligence follow a nationally or internationally recognized due diligence framework. We are persuaded by commentators that requiring an issuer to use a nationally or internationally recognized due diligence framework that is relevant to the audit objectives and permits consistent assessment of the subject matter will provide an independent private sector auditor with a structure by which to assess an issuer's due diligence, which we believe should make the rule more workable and less costly than if no framework was specified. We are also persuaded by commentators that requiring the use of nationally or internationally recognized due diligence framework will enhance the quality of an issuer's due diligence and will promote comparability of the Conflict Minerals Reports of different issuers. Also, we believe that requiring such due diligence will provide issuers with a degree of certainty and, as one commentator noted, "ameliorate the risk that a due diligence process will later be judged to be unreliable."[613]

The OECD's "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas"[614] satisfies our criteria and may be used as a framework for purposes of satisfying the final rule's requirement that an issuer exercise due diligence in determining the source and chain of custody of its conflict minerals. As one commentator noted, the OECD is an international organization with 34 member countries, including the United States, that works internationally with governments and businesses and approved its due diligence guidance as the "the result of a collaborative initiative among governments, international organizations, civil society organizations, and industry participants to promote accountability and transparency in the supply chain of minerals from conflict-affected and high-risk areas."[615] A comment letter submitted by the OECD in conjunction with the United Nations Group of Experts on the Democratic Republic of the Congo ("Group of Experts") and the International Conference on the Great Lakes Region ("ICGLR") indicated that the OECD due diligence guidance was "adopted as an OECD Recommendation by forty one OECD and non-OECD countries meeting at ministerial level on 25 May 2011 under the chairmanship of U.S. Secretary of State Hillary Rodham Clinton."[616] The final rule does not mandate that an issuer use any particular nationally or internationally recognized due diligence framework, such as the OECD's due diligence guidance, in recognition of the fact that other evaluation standards may develop that satisfy the intent of the Conflict Minerals Statutory Provision. However, to satisfy the requirements of the final rule, the nationally or internationally recognized due diligence framework used by the issuer must have been established by a body or group that has followed due-process procedures, including the broad distribution of the framework for public comment, and be consistent with the criteria standards in GAGAS established by the GAO.

As a related matter, one commentator stated that the final rule should clarify whether an issuer has to describe generally its due diligence processes or whether issuers have to describe specifically purchase contracts associated with particular conflict minerals in their products.[617] We believe an issuer's description of its due diligence should be based on the individual issuer's facts and circumstances. In this regard, if an issuer's due diligence process is relatively consistent throughout its supply chain, the issuer could satisfy the requirements by generally describing its due diligence. We recognize, however, that an issuer may use different due diligence processes for different aspects of its supply chain. For example, an issuer using the OECD due diligence guidance may use different due diligence processes for tin, tantalum, and tungsten as compared with that for gold. If an issuer exercises significantly different due diligence processes for different aspects of its supply chain, such as with separate conflict minerals or products, that issuer should describe how they are different.

As we note above, a number of commentators recommended that the final rule allow an issuer to rely on

[606] See letters from CERC, Chamber I, ITIC I, NRF I, and RILA.

[607] See, e.g., letters from Earthworks, Global Witness I, ITRI I, SIF I, and State II.

[608] See letters from AngloGold and WGC II.

[609] See letters from NMA II, NAM III, and WGC II.

[610] See, e.g., letters from AngloGold, Global Witness I, Howland, IPC I, ITIC I, Japanese Trade Associations, JVC et al. II, Kemet, NEI, NMA II, RILA–CERC, RMA, Roundtable, SEMI, Sen. Durbin/Rep. McDermott, State II, Taiwan Semi, and WGC II.

[611] See letters from Global Witness I, Howland, ITIC I, JVC et al. II (stating that written representations would not have to be accompanied by additional processes "until such time as reliable smelter/refiner certification and due diligence systems can be implemented"), Kemet, NMA II, RMA, Sen. Durbin/Rep. McDermott, and State II.

[612] See letter from Roundtable.

[613] See letter from NAM I.

[614] *OECD, Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2011), *available at http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/46740847.pdf.*

[615] See letter from Global Witness I.

[616] See letter from OECD I.

[617] See letter from ITIC I.

reasonable representations from suppliers and/or smelters in satisfying their due diligence requirement,[618] whereas other commentators argued that written representations should not be able to satisfy due diligence by themselves.[619] The final rule requires that an issuer's due diligence follow a nationally or internationally recognized due diligence framework. Therefore, whether an issuer may rely on reasonable representations from suppliers and/or smelters in satisfying its due diligence requirement will be dependent on the nationally or internationally recognized due diligence framework.

3. Independent Private Sector Audit Requirements

a. Proposed Rules

Consistent with the Conflict Minerals Statutory Provision, we proposed that the description of the measures taken by an issuer to exercise due diligence on the source and chain of custody of its conflict minerals include a certified independent private sector audit conducted in accordance with the standards established by the Comptroller General of the United States.[620] Under the Conflict Minerals Statutory Provision, the GAO is to establish the appropriate standards for the independent private sector audit. Therefore, we did not include any auditing standards in the proposed rules or discuss such standards in the Proposing Release.

b. Comments on the Proposed Rules

A number of commentators indicated that the final rule must clarify the independent private sector audit's criteria, objectives, and standards.[621] One commentator was concerned that, if neither the Comptroller General nor the Commission required uniform objectives and standards, the audits would not be useful because they would lack any comparability.[622] Some commentators remarked that the Comptroller General or the Commission must delineate suitable criteria for the measurement and presentation of the information in the Conflict Minerals Report, including the elements of the Conflict Minerals Report subject to the audit, so as to provide an audit framework that would aid both issuers and auditors.[623] Such criteria would provide the basis for the auditor to measure the information provided by the issuer, and this criteria should be objective, measurable, complete, and relevant.[624] Commentators noted, however, that the criteria would differ based on the objective of the audit. For example, the criteria for evaluating whether an issuer is correct in concluding that its products are "DRC conflict free" are different from the criteria for determining whether the issuer's process for determining whether its products are "DRC conflict free" is sufficient.[625]

Commentators from the accounting profession and others recommended that the final rule clearly state the objective of the audit and the subject matter to be audited.[626] Some of these commentators identified possible audit objectives, including: whether management's description of the procedures and controls performed in an issuer's due diligence process are fairly described in the Conflict Minerals Report;[627] whether the design of an issuer's due diligence process described in the Conflict Minerals Report conforms to a recognized standard of due diligence;[628] whether management's description of an issuer's due diligence process in its Conflict Minerals Report is accurate, the results of that process are fairly stated, and the issuer has evaluated/identified the upstream and downstream due diligence processes;[629] whether the design of the due diligence process described in the Conflict Minerals Report conforms to a recognized a standard and whether the process was sufficiently effective;[630] whether the issuer's conclusion regarding the source and chain of custody of its conflict minerals is accurate;[631] and whether the issuer appropriately included in the report all its products described as not "DRC conflict free."[632] Generally, commentators recommended that the final rule not require an audit objective to include a determination as to whether an issuer's due diligence process was effective or that any conclusion based on that due diligence process was accurate, because that would be very challenging and expensive to undertake.[633]

Additionally, some commentators indicated that the Comptroller General or the Commission must identify the acceptable auditing standards for firms to use when auditing an issuer's Conflict Minerals Report.[634] In this regard, as some commentators noted,[635] the Proposing Release stated that the staff of the GAO informed our staff of its preliminary view that no new audit standards need to be promulgated. Therefore, the audit of the Conflict Minerals Report would be performed under GAGAS, and auditors could use either the provisions for Attestation Engagements or Performance Audits in GAGAS.[636] However, as commentators noted, in addition to certain substantive differences between the two standards in GAGAS, only a licensed certified public accountant or person working with a certified public accounting firm or governmental auditing organization may perform an Attestation Engagement.[637] Similarly, commentators noted that Performance Audits are not required to be conducted by certified public accountants, but auditors using the Performance Audit standard would still need to satisfy certain qualification requirements under GAGAS, such as continuing professional education requirements, quality control measures, and

[618] *See, e.g.*, letters from AngloGold, Global Witness I, Howland, IPC I, ITIC I, Japanese Trade Associations, JVC *et al.* II, NEI, NMA II, RILA–CERC, RMA, SEMI, State II, Taiwan Semi, and WGC II.

[619] *See* letters from Global Witness I, Howland, ITIC I, and RMA.

[620] *See* Exchange Act Section 13(p)(1)(A)(i).

[621] *See, e.g.*, letters from American Institute of Certified Public Accountants (Mar. 1, 2011) ("AICPA I"), American Institute of Certified Public Accountants (Nov. 17, 2011) ("AICPA II"), Barrick Gold, BEAC, Calvert, Deloitte, The Elm Consulting Group International LLC (Mar. 1, 2011) ("Elm"), Ernst & Young LLP (Mar. 2, 2011) ("E&Y"), Grant Thornton (recommending that the Commission establish a "working group to support the Comptroller General in the development of the appropriate form of engagement, including the criteria to be used to evaluate the subject matter and the opinion (or conclusion) to be expressed thereon"), Hileman Consulting, ICGLR, IPC II, KPMG LLP (Mar. 2, 2011) ("KPMG"), MSG III, NEI, NYCBar I, WGC II.

[622] *See* letter from WGC II.

[623] *See, e.g.*, letters from Deloitte and KPMG.

[624] *See* letters from Deloitte and Grant Thornton.

[625] *See* letters from AICPA I and Grant Thornton.

[626] *See* letters from AICPA I, AICPA II, Barrick Gold, Grant Thornton, IPC II, KPMG, MSG III, and SIF II.

[627] *See* letters from AICPA I, AICPA II, Grant Thornton, and KPMG.

[628] *See* letters from AICPA I, AICPA II, IPC II, and KPMG. Commentators also observed that this second objective would require the final rule to provide a clear due diligence standard against which an auditor could compare the issuer's due diligence process.

[629] *See* letter from MSG III (noting, however, that the audit scope should not include verification of the ultimate conclusions of the Conflict Minerals Report, only that the process was applied as described). *See also* letter from SIF II (stating that the audit of the Conflict Minerals Report should include a "review of management systems and processes, and of conclusions reached").

[630] *See* letter from AICPA I.

[631] *See* letters from AICPA I and KPMG.

[632] *See id.*

[633] *See, e.g.*, letters from AICPA I, AICPA II, Deloitte, ITIC I, KPMG, MSG III, and Roundtable.

[634] *See* letters from AICPA I, Deloitte, E&Y, Elm, and KPMG.

[635] *See, e.g.*, letters from Barrick Gold and E&Y.

[636] *See* letters from AICPA I, AICPA II, BEAC, Deloitte, E&Y, Elm, Grant Thornton, and MSG III.

[637] *See, e.g.*, letters from AICPA I and BEAC.

independent peer reviews.[638] In this regard, to increase the pool of auditors and thereby reduce costs, some commentators recommended that the final rule allow auditors to use the Performance Audit standard under GAGAS.[639] Some of these commentators recommended that auditors that are not certified public accountants could satisfy GAGAS's Performance Audit qualification requirements by receiving a professional certification relating to environmental, health, and safety auditing from organizations that certify auditors by requiring that an auditor meet certain standards, such as having a code of conduct, committing to a code of ethics and rigorous practices, engaging in continuing professional development and education, being subjected to review, and other provisions to maintain a high caliber of expertise.[640] One commentator suggested that the final rule should allow any auditor to perform the audit as long as it was knowledgeable and able to meet the requirements of the OECD's criteria for the competence of auditors.[641] Other commentators noted, however, that the OECD's criteria for the competence of auditors are inadequate because they fail to provide any guidance as to how this would be assured.[642] Another commentator recommended that the final rule should delineate specific requirements for the accreditation and selection of auditors but did not provide any suggested requirements.[643]

Several commentators asserted that the final rule should clarify the independence standards for auditors.[644] Some of these commentators[645] recommended that the final rule state that performing the independent private sector audit of the Conflict Minerals Report is not inconsistent with the Commission's auditor independence requirements in Rule 2–01 of Regulation S–X.[646] One commentator noted, however, that the OECD's independence requirements prohibit a Conflict Minerals Report auditor from having provided any other service for the issuer within a 24-month period.[647] Similarly, two other commentators asserted that the statement in the proposed rules and the Conflict Minerals Statutory Provision that the independent private sector audit would be considered a "critical component of due diligence" could create confusion regarding the application of our auditor independence requirements in Rule 2–01 of Regulation S–X.[648]

c. Final Rule

i. Auditing Standards

As noted above, the GAO staff has indicated to our staff that the GAO does not intend to develop new standards for the independent private sector audit of the Conflict Minerals Report. As we noted in the Proposing Release, GAO staff informed our staff that existing GAGAS standards,[649] such as the standards for Attestation Engagements or the standards for Performance Audits will be applicable.[650] The GAO staff has also indicated to our staff that the GAGAS Performance Standards could be used by the auditor to express a conclusion as to whether the design of the issuer's due diligence measures are in conformity with the criteria set forth in a nationally or internationally recognized due diligence framework used by the issuer, such as the OECD's "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas," and whether the issuer's description of the due diligence measures it performed, as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is consistent with the due diligence process that the issuer undertook. Therefore, unless the GAO makes some formal pronouncement, it appears that any auditor of the Conflict Minerals Report will need to conduct the audit using the standards set forth in GAGAS. Because the Conflict Minerals Statutory Provision provides that the audit standards are to be established by the GAO, the GAO is responsible for matters pertaining to the audit standards, including questions or concerns about the application of such standards.

ii. Auditor Independence

Similarly, entities performing an independent private sector audit of the Conflict Minerals Report must comply with any independence standards established by the GAO, and any questions regarding applicability of GAGAS on this point should be directed to the GAO. We are not adopting any additional independence requirements. Also, the independence required for the independent private sector audit of the Conflict Minerals Report is not the same as the OECD's independence requirement for auditors conducting audits of conflict mineral smelters.

We acknowledge commentators' requests to clarify how our own independence requirements would apply to an accountant that performed both the independent private sector audit of the Conflict Minerals Report and an engagement (e.g., the audit of the financial statements of an issuer) subject to the independence requirements in Rule 2–01 of Regulation S–X.[651] The independent private sector audit of the Conflict Minerals Report is specifically described in the Act as constituting a "critical component" of the registrant's due diligence process.[652] which commentators were concerned may suggest the auditor would perform work that would impair independence. Despite this language, the Conflict Minerals Statutory Provision only requires an audit and no other functions that may imperil independence, such as "management functions" described in Rule 2–01(c)(4)(vi) of Regulation S–X. Therefore, we do not believe that it would be inconsistent with the independence requirements in Rule 2–01 of Regulation S–X if the independent public accountant also performs the independent private sector audit of the Conflict Minerals Report. The engagement to perform the independent private sector audit of the Conflict Minerals Report would nevertheless be considered a "non-audit service" subject to the pre-approval requirements

[638] *See* letter from Deloitte and BEAC.

[639] *See, e.g.*, letters from ArcelorMittal, ARI, BEAC, Hileman Consulting, IPC II, and MSG III.

[640] *See* letters from BEAC and Hileman Consulting.

[641] *See* letter from NYCBar I.

[642] *See* letter from ARI and BEAC.

[643] *See* letter from ICGLR.

[644] *See, e.g.*, letters from AICPA I, Deloitte, E&Y, Grant Thornton, Hileman Consulting, and KPMG.

[645] *See* letters from AICPA I, Deloitte, and E&Y.

[646] 17 CFR 210.2–01.

[647] *See* letter from KPMG.

[648] *See* letters from E&Y and Grant Thornton.

[649] *See U.S. Gov't Accountability Office, GAO–12–331G, Government Auditing Standards 2011 Revision* (Dec. 2011), *available at http://www.gao.gov/assets/590/587281.pdf.*

[650] The GAGAS Attestation Engagement standards, in Chapter 3.75, require that auditors be "licensed certified public accountants, persons working for a licensed certified public accounting firm or for a government auditing organization, or licensed accountants in states that have multi-class licensing systems that recognize licensed accountants other than certified public accountants." Unlike the GAGAS Attestation Engagement standards, the GAGAS Performance Audit standards allow auditors other than certified public accountants to perform a Performance Audit.

[651] Rule 2–01 of Regulation S–X [17 CFR 210.2–01].

[652] Exchange Act Section 13(p)(1)(A)(i), as added by Section 1502 of the Act, states that the independent private sector audit of the conflict minerals report is included in the "measures taken by the [issuer] to exercise due diligence on the source and chain of custody of such minerals." Exchange Act Section 13(p)(1)(B) further provides that the audit must be certified by the issuer and states that the certified audit "is a critical component of due diligence in establishing the source and chain of custody of such minerals." These provisions make clear that the independent private sector audit is one step in *management's* due diligence process.

of Rule 2–01(c)(7) of Regulation S–X. In addition, the fees related to the independent private sector audit of the Conflict Minerals Report would need to be included in the "All Other Fees" category of the principal accountant fee disclosures.[653] If the accountant were to provide services that extended beyond the scope of the independent private sector audit of the Conflict Minerals Report, the accountant would need to consider whether those services were inconsistent with Rule 2–01 of Regulation S–X.

iii. Audit Objective

We agree with commentators that the final rule should clearly state the objective of the Conflict Minerals Statutory Provision's independent private sector audit and the subject matter to be audited to provide a basis for the auditor to measure the information provided by the issuer. Therefore, the final rule specifies an audit objective. The final rule states that the audit's objective is to express an opinion or conclusion as to whether the design of the issuer's due diligence framework as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is in conformity with, in all material respects, the criteria set forth in the nationally or internationally recognized due diligence framework used by the issuer, and whether the issuer's description of the due diligence measures it performed as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is consistent with the due diligence process that the issuer undertook.

The Conflict Minerals Statutory Provision requires an issuer to submit a Conflict Mineral Report that includes "a description of the measures taken by the [issuer] to exercise due diligence on the source and chain of custody of its conflict minerals, which measurers shall include an independent private sector audit of such report,"[654] and "a description of the products manufactured or contracted to be manufactured that are not DRC conflict free."[655] We recognize that the final rule does not require an audit of the entire Conflict Minerals Report. We believe, however, that it is appropriate for the final rule to limit the audit only to the sections of the Conflict Minerals Report that discuss the design of the issuer's due diligence framework and the due diligence measures the issuer performed because the provision's requirement for an issuer to obtain an independent private sector audit is located in the provision's subsection relating to due diligence.[656]

The audit requirement is not discussed in the subsequent subsection that requires a description in the Conflict Minerals Report of the issuer's products manufactured or contracted to be manufactured that are "not DRC conflict free,"[657] and the final rule does not require an audit of that information. We note that the objective we are adopting differs significantly from the objectives of other audits required by our rules.[658] Nonetheless, in light of the statutory structure, as well as concerns about the costs that could arise from a requirement to audit the conclusion about the conflict minerals' status or take other approaches,[659] we have concluded that the audit objective should be limited in this manner. We recognize that an audit objective requiring an auditor to express an opinion or conclusion as to whether the design of the issuer's due diligence measures as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is in conformity with, in all material respects, the criteria set forth in the nationally or internationally recognized due diligence framework used by the issuer, and whether the issuer's description of the due diligence measures it performed as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is consistent with the due diligence process that the issuer undertook, is not as comprehensive as an audit objective requiring an auditor to express an opinion or conclusion as to whether the due diligence measures were effective, or to express an opinion or conclusion as to whether or not the issuer's necessary conflict minerals are "DRC conflict free," which are more similar to audit objectives in our other rules. However, we believe that the audit is still meaningful because investors and other users will have some assurance from an independent third party that the issuer's due diligence framework, as set forth in the Conflict Minerals Report, is designed in conformity with the relevant nationally or internationally recognized due diligence framework. Further, we believe it is necessary and appropriate to require the audit to address whether the issuer actually performed the due diligence measures that it represents that it performed in the Conflict Minerals Report, so that the audit also addresses, in a cost efficient manner, the actual performance of the due diligence and not just the design, as well as provides independent third party confirmation that the work described was performed.

4. Recycled and Scrap Minerals

a. Proposed Rules

As proposed, the rules would allow for different treatment of conflict minerals from recycled and scrap sources than from original sources due to the difficulty of looking through the recycling or scrap process to determine the mine or other location of origin of the minerals. Given this difficulty, we expected that an issuer generally would not know the origins of its recycled or scrap conflict minerals, so we believed it would be appropriate for the proposed rules to require that an issuer using recycled or scrap conflict minerals furnish a Conflict Minerals Report subject to special rules. Under the proposed rules, if an issuer obtained conflict minerals from a recycled or scrap source, it would have been required to consider the products containing or produced with those conflict minerals to be "DRC conflict free."[660]

As proposed, an issuer with conflict minerals that originated from recycled or scrap sources would have been required to disclose in its annual report, under the "Conflict Minerals Disclosure" heading, that its conflict minerals were obtained from recycled or

[653] See Item 9(e)(4) of Schedule 14A [17 CFR 240.14a-101]. Registrants also are required to describe the nature of the services comprising the fees disclosed under the "All Other Fees" category. As such, the independent private sector audit of the Conflict Mineral Report should be included in that description.

[654] Exchange Act Section 13(p)(1)(A)(i).

[655] Exchange Act Section 13(p)(1)(A)(ii).

[656] *See* Exchange Act Section 13(p)(1)(A)(i).

[657] *See* Exchange Act Section 13(p)(1)(A)(ii).

[658] The objective of the ordinary audit of financial statements by the independent auditor is the expression of an opinion on the fairness with which they present, in all material respects, financial position, results of operations, and its cash flows in conformity with generally accepted accounting principles. *See* paragraph .01 of AU sec. 110, Responsibilities and Functions of the Independent Auditor. The auditor's objective in an audit of internal control over financial reporting is to express an opinion on the effectiveness of the company's internal control over financial reporting, as a part of which the auditor should test the design effectiveness of controls, as well as the operating effectiveness of controls. *See* paragraphs 3, 42, and 44 of Auditing Standard No. 5, An Audit of Internal Control over Financial Reporting That Is Integrated With An Audit of Financial Statements.

[659] *See, e.g.*, letters from AICPA I, Deloitte, and KPMG.

[660] Because the proposed rules would have automatically classified recycled or scrap conflict minerals as "DRC conflict free," issuers with products containing such minerals would not have needed to provide in the Conflict Minerals Report a description of the recycled or scrap conflict minerals' processing facilities or country of origin, nor would they have been required to describe their efforts to determine the mine or location of origin with the greatest possible specificity.

scrap sources and that it furnished a Conflict Minerals Report regarding those recycled or scrap minerals. Also, under the proposed rules, an issuer would have been required to state that its products containing or produced with recycled or scrap minerals in the Conflict Minerals Report were considered "DRC conflict free." In addition, such an issuer would have described the measures taken to exercise due diligence in determining that its conflict minerals were recycled or scrap and obtain an independent private sector audit of that report.

We did not propose to define when a conflict mineral is from recycled or scrap sources. Instead, any issuer seeking to use this alternative approach would describe the measures it took to exercise due diligence in determining that the conflict minerals came from recycled or scrap sources. The Proposing Release stated, however, that we would consider conflict minerals to be "recycled" if they are reclaimed end-user or post-consumer products, but we would not consider those minerals "recycled" if they are partially processed, unprocessed, or a byproduct from another ore.[661]

b. Comments on the Proposed Rules

Commentators offered a wide variety of views on the appropriate approach to conflict minerals from recycled or scrap sources. A number of commentators stated that they either agreed with the recycled and scrap alternative reporting requirements, as proposed, or agreed with some type of recycled and scrap alternative reporting requirements or exemption, although some of these commentators did not necessarily discuss the mechanics of such reporting alternatives.[662] Some commentators indicated that they supported, as proposed, alternative recycled or scrap reporting that requires an issuer to perform due diligence in determining that the conflict minerals were, in fact, from recycled and scrap sources and to submit a Conflict Minerals Report describing the due diligence exercised that includes an audit of the report.[663] A number of commentators believed that the final rule should require that an issuer only conduct the equivalent of a reasonable country of origin inquiry, instead of due diligence, to determine whether its conflict minerals were from recycled or scrap sources.[664] Also, some of these and other commentators stated explicitly that an issuer should not be required to submit a Conflict Minerals Report and/or an audit of its recycled or scrap conflict minerals.[665] Other commentators, including a number of members of Congress, recommended that the final rule exempt conflict minerals from recycled or scrap sources.[666]

Other commentators stated that the final rule should require due diligence but not a Conflict Minerals Report, not require a Conflict Minerals Report but require an audit of the inquiry into whether the conflict minerals are from recycled or scrap sources, require a "reliable process" to determine whether the conflict minerals are from recycled or scrap sources, or not require that an issuer provide any information other than a statement that the conflict minerals are from recycled or scrap sources.[667] Some commentators agreed that products with conflict minerals from recycled and scrap sources should be considered "DRC conflict free," as proposed.[668] Other commentators indicated that the final rule should require an issuer with products containing conflict minerals from recycled or scrap sources to label those products with a name other than "DRC conflict free," such as "recycled" or "scrap" products.[669]

Some commentators stated that the more the alternative reporting approach for conflict minerals from recycled or scrap sources resembles our approach for newly mined conflict minerals the greater the risk of creating a disincentive for a manufacturers to use conflict minerals from recycled or scrap sources.[670] As one of these commentators asserted, without certain alternative reporting requirements for issuers with conflict minerals from recycled or scrap sources, such minerals "would be doomed for burial in a land fill until mined anew under a different authority having jurisdiction," which would be a "clear waste" of conflict minerals that "cannot contribute to new suffering in the DRC even though its disposition regarding past suffering may not be clear."[671] According to this commentator, "it is possible that dishonest people may find a way to pass new material off as recycled," but this possibility "does not outweigh the very obvious benefit of using recycled products and materials."[672] In this regard, other commentators argued that requiring issuers to provide the reason they determined that their conflict minerals came from recycled or scrap sources, including the due diligence processes they used in making their determination, would offset the reduced burden provided by the exemption.[673]

One commentator suggested that an issuer should be able to describe a product as using recycled or scrap minerals if a majority of the minerals used in the product are from recycled or

[661] As we noted in the Proposing Release, the proposed rules regarding recycled and scrap conflict minerals would apply to all conflict minerals equally. If recycled or scrap minerals were mixed with new minerals, the recycled and scrap alternative approach would apply to only the portion of the minerals that were recycled or scrap and the issuer would be required to furnish a Conflict Minerals Report regarding at least the recycled or scrap minerals. If the issuer's new conflict minerals did not originate in the Covered Countries, that Conflict Minerals Report would contain only information regarding the recycled or scrap minerals. If, however, the new conflict minerals originated in the Covered Countries, or the issuer was unable to determine that its new conflict minerals did not originate in the Covered Countries, the Conflict Minerals Report would include information regarding both the new conflict minerals and the recycled or scrap conflict minerals.

[662] *See, e.g.*, letters from AAEI, AAFA, CRS I, Global Tungsten I, Global Witness I, Japanese Trade Associations, MSC I, NRF I, Ohio Precious Metals (Mar. 2, 2011) ("OPM"), PCP, Representative Jason Altmire (Mar. 23, 2012) ("Rep. Altmire"), Rep. Amodei, Rep. Bachus *et al.*, Rep. Critz, Rep. Ellmers, Representative Steven LaTourette (Jun. 13, 2012) ("Rep. LaTourette"), Representative Robert E. Latta (May 16, 2012) ("Rep. Latta"), Rep. Murphy, Representatives Tim Murphy and Peter J. Visclosky (Aug. 2, 2012) ("Reps. Murphy and Visclosky"), Representative James B. Renacci (Mar. 6, 2012) ("Rep. Renacci"), Representative Bill Shuster (Mar. 12, 2012) ("Rep. Shuster"), Representative Patrick J. Toomey (Apr. 12, 2012) ("Rep. Toomey"), Representative Stephen A. Womack (Dec. 23, 2011) ("Rep. Womack"), RMA, SEMI, Senator Mark Pryor (Mar. 19, 2012) ("Sen. Pryor"), and US Steel.

[663] *See, e.g.*, letters from Bario-Neal, Brilliant Earth, Earthworks, Enough Project I, Enough Project IV, Hacker Jewelers, ICAR *et al.* II, Howland, SIF I, and TIAA–CREF.

[664] *See, e.g.*, letters from AdvaMed I, Advanced Medical Technology Association (Nov. 1, 2011) ("AdvaMed II"), AngloGold, Global Tungsten II, Industry Group Coalition I, ITIC I, ITRI I, ITRI IV, JVC *et al.* II, LBMA I, Metalor Technologies USA (Feb. 25, 2011) ("Metalor"), NMA I, RJC I, United States Chamber of Commerce (Nov. 29, 2011) ("Chamber III"), and WGC II.

[665] *See, e.g.*, letters from AdvaMed I, AdvaMed II, ArcelorMittal, Copper & Brass Fabricators Council, Inc. (Mar. 2, 2011) ("Copper & Brass"), Global Tungsten II, IPC I, IPC II, ITIC I, ITRI I, ITRI III, ITRI IV, JVC *et al.* II, JVC *et al.* III, Materials I, NAM I, Rep. Altmire, Rep. Amodei, Rep. Bachus *et al.*, Rep. Ellmers, Rep. Murphy, Rep. Shuster, Sen. Pryor, Specialty Steel Industry of North America (Mar. 2, 2011) ("SSINA"), Tiffany, and WGC II. *See also* letter from Rep. Critz (stating that we should consider "reconfiguring the auditing requirement as it relates to recycled scrap materials").

[666] *See, e.g.*, letters from Rep. Altmire, Rep. Murphy, Reps. Murphy and Visclosky (recommending exempting recycled or scrap steel that contains conflict minerals), Rep. Renacci, Rep. Shuster, Rep. Toomey, Rep. Womack, and Sen. Pryor.

[667] *See, e.g.*, letters from Cleary Gottlieb, JVC *et al.* II, MSG I, and NEI.

[668] *See, e.g.*, letters from Copper & Brass, JVC *et al.* II, MSG I, NEI, NMA II, SIF I, SSINA, TIAA–CREF, and WGC II.

[669] *See, e.g.*, letters from CRS I, Global Witness I, and State II.

[670] *See, e.g.*, letters from Copper & Bass, Global Tungsten I, RMA, SEMI, and SSINA.

[671] *See* letter from SEMI.

[672] *See id.*

[673] *See* letters from Rep. LaTourette and Rep. Latta.

scrap sources or a combination of recycled, scrap, and newly mined conflict minerals because it would be impossible to determine whether all the minerals in a product were from recycled or scrap sources.[674] Another commentator recommended that the final rule should allow an issuer to describe its products as "DRC conflict free" if a majority of the conflict minerals in those products are from recycled or scrap sources.[675] One commentator asserted that tolled material (scrap, second life-cycle materials, or ores processed into raw materials suitable for use in the manufacture of products) received from processing facilities or suppliers should be treated as conflict free if the original material supplied was conflict free.[676] A number of other commentators suggested that the final rule allow an issuer to designate the origin of any recycled or scrap conflict minerals as the country in which those minerals were generated and collected or otherwise initially submitted into the recycling or scrap supply chain, which is consistent with the United States customs law.[677] Also, commentators agreed that the alternative reporting requirements for recycled and scrap minerals should apply to all conflict minerals and issuers equally.[678]

Many commentators discussed the Proposing Release's statement that we would consider conflict minerals to be from a recycled or scrap sources if those minerals are reclaimed end-user or post-consumer products but would not consider those minerals "recycled" if they are partially processed, unprocessed, or a byproduct from another ore. Some of these commentators recommended that the final rule expand this statement to match the OECD's definition of recycled and scrap minerals or explicitly adopt the OECD's definition in the final rule.[679] Likewise, certain commentators recommended that the final rule clarify that we would consider conflict minerals from recycled or scrap sources to include scrap processed metals created during product manufacturing, which is part of the OECD definition.[680] These commentators, however, were concerned that the Proposing Release did not consider partially processed materials as being recycled, because they believed that such a definition would exclude industrial scrap, sometimes referred to as "new" scrap, generated by downstream manufacturers from the treatment given to recycled minerals.[681]

Some commentators provided alternative definitions for recycled and scrap minerals. One commentator stated that the final rule should define a recycled or scrap conflict mineral as "a conflict mineral or a conflict mineral derivative that is within, or has been reclaimed from, a used product that was collected directly from the last product end user, or that was collected from a municipal waste stream."[682] Other commentators indicated that conflict minerals should be considered recycled or scrap only if they have been through a cycle of production and application.[683] A further commentator suggested that the final rule adopt, in substantial part, the Environmental Protection Agency's definition of solid waste for our definition of conflict minerals from recycled or scrap sources, with the related exclusions and definitions of various scrap materials.[684] One commentator recommended that we incorporate the Electronic Industry Citizenship Coalition's ("EICC") definition of "scrap" for tantalum as the definition for scrap in the final rule.[685] Certain commentators sought to limit the definition of recycled and scrap minerals to 100% post-consumer metals.[686] Some commentators suggested a definition that would include reclaimed materials from the manufacture of downstream products that incorporate those metals, processes utilizing those metals, or end-user or post-consumer products, which would not include minerals partially processed, materials from the partially processed minerals, or materials from intermediate stages of the smelting and refining process.[687] One commentator recommended that the final rule consider as conflict minerals from recycled or scrap sources, "not only * * * post-consumer scrap, but also * * * scrap that is the result of an industrial process."[688]

Additionally, some commentators provided recommendations specifically for treating conflict minerals in jewelry, coins, and bars as recycled or scrap. One such commentator stated that conflict minerals from discarded consumer jewelry should be considered recycled or scrap.[689] Another commentator argued that any definition of recycled and scrap gold should grandfather gold bars and gold coins produced before the effective date of the final rule and exclude sludges, slimes, flue dust, carbon fines, slag, and other by-products from consideration as conflict minerals.[690] Conversely, other commentators stated that the definition of conflict minerals from recycled or scrap sources should include only those conflict minerals from post-consumer products and not include any jewelry unsold or not previously owned as end-use products by consumers.[691] Also, some of these commentators indicated that gold coins and bars should not be classified as recycled or scrap[692] because, as some of these commentators stated, they do not represent a clear consumer end-of-life product and are less identifiable as not newly-mined gold.[693]

c. Final Rule

We are revising the proposal's treatment of conflict minerals from recycled and scrap sources in the final rule. We agree with commentators that it is appropriate to provide alternative treatment for such conflict minerals so that the final rule does not provide a disincentive for using conflict minerals from recycled and scrap sources. However, we also want to include safeguards to prevent issuers from claiming to use conflict minerals from recycled and scrap sources when that is not the case. We believe, as certain commentators noted,[694] requiring an issuer with necessary conflict minerals to conduct an inquiry similar to the reasonable country of origin inquiry to determine whether its minerals are from

[674] *See* letter from AngloGold.

[675] *See* letter from WGC II.

[676] *See* letter from Global Tungsten II.

[677] *See, e.g.*, letters from IPMI I, LBMA I, Metalor, NMA II, and RJC I.

[678] *See, e.g.*, letters from Howland, IPC I, ITRI I, and NEI.

[679] *See, e.g.*, letters from Global Witness I, MSG I, and SIF I.

[680] *See, e.g.*, letters from Copper & Brass and SSINA.

[681] *Id.*

[682] *See* letter from SEMI (defining a "used product" as "a product that, prior to recycling or disposal, is commercially sold or otherwise distributed to a buyer not in the commercial chain of distribution and used for some period of time").

[683] *See* letters from Global Tungsten I and RMA.

[684] *See* letter from Elm.

[685] *See* letter from H.C. Starck GmbH (Jul. 27, 2011) ("Starck").

[686] *See, e.g.*, letters from Bario-Neal, Brilliant Earth, Earthworks, Metalsmiths, Hacker Jewelers, and TakeBack.

[687] *See* letters from ITRI I, JGI, and Solutions.

[688] *See* letter from ArcelorMittal.

[689] *See* letter from JVC *et al.* II.

[690] *See* letter from NMA II.

[691] *See, e.g.*, letters from Brilliant Earth, Bario-Neal, Earthworks, Enough Project I, Hacker Jewelers, ICAR *et al.* II, and TakeBack

[692] *See, e.g.*, letters from Brilliant Earth, Bario-Neal, Enough Project I, Hacker Jewelers, ICAR *et al.* II, and TakeBack.

[693] *See* letter from Enough Project I and ICAR *et al.* II.

[694] *See, e.g.*, letters from AdvaMed I, AdvaMed II, AngloGold, Global Tungsten II, Industry Group Coalition I, ITIC I, ITRI I, ITRI IV, JVC *et al.* II, LBMA I, Metalor, NMA I, RJC I, Chamber III, and WGC II.

recycled or scrap sources is an appropriate way to balance these concerns.[695] Under the final rule, if an issuer has reason to believe, as a result of its reasonable country of origin inquiry, that its conflict minerals may *not* have been from recycled or scrap sources, it must exercise due diligence. The issuer would then be required to provide a Conflict Minerals Report if it is unable to determine that the conflict minerals came from recycled or scrap sources.

We believe this approach for any issuer with conflict minerals from recycled or scrap sources is consistent with the Conflict Minerals Statutory Provision. The provision was intended to affect the "exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo [that] is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo."[696] As noted by some commentators, however, armed groups in the Covered Countries are financed and benefit from the extraction and illegal taxation of newly mined conflict minerals and their transport, not the use of recycled or scrap conflict minerals.[697] No further revenue or other benefit will be provided to the armed groups from any transaction involving the conflict minerals from recycled or scrap sources because the armed groups "have already extracted their revenue and do not stand to gain with [their] use or sale."[698]

In this regard, we believe it is appropriate, as proposed, to allow an issuer, if it wishes, to describe its products containing conflict minerals from recycled or scrap sources as "DRC conflict free." As one commentator explained, the "intent of the statute is to provide investors with information about whether minerals used in manufacturing processes may contribute to the ongoing conflict in the DRC,"[699] and it is "comfortable that legitimate recycled post-consumer or scrap minerals do not contribute to the crisis and can be therefore identified as 'DRC conflict free.'"[700] We are aware that the underlying conflict minerals that were recycled or from scrap sources may have once directly or indirectly financed or benefited armed groups in the Covered Countries. However, because the purpose of the provision is to provide information about whether minerals used in manufacturing directly or indirectly financed or benefited armed groups in the Covered Countries, and conflict minerals from recycled or scrap sources no longer do so, we believe it is appropriate to deem all products with conflict minerals from recycled or scrap source as "DRC conflict free."[701] This prevents the final rule from providing a disincentive to use conflict minerals from recycled or scrap sources.

i. Definition of "Recycled and Scrap Sources"

We are revising the proposed rules to adopt a definition of conflict minerals from recycled or scrap sources, which mirrors the OECD definition of recycled metals.[702] We are persuaded by commentators that argued that it is important for us to prescribe clear definitions regarding conflict minerals from recycled or scrap sources so that an issuer does not use this alternative reporting scheme as a means to avoid the requirement to exercise due diligence on the source and chain of custody of its conflict minerals in order to describe its products as "DRC conflict free."[703] Also, we agree with one of these commentators that the definition should be included in the body of the final rule and not just included as guidance in the release.[704]

Further, we are persuaded by commentators that we should use the OECD definition to provide certainty and prevent an issuer from using an alternative definition that would allow the issuer to classify it minerals as recycled or scrap when they were not.[705] Therefore, the final rule states that conflict minerals are considered to be from recycled or scrap sources if they are from recycled metals, which are reclaimed end-user or post-consumer products, or scrap processed metals created during product manufacturing. Also, based on the OECD definition, the final rule states that recycled metal includes excess, obsolete, defective, and scrap metal materials that contain refined or processed metals that are appropriate to recycle in the production of tin, tantalum, tungsten and/or gold. The final rule states further, however, that minerals partially processed, unprocessed, or a byproduct from another ore will not be included in the definition of recycled metal.

The definition included in the final rule should alleviate certain commentators' concern that the Proposing Release would limit the definition of conflict minerals from recycled or scrap sources to only end-user or post-consumer scrap and not include scrap processed metals created during product manufacturing.[706] The final rule's definition, which is consistent with the OECD definition, includes scrap processed metals created during product manufacturing.

ii. Due Diligence for Conflict Minerals That May Not Be From "Recycled and Scrap Sources"

In a change from the proposal, the final rule only requires an issuer with conflict minerals from recycled or scrap sources to exercise due diligence if it has reason to believe, following its reasonable country of origin inquiry, that its conflict minerals that it thought were from recycled or scrap sources may not be from such sources. If so, as is true for issuers with conflict minerals from newly mined sources, the issuer must exercise due diligence that conforms to a nationally or internationally recognized due diligence framework, if such a framework is available. The proposed rules would have required issuers with conflict minerals from recycled or scrap sources to exercise due diligence in determining

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[695] Because we envision these inquiries to be similar, we use the term "reasonable country of origin inquiry" to refer to an issuer's inquiry into both the conflict minerals' country of origin and whether the minerals are from recycled or scrap sources.

[696] *See* Section 1502(a) of the Act.

[697] *See* letters from AAEI and Global Tungsten I.

[698] *See* letter from AAEI. *See also OECD, OECD Due Diligence Guidonce for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 7 n.2 (2011), *available at http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/46740847.pdf* (stating that metals "reasonably assumed to be recycled are excluded from the scope of this" guidance) and *OECD, Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Supplement on Gold*, 28 n.34 (2012), *available at http://www.oecd.org/corporate/guidelinesformultinationalenterprises/FINAL%20Supplement%20on%20Gold.pdf* (stating that "[r]ecycled material is not itself a concern for contributing to conflict, however, recycled material is a potential means of laundering gold that has been mined in conflict-affected and high-risk areas in order to hide its origin").

[699] *See* letter from TIAA–CREF.

[700] *See id.*

[701] We also note that, going forward, newly mined minerals, even if they are eventually recycled, will be covered under the final rule when they are first used.

[702] *See OECD, Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 12 n.2 (2011), *available at http://www.oecd.org/dotooecd/62/30/46740847.pdf*. ("Recycled metals are reclaimed end-user or post-consumer products, or scrap processed metals created during product manufacturing. Recycled metal includes excess, obsolete, defective, and scrap metal materials which contain refined or processed metals that are appropriate to recycle in the production of tin, tantalum, tungsten and/or gold. Minerals partially processed, unprocessed or a bi-product from another ore are not recycled metals.").

[703] *See, e.g.*, letters from Global Witness I, MSG I, and SIF I.

[704] *See* letter from Global Witness I.

[705] *See, e.g.*, letters from Global Witness I, MSG I, and SIF I.

[706] *See* letters from Copper & Brass and SSINA.

that their conflict minerals were from recycled or scrap sources without requiring adherence to any due diligence framework. Presently, it appears that the OECD's supplement for gold is the only nationally or internationally recognized due diligence framework for any conflict mineral from recycled or scrap sources. Therefore, we anticipate that issuers would use the gold supplement to conduct their due diligence for gold that issuer has reason to believe may not come from recycled or scrap sources.

However, neither the OECD nor any other body has a similar due diligence framework for cassiterite, columbite-tantalite, or wolframite. Therefore, until such a framework is developed, the required due diligence for issuers who may have those recycled or scrap conflict minerals is the same as proposed. Those issuers are required to exercise due diligence in determining that their conflict minerals were from recycled or scrap sources without the benefit of a due diligence framework. If, however, a nationally or internationally recognized due diligence framework becomes available for any of the remaining conflict minerals, issuers will be required to utilize that framework for that mineral. Specifically, if due diligence guidance for a particular conflict mineral under a nationally or internationally recognized due diligence framework becomes available prior to June 30 of a calendar year, the first reporting period in which issuers must use the framework for that conflict mineral will be the subsequent calendar year. However, if the due diligence guidance is not approved until after June 30 of a calendar year, issuers are not required to use that framework for that conflict mineral until the second calendar year after approval to provide a full year before implementation.

For example, if the OECD or another body adopts a nationally or internationally recognized due diligence framework for cassiterite, columbite-tantalite, or wolframite from recycled or scrap sources prior to June 30, 2013, the initial reporting period in which issuers with those conflict minerals from recycled or scrap sources must use the due diligence framework will begin on January 1, 2014 and their specialized disclosure reports that discuss their exercise of such due diligence will be due on May 31, 2015. If, however, the OECD or another body adopts such a due diligence framework on or after July 1, 2013, but before June 30, 2014, the initial reporting period for issuers with those conflict minerals to use the framework will begin on January 1, 2015 and their specialized disclosure reports with respect to those minerals will be due on May 31, 2016. Issuers with gold from recycled or scrap sources, however, are required to submit a specialized disclosure report for that mineral using the OECD's due diligence for recycled or scrap gold for the reporting period beginning January 1, 2013, which will be due on May 31, 2014.

Further, consistent with the proposal, because our final rule considers products with conflict minerals from recycled or scrap sources to be "DRC conflict free," the final rule does not require a discussion of processing facilities, countries of origin, or efforts to determine the mine or location of origin with the greatest possible specificity. Therefore, we believe that our approach is consistent with comments that indicated that the final rule should not require an issuer with conflict minerals from recycled or scrap sources to provide a Conflict Minerals Report, but should require such issuers to "disclose how they have determined that sources are genuine scrap recycled." [707] Without this disclosure, such issuers "might otherwise be encouraged to 'launder' new DRC conflict minerals through their operations—misleading consumers and other stakeholders, and undermining the value of the disclosure exercise." [708]

F. Other Matters

If any provision of this rule, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application. Moreover, if any portion of Form SD not related to conflict minerals disclosure is held to be invalid, such invalidity shall not affect the use of the form for purposes of disclosure pursuant to Exchange Act Section 13(p).

III. Economic Analysis

A. Introduction

As discussed in greater detail above,[709] Section 1502 amended the Exchange Act by adding new Section 13(p), which requires us to promulgate disclosure and reporting regulations regarding the use of conflict minerals from the Covered Countries. Section 13(p) mandates that the Commission promulgate regulations requiring that a person described disclose annually whether any conflict minerals that are necessary to the functionality or production of a product manufactured by such person originated in the Covered Countries, and make that disclosure publicly available on the issuer's Internet Web site. If a person concludes that the person's conflict minerals originated in the Covered Countries, that person must submit a Conflict Minerals Report, which must be posted on the person's Internet Web site, that includes a description of the measures taken by the person to exercise due diligence on the minerals' source and chain of custody, which must include an independent private sector audit of the Conflict Minerals Report that is conducted according to standards established by the GAO. The person submitting the Conflict Minerals Report must also identify the independent private sector auditor and certify the independent private sector audit. Further, the report must include a description of the products manufactured or contracted to be manufactured that are not DRC conflict free, the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

We are adopting amendments to our rules to implement the Conflict Minerals Statutory Provision. The final rule requires any reporting issuer for which conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by that issuer to disclose annually in a separate specialized disclosure report on a new form the results of its reasonable inquiry into whether its conflict minerals originated in the Covered Countries or came from recycled or scrap sources. Under the final rule, following its reasonable country of origin inquiry, if (a) The issuer knows that its conflict minerals did not originate in the Covered Countries or knows that they came from recycled or scrap sources, or (b) the issuer has no reason to believe its conflict minerals may have originated in the Covered Countries, or (c) the issuer reasonably believes its conflict minerals came from recycled or scrap sources, then in all such cases the issuer must, in the body of Form SD, disclose its determination and describe briefly the reasonable country of origin

[707] *See* letter from NEI.

[708] *See id.* (recommending also that "[i]ssuers should use due diligence in determining whether conflict minerals are from scrap/recycled sources").

[709] We are incorporating Sections I and II of this release, which fully describe the statutory requirements of Section 1502 of the Act and the final rule in detail, into Section III of the release and providing only a short summary of the statutory requirements and final rule in this section.

inquiry it undertook and the results of the inquiry. On the other hand, following its reasonable country of origin inquiry, if (a) the issuer knows that its conflict minerals originated in the Covered Countries and knows that they did not come from recycled or scrap sources, or the issuer has reason to believe that its conflict minerals may have originated in the Covered Countries, *and* (b) the issuer knows that its conflict minerals did not come from recycled or scrap sources or has reason to believe that its conflict minerals may not have come from recycled or scrap sources, then the issuer must exercise due diligence on the source and chain of custody of its conflict minerals that conforms to a nationally or internationally recognized due diligence framework, if one is available. Following that due diligence, unless the issuer determines, based on that due diligence, that its conflict minerals did not originate in the Covered Countries or that its conflict minerals did come from recycled or scrap sources, the issuer must file a Conflict Minerals Report.

In most circumstances, the issuer must obtain an independent private sector audit of its Conflict Minerals Report. The issuer must also describe in its Conflict Minerals Report, among other information, its products manufactured or contracted to be manufactured that have not been found to be "DRC conflict free." For a temporary two-year period for all issuers, and for a temporary four-year period for smaller reporting issuers, an issuer that must perform due diligence and is unable to determine that the conflict minerals in its products originated in the Covered Countries or came from recycled or scrap sources, or unable to determine that the conflict minerals in those products that originated in the Covered Countries financed or benefited armed groups, may consider those products "DRC conflict undeterminable." In that case, the issuer must describe, among other information, its products manufactured or contracted to be manufactured that are "DRC conflict undeterminable" and the steps it has taken or will take, if any, since the end of the period covered in its most recent prior Conflict Minerals Report to mitigate the risk that its necessary conflict minerals benefit armed groups, including any steps to improve its due diligence. An issuer with products that are "DRC conflict undeterminable" is not required to obtain an independent private sector audit of the Conflict Minerals Report regarding the conflict minerals in those products.

Finally, after its reasonable country of origin inquiry, an issuer that determines that its conflict minerals it thought were from recycled or scrap sources might instead be from newly mined sources must exercise due diligence that conforms to a nationally or internationally recognized due diligence framework developed specifically for conflict minerals from recycled sources to determine that its conflict minerals are from recycled or scrap sources. The issuer must also describe its due diligence in its Conflict Minerals Report. Currently, gold is the only conflict mineral with a nationally or internationally recognized due diligence framework for recycled or scrap conflict minerals. If no nationally or internationally recognized due diligence framework for a particular recycled or scrap conflict mineral is available, which is the case for the other three minerals, until such a framework is developed, the issuer must exercise due diligence in determining that its conflict minerals are from recycled or scrap sources and describe the due diligence measures it exercised in its Conflict Minerals Report.

As we considered how to implement the requirements of Section 1502, we considered the costs and benefits imposed by the new rule and form we are adopting, as well as their effects on efficiency, competition, and capital formation. Many of the economic effects of the rule stem from the statutory mandate, and the discussion below addresses the costs and benefits resulting from both the statute and from our exercise of discretion, and the comments we received about these matters.

The Proposing Release cited some pre-proposal letters we received from commentators indicating the potential impact of the proposed rules on competition and capital formation. In addition to requesting comment throughout the release on the proposal and on potential alternatives to the proposal, we also solicited comment in the Proposing Release on whether the proposal, if adopted, would promote efficiency, competition, or capital formation, or have an impact or burden on competition. We also requested comment on the potential effect on efficiency, competition, or capital formation should we not adopt certain exceptions or accommodations. As discussed throughout this release, we received many comments addressing the potential economic and competitive impact of the proposed rules.

We note, however, that one commentator recommended that the proposed rules be withdrawn because the commentator did not believe we fully analyzed the potential costs, supply chain complexities, and other practical obstacles to implementing the final rule.[710] We disagree. As discussed above, members of the public interested in making their views known were invited to submit comment letters in advance of the official comment period for the proposed rules. In addition, in response to the suggestion by some commentators that we extend the comment period to allow the public additional time to thoroughly consider the matters addressed in the Proposing Release and to submit comprehensive responses, we extended the comment period for an additional 30 days and have continued to receive comment letters through August 2012, which we have considered. In addition, we convened an October 2011 roundtable at the request of commentators. Some commentators have provided responses to other commentators, particularly on the Economic Analysis. This robust, public, and interactive debate has allowed us to more fully consider how to develop our final rules. Additionally, as discussed further in the Economic Analysis section, below, we have considered and analyzed the numerous comments received regarding the costs and complexities of the statute and proposed rule, and have taken them into account in the final rule. Overall, we believe interested parties have had sufficient opportunity to review the proposed rules, as well as the comment letters, and to provide views on the proposals and on the other comment letters and data to inform our consideration of the final rules. Accordingly, we do not believe that withdrawal of the proposed rule and re-proposal is necessary.

After analyzing the comments and taking into account additional data and information, we believe it is likely that the initial cost of compliance is approximately $3 billion to $4 billion, while the annual cost of ongoing compliance will be between $207 million and $609 million. As discussed in detail below, we reach this estimate by taking into account the many comments we received on potential costs, relying particularly on those comment letters that provided quantification and were transparent about their methodologies. As will be discussed in more detail below, after thoroughly considering each comment letter, we determined that it was

[710] *See* letter from Chamber I.

appropriate to modify and/or expand upon some of the submitted estimates and methodologies to reflect data and information submitted by other commentators, as well as our own judgment and experience. Our considered estimate of the total costs thus reflects these synthesized data and analyses. We consider the full range of these costs in the following sections, although where it is possible to discuss separately the costs and benefits related to our discretionary choices in the rule, we attempt to do so.[711]

Exchange Act Section 23(a)(2)[712] also requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition, and Exchange Act Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, Exchange Act Section 3(f)[713] requires us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider whether the action will promote efficiency, competition, and capital formation. Accordingly, as we considered how to implement the requirements of Section 1502, we considered the impact on the economy, burden on competition, and promotion of efficiency, competition, and capital formation.

Given the specific language of the statute and our understanding of Congress's objectives, we believe it is appropriate for the final rule generally to track the statutory provision. Our discretionary authority to implement Section 13(p) is limited, and we are committed to executing the Congressional mandate. Throughout this release, and in the following Economic Analysis, we discuss the benefits and costs arising from the new mandatory reporting requirement, those choices in which we have exercised our discretion, and the comments we received about these matters. Sections III.B and III.C below provide a narrative discussion of the costs and benefits resulting from the mandatory reporting requirement and our exercise of discretion, respectively. In Section III.D below, based on commentators' estimates and our estimates, we provide a quantitative discussion of the costs associated with the final rule as adopted.[714]

B. Benefits and Costs Resulting From the Mandatory Reporting Requirement

1. Benefits

Congress intended for the rule issued pursuant to Section 1502 to decrease the conflict and violence in the DRC, particularly sexual- and gender-based violence.[715] We note also that the Congressional object is to promote peace and security in the Covered Countries.[716] As a means to address the humanitarian situation in the DRC, new Section 13(p) requires issuers to understand and report on their use and source of certain minerals from the Covered Countries. By mandating the additional disclosure requirements of Exchange Act Section 13(p), we understand that Congress likely sought to reduce the amount of money provided to armed groups engaged in conflict in the DRC,[717] thereby achieving the stated objective of the statute.[718] Some commentators have argued that the Conflict Minerals Statutory Provision has already made progress in this area.[719] For example, some commentators have argued that the Conflict Minerals Statutory Provision has already pressured DRC authorities to begin to demilitarize some mining areas and to increase mining oversight.[720] Congress provided that the disclosure requirements of Exchange Act Section 13(p) shall remain in effect until the President determines and certifies that "no armed groups continue to be directly involved in and benefitting from commercial activity involving conflict minerals."[721]

The statute therefore aims to achieve compelling social benefits, which we are unable to readily quantify with any precision, both because we do not have the data to quantify the benefits and because we are not able to assess how effective Section 1502 will be in achieving those benefits. Additionally, the social benefits are quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve.

We also note that these objectives of Section 1502 do not appear to be those that will necessarily generate measurable, direct economic benefits to investors or issuers. Some commentators urged, however, that conflict minerals information is material

[711] As discussed above, our discretionary choices are informed by the statutory mandate and thus, discussion of the benefits and costs of those choices will necessarily involve the benefits and costs of the underlying statute.

[712] 15 U.S.C. 78w(a)(2).

[713] 15 U.S.C. 78c(f).

[714] As noted below, Congress's goals of reducing violence and promoting peace and security in the Covered Countries, as well as enhanced transparency through Section 13(p) and this rulemaking is intended to result in benefits that cannot be readily quantified with any precision, and therefore, our quantitative analysis focuses on the costs.

[715] Section 1502(a) of the Act ("It is the sense of the Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b).").

[716] *See* Exchange Act Section 1502(c)(1)(B)(i) (stating that the Secretary of State, in consultation with the Administrator of the United States Agency for International Development, shall submit to Congress a plan to "promote peace and security" in the Covered Countries). *See* also Section 1502(d)(2)(A) of the Act (directing the GAO to assess the effectiveness of Exchange Act Section 13(p) in promoting peace and security in the Covered Countries).

[717] *Cf.* Exchange Act Section 1502(c)(1) requiring the Secretary of State in consultation with the Administrator of the United States Agency for International Development to submit a report to Congress discussing a strategy to address the linkages between human rights abuses, armed groups, mining of conflict minerals, and commercial products that includes a plan to promote peace, a plan to provide guidance to commercial entities seeking to exercise due diligence, and a description of possible punitive measures.

[718] As discussed above, some commentators, including co-sponsors of the legislation and other members of Congress, indicated that the Conflict Minerals Statutory Provision also materially informs an investor's understanding of the risks in an issuer's reputation and supply chain. *See, e.g.*, letters from CRS I, FRS, Global Witness I, Methodist Pension, Sen. Durbin/Rep. McDermott, Sen. Leahy *et al.*, SIF I, and SIF II.

[719] *See, e.g.*, letters from International Corporate Accountability Roundtable (Jul. 29, 2011) ("ICAR I"), Sen. Boxer *et al.* I, Sen. Leahy *et al.*, and United Nations Group of Experts on the Democratic Republic of Congo (Oct. 21, 2011) ("UN Group of Experts"). Other commentators, however, have argued that the Conflict Minerals Statutory Provision has hurt the general economy and population of the DRC. *See, e.g.*, letters from BEST II ("Though [the Conflict Minerals Statutory Provision] seeks to provide a mechanism for combating the corruption and violence crippling the DRC, its impact on the upstream mining industry has been devastating to the mining communities and the broader economy of Eastern DRC."), CEI II ("There are already indications that Dodd-Frank has had damaging consequences for the artisanal miners. In a recently published New York Times op-ed, freelance reporter David Aronson observed that the law is harming the very people it is aimed at protecting, and that the sole beneficiaries are those perpetrating the violence."), and FEC II (stating that, "we can confirm today that as expected there is more smuggling activities, very big decrease in revenue of the Goyernment of DRC, huge impact on the live hoods of thousands of Congolese, there is no more formal business in the Kivus due to this interpretation of consumers which is far more than the requirements of the law and does not give chance for the improvements that had already begun to work").

[720] *See, e.g.*, Sen. Boxer *et al.* I, Sen. Leahy *et al.*, and United Nations Group of Experts on the Democratic Republic of Congo (Oct. 21, 2011) ("UN Group of Experts"). Other commentators, however, have argued that the Conflict Minerals Statutory Provision has hurt the general economy and population of the DRC. *See, e.g.*, letters from BEST II, CEI II, and FEC II.

[721] Exchange Act Section 13(p)(4).

to an investment decision and, therefore, similar to other disclosures required to be filed by issuers.[722] For example, one commentator noted that, "[a]s a sustainable and responsible investor," this commentator "values companies' prudent management of risk in their global supply chains and has been particularly concerned in recent years by the use of certain minerals to fund the continuing bloody conflict in the" DRC.[723] As another example, a different commentator stated that, "[a]s sustainable and responsible investors, we carefully assess the prudent management of risk in companies' global supply chains and we have been particularly concerned in recent years by the use of certain minerals, namely tin, tantalum, tungsten and gold, to fund the continuing bloody conflict in the" DRC.[724]

2. Cost Estimates in the Comment Letters

In the Proposing Release, we included our estimates of the costs of the disclosure requirements.[725] A number of commentators indicated that we underestimated the costs.[726] One commentator, however, asserted that Economic Analysis was both "thorough and accurate."[727] In this regard, another commentator stated that the cost estimates in comment letters from industry "seem[ed] significantly inflated."[728] Some commentators discussed the costs in a more specific manner. In the Specific Comments section below, we discuss the comments we consider to be the most useful regarding the costs of the disclosure requirements. In both the general and specific comments, commentators did not typically distinguish between the costs and benefits of the statutory mandate and the costs and benefits of the specific aspects of the rule for which we exercised discretion. The overall specific cost range provided by commentators, as discussed in greater detail below, was between $387,650,000[729] and $16 billion.[730] In analyzing the comments, we believe it is more likely that the initial cost of complying with the statutory requirement is approximately $3 billion to $4 billion. We explain why as we consider and describe the full range of these costs below, although where it is possible to discuss separately the costs and benefits related to our discretionary choices in the rule, we attempt to do so.

a. General Comments

Most commentators stated that they fully support the humanitarian goals of the Conflict Minerals Statutory Provision of reducing the levels of violence in the DRC,[731] but some commentators argued that the Proposing Release did not adequately demonstrate any benefits to investors.[732] As noted above, the purpose of Section 1502 is furthering the humanitarian goals of reducing violence and advancing peace and security in the DRC and the benefits Congress intended are derived directly from the statute. Other commentators, including two of the co-sponsors of the provision and other members of Congress, have indicated in comment letters that the provision also serves important investor protection objectives, such as additional disclosure on a company's supply chain,[733] although the legislative history and statutory language do not generally reference investor protection. Therefore, we have designed a final rule to help achieve the intended humanitarian benefits in the way that Congress directed, even though we recognize that the final rule will impose significant compliance costs on companies who use or supply conflict minerals. Although, as one commentator noted, it would be difficult to determine a realistic cost approximation,[734] most of these commentators believed that compliance costs would be high.

b. Specific Comments

Four commentators in particular attempted to catalogue the expense of complying with the new reporting requirements. The commentators generally focused on three categories of costs as the most significant: Due diligence for both suppliers and issuers, information technology ("IT") costs, and audit costs. Although there is a general consensus among these four commentators as to the broadest categories of significant costs, in several cases they provided divergent cost estimates as well as supplying differing levels of detail as to how they developed these estimates. The following section is intended to lay out the cost estimates as submitted by the commentators.

i. Manufacturing Industry Association Comments

In its comment letter, a manufacturing industry association[735] stated that, based on its research, of the 5,994 issuers that the Proposing Release stated could be affected by the final rule, the average issuer would have between 2,000 and 10,000 first-tier suppliers, which would result in the total initial costs to issuers of complying with the final rule being anywhere from approximately $8 billion to $16 billion.[736]

The industry association noted that "a large portion of America's 278 thousand small and medium-sized manufacturers could be affected by the requirement to provide information on the origin of the minerals in the parts and components they supply to companies subject to the SEC." It estimated, however, that "only one in five smaller companies would be in one or more issuer's supply

[722] *See* letters from Calvert, Global Witness I, Sen. Durbin/Rep. McDermott Sen. Leahy *et al.*, SIF I, SIF II, and TIAA–CREFF. *But see* letters from AngloGold, Barrick Gold, Cleary Gottlieb, Corporate Secretaries I, Deloitte, Ford, ITIC I, JVC *et al.* II, NAM III, NMA II, NY State Bar, Taiwan Semi, and WGC II.

[723] *See* letter from Calvert.

[724] *See* letter from SIF II.

[725] In the Proposing Release, we estimated solely for the purposes of the Paperwork Reduction Act the total annual increase in the paperwork burden for all affected companies to comply with our proposed collection of information requirements to be approximately 153,864 hours of company personnel time and to be approximately $71,243,000 for the services of outside professionals. Also, we estimated that the PRA burden for the audit and due diligence requirements to the industry would be approximately $46,475,000. These cost estimates were calculated based on the effect that the proposed rules and form amendments, if adopted, would have on those collections of information as a result of the required due diligence process and independent private sector audit of the Conflict Minerals Report.

[726] *See, e.g.*, letters from Barrick Gold, CEI II, Chamber I, Ford, Howland, IPC I, ITRI I, ITRI II, NAM I, NRF I, PCP, Rep. Lee, RILA, TriQuint I, Tulane University Payson Center for International Development (Oct. 25, 2011) ("Tulane"), and WGC II.

[727] *See* letter from ICAR *et al.* I.

[728] *See* letter from Enough Project IV.

[729] *See* letter from Claigan III.

[730] *See* letter from NAM I.

[731] *See, e.g.*, letters from ABA, Chamber I, Industry Group Coalition I, NAM I, and WGC II.

[732] *See, e.g.*, letters from Chamber I and PCP. These commentators stated also that the Proposing Release did not demonstrate adequately the proposed rules' efficiencies for the market place or any promotion of capital formation, as discussed below.

[733] *See, e.g.*, letter from Senator Leahy *et al.* ("[I]t seems abundantly clear that when a publicly traded company relies on an unstable black market for inputs essential to manufacturing its products it is of deep material interest to investors.").

[734] *See* letter from Howland.

[735] *See* letter from NAM I. The manufacturing industry association indicated that, in developing its cost estimates, it consulted with its manufacturing members and relied on research by The Global Research Center for Strategic Supply Management at the W.P. Carey School of Business at Arizona State University.

[736] *But see* letter from the Fafo Institute for Applied International Studies (Oct. 17, 2011) ("Fafo"). This commentator asserted that the manufacturing industry association's cost estimate was too high because of some incorrect assumptions regarding an issuer's costs of changing legal obligations, obtaining an independent private sector audit, monitoring of the supply chain, administering procurement and contracts, implementing remediation recommendations, conducting internal audits of its due diligence system, and reporting to the Commission.

chains,"[737] and these smaller companies' only costs regarding the proposed rules would be a $25,000 audit cost. Therefore, the proposed rules would cost smaller companies, which are not required to report with us under Exchange Act Sections 13(a) or 15(d), approximately $1.4 billion.[738]

Further, the commentator remarked that our $25,000 estimate[739] of the cost of the independent private sector audit "would only cover the initiation of an audit for a small company with a simple supply chain," and argued that, at a minimum, an independent private sector audit of a company with a more complex supply chain would cost at least $100,000.[740] Additionally, the manufacturing industry association "conservatively estimate[d]" that approximately 75% of the issuers that would be required to provide conflict minerals information also would be required to provide a Conflict Minerals Report and an audit rather than the 20% that we estimated in the Proposing Release, which would equate to approximately 4,500 issuers out of the 5,994 issuers we estimated would be affect by the final rule.[741] Taking into consideration the higher estimated number of affected issuers, the industry association estimated that the total cost to all affected issuers to obtain an independent private sector audit of their Conflict Minerals Report would be $450 million.

In addition, the commentator estimated that, to implement their new due diligence policies, it would cost $1.2 billion for the 5,994 affected issuers to change their legal obligations with each issuer's estimated 2,000 first-tier suppliers, and an additional $300 million for issuers to implement risk-based programs that use control processes to verify that suppliers are providing them with credible information and pushing legal obligations upstream. Also, the commentator estimated that affected issuers would need to expend a collective total of $6 billion to develop new information technology systems to collect information on each issuer's first-tier suppliers.[742] Therefore, the sum of the costs to affected issuers would total approximately $8 billion. Below is a summary of the manufacturing industry association's cost estimates in tabular form:

		Calculation
Manufacturing Industry Association Commentator Estimate		
Issuers affected	5,994	
Average Number of 1st tier suppliers	2,000	
Issuer Due Diligence Reform[743]		
Number of compliance hours per issuer	2	
Cost per hour	$50	
Total compliance cost	*$1,198,800,000*	5,994*2000*2*$50
IT Systems Modification[744]		
Cost per issuer	$1,000,000	
Total cost	*$5,994,000,000*	5,994*$1,000,000
Conflict Minerals Report Audits		
Issuers affected[745]	4,500	5,994*75%
Audit cost	$100,000	
Total cost	*$450,000,000*	4,500*100,000
Issuer Verification of Supplier Information		
Number of hours	0.5	
Cost per hour	$50	
Total cost	*$299,700,000*	5,994*2000*0.5*$50
Smaller Supplier Due Diligence[746]		
Suppliers affected (only 20% to conduct)[747]	55,600	278,000 * .2
Due diligence cost	$25,000	
Total cost	*$1,390,000,000*	278,000*.2*$25,000
Total	$9,332,500,000	
Total for affected issuers	$7,942,500,000	$9,332,500,000 − *$1,390,000,000*

[737] 278,000 × .20 = 55,600.

[738] 278,000 × .20 × $25,000 = $1,390,000,000.

[739] As discussed in the Proposing Release, we indicated that each independent private sector audit of the Conflict Minerals Report would cost approximately $25,000 on average based on the preliminarily estimates of one industry group.

[740] *See* letter from NAM I.

[741] *See id.* The manufacturing industry association commentator estimated that 75% of affected issuers would be required to submit a Conflict Minerals Report because, according to the commentator, the majority of issuers would not be able to determine the origin of their conflict minerals.

[742] See letter from NAM I.

[743] The manufacturing industry association commentator refers to this as "changes to corporate compliance policies."

[744] The manufacturing industry association commentator refers to this as IT system development or revision.

[745] We are using the rounded estimate (4,500) that was used by the university group and manufacturing industry association commentators in their calculations even though a more exact number of issuers would be 4,496 (.75 × 5,994 = 4,495.5). *See infra* note 869.

[746] The manufacturing industry association commentator refers to this as the cost of "provid[ing] proper information regarding the source of minerals."

[747] Supplier compliance cost in the manufacturing industry association commentator's proposal is considered an audit cost and is not limited to smaller suppliers that are issuers.

Additionally, this commentator calculated that the costs of the final rule could be "as high as $16 billion" by "extrapolating from the recent experience of company costs in complying with the European Union's hazardous waste directive ("RoHS"), and estimated on that basis the economic impact of the SEC's proposed regulations."[748] In fact, this commentator postulated that "Section 1502 may be broader in scope because" it "covers more products and sectors than RoHS," it "discriminates against origin," and it "does not include a *de minimis* or weight-based exception."[749] The commentator stated that, according to Technology Forecasters, Inc., the RoHS directive cost the electronics industry $2,640,000 per company to achieve initial RoHS compliance and another $482,000 annually to maintain compliance. Therefore, based on these per company figures, the commentator calculated that initial compliance of all 5,994 issuers would be approximately $16 billion.

ii. Electronic Interconnect Industry Association Comments

Another commentator, an electronic interconnect industry association,[750] estimated that the electronic interconnection industry suppliers would incur compliance costs of approximately $279 million in the first year and approximately $165 million in ongoing annual costs.[751] Additionally, this commentator stated that there could be additional hidden costs for companies that varied widely from no additional costs to more than $2 million in such costs.[752] This commentator did not provide an estimate of the costs to all potentially affected issuers, but focused on the electronic interconnect industry.

The electronic interconnect industry association also argued that more than 20% of the 5,994 affected issuers would have to provide an independent private sector audit.[753] The commentator noted that, although the Covered Countries may, at most, supply 20% of the world's supply of conflict minerals, this 20% could be distributed to 100% of the issuers. Therefore, all issuers could be required to file a Conflict Minerals Report and obtain an independent private sector audit, and the electronic interconnect industry group "expected that nearly 100% of affected issuers will need to complete a [Conflict Minerals Report], especially in the initial years of the regulation."[754] In this regard, the commentator noted that respondents to its survey stated that "[s]upplier verification and auditing was a frequently cited anticipated cost," and the respondents "estimated direct costs of [$]10,000 to [$]100,000 for the third party due diligence audits."[755] The commentator also indicated that the average number of suppliers in the supply chain for those companies responding to their survey was 163.

iii. University Group Comments

Another commentator, a university group, provided its own cost figures regarding the proposed rules in its comment letter.[756] The university group contended that our model underestimated the costs of the proposed rules due to, among other reasons, our failure to consider the costs incurred by all actors, especially first-tier private company suppliers, that are required to modify their management systems to provide critical information to its customers that are the issuers. In contrast, the university group found that the manufacturing industry group's economic model overstated the costs by overestimating the number of suppliers and failing to account for cost efficiencies.

The university group contended that all affected companies, both issuers and private companies, would need to carry out three principal actions to implement Section 1502. These actions consisted of strengthening internal management systems in view of performing due diligence, instituting necessary information technology systems, and obtaining independent private sector audits. The university group's model indicated that the largest driving cost factor was strengthening companies' management systems, which would total approximately $5.17 billion for both issuers and private companies, with issuers' costs being approximately $26 million and private companies' costs being approximately $5.14 billion. The other costs would be borne only by issuers. These other costs included instituting the necessary information technology systems, which would cost approximately $2.56 billion, and obtaining an independent private sector audit, which would cost companies approximately $207 million. Ultimately, according to the university group, the proposed rules would cost all affected companies, both issuers and private companies involved in the conflict minerals supply chain, approximately $7.93 billion initially and approximately $207 million annually thereafter.

As noted, the university group commentator estimated the due diligence costs to both issuers and their private company suppliers. The total initial labor costs, including both laborers and consultants, to all 5,994 issuers would be approximately $26 million. For the costs to private company suppliers, the university group estimated the total number of small private company suppliers to be 148,459, and the number of large private company suppliers to be 711,607.[757] The total initial labor costs, including both laborers and consultants, to all 860,066 private company suppliers would be approximately $5.14 billion. In sum, the total initial labor costs for due diligence to both the 5,994 issuers and the 860,066 private company suppliers would be approximately $5.17 billion.

Also, the university group disagreed with the manufacturing industry group's estimate that the costs for modifying

[748] *See* letter from NAM I. This commentator estimated that each issuer affected by RoHS had an initial compliance cost of $2,640,000. For the 5,994 issuers that we estimate may be affected by the final rule, the estimated total cost to comply with RoHS would be $15,824,160,000 ($2,640,000 × 5,994 = $15,824,160,000).

[749] *See id.*

[750] *See* letter from IPC I.

[751] *See id.* The letter includes an Appendix A, which consists of a published survey produced by Market Research Service of the electronic interconnect industry association commentator entitled, "Results of an IPC Survey on the Impact of U.S. Conflict Minerals Reporting Requirements" (Feb. 2011) ("electronic interconnect industry group survey"). Much of the information cited from this commentator is located in the published survey. For the survey, the commentator surveyed 3,839 of its members in the electronic interconnection industry with a total of 60 separate companies actually participating in the survey. Of these 60 companies, 30% were public issuers while the remaining 70% were private companies. Despite acknowledging that the survey was not intended "to produce statistical significant data," the commentator argued that the survey respondents do "make up a representative sample of the U.S. electronic interconnect supply chain." *See id.*

[752] *See id.*

[753] *Id.*

[754] *See id.* This commentator noted as well that "the vast majority of users will be unable to identify the origin of their conflict minerals * * * and therefore will need to complete" a Conflict Minerals Report.

[755] *See id.*

[756] *See* letter from Tulane. The staff of Senator Richard J. Durbin, one of the co-sponsors of the Conflict Minerals Statutory Provision, contacted this commentator "with a specific request for help in providing a detailed estimate of what it would cost companies to implement the Congo Conflict Mineral Act." *Id.*

[757] The university group commentator developed these estimates by multiplying the number of issuers by the company size factor (large or small) and multiplying the number of relevant first tier supplier contracts by an overlap factor of 0.40. This factor attempts to differentiate and correct for the number of estimated material supply contracts versus the number of unique businesses impacted. Tulane estimated a 60% overlap factor meaning that only 40% (100% – 60% = 40%) of the supply contracts corresponded to non-overlapping suppliers. *See* letter from Tulane.

each issuer's information technology systems would be $1 million. The university group agreed that these costs would be borne solely by issuers because they would be responsible for creating tracking systems for the supplier-furnished supply chain information, and that large issuers that use complex information technology systems to manage their supply chains would have costs of $1 million per company. However, the university group argued that the unit costs for small companies, based on the data from the 2011 electronic interconnect industry association commentator survey, would be $205,000 per company. The university group estimated that the information technology costs for the affected small issuers would be approximately $885 million, and the cost for the affected large issuers would be approximately $1.68 billion. Therefore, the total costs to the 5,994 affected issuers of changing information technology systems would be approximately $2.56 billion.

Finally, the university group discussed the costs associated with the independent private sector audit. The university group disagreed with the manufacturing industry group's assertion that private company suppliers would be required to obtain a private sector audit to demonstrate to their issuer customers that they performed sufficient due diligence. The university group noted that there is no requirement that private company suppliers obtain such an audit, so the burden and cost for a private company supplier to obtain an audit is voluntary in the context of the proposed rules. Further, the university group noted that the impetus for issuers to demand such audits would be reduced if issuers are allowed to use "reasonably reliable representations" from suppliers. For these reasons, the university group excluded any costs for independent private sector audits for private company suppliers from their cost estimates. The university group, however, agreed with the manufacturing industry group's cost estimates and indicated that the cost for an audit of a small issuer would be $25,000 and the cost to a large issuer would be $100,000. Based on these assumptions, the university group estimated that the audit costs for small issuers would be $81 million,[758] and those costs for large issuers would be approximately $126. million.[759] Therefore, the total audit cost for all issuers would be approximately $207 million per year.[760] Below is a summary of the university group commentator's estimates in tabular form:

		Calculation
University Group Commentator Estimate:		
Issuers affected	5,994	
Large issuer (28% of issuers)	1,678	5,994*0.28
Small issuer (72% of issuers)	4,316	5,994*0.72
Average number of 1st tier suppliers (53% of manufacturing industry association commentator)	1,060	2,000*0.53
Issuer Due Diligence Reform:		
Number of compliance hours for large issuer	100	
Number of compliance hours for small issuer	40	
Internal cost per hour	$50	
Internal costs for large issuer (90% of total work load)	*$7,551,000*	1,678*0.9*100*$50
Internal costs for small issuer (75% of total work load)	*$6,473,520*	4,316*0.75*40*$50
Consulting cost per hour	$200	
Consulting costs for large issuer (10% of total work load)	*$3,356,000*	1,678*0.1*100*$200
Consulting costs for small issuer (25% of total work load)	*$8,632,000*	4,316*0.25*40*$200
Total cost	*$26,013,000*	
IT Systems Modification:		
Cost per large issuer	$1,000,000	
Cost per small issuer	$205,000	
Total large issuer cost	*$1,678,000,000*	1,678*$1,000,000
Total small issuer cost	*$884,780,000*	4,316*$205,000
Total costs	*$2,562,780,000*	
Conflict Minerals Report Audits:		
Issuers affected[761]	4,500	
Number of large issuers	1,260	4,500*0.72
Number of small issuers	3,240	4,500*0.28
Large issuer cost	$100,000	
Small issuer cost	$25,000	
Total costs for large issuers	*$126,000,000*	1,260*$100,000
Total costs for small issuers	*$81,000,000*	3,240*$25,000
Total costs	*$207,000,000*	
Supplier Due Diligence Reform:		
Average number of 1st tier supply contracts per large issuer	1,060	
Average number of 1st tier supply contracts per small issuer	86	
Overlap factor (percent of suppliers affected)	0.4	
Total large suppliers	711,472	1,678*1,060*0.4
Total small suppliers	148,470	4,316*86*0.4
Number of compliance hours for large supplier	100	

[758] 5,994 issuers × 75% of issuers requiring an audit × 72% for number of small issuers × $25,000 per audit = $80,919,000.

[759] 5,994 issuers × 75% of issuers requiring an audit × 28% for number of large issuers × $100,000 per audit = $125,874,000.

[760] $80,919,000 + $125,874,000 = $206,793,000.

		Calculation
Number of compliance hours for small supplier	40	
Internal cost per hour	$50	
Internal costs for large supplier (90% of total work load)	*$3,201,624,000*	711,472*100*0.9*$50
Internal costs for small supplier (75% of total work load)	*$222,705,000*	148,470*40*0.75*$50
Consulting cost per hour	$200	
Consulting costs for large supplier (10% of total work load)	*$1,422,944,000*	711,472*100*0.1*$200
Consulting costs for small supplier (25% of total work load)	*$296,940,000*	148,470*40*0.25*$200
Total cost	$5,144,213,000	
Total	$7,940,006,000	

iv. Environmental Consultancy Company Comments

An additionalcommentator, an environmental consultancy company, provided cost figures regarding the proposed rules.[762] The environmental consultancy company asserted that the models provided by the manufacturing industry group and the university group significantly overestimated the costs of the proposed rules, whereas our PRA section underestimated the paperwork costs. Specifically, the commentator stated that the manufacturing industry association group's and the university group's "estimates provide cost projections that do not reflect current industry practice in compliance programs by the vast majority of affected issuers," so it "would be inadvisable to use" their "data as the basis for an accurate cost estimate for implementation of Section 1502."[763]

Also, the environmental consultancy company argued that we underestimated the costs of the proposed rules primarily because we overestimated issuers' knowledge of the origin of materials in their products. According to the commentator, most of the compliance costs for the proposed rules would be derived from identifying where an issuer's materials are sourced. Further, the commentator suggested that our estimate of the percentage of affected issuers was too low, we did not recognize that issuers needed to expend greater internal efforts in communicating requirements throughout their companies, we failed to account for the costs of issuers' software changes, and we did not acknowledge that "many companies" may work to a higher standard than the rules would require due to public sensitivity of this issue.

Conversely, the commentator asserted that the manufacturing industry group's $8 billion and the university group's $7.93 billion cost estimates were too high. The environmental consultancy company argued that the manufacturing industry group's estimate regarding the cost for issuers to modify legal responsibilities should be only $300 million, instead of the manufacturing industry group's estimated $1.2 billion.[764] Similarly, the environmental consultancy company maintained that the university group's $5.17 billion estimate to strengthen internal management systems was too high because of incorrect assumptions, and that the actual cost should be only $600 million.[765]

Further, the environmental consultancy company suggested that the manufacturing industry group's cost estimate regarding issuers' information technology systems should be adjusted from $6 billion to $350 million and that the university group's estimate should be adjusted from $2.56 billion to $360 million.[766] Additionally, the environmental consultancy company asserted that the $100,000 per company audit costs provided by both the manufacturing industry group and the university group were too high because companies' financial statement audits represent only 0.2 to 0.25% of a company's annual revenue, which would mean that a $100,000 cost for a Conflict Minerals Report audit would represent 5% of the total audit costs for a company with a $1 billion per year revenue. Instead, the commentator argued that it would be more accurate to assume that the Conflict Minerals Report audit would represent 1% to 2% of the total audit costs for such a company.[767] Also, the environmental consultancy company contended that only 50% of all reporting issuers would be required to provide a Conflict Minerals Report because the "majority of Energy sector, finance and utilities

[761] We are using the rounded estimate (4,500) that was used by the university group and manufacturing industry association commentators in their calculations even though a more exact number of issuers would be 4,496 (.75 × 5,994 = 4,495.5). *See infra* note 869.

[762] *See* letter from Claigan I. In this letter, the commentator stated that it submitted its letter because it was asked "by Congress and others" to comment on the potential costs of implementing the final rule.

[763] *See* letter from Claigan Environmental Inc. (Jan. 17, 2012) ("Claigan IV"). *But see* letters from IPC—Association Connecting Electronics Industries (Feb. 14, 2012) ("IPC III") and National Association of Manufacturers (Feb. 10, 2012) ("NAM IV") (challenging certain of the assumptions made by the environmental consultancy company in its comment letters).

[764] According to the environmental consultancy company, the manufacturing industry group's assumption that every issuer would have to amend every legal obligation with its suppliers was incorrect because "[a]ll standard contracts with suppliers of public companies contain standard provisions requiring suppliers to comply with relevant laws." Letter from Claigan I. As a result, it would be unlikely that many contracts would need to be modified to enable compliance. Also, the environmental consultancy company asserted that the manufacturing industry group overestimated the cost of modifying legal responsibilities because the manufacturing industry group assumed that every supplier supplies components or products containing conflict minerals to an issuer, which the environmental consultancy company claimed was "very unlikely." Instead, a more reasonable estimate of the numbers of suppliers affected that would require a modification to its legal obligations "would be closer to 50% of suppliers." This commentator asserted that number, however, should be further reduced by an additional 50% due to duplicative and overlapping relationships within and among suppliers.

[765] The environmental consultancy company commentator noted that the university group commentator estimated that there were 860,066 first tier suppliers. However, a 2008 study by the Consumer Electronics Association ("CEA") on RoHS that identified only 90,000 total electronic suppliers. In this regard, the environmental consultancy company noted that, although conflict minerals disclosure is required by more than just electronics industry issuers, "the total number of affected first-tier suppliers being over 100,000 seems unrealistic based on this more substantiated information." Also, the environmental consultancy company noted that, in many cases, first-tier suppliers may not be supplying products or components containing conflict minerals, or these products or components will represent only a small fraction of their business.

[766] The environmental consultancy company commentator noted that the CEA study found that the average cost for information technology systems changes for RoHS was $120,000 per company, and it discovered that the most expensive conflict minerals software was $40,000 by conferring with a provider of conflict minerals compliance software to confirm that their most expensive software for conflict minerals compliance was $40,000 for the first year.

[767] In its second letter, however, the environmental consultancy company commentator acknowledged that it had limited expertise regarding estimates of the cost of third party audits. *See* letter from Claigan Environmental Inc. (Dec. 1, 2011) ("Claigan II").

will not have to create" a Conflict Minerals Report, and "[n]o more than half of the consumer discretionary, consumer staples, and materials sectors is expected" to provide a Conflict Minerals Report.[768]

Finally, the environmental consultancy company developed its own cost model,[769] which was based on current service quotations in the industry and past costs for RoHS compliance based on the 2008 CEA study. In this regard, the commentator provided its estimate of the typical initial costs for affected issuers with revenue of $1 billion per year. Initially, in its first comment letter, the environmental consultancy company concluded that the proposal's compliance cost for a typical affected issuer with $1 billion of revenue would be approximately $315,000 per year.[770]

In a subsequent letter to us, the environmental consultancy company lowered its cost estimate.[771] Instead of the $315,000 per issuer estimate in its initial letter, the environmental consultancy company argued that the cost per issuer for compliance would be closer to $213,000 per issuer because of "more recent information on corporate budgeting and expenditures" that "better reflect current corporate implementation strategies."[772] Further, in another letter, the environmental consultancy company lowered its cost estimate again to approximately $64,673 per issuer.[773]

v. Other Specific Comments

One commentator, an environmental research company, discussed some of the specific cost estimates above and discussed some cost estimates it gathered through interviews with potentially affected issuers.[774] This commentator conducted a study, sponsored by Global Witness, based on interviews with executives at more than 20 global companies that ranged in size from $500 million per year in revenue to over $120 billion in annual revenue, including companies engaged in electronic components, computers, consumer health care, automotive, and retail. Also, the commentator spoke with industry associations, consulting firms, and software providers.

Generally, the commentator found that, based on its interviews, costs for complying with the provision "will vary widely with the size and complexity of companies' supply chains but seem to be manageable for all company sizes."[775] In this regard, the commentator also found that the better informed executives were regarding the Conflict Minerals Statutory Provision and its impacts on their company, the more likely they thought the costs of compliance would be manageable. The commentator stated that the largest companies with annual revenues over $50 billion would have one-time costs ranging from $500,000 to $2 million, but the companies with well-developed responsible sourcing systems may only need to spend half as much. Also, the commentator found that many smaller companies "should be able to meet their obligations for less than the cost of a full-time employee in the first year with costs declining over time."[776]

Regarding the above cost estimates by other commentators, the commentator argued that the manufacturing industry association commentator's cost estimate "significantly overstates the costs most companies will incur, especially those of updating IT systems."[777] Also, the commentator noted that the electronic interconnect industry commentator's cost estimate was overstated because the estimate included electronics manufacturing services companies, and that industry is "dominated by very large companies," which "probably account[ed] for the higher median cost estimates."[778] Further, the commentator noted of the environmental consultancy company commentator's letter that the "relative magnitude of the costs shown by the [environmental consultancy company commentator] estimate are aligned with what [environmental research company commentator] found in [its] interviews: that the effort to gather reliable data from supply chain partners is likely to be more costly initially than any systems changes required."[779]

Another commentator that is attempting to establish a due diligence "bag-and-tag" monitoring system in the Covered Countries asserted that the total costs incurred by local governments and industry as a whole just for the on-the-ground set-up and implementation of this system in the Covered Countries would be $52 million for the first year.[780] This commentator noted that this $52 million estimate is much higher than our $8 to $10 million estimated cost for setting up a mineral source validation scheme in the Proposing Release. Similarly, another commentator provided the February 2011 five-year plan of the organization that administers the bag-and-tag scheme.[781] The commentator noted that, according to the five-year plan, "the cost of cleanly bagged-and-tagged minerals, including taxes, will remain below the world market price."[782] Also, according to the document provided, it appears that the funding requirements for the bag-and-tag scheme, including a 10% contingency, in Eastern DRC and

[768] *See* letter from Claigan I.

[769] *Id.*

[770] The environmental consultancy company commentator noted that the $315,000 per year cost would equate to approximately 0.03% of an issuer's revenue, but argued that, based on certain variations, the cost range could be anywhere between 0.02% and 0.05% of revenue. *Id.* The commentator stated further that the average cost of initial compliance with RoHS for a company with annual revenue of $1 billion was close to 0.8% of revenue. However, the commentator indicated that the data gathering and the software costs for RoHS was approximately 0.08% of the initial RoHS compliance costs, which the commentator argued was "the same order of magnitude" of its 0.03% calculation. This commentator suggested that its "slightly lower" cost projections were due to less expensive conflict minerals software packages, as compared to RoHS, and the large data gathering cost for RoHS, the need to gather data for every part and create new part numbers for compliant parts, are not required for conflict minerals. The commentator noted also that, if the final rule would cause issuers to dispose of their current conflict mineral inventories because the conflict minerals were of indeterminate origin or our rule would not exempt conflict minerals from recycled or scrap sources, the expected costs of compliance would be closer to 0.5% of revenue.1 Finally, the commentator claimed that this initial cost of compliance is expected to increase by a factor of 2.5 for an issuer having ten times the annual revenue ($10 billion) and decrease by a factor of 2.5 for an issuer with 10% of revenue ($100 million). *Id.*

[771] *See* letter from Claigan II.

[772] *Id.*

[773] *See* letter from Claigan III. In this letter, the environmental consultancy group commentator broke down the number of affected issuers by size and cost per issuer based on that size. The commentator determined that the total cost to 6,000 affected issuers would be $387,650,000, which would be $64,608 per issuer. However, because we estimated that there would be 5,994 affected issuers, we divided the $387,650,000 by 5,994 issuer to come up with $64,673 per issuer. *See also* letter from Assent Compliance (Dec. 19, 2011) ("Assent") (discussing the software costs to issuers for implementing Section 1502, which apparently was included as part of the overall cost calculation in the letter from Claigan III). Further, the environmental consultancy company commentator provided an additional comment letter that did not revise its cost estimate, but expanded upon differences between costing estimates it submitted and previous costing estimates submitted by the manufacturing industry association and university group commentators. *See* letter from Claigan IV.

[774] *See* letter from Green II. At the end of the letter, the commentator describes itself as a "research, advisory and consulting firm focusing on clean tech, alternative energy and corporate sustainability."

[775] *See id.*

[776] *See id.*

[777] *See id.*

[778] *See id.*

[779] *See id.*

[780] *See* letter from ITRI II.

[781] Representative Jim McDermott (Oct. 12, 2011) ("Rep. McDermott") (providing the five-year plan authored by iTSCi, the International Tin Research Institute's Tin Supply Chain Initiative, in February 2011).

[782] *Id.*

Rwanda will be approximately $38,971,000 from 2011 through 2015.

Also, this commentator stated that trading companies, transporters, and concentrate treatment facilities that continue to trade with the Covered Countries would incur additional costs in relation to the greatly increased levels of administration and auditing that "may amount to an additional man year," which is "approximately US$100,000 per year" per trading company, transporter, and concentrate treatment facility going forward.[783] The costs to trading companies, transporters, and concentrate treatment facilities that stop treating minerals from the Covered Countries would be less "but still of significance." The commentator estimated that these companies' costs could "perhaps be an additional half a man year," which would be approximately $50,000 per year per company. Further, this commentator indicated that smelters and processing facilities may be requested to perform an independent audit every six months or every year, which would cost these smelters and processing facilities approximately $60,000 per audit. Finally, the commentator argued that the "sum cost of new auditing requirements and increasing burden of documentation in the international supply chain may amount to a total of US$7 million per year."

A few commentators provided other, less specific cost estimates. One commentator indicated that it would require 1,400 hours in the first year working with its suppliers to implement the proposed rules and an additional 700 hours in each subsequent year to comply with the proposed rules.[784] The commentator calculated this figure by using the 450 different materials the commentator would have to research, and estimated that it would require three hours per material, which would equate to approximately 1,400 hours.[785] The commentator stated that this estimate did "not take into account the days and weeks that will be required to write any required reports and work with auditors." Although the commentator provided an estimate of the number of hours required to comply with the rules, it did not disclose the costs associated with its number of estimated hours. The commentator noted, however, that it is "a relatively small company, [and] these costs will be multiplied many times throughout the entire economy."

Another commentator indicated that "the initial cost for establishing record keeping processes, staffing, and identifying the contacts throughout the supply chain will run approximately [four times] the on-going annual staffing [and] cost for certification."[786] In addition, this commentator asserted that the "software to track and retain these records for [five to ten] years could add another [two times] the annual cost for certification."[787] Ultimately, although the commentator did not disclose the actual costs associated with its estimates, it concluded that complying with the proposed rules would be "very expensive" for even one year.

Another commentator argued that the costs of the proposed rules to implement the statute would be expensive even for an issuer with existing systems in place to track inputs in the supply chain because such an issuer would still have to add capability to its existing systems, provide additional supplier training, and revise its existing information technology systems.[788] A few commentators noted Apple Inc.'s Supplier Responsibility 2011 Progress Report.[789] As one of these commentators noted, Apple investigated the use of extractives at all levels of its supply base and mapped its supply chain to the smelter level to know which of its suppliers are using tantalum, tin, tungsten, or gold and from where they are receiving the metal.[790] Accordingly, Apple determined that it has a total of 142 suppliers of conflict minerals.[791] Some commentators asserted that the costs of the proposed rules could be disproportionally higher to smaller issuers.[792] Other commentators asserted that the Proposing Release failed to account for the costs to non-issuers, which would be significant.[793]

Other commentators asserted also that the $25,000 estimated audit cost is not the correct cost for the type of audit that would be required.[794] One such commentator noted that the "cost of an independent audit [sic] of $25,000 is also not specifically for the type of audits that would be required either on the upstream supply chain, or at the smelters."[795] Another commentator stated that we "did not specify the scope of the independent private sector audit of the Conflict Minerals Report" in the Proposing Release, and our $25,000 estimate would correspond only to an audit of whether the issuer's Conflict Minerals Report accurately describes the due diligence the issuer exercised.[796] According to this commentator, this cost estimate, however, could be far higher depending on the audit scope to be outlined in the final rule. A further commentator indicated that our assumptions about the scope and objective of the audit in the Proposing Release were not clear, but it appeared that the estimate "may depend on a company relying on an industry-wide due diligence process and that company being able to conclude that its conflict minerals did not originate in a DRC country."[797] This commentator stated that it was not aware of any such industry-wide due diligence process in place.

C. Benefits and Costs Resulting From Commission's Exercise of Discretion

As discussed in detail in Section II, we have revised the rules from the Proposing Release to address comments we received while remaining faithful to the language and intent of the statute as adopted by Congress. In addition to the statutory benefits and costs noted above, we believe that the use of our discretion in implementing the statutory requirements will result in a number of benefits and costs to issuers and users of the conflict minerals information. Below, we discuss the most significant choices we made in implementing the statute and the associated benefits and costs. We are unable to quantify the impact of each of the decisions we discuss below with any precision because reliable, empirical evidence regarding the effects is not readily available to the Commission, and commentators did not provide sufficient information to allow us to do so. Thus, in this section, our discussion on the costs and benefits of our individual discretionary choices is qualitative. Later in the release, we present a quantified analysis on the overall costs and benefits of the final rule that includes all aspects of the implementation of the statute.

[783] *See* letter from ITRI II.

[784] *See* letter from TriQuint I.

[785] *Id.* The commentator did not provide a similar breakdown of its calculation regarding its 700 hour per subsequent year estimate.

[786] *See* letter from Teggeman.

[787] *See id.*

[788] *See* letter from Ford.

[789] *See, e.g.*, letters from Enough Project I (citing to Apple Inc.'s Supplier Responsibility 2011 Progress Report at *http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2011_Progress_Report.pdf*), Enough Project IV, and Fafo (citing to *http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2011_Progress_Report.pdf*).

[790] *See* letter from Enough Project I.

[791] *See* letters from Enough Project IV and Fafo.

[792] *See* letter from Howland.

[793] *See* letters from NAM I and WGC II.

[794] *See* letters from CTIA, ITRI I, and KPMG.

[795] *See* letter from ITRI I.

[796] *See* letter from CTIA.

[797] *See* letter from KPMG.

1. Reasonable Country of Origin Inquiry

The Conflict Minerals Statutory Provision requires any issuer with necessary conflict minerals that "did originate" in the Covered Countries to provide a Conflict Minerals Report.[798] The provision, however, does not specify how an issuer is to determine whether its conflict minerals originated in the Covered Countries. The provision states only that any issuer with such conflict minerals must submit a report to us that describes, among other matters, the measures taken by the issuer to determine the source and chain of custody of those conflict minerals.

We used our discretion in the final rule to require that issuers covered by Section 1502 of the Act conduct a good faith "reasonable country of origin inquiry" that is reasonably designed to determine whether their conflict minerals originated in the Covered Countries or are from recycled or scrap sources. We do not specify what would constitute a "reasonable country of origin inquiry." We believe that this decision to employ a performance standard rather than a design standard should benefit issuers by allowing them the flexibility to use the reasonable country of origin inquiry standard that is best suited to their circumstances.

Although the final rule does not specify what would constitute a reasonable country of origin inquiry, it requires that the issuer conduct in good faith an inquiry that is reasonably designed to determine whether any of its conflict minerals originated in the Covered Countries or came from recycled or scrap sources. Although the proposal did not state explicitly that an issuer must reasonably design its inquiry and conduct it in good faith, we believe that this is not a change from the proposal, but a clarification of the proposal's intent. We believe providing this clarification will facilitate compliance with the rule by providing further guidance to issuers about what is required to satisfy the reasonable country of origin inquiry. Other than being reasonably designed and performed in good faith, however, the final rule does not require issuers to conduct an exhaustive inquiry to establish to a certainty whether their conflict minerals originated in Covered Countries or came from recycled or scrap sources. We believe this is appropriate because, under the Conflict Minerals Statutory Provision, issuers are required to ascertain whether their conflict minerals did originate in the Covered Countries to know whether they must submit a Conflict Minerals Report. Therefore, some inquiry is necessary.

We could have required an issuer to exercise due diligence in determining whether its conflict minerals originated in the Covered Countries or came from recycled or scrap sources. We also could have required an exhaustive inquiry in which an issuer would be required to determine to a certainty whether each mineral originated in the Covered Countries. However, while these would be plausible alternatives, such inquiries likely would be more costly, and we do not believe those approaches are necessary. Instead, we believe the reasonable country of origin inquiry standard provides a clear way for issuers to make the necessary determination and does so in a more cost-effective manner. The reasonable country of origin inquiry is consistent with the supplier engagement approach in the OECD guidance where issuers use a range of tools and methods to engage with their suppliers.[799] The results of the inquiry may or may not trigger due diligence. This is the first step issuers take under the OECD guidance to determine if the further work outlined in the OECD guidance—due diligence—is necessary. The Conflict Minerals Statutory Provision specifically contemplates due diligence, which goes beyond inquiry and involves further steps to establish the truth or accuracy of relevant information, by requiring a description of the measures the issuer took to exercise due diligence on the source and chain of custody of the minerals. The Conflict Minerals Statutory Provision specifically notes that due diligence includes the audit discussed below.

We recognize that our reasonable country of origin approach is broad enough that some issuers might perform an insufficiently rigorous inquiry and some issuers might perform an overly rigorous inquiry. An insufficiently rigorous inquiry could result in an erroneous determination that the issuer is not required to submit a Conflict Minerals Report, thus reducing the utility of the disclosure with respect to the issuer's use of conflict minerals. An overly rigorous inquiry, on the other hand, could cause issuers to incur greater costs than they would otherwise. We believe, however, that the requirement that issuers make certain disclosures about the particular reasonable country of origin inquiry they undertook mitigates concerns about an insufficiently rigorous inquiry. Similarly, we believe our guidance that issuers need only conduct an inquiry reasonably designed to determine whether conflict minerals originated in the Covered Countries mitigates concerns about an overly rigorous inquiry. Overall, we believe that the benefit of mitigating issuer compliance costs justifies the "reasonable country of origin" approach we have chosen.

Also, in a change from the proposal, the final rule establishes a different standard for the issuer in determining, based on its reasonable country of origin inquiry, whether due diligence on the conflict minerals' source and chain of custody and a Conflict Minerals Report is required. The proposed rules would have required an issuer to conduct due diligence and provide a Conflict Minerals Report, based on its reasonable country of origin inquiry, if, among other conclusions, the issuer was unable to determine that its conflict minerals did not originate in the Covered Countries or came from recycled or scrap sources. Under the proposal, issuers could only avoid providing a Conflict Minerals Report if they could prove a negative—that their conflict minerals did not originate in the Covered Countries. That approach would arguably have been more burdensome than necessary to accomplish the purpose of the statutory provision.

Under the final rule, however, an issuer must exercise due diligence on its conflict minerals' source and chain of custody and potentially provide a Conflict Minerals Report if the issuer knows that its necessary conflict minerals originated in the Covered Countries and did not come from recycled or scrap sources, or has reason to believe that its necessary conflict minerals may have originated in the Covered Countries and may not have come from recycled or scrap sources. This new approach does not require an issuer to prove a negative to avoid performing due diligence, but it also does not allow an issuer to ignore warning signs or circumstances reasonably indicating that its conflict minerals may have originated in the Covered Countries or may not have been from recycled or scrap sources. This approach should reduce the total costs

[798] Exchange Act Section 13(p)(1)(A).

[799] In June 2012, the OECD issued a report regarding implementation of the OECD guidance. *See OECD, Downstream Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Cycle 2 Interim Progress Report on the Supplement on Tin, Tantalum, and Tungsten Final Draft* (June 2012), *available at http://www.oecd.org/investment/guidelinesformultinationalenterprises/Dawnstream%20cycle%202%20report%20-%20Edited%20Final%20-%201%20June.pdf.* This additional guidance includes sample letters to suppliers and customers regarding the use of conflict minerals.

of the final rule, by enabling an issuer that, following a reasonable country of origin inquiry, is unable to determine that its conflict minerals did not originate in the Covered Countries or come from recycled or scrap sources, but has no reason to believe that its necessary conflict minerals may have originated in the Covered Countries or do not come from recycled or scrap sources, to fully comply with the rule without conducting due diligence, obtaining an audit, or preparing and filing a Conflicts Mineral Report.

We realize that requiring a Conflict Minerals Report if, after exercising a reasonable country of origin inquiry, the issuer has reason to believe that it has necessary conflict minerals that may have originated in the Covered Countries and may not have come from recycled or scrap sources will be more costly than only requiring a report if the issuer has affirmatively determined that its minerals did come from the Covered Countries. However, as already discussed, we believe that such an approach is required to achieve the benefits intended by the statute. Moreover, this approach provides an appropriate balance compared to the more costly possible approach of requiring an issuer to submit a Conflict Minerals Report unless it determines to a certainty that its necessary conflict minerals did not originate in the Covered Countries.

This approach regarding when an issuer must exercise due diligence as to the source and chain of custody of its conflict minerals and provide a Conflict Minerals Report could increase costs of the final rule. Some issuers may expend more resources than necessary to satisfy the standard in order to assure themselves that their minerals did not originate in the Covered Countries. On the other hand, other issuers may expend insufficient resources which could lead to inadequate inquiries. However, we anticipate that overall this approach will result in fewer issuers engaging in due diligence and providing a Conflict Minerals Report because, although an issuer may not be able to determine to a certainty, even after a reasonable country of origin inquiry, that its conflict minerals did not originate in the Covered Countries or are from recycled and scrap sources, that issuer may have no reason to believe that its necessary conflict minerals may have originated in the Covered Countries and not come from recycled or scrap sources. This situation will reduce costs to such issuers because those issuers are not required to exercise due diligence and provide a Conflict Minerals Report.

In a further change from the proposal, the final rule requires an issuer that determines that, following its reasonable country of origin inquiry, its conflict minerals did not originate in the Covered Countries or come from recycled or scrap sources or has no reason to believe that its necessary conflict minerals may have originated in the Covered Countries or did not come from recycled or scrap sources to provide a brief description of the results of that inquiry. The proposal required issuers to disclose their reasonable country of origin inquiry and their determination based on that inquiry. Compared to an alternative that does not require such description, this requirement will increase the disclosure costs to issuers. However, the disclosure will enable users of the information to assess more thoroughly the issuer's reasonable country of origin design and its efforts in carrying out that design. This information will allow stakeholders to form their own views on the reasonableness of the issuer's efforts and track those efforts over a number of years. Based on this information, stakeholders could advocate for different processes for individual issuers if they believe it is necessary, thereby maximizing the potential benefits of the performance-based approach we are adopting.

Additionally, we revised the final rule from the proposal so that, following its reasonable country of origin inquiry, an issuer that determines its conflict mineral did not originate in the Covered Countries is not required to keep reviewable records for five years. We believe this decision should benefit issuers by allowing them greater flexibility and by reducing their compliance costs because they no longer have a record retention cost, which should reduce the overall costs involved as compared to the other possible methods of implementing the statute.

2. Information in the Specialized Disclosure Report

We revised the final rule from the proposal so that an issuer that must file a Conflict Minerals Report is not required to disclose, in its specialized disclosure report under a separate "Conflict Minerals Disclosure" heading, the reason it is filing its Conflict Minerals Report. Similarly, the final rule does not require an issuer to disclose in its specialized disclosure report that it has provided an audit report or a certification of the audit because the audit report and certification are part of the Conflict Minerals Report already, so specifically mentioning the audit report or certification here is not necessary and may be confusing. Instead, the issuer must only disclose that a Conflict Minerals Report is provided as an exhibit to its specialized disclosure report and a link to its Internet Web site where the Conflict Minerals Report is publicly available. We believe these decisions should benefit issuers by not requiring them to provide as much disclosure in the specialized disclosure report, which should reduce the costs involved as compared to the other possible methods of implementing the statute. However, we do not believe that such decisions will reduce the benefits to be achieved by the final rule, because the information that the proposal required to be disclosed in the specialized disclosure report is already provided in the Conflict Minerals Report, which is required to be filed as an exhibit to Form SD.

3. "DRC Conflict Undeterminable" Determination

The final rule temporarily permits issuers to describe their products as "DRC conflict undeterminable" if they are required to file a Conflict Minerals Report and are either unable to determine that their conflict minerals did not originate in the Covered Countries or are unable to determine that their conflict minerals that originated or may have originated in the Covered Countries did not directly or indirectly benefit or finance armed groups in the Covered Countries. An issuer with products that are "DRC conflict undeterminable" is required to exercise due diligence on the source and chain of custody of its conflict minerals and submit a Conflict Minerals Report describing the due diligence, the country of origin of the conflict minerals, if known, the facilities used to process the conflict minerals, if known, and the efforts to determine the mine or location of origin with the greatest possible specificity. Also, such an issuer is required to describe its products containing these conflict minerals as "DRC conflict undeterminable," rather than stating that they have not been found to be "DRC conflict free." An issuer with such conflict minerals, however, is not required to obtain an independent private sector audit of that Conflict Minerals Report. This reporting alternative is temporary and will be available only during the first two reporting cycles following the effectiveness of the final rule for all issuers, which includes the specialized disclosure reports for 2013 and 2014, and the first four reporting cycles following the effectiveness of the final rule for smaller reporting companies,

which includes the specialized disclosure reports for 2013 through 2016. After these times, an issuer unable to determine that its conflict minerals did not originate in the Covered Countries or unable to determine that its conflict minerals that originated or may have originated in the Covered Countries did not directly or indirectly finance or benefit armed groups in the Covered Countries must describe its products containing those minerals as having not been found to be "DRC conflict free" and provide an independent private sector audit of its Conflict Minerals Report.

This temporary provision will have the benefit of lowering the initial costs of the rule both because an audit will not be required and because, to the extent issuers suffer negative consequences from disclosure that their products have not been found to be "DRC conflict free," those consequences would likely not be as significant for an issuer that is able to disclose that it has conducted due diligence on its conflict minerals and not found a connection to armed groups. We believe that not requiring an independent private sector audit of the Conflict Minerals Report during this temporary period is appropriate because an audit of the design of an issuer's due diligence that results in an undeterminable conclusion would not appear to have a meaningful incremental benefit. Also, we recognize the concerns about the feasibility of preparing the required disclosure in the near term because of the stage of development of the supply chain tracing mechanisms. We adopted this temporary provision to allow sufficient time for more comprehensive tracking systems to be developed by industry and trade groups. The development and use of such comprehensive tracking systems should improve due diligence performance and lower the cost of compliance with the statute by reducing duplication and taking advantage of economies of scale. We believe that a two-year period for issuers with an indeterminate conclusion is appropriate because this appeared to be the approximate amount of time that many commentators stated would be necessary to establish traceability systems in the Covered Countries.[800] Also, we believe that a four-year period for smaller reporting companies with an indeterminate conclusion is appropriate because they may have fewer resources to implement the final rule and may lack the leverage to obtain detailed information regarding the source of a particular conflict mineral.[801]

Issuers that are unable to determine, following their exercise of due diligence, that their conflict minerals did not originate in the Covered Countries; that their conflict minerals that originated in the Covered Countries did not directly or indirectly finance or benefit armed groups in the Covered Countries; or, after their exercise of due diligence, are unable to determine that their conflict minerals came from recycled or scrap sources are required to file a Conflicts Minerals Report describing, among other matters, the due diligence they exercised and the steps they have taken or will take, if any, since the end of the period covered in their most recent prior Conflict Minerals Report to mitigate the risk that their necessary conflict minerals benefit armed groups, including any steps to improve their due diligence. After the transition period, such issuers will be required to include an independent private sector audit of their Conflict Minerals Reports with respect to those minerals, which is likely to increase costs for those issuers. One commentator argued that "Section 1502 does not require an issuer that has been unable to determine (after a proper inquiry) the source of its conflict minerals * * * to provide a Conflict Minerals Report."[802] As discussed above, we believe the process that better reflects the statutory intent is as follows:

- An issuer that, following a reasonable country of origin inquiry, has reason to believe that its necessary conflict minerals may have originated in the Covered Countries, and may not be from recycled or scrap sources, must conduct due diligence on the source and custody of such conflict minerals, in accordance with a nationally or internationally recognized due diligence framework, and
- If, following such due diligence, such issuer is unable to determine that such conflict minerals did not originate in the Covered Countries (and is unable to determine that such conflict minerals are from recycled or scrap sources), then such issuer is required to submit a Conflict Minerals Report.

While this approach may add to the overall costs of compliance, we do not believe the alternative reading suggested by commentators is consistent with the purposes of the statute. The final rule's temporary provision for "DRC conflict undeterminable" products, however, is designed to reduce compliance costs during the transition period.

4. "Contract To Manufacture"

As discussed above, the final rule applies to issuers that contract to manufacture products. This requirement is based on our interpretation of the statute in light of our understanding of the statutory intent and a reading of the statute's text. We recognize that this approach affects the overall compliance costs and burdens, in particular, on the subset of issuers that contract to manufacture products. However, we have sought to mitigate these costs by not defining the term "contract to manufacture" in the final rule, and instead letting issuers determine based on their own facts and circumstances which of their products have conflict minerals that may trigger a reporting obligation.

Compared to the alternative approach of defining this term, our decision not to define the term provides issuers with significant flexibility to use a definition that applies best to their particular circumstances. Such flexibility may lower issuers' compliance costs to the extent any definition could have been overbroad. But, we also recognize that our decision not to define this phrase could increase uncertainty for issuers on how the phrase should be implemented and may result in additional costs to some issuers. For example, the uncertainty associated with leaving the phrase undefined could lead some issuers to interpret the definitions in a manner that is more expansive than if the phrase was defined, thus incurring a higher compliance cost than is necessary. In this regard, some issuers may decide to use more internal or external resources than if this phrase was defined to make sure they are compliant with the rule, which would also increase compliance costs. The lack of a clear definition could also result in a diminishment of the benefit if some issuers are less rigorous in determining and reporting on their products that have conflict minerals, which would reduce the utility of their disclosure. Overall, however, we believe the potential benefit of flexibility outweighs the potential increases in costs.

In the proposal, we expressed our view that an issuer that does not manufacture a product itself but that has "any" influence over the product's manufacturing should be considered to be contracting to manufacture that

[800] *See, e.g.*, letters from AdvaMed I, FEC I, JVC *et al.* II, Plexus, Verizon, and WilmerHale.

[801] Using the cost of audit estimates provided by the university group and the manufacturing industry group commentators, which we also use below, we estimate that this exercise of discretion by the Commission would reduce the initial compliance cost of a small issuer by approximately $25,000 and the initial compliance cost of a large issuer by approximately $100,000 per year for each year of the applicable temporary period based upon the analysis of the university group commentator.

[802] *See* letter from Cleary Gottlieb.

product. Also, we expressed our view that an issuer that offers a generic product under its own brand name or a separate brand name should be considered to be contracting to manufacture that product so long as the issuer had contracted to have the product manufactured specifically for itself. As noted in the Proposing Release, we had believed that these issuers should have been considered to be contracting those products to be manufactured because the issuers would implicitly influence the manufacturing of the products. However, we are persuaded by commentators that this level of control set forth in the Proposing Release was "overbroad" and "confusing" and would impose on such an issuer "significant," "unrealistic," and "costly" burdens.[803] Therefore, we provide guidance indicating that an issuer is considered to be contracting to manufacture a product depending on the degree of influence it exercises over the materials, parts, ingredients, or components to be included in any product as well as examples. We believe that this guidance may decrease issuers' flexibility for some issuers, but it will provide more certainty for others.

5. Nationally or Internationally Recognized Due Diligence Framework (Including Gold)

Although Exchange Act Section 13(p)(1)(A)(i) requires issuers to describe the measures taken to exercise due diligence, the provision does not indicate the due diligence required. The final rule's requirement that issuers use a nationally or internationally recognized due diligence framework in their Conflict Minerals Reports may result in a certain degree of standardization in the preparation of the disclosure and may reduce audit costs by focusing the audit. To the extent issuers tend to use the same due diligence framework, this standardization will benefit users of the information by making the Conflict Minerals Reports easier to compare, thus reducing costs for users of comparing information across issuers.

Also, requiring a nationally or internationally recognized due diligence framework allows us to provide a clear audit objective that includes whether the design of an issuer's due diligence measures is in conformity with the criteria set forth in the nationally or internationally recognized due diligence framework and whether an issuer's description of the due diligence measures it performed is consistent with the due diligence process it undertook. As discussed below, having a clear audit objective based on the design of an issuer's due diligence framework lowers audit costs compared with a rule that does not require a specified framework because it focuses the scope of the audit that must be performed and, therefore, makes the audit less time-consuming and less costly.

Further, the final rule requires that an issuer's due diligence follow a nationally or internationally recognized due diligence framework that is established by a body or group that has followed due-process procedures, including the broad distribution of the framework for public comment, and is consistent with the criteria standards in GAGAS established by the GAO. This requirement improves the credibility and usefulness of the reports. Also, requiring adherence to a nationally or internationally recognized due diligence framework will provide issuers with a degree of certainty that their due diligence process is reliable and will pass a regulatory review. However, this requirement also will limit the issuer's flexibility in determining the source of origin and chain of custody of their conflict minerals. If the established requirement is more burdensome than what the issuer might have otherwise considered sufficient due diligence, it might make it more costly for issuers compared to using a due diligence process based on their own facts and circumstances.

6. Liability for the Audit and Audit Certifications

Exchange Act Section 13(p)(1)(A)(i) requires the independent private sector audit to be conducted in accordance with the standards established by the GAO. Exchange Act Section 13(p)(1)(B) states that the issuer must certify the audit and that certified audit constitutes a critical component of due diligence.[804] Under the final rule, an issuer's audit certification is in the form of a statement in the Conflict Minerals Report that the issuer obtained an independent private sector audit. This should benefit issuers by not subjecting individuals employed by the issuer to liability for the information in the Conflict Minerals Report or the audit. Additionally, the final rule does not require an auditor to assume expert liability regarding the audit because the audit report would not be incorporated by reference or otherwise included in Securities Act filings. Therefore, depending on the state of competition in the market for independent private sector audits, not requiring the assumption of such liability may result in lower audit fees, which in turn should decrease conflict minerals-reporting companies' cost of compliance with the statute. However, not requiring the certification to be signed by an officer and not requiring an auditor to assume expert liability could decrease the benefits of the rule if it results in issuers taking less care in their certifications and auditors conducting less thorough audits.

7. Audit Objective

The final rule provides a clear audit objective. We believe that the audit is meaningful because investors and other users will have some assurance from an independent third party that the issuer's due diligence framework, as set forth in the Conflict Minerals Report, is designed in conformity with the relevant nationally or internationally recognized due diligence framework, and that the issuer actually performed the due diligence measures that it represents that it performed in the Conflict Minerals Report. We recognize that an audit objective requiring an auditor to express an opinion or conclusion as to the design and description of an issuer's due diligence measures is not as comprehensive as an audit objective requiring an auditor to express an opinion or conclusion as to the effectiveness of due diligence measures or the accuracy of conclusions in the Conflict Minerals Report. However, we believe that the audit will

[803] *See, e.g.*, letters from ABA, AT&T, Corporate Secretaries I, Davis Polk, and Verizon. *See also* letter from NRF I (stating that our proposed approach would be "draconian").

[804] As noted elsewhere in this release, the staff of the GAO has indicated to our staff that the GAO does not intend to publish standards for the independent private sector audit and that GAGAS' Performance Audit or Attestation Engagement standards can be used for these audits. *See U.S. Gov't Accountability Office, GAO–12–331G, Government Auditing Standards 2011 Revision* (Dec. 2011), *available at http://www.gao.gov/assets/590/587281.pdf*. Therefore, to conduct an independent private sector audit, an auditor must comply with certain quality control procedures and peer reviews, which are required under the GAGAS Performance Audit and Attestation Engagement standards. The GAGAS Attestation Engagement standards, in Chapter 3.75, require that auditors be "licensed certified public accountants, persons working for a licensed certified public accounting firm or for a government auditing organization, or licensed accountants in states that have multi-class licensing systems that recognize licensed accountants other than certified public accountants." Unlike the GAGAS Attestation Engagement standard, the GAGAS Performance Audit standard allows auditors other than certified public accountants to perform a Performance Audit, provided the auditor complies with the applicable qualification requirements under GAGAS, which will increase the number of firms eligible to conduct the private sector audits. Increasing the number of firms that are eligible to conduct the independent private sector audits should increase competition, which should make it less costly for an issuer to obtain such an audit.

still be meaningful because it will provide some assurance from an independent third party that the issuer's due diligence framework is designed in conformity with the relevant nationally or internationally recognized due diligence framework and that the issuer actually performed the due diligence measures as they were described.

With respect to what audit objective is appropriate, we considered the following possible audit objective alternatives from commentators: whether management's description of procedures and controls performed in their due diligence process are fairly described in the report; whether an issuer's design of its due diligence process described in the report conformed to a recognized standard of due diligence; whether management's description of an issuer's due diligence process in its report is accurate, the results of that process are fairly stated, and the issuer has evaluated/identified the upstream and downstream due diligence processes; whether the design of the due diligence process described in the report conformed to a recognized standard and whether the process was effective; whether the issuer's conclusion regarding the source and chain of custody of its conflict minerals is accurate; and whether the issuer appropriately included in the report all its products described as having not been found to be "DRC conflict free." We used our discretion to make the audit objective in the final rule similar to the first and second alternatives with some modification. The final rule states that the objective of the independent private sector audit is for the auditor to express an opinion or conclusion as to whether the design of the issuer's due diligence measures as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is in conformity with, in all material respects, the criteria set forth in the nationally or internationally recognized due diligence framework used by the issuer, and whether the issuer's description of the due diligence measures it performed as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is consistent with the due diligence process that the issuer undertook.

We believe that our choice of audit objective in the final rule will reduce the costs and burdens more than certain other alternatives. However, we recognize that the audit objective will not reduce the costs and burdens as much as if the audit objective required only an opinion or conclusion as to whether the design of the issuer's due diligence measures is in conformity with the criteria set forth in the nationally or internationally recognized due diligence framework. We believe an audit related to whether the issuer actually performed the due diligence measures that it represents that it performed in the Conflict Minerals Report is necessary and appropriate so that the audit also addresses, in a cost effective manner, the actual performance of the due diligence and not just the design as well as provide independent third party confirmation that the work described was performed. Based on the comments we received, however, an audit objective based on any of the alternatives other than just the design of the issuer's due diligence measures and the issuer's description of the due diligence measures it performed would be very costly and burdensome to undertake due to the breadth of those alternatives and the fact that most of the evidence required for those alternatives would be held by third party suppliers and smelters.

8. Conflict Minerals From Recycled or Scrap Sources

The Conflict Minerals Statutory Provision is silent as to the treatment of conflict minerals from recycled or scrap sources. In the final rule, however, we provided for alternative treatment for conflict minerals from recycled or scrap sources. The alternative reporting requirements for conflict minerals from recycled or scrap sources should benefit issuers by reducing issuers' compliance costs with the disclosure requirements in Section 1502 because those issuers will conduct a reasonable inquiry regarding whether those minerals are from recycled or scrap sources instead of having to exercise due diligence and provide a Conflict Minerals Report in all cases. Also, issuers that, following a reasonable inquiry conducted in good faith, reasonably believe their minerals are from recycled or scrap sources will not have to obtain an independent private sector audit. A reduction in costs of not having to exercise due to diligence or obtain an independent private sector audit is likely to be significant for those industries that use a high concentration of conflict minerals that are from recycled or scrap sources.[805]

The final rule requires issuers with conflict minerals that have reason to believe their conflict minerals may not come from recycled or scrap sources to exercise due diligence in determining whether the minerals are, in fact, from recycled or scrap sources. That due diligence must follow a nationally or internationally recognized due diligence framework, if such framework is available. While providing a higher degree of certainty that those conflict minerals came from recycled or scrap sources, the requirement will also increase the costs to issuers, compared to an alternative that would allow issuers to rely on their own due diligence approach to verify that these minerals are from recycled or scrap sources. Eliminating the requirement of an independent private sector audit of their Conflict Minerals Report, however, could potentially decrease costs to issuers.

We believe that the magnitude of the cost savings for issuers with conflict minerals from recycle or scrap sources will be greatest for companies that use exclusively scrap and recycled materials. Although we did not receive any information from commentators as to the number of companies that may fall into this category, a number of commentators stated that the use of conflict minerals from recycled or scrap sources is significant. For example, some commentators noted that China controls approximately 85% of the world's tungsten supply, but China is cutting back on tungsten exports, which is causing the price of tungsten to increase by 130%.[806] According to these commentators, this development has caused American manufactures to move to recycled tungsten, which represented approximately 55% of apparent consumption of tungsten in all forms. Also, as another example, one commentator noted that up to 40% of the world's gold supply is from recycled or scrap sources.[807] Even so, issuers that use both conflict minerals from recycled or scrap sources and newly mined minerals may still need to exercise due diligence and obtain an audit regarding the conflict minerals that are not from recycled or scrap sources and thus, may not have significant additional cost savings. Overall, however, even with these requirements, we believe that providing an alternative treatment for conflict minerals from recycled or scrap sources should benefit issuers by reducing their compliance costs for those minerals as compared with the costs applicable to newly mined conflict minerals. Moreover, an indirect consequence of our differential

[805] We are unable to estimate the total magnitude of these cost savings because we do not have empirical evidence regarding the scope of the use of conflict minerals that are from recycled or scrap sources. See below Section D for a further analysis of the potential costs of this provision.

[806] See, e.g., letters from Rep. Altmire, Rep. Murphy, Rep. Renacci, Rep. Shuster, Rep. Toomey, Rep. Womack, and Sen. Pryor.

[807] See letter from WGC II.

treatment of scrap and recycling materials may be to increase the extent to which these materials are recycled. Finally, the reasonable country of origin inquiry requirements are likely to improve the disclosures regarding conflict materials from recycled or scrap sources.

9. Conflict Minerals "Outside the Supply Chain"

Like conflict minerals from recycled and scrap sources, the Conflict Minerals Statutory Provision is silent as to the treatment of conflict minerals "outside the supply chain" at the time our final rule takes effect, including existing stockpiles of conflict minerals. However, in the final rule we have determined to exclude any conflict minerals that are "outside the supply chain" prior to January 31, 2013. The final rule considers conflict minerals to be "outside the supply chain" after such conflict minerals have been smelted (in the case of tantalum, tin, or tungsten) or refined (in the case of gold), or, if not smelted or refined, are physically located outside of the Covered Countries.

We are aware of the concern that these existing stockpiles could have come from activities that financed or benefited armed groups in the Covered Countries. However, once those minerals have been smelted, refined, or transported out of the Covered Countries, it seems unlikely that they could further finance or benefit armed groups. Therefore, we believe excluding these stockpiled minerals would be consistent with the statutory intent of the Conflict Minerals Statutory Provision and does not significantly impair the benefits sought by the statute. Moreover, the approach we have chosen may substantially reduce compliance costs for some issuers by not requiring them to determine the origin and chain of custody of these stockpiled minerals. An alternative approach that requires issuers to determine the origin and chain of custody of their stockpiled minerals would greatly increase costs, particularly for conflict minerals that were extracted prior to the contemplation of the Conflict Minerals Statutory Provision because issuers would not have known they were expected to determine the origin of those minerals at the time of their extraction. Further, if stockpiled minerals were not excluded, issuers might not be able to sell those minerals and could be forced to dispose of their existing conflict minerals inventory at below market prices, or at a loss. If such a situation occurred, as one commentator noted, the cost of the final rule would increase "dramatically." [808]

10. Conflict Mineral Derivatives

The Conflict Minerals Statutory Provision defines the term "conflict mineral" as cassiterite, columbite-tantalite, gold, wolframite, or their derivatives, or any other minerals or their derivatives determined by the Secretary of State to be financing conflict in the Covered Countries.[809] The Proposing Release provided the same definition of the term "conflict mineral" as well. In the final rule, however, we used our discretion to limit the term "conflict mineral" to include only cassiterite, columbite-tantalite, gold, wolframite, and their derivatives, which are limited to only the 3Ts, unless the Secretary of State determines that additional derivatives are financing conflict in the Covered Countries, in which case they are also considered "conflict minerals." By using our discretion to limit the covered mineral derivatives, we could be limiting the usefulness of the information of the conflict minerals disclosure. This potential disadvantage is mitigated, however, by the fact that tantalum, tin, and tungsten are by far the most common derivatives of these minerals.[810] A different approach would increase costs to issuers by increasing the number of derivatives that they would have to determine are in their products.

11. Method and Timing of Disclosure on Form SD

Exchange Act Section 13(p)(1)(A) requires issuers to "disclose annually" their conflict minerals information, but does not specify how issuers should disclose this information or at what time during the year the disclosure must be provided. The final rule requires issuers to provide this information annually in a new specialized disclosure report on new Form SD that covers a calendar year, regardless of the issuer's fiscal year end, and is due on May 31 of the subsequent year. Our decision to provide through rulemaking that issuers use the new form for the disclosure of conflict minerals' origin and the Conflict Minerals Report makes it easier for those interested in the disclosed information to locate the form. In addition, the final rule requires that issuers present the information in a standardized manner. Users that find the information about an issuer's conflict minerals relevant to their decision making will benefit from the standardization and simplification of the disclosure.

Further, requiring issuers to use a new form with a uniform filing date rather than submitting conflict minerals information in their annual reports would benefit most issuers by allowing them to have sufficient time to prepare and file their conflict minerals information independent from the due dates for annual reports.[811] Moreover, we believe that this staggered filing date will benefit issuers because they could, if they choose to do so, use the same personnel to handle this filing as their annual reports. Another benefit for issuers of requiring issuers to provide their conflict minerals information on a new form, instead of an annual report on Form 10–K, Form 20–F, or Form 40–F, is to remove the conflict minerals information from the disclosure that principal executive and financial officers must certify under Sections 302 and 906 of Sarbanes-Oxley, which could reduce costs to issuers. Also, requiring a uniform reporting period for all issuers will benefit companies that supply products or components with conflict minerals by allowing them to provide reports once per year for all their customers, rather than having to prepare reports throughout the year for customers with different reporting periods, which will reduce such companies' costs.

Our decision to require a new form will result in costs related to the preparation of this form, as we discuss below in the Paperwork Reduction Act section. Also, our decision to require an issuer to provide its Conflict Minerals Report and its independent private sector audit report as an exhibit to its specialized disclosure report on Form SD will result in costs related to the preparation of such an exhibit.

Requiring covered issuers to file, instead of furnish, their Conflict Minerals Reports gives investors the ability to bring suit if issuers fail to comply with the new disclosure requirements, for instance under Exchange Act Section 18. This may, therefore, potentially improve the avenues of redress available to investors. This, in turn, may provide benefits to investors to the extent they rely on the information to make investment decisions. Because this could improve investors' ability to seek

[808] *See* letter from Claigan I.

[809] Section 1502(e)(4) of the Act. Presently, the Secretary of State has not designated any other mineral as a conflict mineral. Therefore, the conflict minerals include only cassiterite, columbite-tantalite, gold, wolframite, or their derivatives.

[810] See letters from AAFA, ITIC I, and PCP.

[811] We estimate that almost 58% of total number of affected issuers uses December 31 as a fiscal year end.

redress, it is possible that covered issuers could be found liable for the disclosure. Our decision to require issuers to "file," rather than "furnish," the information will potentially subject issuers to litigation under Section 18 and may "incentivize issuers (and auditors and underwriters) to conduct an appropriate level of diligence" in preparing the disclosures,[812] thereby increasing issuers' cost of complying with the final rule.[813] In addition, our decision to require a uniform reporting period could further increase costs to issuers that do not have calendar year fiscal years by requiring separate reporting outside of the issuer's normal reporting period.

12. "Necessary to the Functionality or Production"

Exchange Act Section 13(p)(2)(B) defines a "person described" as one for which conflict minerals are "necessary to the functionality or production of a product manufactured by such a person." The Conflict Minerals Statutory Provision, however, provides no additional explanation or guidance as to the meaning of "necessary to the functionality or production of a product." We use our discretion not to define this phrase in the final rule.

Compared to an alternative of the rule, which would define this phrase, our decision not to provide a definition gives issuers significant flexibility to use a definition that applies best to their particular circumstances. Such flexibility generally lowers issuers' compliance costs as issuers can determine whether the phrase is applicable based upon their specific facts and circumstances. But we also recognize that our decision not to define this phrase could increase uncertainty for issuers on how the phrase should be implemented and may therefore result in additional costs to some issuers. For example, the uncertainty associated with leaving the phrase undefined could lead some issuers to interpret the definitions in a manner that is more expansive than if these terms were defined, thus incurring a higher compliance cost than is necessary. In this regard, some issuers may decide to use more internal or external resources than if this phrase was defined to make sure they are compliant with the rule, which would also increase compliance costs. The lack of a clear definition could also result in a diminishment of the benefit of the rule if some issuers are less rigorous in determining and reporting on their products that have conflict minerals, which would reduce the informativeness of their disclosure.

We have attempted to mitigate the potential cost of leaving the phrase undefined by the guidance we provide in the release. Our guidance provides issuers with contributing factors that they should use in their determination of "necessary to the functionality or production," which will reduce the possibility that some issuers may interpret the phrase in either an over or underinclusive manner. Also, we noted concerns that there is ambiguity in the application of the provision to conflict minerals that do not end up in the product, and, as noted above, commentators were mixed in their views regarding how the rule should treat catalysts and other conflict minerals necessary to the production of a product that do not appear in the product. After considering the comments, we agree that it would be very difficult for any manufacturer of products that do not themselves contain conflict minerals to know every conflict mineral used in the production process. Therefore, we used our discretion to decide that, for a conflict mineral to be considered "necessary to the production" of the product, the conflict mineral must be contained in the product—and be necessary to the product's production. Therefore, although this requirement may decrease the number of issuers that are covered under the final rule, we believe this is a reasonable approach that reduces costs to issuers by eliminating an especially challenging aspect from the proposal.

13. Categories of Issuers

We do not read the statute as making any distinction among issuers based on the issuer's size or domesticity. As discussed above, although not specifically in the context of smaller reporting companies or foreign private issuers, some commentators suggested that we exempt certain classes of companies from full and immediate compliance with the disclosures required by the Conflict Minerals Statutory Provision.[814] We are concerned that any broad categories of exemptions would undermine the statutory objectives discussed above. For the provision to have the effect we understand Congress intended, we are not exempting any class of issuer from its application. We recognize that this imposes a cost burden on those issuers who are not exempted, but conclude that this burden is required by the statute.

Additionally, as one commentator noted, it is unclear whether exempting smaller reporting companies would significantly reduce their burdens because smaller reporting companies could still be required to track and provide their conflict minerals information for larger issuers.[815] Moreover, as other commentators noted, to the extent there are benefits to smaller companies from an exemption, such an exemption could increase the burden on larger companies that rely on smaller reporting company suppliers to provide conflict minerals information needed by the larger reporting companies.[816] Further, the temporary availability of the "DRC conflict undeterminable" category is likely to reduce the compliance burden for all companies, including smaller reporting companies. In this regard, not including private companies and individuals in the final rule may not unduly burden reporting issuers because the commercial pressure on private companies from issuers that need this information for their reports and from the public in general demanding that issuers make this information available could be sufficient for the private companies to provide voluntarily their conflict minerals information as standard practice.[817] Further, the extension of the availability of the "DRC conflict undeterminable" category for an additional two years is likely to reduce the compliance burden even more for some smaller reporting companies.

Similarly, exempting foreign private issuers from the final rule could increase domestic issuers' burdens by making it very difficult for them to compel their foreign private issuer suppliers to provide conflict minerals information. In addition, exempting foreign private issuers from the final rule could result in a competitive disadvantage for domestic issuers because foreign private issuers would not be subject to the final rule.[818] Overall, we are not exempting foreign

[812] *See* letter from Global Witness I.

[813] While the increased potential for litigation may increase costs, we note that Section 18 claims have not been prevalent in recent years and a plaintiff asserting a claim under Section 18 would need to meet the elements of the statute, including materiality, reliance, and damages. *See* Louis Loss and Joel Seligman, Ch. 11 "Civil Liability," Subsect. c "False Filings [§ 18]," *Fundamentals of Securities Regulation* (3rd Ed. 2005). We are unable to estimate the magnitude of this potential cost increase because we cannot predict at this time whether Section 18 claims will increase (and if so, by how much) and how costly it may be to ultimately prove the required elements or defend such a case.

[814] *See, e.g.*, letters from Davis Polk, NCTA, Verizon, and WilmerHale.

[815] *See* letters from IPC I.

[816] *See, e.g.*, letters from IPC I and TriQuint I.

[817] *See* letter from Howland and TIC.

[818] *See* letter from CEI II, Rep. Amodei, Rep. Ellmers, Rep. Murphy, and TriQuint I.

private issuers because we believe that doing so would not give effect to Congressional intent.

14. Not Including Mining Issuers as Manufacturing Issuers

The Conflict Minerals Statutory Provision does not state whether issuers that mine conflict minerals should be considered to be manufacturing those minerals and be included under the provision. We do not consider an issuer that mines or contracts to mine conflict minerals to be manufacturing or contracting to manufacture those minerals unless the issuer also engages in manufacturing, whether directly or through contract, in addition to mining. In this regard, we do not believe that mining is "manufacturing" based on a plain reading of the provision. Excluding such mining issuers from the universe of covered companies could create a competitive advantage for those companies over covered companies to the extent that they are competitors, but this advantage should be diminished for mining companies that are suppliers of conflict minerals to covered companies because the covered companies would require the conflict minerals information from the mining company. Also, excluding such mining issuers from the final rule could increase costs to other issuers along the supply chain because, without being covered, such mining issuers may not have the incentive to share origin and chain of custody information about the conflict minerals they mined. However, not including such mining issuers may decrease certain costs for mining issuers, since such issuers will not have to comply with the Conflict Minerals Statutory Provision with respect to conflict minerals mined by such issuers (unless necessary to the production or functionality of a product manufactured, or contracted to be manufactured, by such issuer). However, we expect that such mining issuers will incur costs to provide information on the source and custody of conflict minerals mined by such issuers to their customers, and other participants in their supply chain, who are subject to the Conflict Minerals Statutory Provision.

D. Quantified Assessment of Overall Economic Effects

As noted above, Congress intended for the rule issued pursuant to Section 1502 to decrease the conflict and violence in the DRC, particularly sexual and gender based violence.[819] A related goal of the statute is the promotion of peace and security in the Congo.[820] These are compelling social benefits, which we are unable to readily quantify with any precision, both because we do not have the data to quantify the benefits and because we are not able to assess how effective Section 1502 will be in achieving those benefits.[821] We also note that these objectives of Section 1502 appear to be directed at achieving overall social benefits and are not necessarily intended to generate measurable, direct economic benefits to investors or issuers specifically. Additionally, the social benefits are quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve. We therefore have not attempted to quantify the benefits of the final rule.

Based on comments and our analysis, we do expect that the statute will result in significant economic effects. We have noted the views of commentators on direct compliance costs, and we acknowledge that these costs are substantial. In addition, issuers with a reporting obligation under the Conflict Minerals Statutory Provision could be put at a competitive disadvantage with respect to private companies that do not have such an obligation.[822] We note, however, that non-reporting companies are part of the supply chain of reporting issuers and will bear many of the compliance costs of determining whether their minerals are conflict-free.[823] We also expect that the implementation of the statute may provide significant advantage to foreign companies that are not reporting in the United States—and thus need not comply—but do compete directly with reporting issuers in the United States. In requiring the Commission to promulgate this rule, however, Congress determined that its costs were necessary and appropriate in furthering the goals of helping end the conflict in the DRC and promoting peace and security in the DRC. To the extent the final rule implementing the statute imposes a burden on competition in the industries of affected issuers, therefore, we believe the burden is necessary and appropriate in furtherance of the purposes of Section 13(p). Also, if foreign jurisdictions implement similar laws or regulations similar to Section 1502 or the final rule,[824] any advantages available to foreign companies listed in such jurisdictions but not listed in the United States may be diminished.

As we have observed, unlike in most of the securities laws, Congress intended the Conflicts Mineral Provision to serve a humanitarian purpose, which is to prevent armed groups from benefiting from the trade of conflict minerals. There may also be a benefit to investors given the view expressed by some commentators that the provision also protects investors by requiring disclosure of information that may be material to their understanding of the risks of investing in an issuer or its supply chain. To the extent that the required disclosure will help investors in pricing the securities of the issuers subject to the Conflict Minerals Statutory Provision, the rule could improve informational efficiency. Because, however, the cost of compliance for this provision will be borne by the shareholders of the company, which could potentially divert capital away from other productive opportunities, the rule may result in a loss of allocative efficiency. The reduction in allocative efficiency could be offset, somewhat, by increased demand for the firm's products and/or shares by socially conscious consumers and investors. We do not expect that the rule would negatively impact prospects of the affected industries to an extent

[819] Section 1502(a) of the Act ("It is the sense of the Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b).").

[820] *See* Section 1502(d)(2)(A) of the Act (directing the GAO to assess the effectiveness of Exchange Act Section 13(p) in promoting peace and security in the Covered Countries).

[821] Some commentators argued, however, that the Conflict Minerals Statutory Provision has already pressured DRC authorities to begin to demilitarize some mining areas and to increase mining oversight. *See, e.g.*, letters from International Corporate Accountability Roundtable (Jul. 29, 2011) ("ICAR I"), Sen. Boxer *et al.* I, Sen. Leahy *et al.*, and United Nations Group of Experts on the Democratic Republic of Congo (Oct. 21, 2011) ("UN Group of Experts").

[822] In our Economic Analysis, we use the term "competition" to mean competition in the industries of the affected issuers, not competition in all of the markets that the Commission is charged with regulating, which are the United States securities markets. We do not expect any effects of the rule on the competition in the United States securities markets.

[823] *See, e.g.*, letters from Japanese Trade Associations and NAM I.

[824] *See cf.* letters from Member of the European Parliament (Nov. 17, 2011) ("European Parliament") (stating that in "2010 the European Parliament adopted a resolution welcoming the adoption of the new US 'Conflict Minerals' Law and asked the Commission and the Council to examine a legislative initiative along these lines") and NEI (stating that "[s]imilar action can be expected in other countries in response to the SEC's leadership, and as global awareness of the conflict minerals issue increases," that "conflict minerals legislation [in Canada] has already been tabled," and "the Canadian Securities Administrators (CSA) pay[s] close attention to SEC rule-making developments").

that would result in withdrawal of capital from these industries. Thus, we do not expect the rule to have a significant impact on capital formation.

There may, however, be several indirect economic effects that could be significant. The high cost of compliance provides an incentive for issuers to choose only suppliers that obtain their minerals exclusively from outside the Covered Countries, thereby avoiding the need to prepare a Conflict Minerals Report. To the extent that Covered Countries are the lowest cost suppliers of the minerals affected by the statute, issuers preferring to find substitutes or other suppliers of non-DRC minerals would have to increase the costs of their products to recoup the higher costs. Reducing the viable supply of such minerals may have the indirect effect of increasing the cost of acquiring these minerals.

As mentioned above, the overall specific range of costs for compliance with the rule provided by commentators was between $387,650,000 and $16 billion. The wide divergence of the cost estimates among the four separate analyses submitted by a manufacturing industry association,[825] an electronic interconnect industry association,[826] a university group,[827] and an environmental consultancy company[828] illustrates to us the difficulty of ascertaining the estimated costs of implementing the statute and our discretionary choices. We have reviewed the proposal and the comments received and have used the information provided by commentators to inform our Economic Analysis of the final rule. In the remaining part of this section we attempt to quantify, to the extent possible, the compliance costs resulting from the final rule by relying on and critically evaluating the estimates and the analyses that commentators provided. Rather than using a single analysis, a combination of the analyses can provide a useful framework for understanding various cost components of our implementing the rule. Our approach strives to achieve a balanced and reasonable analysis based on the data and assumptions provided by all commentators, as well as our own analysis and assumptions. When it is deemed prudent, we have chosen to make conservative assumptions that may, in some cases, lead to an overestimation of the costs. Overall, after performing our analysis we conclude that the costs of the statute will be substantial. Thus, we have revised our own prior estimate of the cost of complying with the rule. Based on our analysis of the data, we provide a range of the costs of both initial compliance and the annual cost of ongoing compliance. In our view, because of the potential variations in the manner in which issuers will undertake compliance, providing such a range is more appropriate than providing a precise cost estimate. Our revised estimate is that the initial cost of compliance is between approximately $3 billion to $4 billion, while the annual cost of ongoing compliance will be between $207 million and $609 million.

We start our analysis of the cost of compliance by incorporating all of the comments that provide quantified data on the aggregate potential costs of the proposed rule. So, while our overarching consideration of the costs of the rule we are adopting today takes into account the information provided by a broad range of commentators, the most useful frameworks for considering costs were provided by the manufacturing industry association and university group commentators. Other comments, while also providing certain valuable insights into how our rules would be implemented, were either not as transparent in their analytical frameworks or not easily generalizable in terms of aggregating the costs across multiple industries.[829]

We also found it significant that the two analyses by the manufacturing industry association and university group commentators take into account the categories of costs most often identified as significant by commentators and that we agree are likely to be deemed as such. Moreover, we did not find the assumptions underlying their frameworks to be qualitatively different from the discussions of costs provided by other commentators.

At the same time, in our view, even these two studies did not provide sufficiently documented evidence to support all of their assumptions and assertions and consequently, commentators differed on the quantification of these costs. We have therefore taken into account the views expressed in other comment letters, and made modifications to the analyses provided by the manufacturing industry association and university group commentators accordingly. What follows is a modified analysis of the manufacturing industry association and university group commentators' estimates that we believe better synthesizes the information provided to us in the comment process.

First, in both of these estimates, an important consideration is the cost of upgrading or implementing changes to IT systems. Based on the letters submitted as well as estimates from other commentators, we believe the manufacturing industry association and university group commentators may have been over-inclusive in their estimates. For example, the environmental consultancy company commentator estimates a much smaller number of $25,000 for the IT system and $10,000 for IT support.[830] The commentator then states that, "a cost of $6B is 10 times the total annual sales for all restricted materials software (of which conflict minerals is a small part) and does not seem realistic * * * [p]articularly since conflict minerals software for small companies can be downloaded for free." The environmental consultancy company commentator further states that "[t]he systems quoted by [the manufacturing industry association and university group commentators] are the most expensive systems on the market," and that "[m]ost companies we interviewed said they would not need to invest in new software solely for conflict minerals * * *."[831]

While we are persuaded by the argument that an average issuer should not expect to spend $1,000,000 to invest in a new IT system, we do not accept the environmental consultancy company commentator's own estimate of $35,000 because it does not provide a factual basis for the assertion. In modifying the estimates of the manufacturing industry association and university group commentators, we do not intend to replace the manufacturing industry association and university group commentators' cost estimates with the smaller estimate provided; rather, for purposes of our cost estimate, the appropriate estimate lies somewhere in between those two estimates.

Based on the university group commentator's analysis, we assumed $205,000 for small company computer costs rather than $1,000,000. Further, we assumed that the computer costs for

[825] *See* Section III.B.2.b.i.

[826] *See* Section III.B.2.b.ii.

[827] *See* Section III.B.2.b.iii.

[828] *See* Section III.B.2.b.iv.

[829] As shown below, while we draw on the quantified analyses supplied by the electronic interconnect industry association and the environmental consultancy company commentators, these letters did not provide as broad a range of quantified cost estimates as those provided by the manufacturing industry association and university group commentators.

[830] *See* letter from Claigan III. *See also* letter from Assent (critiquing the cost estimates of both the manufacturing industry association commentator and the university group commentator).

[831] Letter from Claigan III.

large issuers would be twice those for smaller issuers, or $410,000, and not four times those for a smaller issuer as assumed by the university group commentator.[832] In order to make the IT cost analysis consistent between the university group and the manufacturing group's revised analysis, we averaged the total IT cost per company in the university analysis and divided it by the total number of issuers for an average IT cost for all companies (irrespective of size) of approximately $250,000 and apply it to the manufacturing group's analysis.[833] This respectively changes the manufacturing industry association and university group commentators' estimates of the total IT cost from $5.9 billion and $2.6 billion, respectively, to approximately $1.5 billion.

Second, another important cost assumption is that the manufacturing industry association commentator assumes that each issuer has an average of 2000 first-tier suppliers. They arrive at this number based on their "consultations with a number of large manufacturers, and based on research by" others. This estimate of the average number of first-tier suppliers is, however, not supported by other estimates, and is in fact difficult to reconcile with figures reported by other commentators. For example, the average number of suppliers per company in the electronic interconnect industry association commentator study is only 163.[834] The environmental consultancy company commentator also believes the supply chain would be much simpler than the manufacturing industry association commentator predicts, based on the EICC/GeSI process. The manufacturing industry association commentator maintains, however, that many of its members have well over 2,000 suppliers. We do think a prudent reduction in the manufacturing industry association commentator's estimate is warranted, but here again, we do not know that 163 is any more representative of an average company's experience. Thus, we use the university group commentator's estimate of 1,060 suppliers while employing the manufacturing industry association commentator's analysis. Revising the manufacturing industry association commentator's number of suppliers in the supply chain lowers their estimate of compliance costs from $1.2 billion to $635 million.

In addition, we are not convinced that the estimate of cost to suppliers is appropriately generated by a top-down approach (number of supplier relationships). Indeed, we think a top-down approach may not reflect how our rule may be implemented because it is not clear how the market may react in placing the various burdens of traces on the countless entities in the supply chains. In this top-down approach (which is the approach used by many commentators) each firm using these minerals will need to track backwards through each supplier. If many firms share the same supplier, the underlying assumption is there are few economies of scale in determining whether the minerals are conflict-free. Under this approach, each firm pays an independent cost of finding out from each of their suppliers where the minerals originate.[835]

We believe, however, that due diligence on the part of suppliers likely will be a bottom-up approach in which materials are tagged at the mine and certified at the smelter and then are introduced into the supply chain. Given this bottom-up approach, each supplier will then track whether the mineral is conflict-free and to whom it will be sold. While the system for tracking the sales of these minerals may increase in magnitude with the number of companies the supplier supplies, we believe the better approach to estimating costs of the supply chain would be to estimate the total number of *affected* suppliers (bottom-up) rather than the total number of supplier *relations* (top-down).

A bottom-up approach places more emphasis on the number of suppliers and assumes that there are economies of scale in the cost because suppliers need only determine the source of their minerals once and then spread the cost of determining the source across many issuing firms. For example, if issuers have many suppliers to choose from, they may find it easier to deal with—and hence more valuable to employ—only those suppliers who can fully attest that they are conflict-free. Therefore, if all first-tier suppliers bear the burden of certifying and providing conflict reports, then the relative burden on the issuers will be very small. All of this will, however, depend in turn on the comparative bargaining power between the issuers and the suppliers at every level. Ultimately, none of the studies have provided compelling explanations for the precise dynamics that will govern the issuer-supplier or first-tier supplier►second-tier supplier relationships. On the whole, we think it would be much more reasonable to believe that suppliers at all levels will expend some effort individually in providing information to some of their customers regarding the source of their minerals, but each supplier's effort in turn will most likely reduce the cost of its customers to comply with our rules.

Few commentators provided an estimate of the total number of suppliers affected. In the university group commentator's estimate, even after adjusting for potential overlap, the total number of suppliers to be affected totals over 860,000, which is based on the total supply chain. Using the total supply chain to estimate the affected suppliers will create redundancies because a supplier may be in more than one supply chain and therefore, be counted multiple times. Thus, we believe the total number of suppliers affected in the university group commentator's analysis is likely to be too high. The manufacturing industry association commentator, on the other hand, estimated the total number of small and medium-sized manufacturing businesses to be affected at 278,000 and states that many of these small businesses are likely to be suppliers. The 2009 Statistics of U.S. Businesses from the U.S. Census estimates the total number of manufacturing businesses at 266,175, and the number of small manufacturing businesses (those with fewer than 500 employees) at 262,524.[836] Both of these numbers are

[832] The environmental consultancy company commentator estimates the IT costs for a company with $1 billion in revenue to be $35,000. Our estimate of IT costs attempts to incorporate these two widely varying viewpoints. *See* letter from Claigan III.

[833] Approximately $1.5 billion/5,994 issuers.

[834] *See* letter from IPC I.

[835] The university group commentator states that there are "overlap" or "mutuality" cost efficiencies that will emerge on the supplier side, as the same supplier may have supply contracts with more than one issuer thus allowing them to use any management systems changes to meet the needs of multiple issuers. This commentator estimates that supplier efforts will be reduced by 60% because of this supplier-issuer overlap and modifies the number of suppliers accordingly. *See* letter from Tulane.

[836] *See U.S. Census Bureau, Statistics of U.S. Business* (2009), *available at http://www.census.gov/econ/susb/*. We recognize that the U.S. Census Bureau uses the NAICS definitions, including the definition of "manufacturing." As discussed above, we did not adopt that definition for the final rule because it appears to exclude any issuer that manufactures a product by assembling that product out of materials, substances, or components that are not in raw material form, which would exclude large categories of issuers that manufacture products through assembly. However, we believe it is not inappropriate to use the Census Bureau's data regarding the total number of manufacturing businesses and the number of small manufacturing businesses in determining whether to use the number of suppliers provided by the university group commentator or the number provided by the manufacturing industry association commentator. Because we only have two real choices in the number of suppliers to use for our calculations, we need some way to determine which figure is a more viable estimate. Despite the

similar to the number provided by the manufacturing industry association commentator. We therefore have revised the university group commentator's analysis on the number of affected suppliers to be consistent with the manufacturing industry association commentator at 278,000 to reflect this judgment. In addition, consistent with the university group commentator framework, we assumed that the same percentage of suppliers as issuers would be considered large (28%) and small (72%). Thus, in our revised university group commentator's analysis, the total number of large suppliers is 77,840 while the total number of small suppliers is 200,160. This changes the total compliance cost for suppliers from $5.1 billion in the university group commentator's analysis to $1.2 billion in our revised analysis.

The overall impact of these changes to the analysis, a reduction in IT costs (to both the manufacturing industry association and university group commentators), a modification in the number of suppliers in the supply chain (to the manufacturing industry association commentator) and a decrease in the number of suppliers affected (to the university group commentator) changes the total estimated cost of compliance substantially. The manufacturing industry association commentator's estimate declines from $9.3 billion to $4.1 billion while the university group commentator's estimate drops from $7.94 billion to $3.0 billion.

The combination of these modifications in the two analyses leads us to estimate that initial compliance costs could be between $3.0 and $4.0 billion for all companies to comply with the statutory requirements. Below are the two revised analyses in tabular form with the revised estimates highlighted in bold:

Revised		Calculation
Manufacturing Industry Association Commentator Estimate:		
Issuers affected	5,994	
Average number of 1st tier suppliers	**1,060**	2000*.53
Issuer Due Diligence Reform: [837]		
Number of compliance hours per supplier	2	
Cost per hour	$50	
Total compliance cost	*$635,364,000*	5,994*1,060*2*$50
IT Systems Modification: [838]		
Cost per issuer	*$250,000*	
Total cost	*$1,498,500,000*	5,994*$250,000
Conflict Minerals Report Audits:		
Issuers to do audit [839]	4,500	5,994*75%
Audit cost for issuers	$100,000	
Total cost	*$450,000,000*	4,500*100,000
Issuer Verification of Supplier Information:		
Number of hours	0.5	
Cost per hour	$50	
Total cost	*$158,841,000*	5,994*1,060*0.5*$50
Smaller Supplier Due Diligence: [840]		
Suppliers affected (only 20% to conduct)	55,600	278,000*.2
Due diligence cost	$25,000	
Total cost	*$1,390,000,000*	278,000*.2*$25,000
Total	$4,132,705,000	

Revised		Calculation
University Group Commentator Estimate:		
Issuers affected	5,994	
Large issuer (28% of issuers)	1,678	5,994*0.28
Small issuer (72% of issuers)	4,316	5,994*0.72
Number of 1st tier suppliers (53% of NAM)	1,060	2,000*0.53
Issuer Due Diligence Reform:		
Number of compliance hours for large issuer	100	
Number of compliance hours for small issuer	40	
Internal cost per hour	$50	

fact that the Census Bureau uses the NAICS definition of "manufacturing," which may exclude certain manufacturers, it would need to exclude almost 600,000 manufacturers for the university group commentator's figure to be more accurate than the manufacturing industry association commentator's figure. This appears to be too high. Therefore, because the manufacturing industry association commentator's figure is so much closer to the Census Bureau's figures, we decided it would not be inappropriate to use the manufacturing industry association commentator's figure even though our reasoning was based on the NAICS definition of "manufacturing."

[837] The manufacturing industry association commentator refers to this as "changes to their corporate compliance policies." *See* letter from NAM I.

[838] The manufacturing industry association commentator refers to this as IT system development or revision. *See id.*

[839] We are using the rounded estimate (4,500) that was used by the university group and manufacturing industry association commentators in their calculations even though a more exact number of issuers would be 4,496 (.75 × 5,994 = 4,495.5). *See infra* note 869.

[840] The manufacturing industry association commentator refers to this as the cost of providing "proper information regarding the source of minerals." *Id.*

Revised		Calculation
Internal costs for large issuer (90% of total work load)	*$7,551,000*	1,678*0.9*100*$50
Internal costs for small issuer (75% of total work load)	*$6,474,000*	4,316*0.75*40*$50
Consulting cost per hour	$200	
Consulting costs for large issuer (10% of total work load)	*$3,356,000*	1,678*0.1*100*$200
Consulting costs for small issuer (25% of total work load)	*$8,632,000*	4,316*0.25*40*$200
Total cost	*$26,013,000*	
IT Systems Modification:		
Cost per large issuer	**$410,000**	
Cost per small issuer	**$205,000**	
Total large issuer cost	*$687,980,000*	1,678*$410,000
Total small issuer cost	*$884,780,000*	4,316*$205,000
Total costs	*$1,572,760,000*	
Conflict Minerals Report Audits:		
Issuers affected[841]	4,500	
Number of large issuers	1,260	4,500*0.72
Number of small issuers	3,240	4,500*0.28
Large issuer cost	$100,000	
Small issuer cost	$25,000	
Total costs for large issuers	*$126,000,000*	1,260*$100,000
Total costs for small issuers	*$81,000,000*	3,240*$25,000
Total costs	*$207,000,000*	
Supplier Due Diligence Reform:		
Total large suppliers	**77,840**	278,000*.28
Total small suppliers	**200,160**	278,000*.72
Number of compliance hours for large supplier	100	
Number of compliance hours for small supplier	40	
Internal cost per hour	$50	
Internal costs for large supplier (90% of total work load)	*$350,280,000*	77,840*100*0.9*$50
Internal costs for small supplier (75% of total work load)	*$300,240,000*	200,160*40*0.75*$50
Consulting cost per hour	$200	
Consulting costs for large supplier (10% of total work load)	*$155,680,000*	77,840*100*0.1*$200
Consulting costs for small supplier (25% of total work load)	*$400,320,000*	200,160*40*0.25*$200
Total cost	*$1,206,520,000*	
Total	$3,012,293,000	

The manufacturing industry association and the university group commentators also provided estimates of ongoing compliance costs. As discussed above, we consider the framework provided by these commentators to be the most useful for estimating costs. The only other commentator to provide an estimate of ongoing costs was the electronic interconnect industry association commentator, but its analysis only included companies in that industry. The analyses provided by the manufacturing industry association and university group commentators yield costs estimates across multiple industries. The manufacturing industry association group commentator estimated an ongoing audit cost of $450 million and an ongoing cost estimate of approximately $300 million for issuer verification of supplier information.[842] In our table above, however, we revised the estimate for issuer verification of supplier information to approximately $159 million.[843] We did not modify the approximately $450 million cost estimate of the audit, which was based on its estimate that the cost of such an audit for these issuers would be $100,000 per issuer, and not the $25,000 we estimated it to be in the Proposing Release. The total estimate of ongoing compliance costs based on our revisions to the manufacturing industry association commentator's analysis is therefore approximately $609 million.[844] We believe that the university group commentator's only significant recurring costs are the approximately $207 million audit costs.[845] As with the manufacturing industry association commentator, we did not modify the approximately $207 million cost estimate of the audit. Therefore, we believe that the ongoing compliance cost estimate is likely to be in the range of $207 million to $609 million.[846]

[841] We are using the rounded estimate (4,500) that was used by the university group and manufacturing industry association commentators in their calculations even though a more exact number of issuers would be 4,496 (.75 × 5,994 = 4,495.5). *See infra* note 869.

[842] *See* letter from NAM I.

[843] 5,994*1,060 *0.5 *$50 = $158,841,000

[844] $450,000,000 + $158,841,000 = $608,841,000

[845] The university group commentator noted that "there would be some internal operations costs associated with performing ongoing due diligence and maintaining the necessary [information technology] systems on a company-to-company basis over the years," but that the "recurring costs of operating same is very low compared with the initial implementation." *See* letter from Tulane.

[846] The manufacturing industry association commentator also quotes compliance costs by Technology Forecasters, Inc on the RoHS directive. Using the RoHS directive, they estimate total compliance costs of $32 billion and $3 billion annually for maintenance. *See* letter from NAM I. One potential method to estimate ongoing costs is to apply the ratio of initial compliance costs to ongoing compliance costs (9.375%) in the submitted RoHS analysis ($3 billion/$32 billion or 9.375%) and apply it to our revised estimates of the analyses of the manufacturing industry association and university group commentators. This results in total ongoing estimated compliance costs of $400

IV. Paperwork Reduction Act

A. Background

Certain provisions of the final rule contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (the "PRA").[847] We published a notice requesting comment on the collection of information requirements in the Proposing Release for the proposed rules and amendments. The proposed rules and amendments would have amended one regulation and three forms. In response to comments received from the public, the Commission has decided to adopt a new disclosure form, rather than amend existing rules and forms. We have submitted the new collection of information requirements to the Office of Management and Budget (the "OMB") for review in accordance with the PRA.[848]

The title for the collection of information is: "Form SD" (a new collection of information).

The form is adopted under the Exchange Act and sets forth the disclosure requirements for reports filed by certain issuers regarding their use of conflict minerals from the Covered Countries. The hours and costs associated with preparing and submitting the form constitute the reporting and cost burdens imposed by the collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Compliance with the rule is mandatory. Responses to the information collection will not be kept confidential and there is no mandatory retention period for the information disclosed.

B. Summary of the Comment Letters

In the Proposing Release, we requested comment on the PRA analysis. We received only one comment letter that addressed the PRA explicitly,[849] but we received a number of other comment letters and submissions that discussed the costs and burdens to issuers generally that would have an effect on the PRA analysis.[850] A detailed discussion of these comments is included in the section III above regarding the Economic Analysis of the statute. In the Proposing Release, we estimated that approximately 5,994 of the approximately 14,600 annual reports are filed by issuers that would be affected by the proposed rules and form amendments.

The letter discussing the PRA specifically was from the manufacturing industry association commentator.[851] The commentator concluded that, of the 5,994 issuers that the Proposing Release stated could be affected by the final rule, the average issuer would have between 2,000 to 10,000 first-tier suppliers. The commentator agreed, therefore, with our statement in the Proposing Release that the paperwork costs could be significant because the disclosure requirement in the proposed rules "drastically increases the amount of paperwork issuers will have to collect and provide to the SEC to make the required disclosures."[852] The amount calculated by the commentator was $9.4 billion, which included approximately "$8 billion for issuers and $1.4 billion from smaller companies that are not issuers."[853]

Our PRA analysis pertains solely to the paperwork burdens of issuers that file reports with us, although we discuss the burdens and costs of the final rule to both reporting issuers and non-reporting companies in our Economic Analysis section above. Therefore, for the purpose of the PRA analysis, we do not take into account the commentator's $1.4 billion figure because it relates solely to non-reporting companies. As a result, the commentator's paperwork burden estimate appears to be approximately $8 billion, which is much higher than our estimate of $46,475,000 in the Proposing Release. Also, as we note above, other commentators provided costs estimates. These commentators did not specifically discuss the costs of the statute or the rule as they relate to the PRA. However, as discussed in greater detail below, we have attempted to extrapolate the paperwork costs from the overall cost estimates of these commentators.[854]

C. Revisions to PRA Reporting and Cost Burden Estimates

For purposes of the PRA, in the Proposing Release, we estimated that the total annual increase in the paperwork burden for all companies to prepare the disclosure that would be required under the proposed rules would be approximately 153,864 hours of company personnel time and a cost of approximately $71,243,000 for the services of outside professionals. These figures reflected our estimated costs for issuers to satisfy the due diligence and audit requirements of the proposed rules, which we estimated would be $46,475,000. As discussed in more detail below, we are revising our PRA burden and cost estimates in light of the comments we received.

For purposes of the PRA for the final rule, we estimate the total annual increase in the paperwork burden for all affected companies to comply with the collection of information requirements in our final rule is approximately 2,225,273 hours of company personnel time and approximately $1,178,378,167 for the services of outside professionals.[855] These estimates include the time and cost of collecting the information, preparing and reviewing disclosure, and submitting documents. In this regard, we include due diligence, which includes updating information technology systems and obtaining an independent private sector audit, as part of collecting information. We estimate that the total cost for issuers to satisfy their due diligence is $1,030,026,667. We added this estimate to our estimate of the cost to issuers to hire outside professionals to prepare and review disclosure, submit

million ($4.1 billion * 9.375%) and $281 million ($3.0 billion * 9.375%), respectively. However, because the manufacturing industry association commentator does not specify the composition of these maintenance costs (e.g., it is not stated whether this includes audit costs), nor does it provide the underlying RoHS study for verification, we are unable to confirm the accuracy of this ratio.

[847] 44 U.S.C. 3501 *et seq.*

[848] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[849] *See* letter from NAM I.

[850] *See, e.g.*, letters from Assent, Barrick Gold, CEI I, CEI II, Chamber I, Chamber III, Claigan I, Claigan II, Claigan III, CTIA, Ford, Howland, IPC I, ITRI I, ITRI II, ITRI III, Japanese Trade Associations, NAM I, NRF I, PCP, Rep. Lee, Roundtable, Society of Corporate Secretaries and Governance Professionals (Jun. 21, 2011) ("Corporate Secretaries II"), TriQuint I, Tulane, United States Chamber of Commerce (Jul. 18, 2011) ("Chamber II"), and WGC I.

[851] *See* letter from NAM I.

[852] *Id.*

[853] *See id.* In response to our estimate in the Proposing Release, of 793 reporting companies that would qualify as "small entities" for purposes of the Initial Regulatory Flexibility Act and that have conflict minerals necessary to the functionality or production of products they manufacture or contract to manufacture, the manufacturing industry association commentator noted that "a large portion of America's 278 thousand small and medium-sized manufacturers could be affected by the requirement to provide information on the origin of the minerals in the parts and components they supply to companies subject to the SEC." *Id.* The commentator estimated, however, that "only one in five smaller companies would be in one or more issuer's supply chains," and these smaller companies' only costs regarding the proposed rules would be a $25,000 audit cost. *Id.* Therefore, the proposed rules would cost smaller companies that are not required to report with us under Exchange Act Sections 13(a) or 15(d) approximately $1.4 billion. *Id.*

[854] *See* letters from Claigan I, Claigan II, Claigan III, Claigan IV, IPC I, and Tulane.

[855] $1,030,026,667 + $148,351,500 = $1,178,378,167.

documents, and retain records, which is $148,351,500.[856]

Consistent with our methodology in the Proposing Release, in deriving our estimates for the final rule, we recognize that the burdens will likely vary among individual companies based on a number of factors, including the size and complexity of their operations, the number of products they manufacture or contract to manufacture, and the number of those products that contain conflict minerals. We believe that some issuers will experience costs in excess of this average in the first year of compliance with the final rule and some issuers may experience less than these average costs. We base our revised estimates of the effect that the final rule will have on the collection of information as a result of the required reasonable country of origin inquiry, due diligence process, and independent private sector audit of the Conflict Minerals Report primarily on information that we have obtained from comment letters.

In the Proposing Release, we noted that the DRC accounts for approximately 15% to 20% of the world's tantalum, and accounts for a considerably smaller percentage of the other three conflict minerals.[857] Therefore, for the purposes of the PRA, we assumed in the Proposing Release that only 20% of the 5,994 affected issuers would have to provide an audited Conflict Minerals Report, which would have been 1,199 issuers. Both the manufacturing industry association commentator and the university group commentator, however, estimated in their comment letters that 75% of issuers would have to submit a Conflict Minerals Report.[858] Also, the electronic interconnect industry association commentator indicated that it expected "nearly 100% of affected issuers will need to complete" a Conflict Minerals Report because "the vast majority of [issuers] will be unable to identify the origin of their conflict minerals."[859] However, because of the reasonable country of origin inquiry requirement, the fact that only issuers who know or have reason to believe that their conflict minerals may have originated in the Covered Countries and may not have come from recycled or scrap sources are required to proceed to step three, and the "DRC conflict undeterminable" temporary provision, we believe it is appropriate to estimate that some percentage of issuers will not be required to submit a Conflict Minerals Report, an independent private sector audit, or both. Therefore, for the final rule, we estimate that 75% of all the 5,994 issuers, which is approximately 4,496 issuers,[860] will have to submit a Conflict Minerals Report and provide an independent private sector audit of that report for the first two years after implementation. We note that, under the final rule, issuers that proceed to step three but are unable to determine whether their conflict minerals originated in the Covered Countries, came from recycled or scrap sources, or financed or benefited armed groups in those countries are required to provide a Conflict Minerals Report, but that report does not have to be audited for the first two years following the rule's adoption for all issuers and the first four years for smaller reporting issuers. This change from the proposal could cause the actual costs to issuers for the first two years after implementation, for all issuers and four years after implementation for smaller issuers, to be lower than the commentators' cost estimates. We believe, however, that our assumption that 75% of affected issuers will have to submit a Conflict Minerals Report and provide an independent private sector audit of that report will balance some of the cost estimate discrepancies because 75% was lower than the 100% estimate of the number of affected issuers.[861]

1. Estimate of Conducting Due Diligence, Including the Audit

We received a number of comments regarding the estimated costs of the proposed rules, particularly setting up the overall supply chain tracking systems and conducting an audit. The cost estimates provided by the manufacturing industry association commentator and the university group commentator were the most comprehensive because they discussed the costs to all companies, including issuers and private company suppliers.[862] We note that the electronic interconnect industry association commentator provided an extensive discussion of the costs of the proposed rules.[863] Its discussion and cost estimates, however, were limited to the electronic interconnect industry, which is only one segment of affected issuers. Also, although the tin industry association commentator's estimates were useful, they were limited to the costs of its bag-and-tag system, which covers only the costs of due diligence for the portion of the supply chain from the mine to the smelter.[864] For the PRA estimate of the due diligence costs, we relied primarily on the cost estimates from the manufacturing industry association and the university group commentators and, to a lesser extent, we also relied on the electronic interconnect industry association commentator's estimates.[865]

The manufacturing industry association commentator estimated that the initial costs to affected issuers would be approximately $8 billion.[866] This commentator's only two recurring costs in its $8 billion estimate were the approximately $300 million cost for risk-based programs needed to verify the credibility of suppliers' information, which the commentator indicated would be incurred "on an annual basis,"[867] and the approximately $450 million cost for the annual audit of the Conflict Minerals Report, which together total $750 million.[868]

The university group commentator estimated that the initial costs to affected issuers would be approximately

[856] We note that commentators rounded many of the calculations they made and used. However, for clarity in the body of the release, we refer to many rounded figures, but we have included the more exact figures and our calculations in the footnotes. Regardless, it does not appear that the rounded numbers vary significantly from the more exact calculations to make them meaningfully different.

[857] *See* Proposing Release. *See also* Jessica Holzer, *Retailers Fight to Escape 'Conflict Minerals' Law*, *The Wall Street Journal*, Dec. 2, 2010, at B1. The DRC also accounts for approximately 4% of the world's tin, *see id.*, and approximately 0.3% of global gold mine production, *see* letter from JVC *et al.* II (citing to GFMS Gold Survey 2010).

[858] *See* letters from NAM I and Tulane.

[859] *See* letter from IPC I.

[860] 5,994 issuers × 75% = 4,495.5.

[861] *See* letters from IPC I (stating that nearly 100% of affected issuers would have to complete a Conflict Minerals Report) and NAM I (stating that it "conservatively" estimated that 75% of affected issuers would have to provide an audited Conflict Minerals Report).

[862] *See* letters from NAM I and Tulane.

[863] *See* letter from IPC I.

[864] *See* letter from ITRI II.

[865] We note that in the Economic Analysis above, we provided a range to estimate the ongoing compliance costs. For purposes of the PRA, however, which calls for a specific estimate of the total annual paperwork burden imposed by the rule, we are using two of the data points within that range based on the more comprehensive comment letters we received and are then averaging the results to yield a final PRA estimate.

[866] We calculate the exact amount, based on the commentator's estimates and assumptions, to be $7,941,250,000. The commentator stated that this cost would include changing legal obligations, changing IT systems, obtaining an independent private sector audit, and implementing risk-based programs. Changing legal obligations would entail 2 hours for each affected issuer's 2,000 suppliers at $50 per hour [2 × $50 × 2,000 × 5,994 = $1,198,800,000.]. Changing IT systems would entail a cost of $1 million per affected issuer [$1 million × 5,994 = $5,994,000,000]. Obtaining an audit would entail a cost of $100,000 for 75% of all affected issuers [$100,000 × 75% × 5,994 = $449,550,000]. Implementing risk-based programs would entail 1,000 hours at a cost of $50 per hour for all affected issuers [1,000 × $50 × 5,994 = $299,700,000].

[867] *See* letter from NAM I.

[868] The actual cost would be $749,250,000 [$449,550,000 + $299,700,000 = $749,250,000].

$2.8 billion,[869] and the cost to affected issuers in subsequent years would consist primarily of the approximately $207 million portion of that amount that would be used for the annual audit of the Conflict Minerals Report.[870]

As discussed above in section III, however, we adjusted the cost estimates provided to us by the manufacturing industry association and the university group commentators. Therefore, our overall estimate regarding the costs of conducting due diligence, including the audit, is based on the modified cost figures. Although the manufacturing industry association commentator estimated that the initial costs to affected issuers would be approximately $8 billion, we modified that figure to be approximately $2.7 billion for affected issuers.[871] In this regard, we modified that commentator's approximately $300 million cost estimate for risk-based programs to be approximately $159 million.[872] We did not, however, modify the commentator's approximately $450 million cost estimate of the independent private sector audit for affected issuers, which was based on its estimate that the cost of such an audit for these issuers would be $100,000 per issuer, and not the $25,000 we estimated it to be in the Proposing Release.[873] We note that the electronic interconnect industry association commentator agreed that the costs for an independent private sector audit could be as much as $100,000.[874] The manufacturing industry association commentator noted, however, that $25,000 would cover the audit for a small company with a simple supply chain.[875]

From the approximately $159 million cost estimate for the risk-based programs needed to verify the credibility of suppliers' information, based on our revised calculations of the manufacturing industry association commentator's figures, and that commentator's approximately $450 million cost estimate for the audit, we derive an approximate estimate of $609 million for annual recurring costs.[876] We note that the initial approximately $2.7 billion burden is much greater than the subsequent approximately $609 million annual burden, and we averaged the burdens over the first three years. Over a three-year period, the average annual cost to affected issuers would be approximately $1.32 billion using the manufacturing industry association commentator's figures.[877]

Additionally, although the university group commentator estimated that the initial costs to affected issuers would be approximately $2.8 billion, we modify that figure to be approximately $1.8 billion.[878] We did not, however, modify the university group commentator's approximately $207 million cost estimate of the independent private sector audit for affected issuers. Therefore, we do not modify the estimate of the cost to affected issuers in subsequent years, which would still be approximately $207 million. Again, the initial approximately $1.8 billion burden is much greater than the subsequent approximately $207 million annual burden, and we also averaged the burdens over the first three years. Over a three-year period, the average annual cost to affected issuers would be approximately $740 million using the university group commentator's figures.[879]

To estimate the overall costs of conducting due diligence, including the audit, we averaged the modified estimates from the manufacturing industry association and the university group commentators discussed above. The average of these two costs is approximately $1.03 billion.[880]

2. Estimate of Preparing the Disclosure

The few estimates that we received from commentators regarding the number of hours it would take issuers to prepare and review the proposed disclosure requirements varied widely. One commentator, a semiconductor company, asserted that it would require 1,400 hours initially to implement the proposed rules and 700 hours in subsequent years.[881] The university group commentator suggested that a small issuer would require 40 man-hours to comply with the proposed rules and a large issuer would require 100 man-hours,[882] and it appears that these costs would be recurring.[883] The manufacturing industry association commentator concluded that changing legal obligations to reflect a company's new due diligence would require "at a minimum" two hours of employee time,

[869] The actual estimated cost was $2,795,793,000. This cost estimate included a $2,562,780,000 cost for instituting the necessary IT systems [$1,678,000,000 for large issuers plus $884,780,000 for small issuers], a $26,013,000 cost for strengthening internal management systems in view of performing due diligence, and a $207,000,000 cost for the independent private sector audit. The university group commentator estimated the audit cost to be exactly $207 million by using the manufacturing industry association commentator's estimate that 4,500 of the 5,994 affected issuers (75%) would be required to obtain an audit of their Conflict Minerals Report. The 4,500 figure, however, is rounded up from a more exact calculation of 75% of 5,994. The more exact calculation for 75% of 5,994 is 4,496 [5,994 × .75 = 4,459.5], and not 4,500, but both the university group commentator and the manufacturing industry association commentator rounded to 4,500. Using the electronic interconnect industry association commentator's estimates that 72% of all affected issuers are small and medium-sized issuers (under $99 million in annual sales) and 28% are large issuers, the university group estimated that, of the 4,500 affected issuers, 3,240 were small and medium-sized issuers and 1,260 were large issuers. The university group commentator assumed that, based on the manufacturing industry association commentator's estimates, an audit for small and medium-sized issuers would cost $25,000 per audit and an audit for large issuers would cost $100,000 per audit. Using these estimates, the university group determined that the total audit cost amount for affected issuers would be $207 million exactly.

[870] *See* letter from Tulane.

[871] Our estimate of the cost is $2,742,705,000. This cost estimate included a $635,364,000 cost for issuer due diligence reform, a $1,498,500,000 cost for IT system modifications, a $450,000,000 cost for the independent private sector audit, and a $158,841,000 cost of risk-based programs needed to verify the credibility of suppliers' information.

[872] Our estimate of the cost is $158,841,000.

[873] *See* letter from NAM I.

[874] *See* letter from IPC I.

[875] *See* letter from NAM I. We note that the manufacturing industry association commentator separately indicated that costs of the final rule could be $16 billion or more by extrapolating from the costs of compliance with the RoHS. We did not use this estimate in our analysis because, despite the fact that this commentator claimed that both directives require companies to trace materials used in their products, the commentator did not discuss how RoHS compares to the requirements in the final rule.

[876] $450,000,000 + $158,841,000 = $608,841,000.

[877] ($2,742,705,000 + $608,841,000 + $608,841,000)/3 = $1,320,129,000.

[878] The estimated cost was $1,805,773,000. This cost estimate for issuers included the modified $1,572,760,000 cost for instituting the necessary IT systems, the $207,000,000 cost for the independent private sector audit, and the $26,013,000 cost for strengthening internal management systems in view of performing due diligence.

[879] ($1,805,773,000 + $207,000,000 + $207,000,000)/3 = $739,924,333.

[880] ($1,320,129,000 + $739,924,333)/2 = $1,030,026,667.

[881] *See* letter from TriQuint I.

[882] *See* letter from Tulane. This commentator stated that an issuer's compliance could be "facilitated" by using third parties. The commentator assumed that large issuers would use third parties for 10% of their compliance needs and small companies would use third parties for 25% of their compliance needs. In our calculations for the number of hours issuers would require in complying with our proposed rules, we did not include third parties because it appears that the use of third parties would not affect the number of hours required for compliance, but would only affect the cost.

[883] *Id.* This commentator stated that the 100 hours or 40 hours needed to comply with the proposed rules would involve multiple tasks, including: Initial reviews of the issuer's policies, procedures, and controls; developing a gap analysis and compliance plan, and modifying that plan as needed; developing draft revised policies, procedures, and controls; conducting initial testing on those revised policies, procedures, and controls; and implementing the revised policies, procedures, and controls, training personnel on them, and communicating them to suppliers. Although many of these are described as "initial" actions, issuers will need to review and modify many of them as well. For example, it is likely that each year issuers may need to review and test their policies, procedures, and controls, modify them as needed, and implement any new further revised policies, procedures, and controls.

"and considerably more than two hours is a distinct possibility." [884]

In calculating the number of hours necessary to prepare and review the disclosure required by the final rule, we derived an average based on the estimates provided by the semiconductor company and university group commentators.[885] For the semiconductor company commentator estimate, we multiplied its initial 1,400 hour estimate by the 5,994 affected issuers, so the first year's burden for all affected issuers would be approximately 8.4 million hours,[886] and the 700 hour subsequent year estimate also by the 5,994 affected issuers, which resulted in approximately 4.2 million hours for each subsequent year.[887] Averaging the burden hours over the first three years resulted in an average burden hour estimate of approximately 5.6 million hours per year.[888] To determine the estimated number of hours per year per issuer, we divided the 5.6 million hours by 5,994 affected issuers, which resulted in 933 hours per year per affected issuer to comply with the proposed rules.[889]

The university group commentator separated its estimated hours between small and large issuers using the estimated breakdown between the number of affected large and small companies provided by the electronic interconnect industry association in its comment letter.[890] Because we recognized that companies of varying sizes may incur different burdens, we also differentiated between large and small companies in our estimate of burden hours. Therefore, we multiplied the university group commentator's 100 hour estimate for large issuers by the electronic interconnect industry association commentator's estimated 28% for large affected issuers, so the burden for large affected issuers would be 167,832 hours,[891] and multiplied the 40 hour estimate for small issuers by the electronic interconnect industry association commentator's 72% for small affected issuers, which resulted in 172,627 hours for small affected issuers.[892] To determine the estimated number of hours per year per issuer, we added the estimated hours for the small and large companies, which would be 340,459 hours,[893] and divided that number by all the 5,994 affected issuers. Therefore, the average amount of hours per year for each issuer, both large and small, to prepare and review the disclosure required by our rule would be approximately 57 hours.[894] Although not explicit in its comment letter, it appears that the burden hours for the university group commentator's estimates would be incurred annually, so we did not average these hours over the first three years as we did for the semiconductor company commentator's estimate.

Next, we averaged the two burden hour estimates by adding the 933 hour estimate to the 57 hour estimate (and by dividing by two) and determined that each affected issuer, on average, would spend 495 burden hours preparing and reviewing the disclosure.[895] We assumed that 75% of the burden of preparation would have been carried by the company internally and that 25% of the burden of the preparation would have been carried by outside professionals retained by the company at an average cost of $200 per hour.[896] The portion of the burden carried by outside professionals would have been reflected as a cost, while the portion of the burden carried by the company internally would have been reflected in hours. Therefore, the total number of internal preparation hours for affected issuers would be 2,225,273 hours.[897] Similarly, the total cost for external preparation for affected issuers would be $148,351,500.[898]

3. Revised PRA Estimate

The following table illustrates the estimated changes in annual compliance burden in the collection of information in hours and costs for the new Exchange Act specialized disclosure report that will result from the final rule. The burden hours figure is the 2,225,273 internal burden hours estimate for preparing the disclosure. We are adding the $148,351,500 estimate of external professional costs for preparing the disclosure to the $1,030,026,667 estimate of conducting due diligence, including the audit, to determine the $1,178,378,167 professional costs in the below table.

Form	Current annual responses	Final annual responses	Current burden hours (A)	Increase in burden hours (B)	Final burden hours (C) = (A) + (B)	Current professional costs (D)	Increase in professional costs (E)	Final professional costs (F) = (D) + (E)
S–D	.....	5,994	.....	2,225,273	2,225,273	.....	$1,178,378,167	$1,178,378,167

V. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Act Analysis ("FRFA") [899] relates to new rule 13p–1 and new Form SD, which implement Section 13(p) of the Exchange Act. Section 13(p) concerns certain disclosure and reporting obligations of issuers with conflict minerals necessary to the functionality or production of any product manufactured or contracted by those

[884] *See* letter from NAM I.

[885] We did not include the two-hour figure from the manufacturing industry association commentator in our estimate because it was so much lower than the other two estimates and did not appear to include all the necessary steps to comply with the proposed rules. Instead, this estimate was based only on the time required to make changes to an issuer's corporate compliance policies and supply chain operating procedures. Also, the university group commentator specifically disagreed with this estimate and the manufacturing industry association commentator acknowledged that these actions may take "considerably more than two hours."

[886] 1,400 hours × 5,994 affected issuers = 8,391,600 hours.

[887] 700 hours × 5,994 affected issuers = 4,195,800 hours.

[888] [8,391,600 hours + (4,195,800 hours × 2)]/3 = 5,594,400 hours average per year.

[889] 5,594,400 hours/5,994 affected issuers = 933 hours.

[890] *See* letter from Tulane.

[891] 100 hours × 5,994 affected issuers × 28% large affected issuers = 167,832 hours.

[892] 40 hours × 5,994 affected issuers × 72% small affected issuers = 172,627 hours.

[893] 167,832 hours + 172,627 hours = 340,459 hours.

[894] 340,459 hours/5,994 affected issuers = 56.80 hours.

[895] 933 hours + 57 hours/2 = 495 hours.

[896] The university group commentator estimated that outside professionals would cost $200 per hour because it believed that "a substantial portion" of required consulting work will be done by "lower cost environmental and sustainability consulting firms" instead of large accounting firms that would be more expensive. We frequently use a $400 per hour estimate in our PRA analysis on the assumption that attorneys will be involved in the preparation of the securities law disclosures required by our rules. The disclosure required by the final rule may likely involve work by other types of professionals, so that the $200 per hour estimate may be more appropriate in this circumstance.

[897] 495 hours × 75% internal preparation × 5,994 affected issuers = 2,225,272.50 hours.

[898] 495 hours × 25% external preparation × $200 per hour for outside consultants × 5,994 affected issuers = $148,351,500.

[899] This analysis has been prepared in accordance with 5 U.S.C. 601.

issuers to be manufactured. An Initial Regulatory Flexibility Act Analysis was prepared in accordance with the Regulatory Flexibility Act and included in the Proposing Release.

A. Reasons for, and Objectives of, the Final Action

The final rule is designed to implement the requirements of Section 1502 of the Act. Specifically, we are adopting amendments to our rules to implement the Conflict Minerals Statutory Provision. The final rule requires any reporting issuer for which conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by that issuer to disclose annually in a separate specialized disclosure report on a new form the results of its reasonable country of origin inquiry into whether its conflict minerals originated in the Covered Countries or came from recycled or scrap sources. Under the final rule, following its reasonable country of origin inquiry, if (a) The issuer knows that its conflict minerals did not originate in the Covered Countries or knows that they came from recycled or scrap sources, or (b) the issuer has no reason to believe its conflict minerals may have originated in the Covered Countries, or (c) the issuer reasonably believes its conflict minerals came from recycled or scrap sources, then in all such cases the issuer must disclose its determination and describe briefly in the body of Form SD, the reasonable country of origin inquiry it undertook and the results of the inquiry. On the other hand, following its reasonable country of origin inquiry, if (a) the issuer knows that its conflict minerals originated in the Covered Countries and knows that they did not come from recycled or scrap sources, or the issuer has reason to believe that its conflict minerals may have originated in the Covered Countries, *and* (b) the issuer knows that its conflict minerals did not come from recycled or scrap sources or has reason to believe that its conflict minerals may not have come from recycled or scrap sources, then the issuer must exercise due diligence on the source and chain of custody of its conflict minerals that conforms to a nationally or internationally recognized due diligence framework, if one is available. If one is not available, the issuer must exercise due diligence without the benefit of such a framework. Following its due diligence, unless the issuer determines, based on that due diligence, that its conflict minerals did not originate in the Covered Countries or that its conflict minerals did come from recycled or scrap sources, the issuer must file a Conflict Minerals Report.

In most circumstances, the issuer must obtain an independent private sector audit of its Conflict Minerals Report. The issuer must also describe in its Conflict Minerals Report, among other information, its products manufactured or contracted to be manufactured that have not been found to be "DRC conflict free." For a temporary two-year period for all issuers, and for a temporary four-year period for smaller reporting issuers, an issuer that must perform due diligence and is unable to determine that the conflict minerals in its products originated in the Covered Countries or came from recycled or scrap sources, or unable to determine that the conflict minerals in those products that originated in the Covered Countries financed or benefited armed groups in those countries, may consider those products "DRC conflict undeterminable." In that case, the issuer must describe, among other information, its products manufactured or contracted to be manufactured that are "DRC conflict undeterminable" and the steps it has taken or will take, if any, since the end of the period covered in its most recent prior Conflict Minerals Report to mitigate the risk that its necessary conflict minerals benefit armed groups, including any steps to improve its due diligence. An issuer with products that are "DRC conflict undeterminable" is not required to obtain an independent private sector audit of the Conflict Minerals Report regarding the conflict minerals in those products.

Finally, after its reasonable country of origin inquiry, an issuer that has reason to believe that its conflict minerals may not have been from recycled or scrap sources must exercise due diligence that conforms to a nationally or internationally recognized due diligence framework developed specifically for conflict minerals from recycled sources to determine that its conflict minerals are from recycled or scrap sources. The issuer must also describe its due diligence in its Conflict Minerals Report. Currently, gold is the only conflict mineral with a nationally or internationally recognized due diligence framework for recycled or scrap conflict minerals. If no nationally or internationally recognized due diligence framework for a particular recycled or scrap conflict mineral is available, which is the case for the other three minerals, until such a framework is developed, the issuer must exercise due diligence in determining that its conflict minerals are from recycled or scrap sources and describe the due diligence measures it exercised in its Conflict Minerals Report.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on any aspect of the IRFA, including the number of small entities that would be affected by the proposed rules, the nature of the impact, how to quantify the number of small entities that would be affected, and how to quantify the impact of the proposed rules. We received some comments that specifically referenced the Regulatory Flexibility Analysis ("RFA").[900] Some of these commentators claimed that we underestimated the number of small entities that would be impacted by the proposal because our estimate did not account for the number of small businesses that do not report with us but participate in a reporting issuer's supply chain.[901] In this regard, the SBA recommended that we publish an amended IFRA for the proposed rules to "more accurately reflect the costs of the proposed rule and the number of small businesses that it will affect."[902] Another commentator noted specifically that we must look beyond the 793 reporting issuers that are also small entities because, when an issuer seeks to establish whether its supply chain is free of conflict minerals, it will have to turn to its first-tier suppliers and require due diligence.[903] This commentator indicated, therefore, that "a large portion of America's 278 thousand small and medium-sized manufacturers could be affected by" the final rule. Moreover, for purposes of determining the cost of the independent private sector audit on smaller companies, the commentator estimated that one in five smaller companies would be in an issuer's supply chain. As discussed in the Economic Analysis section above, we acknowledge that the statute and the final rule will affect many companies, including both companies that are directly subject to the rule's requirements and those that are not reporting companies but are part of a reporting issuer's supply chain.[904] For

[900] *See, e.g.*, letters from Industry Group Coalition II; IPC I; NAM I; Senator Olympia J. Snowe, Representative Sam Graves, Senator Scott P. Brown, Representative Roscoe Barlett, Representative Scott Tipton, and Representative Joe Walsh (Nov. 17, 2011) ("Sen. Snowe *et al.*"); and the Small Business Administration's Office of Advocacy (Oct. 25, 2011) ("SBA").

[901] *See, e.g.*, letters from NAM I, SBA, Sen. Snowe *et al.*, and WGC II.

[902] *See* letter from SBA.

[903] *See* letter from NAM I.

[904] *Id.*

purposes of the RFA, however, the focus is the impact on entities on which our rules impose direct requirements.[905] Therefore, although we do acknowledge the rule's impact on non-reporting small entities, they were not included in our RFA estimate of the 793 small entities that would be directly subject to the final rule.

Additionally, several commentators addressed aspects of the proposed rules that could potentially affect smaller reporting companies or small companies generally.[906] These commentators did not clarify whether they were referring to "small entities" as that term is defined under Exchange Act Rule 0–10(a).[907] In particular, certain commentators argued that the costs of the rules could be disproportionally higher to smaller issuers.[908] One commentator suggested that the Conflict Minerals Statutory Provision "does create a burden on small businesses, but not as high or disproportionate to revenue as has been reported" by other commentators.[909] Also, as discussed above, one commentator argued that the final rule should exempt smaller reporting companies.[910] Many other commentators argued, however, that final rule should not exempt smaller reporting companies.[911] Many commentators indicated that exempting smaller reporting companies would not reduce significantly their burdens [912] because, among other reasons, many of these smaller companies are part of larger companies' supply chains and these larger companies would require the smaller companies to provide conflict minerals information so that the larger companies could meet their obligations under the rule.[913] Two commentators agreed that smaller reporting companies should not be exempt from the rule, but stated that they should be allowed to phase-in the rules to mitigate their costs and not drain their resources.[914]

C. Small Entities Subject to the Final Rule

The final rule will affect some reporting issuers that are small entities. Exchange Act Rule 0–10(a) [915] defines an issuer to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year. We believe that the final rule would affect small entities with necessary conflict minerals as defined under Exchange Act Section 13(p). In the Proposing Release, we estimated that there were approximately 793 issuers to which conflict minerals are necessary and that may be considered small entities. As discussed above some commentators indicated that we underestimated the number of small entities that would be impacted by the rule, but that was based on the assertion that we consider small entities that are not directly subject to the requirements of the final rule.[916] We note that no commentator provided any other number of small entities or disagreed that 793 is the number that will be directly subject to the final rule. We continue to believe that there are 793 small entities that file reports with us under Exchange Act Sections 13(a) and 15(d) and that will be directly subject to the final rule because they likely have conflict minerals necessary to the functionality or production of products they manufacture or contract to manufacture.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The final rule will add to the annual disclosure requirements of issuers with necessary conflict minerals, including small entities, by requiring them to comply with the disclosure and reporting obligations under Section 13(p) and provide certain additional disclosure in their new specialized disclosure reports on Form SD that certain issuers will be required to file annually. Among other matters, that information must include, as applicable:

- Disclosure in the body of the specialized disclosure report as to whether such issuer knows or has reason to believe that conflict minerals necessary to the functionality or production of a product manufactured or contracted by an issuer to be manufactured originated in the Covered Countries or may have originated in the Covered Countries and may not have come from recycled or scrap sources;
- If not, or if the issuer knows or has reason to believe that its necessary conflict minerals came from recycled or scrap sources, disclosure in the body of the specialized disclosure report and on the issuer's Internet Web site of that determination and a brief description of the reasonable country of origin inquiry used in making that determination and the results of the inquiry it performed, and disclosure in the body of the specialized disclosure report of the address of the issuer's Internet Web site where that information is publicly available;
- If so, and the issuer is able to determine whether its conflict minerals directly or indirectly financed or benefited armed groups in the Covered Countries,

A Conflict Minerals Report filed as an exhibit to the specialized disclosure report, which includes a certified independent private sector audit report, a description of the nationally or internationally recognized due diligence framework the issuer used to determine the source and chain of custody of its conflict minerals, a description of the issuer's products that have not been found to be "DRC conflict free," and a description of the facilities used to process the necessary conflict minerals in those products, the country of origin of the necessary conflict minerals in those products, and the efforts to determine the mine or location of origin with the greatest possible specificity;

Disclosure in the body of the specialized disclosure report that a Conflict Minerals Report is filed as an exhibit to the specialized disclosure report and is publicly available on the issuer's Internet Web site, and disclosure within the body of the specialized disclosure report of the address of the issuer's Internet Web site on which the Conflict Minerals Report is publicly available;

Posting of the Conflict Minerals Report on the issuer's publicly available Internet Web site.

- If so, but the issuer is unable to determine that its conflict minerals did not directly or indirectly finance or benefit armed groups in the Covered Countries, if the issuer has reason to believe that its conflict minerals may have originated in the Covered Countries but is unable to determine the origin,

[905] *See, e.g., Mid-Tex Electric Cooperative* v. *FERC*, 773 F.2d 327 (D.C. Cir. 1985) and *White Eagle Cooperative Ass'n* v. *Conner*, 553 F.3d 467 (7th Cir. 2009). *See also Small Bus. Admin., Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (June 2010) ("SBA Guidance"), *available at http://archive.sba.gov/advo/laws/rfaguide.pdf.*

[906] *See, e.g.*, letters from BCIMC, Corporate Secretaries I, CRS I, Earthworks, Global Witness I, Howland, IPC I, JVC *et al.* II, NAM I, Rep. Bachus *et al.*, Rockefeller, Sen. Durbin/Rep. McDermott, SIF I, State II, TIAA–CREF, TIC, TriQuint I, and WGC II.

[907] 17 CFR 240.0–10(a) (defining an issuer to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year).

[908] *See, e.g.*, letters from Howland, NAM I, and WGC II.

[909] *See* letter from Claigan IV.

[910] *See* letter from Corporate Secretaries I.

[911] *See, e.g.*, letters from BCIMC, CRS I, Earthworks, Global Witness I, Howland, IPC I, JVC *et al.* II, Rockefeller, Sen. Durbin/Rep. McDermott, SIF I, State II, TIAA–CREF, TIC, and TriQuint I.

[912] *See, e.g.*, letters from IPC I and TriQuint I.

[913] *See* letter from IPC I.

[914] *See* letters from Howland and JVC *et al.* II.

[915] 17 CFR 240.0–10(a).

[916] *See, e.g.*, letters from NAM I, SBA, and WGC II.

A Conflict Minerals Report filed as an exhibit to the specialized disclosure report that includes a description of the nationally or internationally recognized due diligence framework the issuer used to determine the source and chain of custody of its conflict minerals, a description of the facilities used to process the necessary conflict minerals in those products, if known, the country of origin of the necessary conflict minerals in those products, if known, and the efforts to determine the mine or location of origin with the greatest possible specificity, and, for a temporary period, a description of the issuer's products that are "DRC conflict undeterminable" (for the temporary period, such issuers are not required to have their Conflict Minerals Report audited regarding such minerals);

Disclosure in the body of the specialized disclosure report that a Conflict Minerals Report is filed as an exhibit to the specialized disclosure report and is publicly available on the issuer's Internet Web site and the address of the issuer's Internet Web site on which the Conflict Minerals Report is publicly available;

Posting of the Conflict Minerals Report on the issuer's publicly available Internet Web site.

- If there is reason to believe that the conflict minerals may not be from recycled or scrap sources and there is a nationally or internationally recognized due diligence framework for those particular conflict minerals,

A Conflict Minerals Report filed as an exhibit to the specialized disclosure report, which includes a description of the nationally or internationally recognized due diligence framework the issuer used to determine that those conflict minerals were or has reason to believe may have been from recycled or scrap sources, which includes a certified independent private sector audit report regarding those minerals;

Disclosure in the body of the specialized disclosure report that a Conflict Minerals Report is filed as an exhibit to the specialized disclosure report and is publicly available on the issuer's Internet Web site and the address of the issuer's Internet Web site on which the Conflict Minerals Report is publicly available.

- If there is reason to believe that the conflict minerals may not be from recycled or scrap sources but there is no nationally or internationally recognized due diligence framework for those particular conflict minerals,

A Conflict Minerals Report filed as an exhibit to the specialized disclosure report, which includes a description of the due diligence the issuer used to determine that those conflict minerals were or has reason to believe may have been from recycled or scrap (until a nationally or internationally recognized due diligence framework is available for those conflict minerals from recycled or scrap sources, such issuers are not required to have their Conflict Minerals Report audited regarding such minerals);

Disclosure in the body of the specialized disclosure report that a Conflict Minerals Report is filed as an exhibit to the specialized disclosure report and is publicly available on the issuer's Internet Web site and the address of the issuer's Internet Web site on which the Conflict Minerals Report is publicly available.

The same disclosure and reporting requirements apply to U.S. and foreign issuers. However, under the final rule, issuers that proceed to step three but are unable to identify the origin of their conflict minerals or whether their conflict minerals came from recycled or scrap sources are required to provide a Conflict Minerals Report, but that report does not have to be audited for the first four years following the rule's adoption for smaller reporting companies. We are creating new Form SD that requires every issuer to file its conflict minerals information for each applicable calendar year on May 31 of the following year.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with the final rule, we considered the following alternatives:

(1) Establishing different compliance or reporting requirements which take into account the resources available to small entities;

(2) Exempting small entities from coverage of the disclosure requirements, or any part thereof;

(3) Clarification, consolidation, or simplification of the rules compliance and reporting requirements for small entities; and

(4) Use of performance standards rather than design standards.

We considered but did not establish different compliance requirements for small entities. As discussed above in response to commentators' suggestions that we exempt smaller reporting companies, we similarly believe that separate disclosure requirements for small entities that would differ from the final reporting requirements for other issuers, or exempting them from those requirements, would not achieve Congress's objectives of Section 13(p). The final rule is designed to implement the conflict minerals disclosure and reporting requirements of Section 13(p). That statutory section applies to all issuers with necessary conflict minerals, regardless of size. In any case, as several commentators noted, many smaller companies are part of larger companies' supply chains and would need to provide conflict minerals information so that the larger companies could meet their obligations under the rule.[917] However, under the final rule, issuers that proceed to step three but are unable to determine their conflict minerals originated in the Covered Countries or came from recycled or scrap sources, or unable to determine that the conflict minerals that originated in the Covered Countries financed or benefited armed groups in those countries are required to provide a Conflict Minerals Report, but that report does not have to be audited for the first four years following the rule's adoption for smaller reporting companies and the issuers may describe the product with known origin as "DRC conflict undeterminable."

We clarified and simplified aspects of the final rule for all issuers, including small entities. For example, the final rule specifies and clarifies the objective for the audit of a Conflict Minerals Report for newly-mined conflict minerals. The final rule also requires an issuer to disclose the information in the body of and as an exhibit to its specialized disclosure report, which may simplify the process of submitting the conflict minerals disclosure and Conflict Minerals Report as compared with requiring disclosure in an issuer's annual report on Form 10–K, Form 20–F, or Form 40–F.

We have generally used design rather than performance standards in connection with the final rule because we believe design standards will better accomplish Congress's objectives. The reasonable country of origin inquiry is the performance standard. In addition, the specific disclosure requirements in the final rule will promote consistent and comparable disclosure among all issuers with necessary conflict minerals. However, we are providing guidance regarding "contract to manufacture," and "necessary to the functionality and production," which we believe will allow issuers to comply with the statutory requirements in a manner more tailored to their individual circumstances.

[917] *See, e.g.*, letters from NAM I, SBA, Sen. Snowe *et al.*, and WGC II.

VI. Statutory Authority and Text of the Final Rule

We are adopting the rule amendments contained in this document under the authority set forth in Sections 3(b), 12, 13, 15(d), 23(a), and 36 of the Exchange Act, as amended.

List of Subjects in 17 CFR Parts 240 and 249b

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, we are amending Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 is amended by adding an authority for § 240.13p–1 in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77jjj, 77kkk, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78 *l*, 78m, 78n, 78n–1, 78o, 78o–4, 78o–8, 78p, 78q, 78s, 78u–5, 78w, 78x, 78dd(b), 78dd(c). 78 *ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.*, and 8302; 18 U.S.C. 1350; 12 U.S.C. 5221(e)(3), and Pub. L. 111–203, Sec. 712, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

Section 240.13p–1 is also issued under sec. 1502, Pub. L. 111–203, 124 Stat. 1376.

* * * * *

■ 2. Add § 240. 13p–1 to read as follows:

§ 240.13p–1 Requirement of report regarding disclosure of registrant's supply chain information regarding conflict minerals.

Every registrant that files reports with the Commission under Sections 13(a) (15 U.S.C. 78m(a)) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act, having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that registrant to be manufactured, shall file a report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form (17 CFR 249b.400).

PART 249b—FURTHER FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The authority citation for part 249b is amended by adding an authority for § 249b.400 to read as follows:

Authority: 15 U.S.C. 78a *et seq.*, unless otherwise noted.

* * * * *

Section 249b.400 is also issued under secs. 1502, Pub. L. 111–203, 124 Stat. 2213.

■ 4. Add § 249b.400 to read as follows:

§ 249b.400 Form SD, specialized disclosure report.

This Form shall be filed pursuant to § 240.13p–1 of this chapter by registrants that file reports with the Commission pursuant to Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 and are required to disclose the information required by Section 13(p) under the Securities Exchange Act of 1934 and Rule 13p–1 (§ 240.13p–1) of this chapter.

■ 5. Add Form SD (referenced in § 249b.400) to read as follows:

Note: The text of Form SD does not appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM SD

Specialized Disclosure report

_____

(Exact name of the registrant as specified in its charter)

_____

(State or other jurisdiction of incorporation or organization)

_____

(Commission File Number)

_____

(IRS Employer Identification No.)

_____

(Address of principal executive offices) (Zip code)

_____

(Name and telephone number, including area code, of the person to contact in connection with this report.)

Check the appropriate box to indicate the rule pursuant to which this form is being filed, and provide the period to which the information in this form applies:

___ Rule 13p–1 under the Securities Exchange Act (17 CFR 240.13p–1) for the reporting period from January 1 to December 31, _____.

GENERAL INSTRUCTIONS

A. Rule as to Use of Form SD.

This form shall be used for a report pursuant to Rule 13p–1 (17 CFR 240.13p–1) under the Exchange Act.

B. Information to be Reported and Time for Filing of Reports.

1. *Form filed under Rule 13p–1.* A report on this Form shall be filed on EDGAR no later than May 31 after the end of the issuer's most recent calendar year.

2. If the deadline for filing this form occurs on a Saturday, Sunday or holiday on which the Commission is not open for business, then the deadline shall be the next business day.

C. Inapplicability to Registered Investment Companies.

The disclosures required in Form SD shall not apply to investment companies required to file reports pursuant to Rule 30d–1 (17 CFR 270.30d–1) under the Investment Company Act of 1940.

D. Preparation of Report.

This form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the report meeting the requirements of Rule 12b–12 (17 CFR 240.12b–12). The report shall contain the number and caption of the applicable item, but the text of such item may be omitted, provided the answers thereto are prepared in the manner specified in Rule 12b–13 (17 CFR 240.12b–13). All items that are not required to be answered in a particular report may be omitted and no reference thereto need be made in the report. All instructions should also be omitted.

E. Application of General Rules and Regulations.

The General Rules and Regulations under the Act (17 CFR Part 240) contain certain general requirements which are applicable to reports on any form. These general requirements should be carefully read and observed in the preparation and filing of reports on this form.

F. Signature and Filing of Report.

The report must be signed by the registrant on behalf of the registrant by an executive officer.

INFORMATION TO BE INCLUDED IN THE REPORT

Section 1—Conflict Minerals Disclosure

Item 1.01 Conflict Minerals Disclosure and Report

(a) If any conflict minerals, as defined by paragraph (d)(3) of this item, are necessary to the functionality or production of a product manufactured by the registrant or contracted by the registrant to be manufactured and are required to be reported in the calendar year covered by the specialized disclosure report, the registrant must conduct in good faith a reasonable country of origin inquiry regarding those conflict minerals that is reasonably designed to determine whether any of the conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, as

defined by paragraph (d)(1) of this item, or are from recycled or scrap sources, as defined by paragraph (d)(6) of this item.

(b) Based on its reasonable country of origin inquiry, if the registrant determines that its necessary conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country or did come from recycled or scrap sources, or if it has no reason to believe that its necessary conflict minerals may have originated in the Democratic Republic of the Congo or an adjoining country, or if based on its reasonable country of origin inquiry the registrant reasonably believes that its necessary conflict minerals did come from recycled or scrap sources, the registrant must, in the body of its specialized disclosure report under a separate heading entitled "Conflict Minerals Disclosure," disclose its determination and briefly describe the reasonable country of origin inquiry it undertook in making its determination and the results of the inquiry it performed. Also, the registrant must disclose this information on its publicly available Internet Web site and, under a separate heading in its specialized disclosure report entitled "Conflict Minerals Disclosure," provide a link to that Web site.

(c) Alternatively, based on its reasonable country of origin inquiry, if the registrant knows that any of its necessary conflict minerals originated in the Democratic Republic of the Congo or an adjoining country and are not from recycled or scrap sources, or has reason to believe that its necessary conflict minerals may have originated in the Democratic Republic of the Congo or an adjoining country and has reason to believe that they may not be from recycled or scrap sources, the registrant must exercise due diligence on the source and chain of custody of its conflict mineral, as discussed in paragraph (c)(1) of this item, that conforms to a nationally or internationally recognized due diligence framework, if such a framework is available for the conflict mineral. If, as a result of that due diligence, the registrant determines that its conflict minerals did *not* originate in the Democratic Republic of the Congo or an adjoining country or the registrant determines that its conflict minerals *did* come from recycled or scrap sources, a Conflict Minerals Report is not required, but the registrant must disclose its determination and briefly describe, in the body of its specialized disclosure report under a separate heading entitled "Conflict Minerals Disclosure," the reasonable country of origin inquiry and the due diligence efforts it undertook in making its determination and the results of the inquiry and due diligence efforts it performed. Also, the registrant must disclose this information on its publicly available Internet Web site and, under a separate heading in its specialized disclosure report entitled "Conflict Minerals Disclosure," provide a link to that Web site. Otherwise, the registrant must file a Conflict Minerals Report as an exhibit to its specialized disclosure report and provide that report on its publicly available Internet Web site. Under a separate heading in its specialized disclosure report entitled "Conflict Minerals Disclosure," the registrant must disclose that it has filed a Conflict Minerals Report and provide the link to its Internet Web site where the Conflict Minerals Report is publicly available.

The Conflict Minerals Report must include the following information:

(1) *Due Diligence:* A description of the measures the registrant has taken to exercise due diligence on the source and chain of custody of those conflict minerals;

(i) The registrant's due diligence must conform to a nationally or internationally recognized due diligence framework, if such a framework is available for the conflict mineral;

(ii) Except as provided in paragraphs (c)(1)(iv), (c)(1)(v), and (c)(1)(vi) of this item, the due diligence measures shall include but not be limited to an independent private sector audit of the Conflict Minerals Report that is conducted in accordance with standards established by the Comptroller General of the United States and certified pursuant to paragraph (c)(1)(ii)(B) of this item, which shall constitute a critical component of the registrant's due diligence in establishing the source and chain of custody of the necessary conflict minerals.

(A) The objective of the audit of the Conflict Minerals Report is to express an opinion or conclusion as to whether the design of the registrant's due diligence measures as set forth in, and with respect to the period covered by, the registrant's Conflict Minerals Report, is in conformity with, in all material respects, the criteria set forth in the nationally or internationally recognized due diligence framework used by the registrant, and whether the registrant's description of the due diligence measures it performed as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is consistent with the due diligence process that the registrant undertook.

(B) The registrant's Conflict Minerals Report must include a statement that the registrant has obtained an independent private sector audit of the Conflict Minerals Report, which shall constitute an audit certification;

(C) As part of the Conflict Minerals Report, the registrant must identify the independent private sector auditor of the report, if the auditor is not identified in the audit report, and provide the audit report prepared by the auditor in accordance with standards established by the Comptroller General of the United States;

(iii) Any registrant that manufactures products or contracts for products to be manufactured that are "DRC conflict undeterminable," as defined in paragraph (d)(5) of this item, must disclose the steps it has taken or will take, if any, since the end of the period covered in its most recent prior Conflict Minerals Report to mitigate the risk that its necessary conflict minerals benefit armed groups, including any steps to improve its due diligence.

(iv) For the temporary period specified in Instruction 2 to Item 1.01, following its exercise of appropriate due diligence, a registrant with products that are "DRC conflict undeterminable" is not required to obtain an independent private sector audit of its Conflict Minerals Report regarding the conflict minerals that the registrant is unable to determine did not originate in the Democratic Republic of the Congo or an adjoining country, or that the registrant is unable to determine did not directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country.

(v) If a nationally or internationally recognized due diligence framework does not exist for a necessary conflict mineral, until such a framework is developed, the registrant is required to exercise appropriate due diligence in determining the source and chain of custody of the necessary conflict mineral, including whether the conflict mineral is from recycled or scrap sources, without the benefit of a due diligence framework. If a nationally or internationally recognized due diligence framework becomes available for the necessary conflict mineral prior to June 30 of a calendar year, the registrant must use that framework in the subsequent calendar year. If the due diligence guidance does not become available until after June 30 of a calendar year, the registrant is not required to use that framework until the second calendar year after the framework becomes available to provide a full calendar year before implementation. If no nationally or internationally recognized due diligence framework is available for a particular conflict mineral from recycled or scrap sources, the due

diligence inquiry regarding the conflict mineral focuses on whether the conflict mineral is from recycled or scrap sources. In addition, an independent private sector audit will not be required for the section of the Conflict Minerals Report pertaining to the registrant's due diligence on that recycled or scrap conflict mineral.

(vi) If the registrant performs due diligence because it has a reason to believe that its conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, and as a result of that due diligence it determines that its conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country (or it determines as a result of that due diligence that its necessary conflict minerals did come from recycled or scrap sources), a Conflict Minerals Report and an audit is not required.

(2) *Product Description:* Any registrant that manufactures products or contracts for products to be manufactured that have not been found to be "DRC conflict free," as defined in paragraph (d)(4) of this item, must provide a description of those products, the facilities used to process the necessary conflict minerals in those products, the country of origin of the necessary conflict minerals in those products, and the efforts to determine the mine or location of origin with the greatest possible specificity.

(i) For the temporary period specified in Instruction 2 to Item 1.01, following its exercise of appropriate due diligence, any registrant that manufactures products or contracts for products to be manufactured that are "DRC conflict undeterminable" must provide a description of those products, the facilities used to process the necessary conflict minerals in those products, if known, the country of origin of the necessary conflict minerals in those products, if known, and the efforts to determine the mine or location of origin with the greatest possible specificity;

(ii) A registrant is not required to provide the information in paragraph (c)(2) of this item if the necessary conflict minerals in its product are solely from recycled or scrap sources because those products are considered "DRC conflict free."

(d) For the purposes of this item, the following definitions apply:

(1) *Adjoining country.* The term *adjoining country* means a country that shares an internationally recognized border with the Democratic Republic of the Congo.

(2) *Armed group.* The term *armed group* means an armed group that is identified as a perpetrator of serious human rights abuses in annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(d) and 2304(b)) relating to the Democratic Republic of the Congo or an adjoining country.

(3) *Conflict mineral.* The term *conflict mineral* means:

(i) Columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives, which are limited to tantalum, tin, and tungsten, unless the Secretary of State determines that additional derivatives are financing conflict in the Democratic Republic of the Congo or an adjoining country; or

(ii) Any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.

(4) *DRC conflict free.* The term *DRC conflict free* means that a product does not contain conflict minerals necessary to the functionality or production of that product that directly or indirectly finance or benefit armed groups, as defined in paragraph (d)(2) of this item, in the Democratic Republic of the Congo or an adjoining country. Conflict minerals that a registrant obtains from recycled or scrap sources, as defined in paragraph (d)(6) of this item, are considered DRC conflict free.

(5) *DRC conflict undeterminable.* The term *DRC conflict undeterminable* means, with respect to any product manufactured or contracted to be manufactured by a registrant, that the registrant is unable to determine, after exercising due diligence as required by paragraph (c)(1) of this item, whether or not such product qualifies as DRC conflict free.

(6) *Conflict Minerals from Recycled or Scrap Sources.* Conflict minerals are considered to be from recycled or scrap sources if they are from recycled metals, which are reclaimed end-user or post-consumer products, or scrap processed metals created during product manufacturing. Recycled metal includes excess, obsolete, defective, and scrap metal materials that contain refined or processed metals that are appropriate to recycle in the production of tin, tantalum, tungsten and/or gold. Minerals partially processed, unprocessed, or a bi-product from another ore will not be included in the definition of recycled metal.

(7) *Outside the Supply Chain.* A conflict mineral is considered *outside the supply chain* after any columbite-tantalite, cassiterite, and wolframite minerals, or their derivatives, have been smelted; any gold has been fully refined; or any conflict mineral, or its derivatives, that have not been smelted or fully refined are located outside of the Democratic Republic of the Congo or an adjoining country.

(8) *Nationally or internationally recognized due diligence framework.* The term "nationally or internationally recognized due diligence framework" means a nationally or internationally recognized due diligence framework established following due-process procedures, including the broad distribution of the framework for public comment, and is consistent with the criteria standards in the Government Auditing Standards established by the Comptroller General of the United States.

Item 1.02 Exhibit

Registrants shall file, as an exhibit to this Form SD, the Conflict Minerals Report required by Item 1.01.

Instructions to Item 1.01

(1) A registrant that mines conflict minerals would not be considered to be manufacturing those minerals for the purpose of this item. The specialized disclosure report on Form SD shall cover a calendar year, regardless of the registrant's fiscal year, and be due annually on May 31 for the prior calendar year.

(2) During the first two calendar years following November 13, 2012 for all registrants and the first four calendar years for any smaller reporting company, a registrant will not be required to submit an audit report of its Conflict Minerals Report prepared by an independent private sector auditor with respect to the conflict minerals in any of its products that are "DRC conflict undeterminable." Beginning with the third or fifth reporting calendar year, as applicable, a registrant with products manufactured or contracted to be manufactured that are "DRC conflict undeterminable," must describe those products as having not been found to be "DRC conflict free" and must provide the information required in paragraph (c) of this item including the audit report.

(3) A registrant that acquires or otherwise obtains control over a company that manufactures or contracts to manufacture products with conflict minerals necessary to the functionality or production of those products that previously had not been obligated to provide a specialized disclosure report with respect to its conflict minerals will be permitted to delay reporting on the products manufactured by the acquired company until the end of the first reporting calendar year that begins no

sooner than eight months after the effective date of the acquisition.

(4) A registrant is not required to provide any information regarding its conflict minerals that, prior to January 31, 2013, are located outside of the supply chain, as defined by paragraph (d)(7) of this item.

(5) A registrant must provide its required conflict minerals information for the calendar year in which the manufacture of a product that contains any conflict minerals necessary to the functionality or production of that product is completed, irrespective of whether the registrant manufactures the product or contracts to have the product manufactured.

Section 2—Exhibits

Item 2.01 Exhibits

List below the following exhibit filed as part of this report.

Exhibit 1.01—Conflict Minerals Report as required by Items 1.01 and 1.02 of this Form.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the duly authorized undersigned.

(Registrant)

By (Signature and Title)*

(Date)

* Print name and title of the registrant's signing executive officer under his or her signature.

* * * * *

Dated: August 22, 2012.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–21153 Filed 9–11–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–67717; File No. S7–42–10]

RIN 3235–AK85

Disclosure of Payments by Resource Extraction Issuers

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting new rules and an amendment to a new form pursuant to Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to disclosure of payments by resource extraction issuers. Section 1504 added Section 13(q) to the Securities Exchange Act of 1934, which requires the Commission to issue rules requiring resource extraction issuers to include in an annual report information relating to any payment made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer, to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Section 13(q) requires a resource extraction issuer to provide information about the type and total amount of such payments made for each project related to the commercial development of oil, natural gas, or minerals, and the type and total amount of payments made to each government. In addition, Section 13(q) requires a resource extraction issuer to provide information regarding those payments in an interactive data format.

DATES: *Effective date:* November 13, 2012.

Compliance date: A resource extraction issuer must comply with the new rules and form for fiscal years ending after September 30, 2013. For the first report filed for fiscal years ending after September 30, 2013, a resource extraction issuer may provide a partial year report if the issuer's fiscal year began before September 30, 2013. The issuer will be required to provide a report for the period beginning October 1, 2013 through the end of its fiscal year. For any fiscal year beginning on or after September 30, 2013, a resource extraction issuer will be required to file a report disclosing payments for the full fiscal year.

FOR FURTHER INFORMATION CONTACT: Tamara Brightwell, Senior Special Counsel, Division of Corporation Finance, Elliot Staffin, Special Counsel, Office of International Corporate Finance, Division of Corporation Finance, or Eduardo Aleman, Special Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 551–3290, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–4553.

SUPPLEMENTARY INFORMATION: We are adopting new Rule 13q–1 [1] and an amendment to new Form SD [2] under the Securities Exchange Act of 1934 ("Exchange Act").[3]

[1] 17 CFR 240.13q–1.

[2] 17 CFR 249.448.

[3] 15 U.S.C. 78a *et seq.*

Table of Contents

I. Background

On December 15, 2010, we proposed rule and form amendments [4] under the Exchange Act to implement Section 13(q) of the Exchange Act, which was added by Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Act").[5] Section 13(q) requires the Commission to "issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including—(i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government."[6]

Based on the legislative history, we understand that Congress enacted Section 1504 to increase the transparency of payments made by oil, natural gas, and mining companies to governments for the purpose of the commercial development of their oil, natural gas, and minerals. A primary goal of such transparency is to help empower citizens of those resource-rich countries to hold their governments accountable for the wealth generated by those resources.[7] To accomplish this goal, Congress created a disclosure regime under the Exchange Act that would support the commitment of the U.S. Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.[8]

Section 13(q) provides the following definitions and descriptions of several key terms:

- "resource extraction issuer" means an issuer that is required to file an annual report with the Commission and engages in the commercial development of oil, natural gas, or minerals;[9]
- "commercial development of oil, natural gas, or minerals" includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity, as determined by the Commission;[10]
- "foreign government" means a foreign government, a department, agency or instrumentality of a foreign government, or a company owned by a foreign government, as determined by the Commission;[11] and
- "payment" means a payment that:
- Is made to further the commercial development of oil, natural gas, or minerals;
- Is not de minimis; and
- Includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[12]

Section 13(q) specifies that "[t]o the extent practicable, the rules issued under [the section] shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals."[13] As noted above, the statute explicitly refers to one international initiative, the Extractive Industries Transparency Initiative ("EITI"),[14] in the definition of "payment." Although a separate provision in Section 13(q) regarding international transparency

[4] *See* Exchange Act Release No. 63549 (December 15, 2010), 75 FR 80978 (December 23, 2010), *available at http://www.sec.gov/rules/proposed/2010/34-63549.pdf* ("Proposing Release").

[5] Public Law 111–203 (July 21, 2010).

[6] 15 U.S.C. 78m(q)(2)(A). As discussed further below, Section 13(q) also specifies that the Commission's rules must require certain information to be provided in interactive data format.

[7] *See, e.g.*, statement by Senator Richard Lugar, one of the sponsors of Section 1504 ("Adoption of the Cardin-Lugar amendment would bring a major step in favor of increased transparency at home and abroad * * *. More importantly, it would help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas, and mineral resources and revenues * * *. The essential issue at stake is a citizen's right to hold its government to account. Americans would not tolerate the Congress denying them access to revenues our Treasury collects. We cannot force foreign governments to treat their citizens as we would hope, but this amendment would make it much more difficult to hide the truth."), 156 Cong. Rec. S3816 (May 17, 2010).

[8] *See* 15 U.S.C. 78m(q)(2)(E).

[9] 15 U.S.C. 78m(q)(1)(D).

[10] 15 U.S.C. 78m(q)(1)(A).

[11] 15 U.S.C. 78m(q)(1)(B).

[12] 15 U.S.C. 78m(q)(1)(C).

[13] 15 U.S.C. 78m(q)(2)(E).

[14] The EITI is a voluntary coalition of oil, natural gas, and mining companies, foreign governments, investor groups, and other international organizations dedicated to fostering and improving transparency and accountability in countries rich in oil, natural gas, and minerals through the publication and verification of company payments and government revenues from oil, natural gas, and mining. *See Implementing the Extractive Industries Transparency Initiative* (2008) ("*Implementing the EITI*"), *available at http://eiti.org/document/implementingtheeiti*. According to the EITI, "(b)y encouraging greater transparency and accountability in countries dependent on the revenues from oil, gas and mining, the potential negative impacts of mismanaged revenues can be mitigated, and these revenues can instead become an important engine for long-term economic growth that contributes to sustainable development and poverty reduction." *EITI Source Book* (2005), at 4, *available at http://eiti.org/files/document/sourcebookmarch05.pdf*. Announced by former UK Prime Minister Tony Blair at the World Summit on Sustainable Development in Johannesburg in September 2002, the EITI received the endorsement of the World Bank Group in 2003. *See* History of EITI, *http://www.eiti.org/eiti/history* (last visited August 15, 2012).

Currently 14 countries—Azerbaijan, Central African Republic, Ghana, Kyrgyz Republic, Liberia, Mali, Mauritania, Mongolia, Niger, Nigeria, Norway, Peru, Timor Leste, and Yemen—have achieved "EITI compliant" status by completing a validation process in which company payments are matched with government revenues by an independent auditor. *See http://eiti.org/countries/compliant* (last visited August 15, 2012). Some 22 other countries are EITI candidates in the process of complying with EITI standards, although one of the countries, Madagascar, recently had its EITI candidate status suspended. *See http://eiti.org/candidatecountries* (last visited August 15, 2012). Several other countries have indicated their intent to implement the EITI. *See http://eiti.org/othercountries*. Implementation of the EITI varies across countries—the EITI provides criteria and a framework for implementation, but allows countries to make key decisions on the scope of its program (*e.g.*, degree of aggregation of data, inclusion of subnational or social or community payments). *See Implementing the EITI*, at 23–24.

On September 20, 2011, President Obama declared that the United States will join the global initiative and released a National Action Plan stating that the Administration is committing to implement the EITI. *See http://www.whitehouse.gov/the-press-office/2011/09/20/opening-remarks-president-obama-open-government-partnership* and *http://www.whitehouse.gov/sites/default/files/us_national_action_plan_final_2.pdf*. The U.S. Department of the Interior ("DOI") is responsible for implementing the U.S. EITI. *See* "White House Announces Secretary Ken Salazar as Senior Official Responsible for Oversight of Implementation of Extractive Industries Transparency Initiative," White House Statements and Releases (October 25, 2011), *available at http://www.whitehouse.gov/the-press-office/2011/10/25/white-house-announces-secretary-ken-salazar-administrations-senior-offic*. After soliciting comment on and evaluating comments regarding the formation of the multi-stakeholder group for the U.S. EITI, the DOI announced that the assessment phase of the U.S. EITI implementation was complete, and the next phase of the U.S. EITI implementation will involve establishing the multi-stakeholder group. *See* "U.S. Department of the Interior Announces Results of USEITI Implementation Assessment," U.S. Department of the Interior News Release (July 10, 2012), *available at http://www.doi.gov/EITI/index.cfm*. *See also* letter from Batirente Inc. and NEI Investments (February 10, 2012) ("Batirente and NEI Investments") (submitting a copy of a statement by 17 Canadian investment institutions calling on the Canadian government to become an EITI implementing country). One commentator indicated that the final rules should be "aligned and coordinated" with the process being developed by the DOI to fulfill the United States' commitment to implementing the EITI. *See* letter from NMA 3.

efforts does not explicitly mention the EITI, the legislative history indicates that the EITI was considered in connection with the new statutory provision.[15] The United States is one of several countries that supports the EITI.[16]

The Commission's rules under Section 13(q) must require a resource extraction issuer to submit the payment information included in an annual report in an interactive data format [17] using an interactive data standard established by the Commission.[18] Section 13(q) defines "interactive data format" to mean an electronic data format in which pieces of information are identified using an interactive data standard.[19] The section also defines "interactive data standard" as a standardized list of electronic tags that mark information included in the annual report of a resource extraction issuer.[20] The rules issued pursuant to Section 13(q)[21] must include electronic tags that identify:

- The total amounts of the payments, by category;
- The currency used to make the payments;
- The financial period in which the payments were made;
- The business segment of the resource extraction issuer that made the payments;
- The government that received the payments and the country in which the government is located; and
- The project of the resource extraction issuer to which the payments relate.[22] Section 13(q) further authorizes the Commission to require electronic tags for other information that it determines is necessary or appropriate in the public interest or for the protection of investors.[23]

Section 13(q) provides that the final rules "shall take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the fiscal year * * * that ends not earlier than 1 year after the date on which the Commission issues final rules[.]"[24]

Finally, Section 13(q) requires, to the extent practicable, the Commission to make publicly available online a compilation of the information required to be submitted by resource extraction issuers under the new rules.[25] The statute does not define the term compilation.

The Commission received over 150 unique comment letters on the proposal as well as over 149,000 form letters (including a petition with 143,000 signatures).[26] These letters came from corporations in the resource extraction industries, industry and professional associations, United States and foreign government officials, non-governmental organizations, law firms, pension and other investment funds, academics, investors, a labor union and other employee groups, and other interested parties. Commentators generally supported transparency efforts and offered numerous suggestions for revising certain aspects of the proposal in the final rules.

We have reviewed and considered all of the comments that we received and the rules we are adopting reflect changes made in response to many of the comments. Generally, as adopted, the final rules track the language in the statute, and except for where the language or approach of Section 13(q) clearly deviates from the EITI, the final rules are consistent with the EITI.[27] In instances where the language or approach of Section 13(q) clearly deviates from the EITI, the final rules track the statute rather than the EITI because in those instances we believe Congress intended the final rules to go beyond what is required by the EITI. We believe this approach is consistent with Section 13(q) and furthers the statutory goal to support international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals because the EITI is referenced in Section 13(q) and is well-recognized for promoting such transparency.[28]

II. Final Rules Implementing Section 13(q)

A. Summary of the Final Rules

Consistent with the proposal, we are adopting final rules that define the term "resource extraction issuer" as defined in Section 13(q). As proposed, the final rules will apply to all U.S. companies and foreign companies that are engaged in the commercial development of oil, natural gas, or minerals, and that are required to file annual reports with the Commission, regardless of the size of the company or the extent of business operations constituting commercial development of oil, natural gas, or minerals. Consistent with the proposal, the final rules will apply to an issuer, whether government-owned or not, that

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[15] *See, e.g.*, statement by Senator Lugar ("This domestic action will complement multilateral transparency efforts such as the Extractive Industries Transparency Initiative—the EITI—under which some countries are beginning to require all extractive companies operating in their territories to publicly report their payments."), 111 *Cong. Rec.* S3816 (daily ed. May 17, 2010). Other examples of international transparency efforts include the amendments of the Hong Kong Stock Exchange listing rules for mineral companies and the London Stock Exchange AIM rules for extractive companies. *See* Amendments to the GEM Listing Rules of the Hong Kong Stock Exchange, Chapter 18A.05(6)(c) (effective June 3, 2010), *available at http://www.hkex.com.hk/eng/rulesreg/listrules/gemrulesup/Documents/gem34_miner.pdf* (requiring a mineral company to include in its listing document, if relevant and material to the company's business operations, information regarding its compliance with host country laws, regulations and permits, and payments made to host country governments in respect of tax, royalties, and other significant payments on a country by country basis) and Note for Mining and Oil & Gas Companies—June 2009, *available at http://www.londonstockexchange.com/companies-and-advisors/aim/advisers/rules/guidance-note.pdf* (requiring disclosure in the initial listing of "any payments aggregating over £10,000 made to any government or regulatory authority or similar body made by the applicant or on behalf of it, in regards to the acquisition of, or maintenance of its assets.").

[16] *See* the list of EITI supporting countries, *available at http://eiti.org/supporters/countries* (last visited August 15, 2012).

[17] 15 U.S.C. 78m(q)(2)(C).

[18] 15 U.S.C. 78m(q)(2)(D).

[19] 15 U.S.C. 78m(q)(1)(E).

[20] 15 U.S.C. 78m(q)(1)(F).

[21] 15 U.S.C. 78m(q)(2)(D)(i).

[22] 15 U.S.C. 78m(q)(2)(D)(ii).

[23] 15 U.S.C. 78m(q)(2)(D)(ii).

[24] 15 U.S.C. 78m(q)(2)(F).

[25] 15 U.S.C. 78m(q)(3).

[26] The letters, including the form letters designated as Type A, Type B, and Type C, are available at *http://www.sec.gov/comments/s7-42-10/s74210.shtml*. In addition, to facilitate public input on the Act, the Commission provided a series of email links, organized by topic, on its Web site at *http://www.sec.gov/spotlight/regreformcomments.shtml*. The public comments we received on Section 1504 of the Act, which were submitted prior to the Proposing Release, are available on our Web site at *http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specialized-disclosures.shtml*. Many commentators provided comments both prior to, and in response to, the proposal. Generally, our references to comment letters refer to the comments submitted in response to the proposal. When we refer to a comment letter submitted prior to the proposal, however, we make that clear in the citation.

[27] A country volunteers to become an EITI member. To become an EITI member country, among other things, a country must establish a multi-stakeholder group, including representatives of civil society, industry, and government, to oversee implementation of the EITI. The stakeholder group for a particular country agrees to the terms of that country's EITI plan, including the requirements for what information will be provided by the governments and by the companies operating in that country. Generally, as we understand it, under the EITI, companies and the host country's government submit payment information confidentially to an independent administrator selected by the country's multi-stakeholder group, which is frequently an independent auditor. The auditor reconciles the information provided to it by the government and by the companies and produces a report. The information provided in the reports varies widely among countries. A country must complete an EITI validation process to become a compliant member. The EITI Source Book and Implementing the EITI provide guidance regarding what should be included in a country's EITI plan, and we have looked to those materials and to the reports made by EITI member countries for guidance as to EITI requirements. *See* the EITI's Web site at *http://eiti.org*.

[28] *See* Exchange Act Sections 13(q)(2)(C)(ii) and 13(q)(2)(E) [15 U.S.C. 78m(q)(2)(C)(ii) and 78m(q)(2)(E)].

meets the definition of resource extraction issuer.

Consistent with the proposal and in light of the structure, language, and purpose of the statute, the final rules do not provide any exemptions from the disclosure requirements. As such, the final rules do not include an exemption for certain categories of issuers or for resource extraction issuers subject to similar reporting requirements under home country laws, listing rules, or an EITI program. The final rules also do not provide an exemption for situations in which foreign law may prohibit the required disclosure. In addition, the final rules do not provide an exemption for instances when an issuer has a confidentiality provision in an existing or future contract or for commercially sensitive information.

Consistent with Section 13(q) and the proposal, the final rules define "commercial development of oil, natural gas, or minerals" to include the activities of exploration, extraction, processing, and export, or the acquisition of a license for any such activity.

Consistent with Section 13(q) and the proposal, the final rules define "payment" to mean a payment that is made to further the commercial development of oil, natural gas, or minerals, is "not de minimis," and includes taxes, royalties, fees (including license fees), production entitlements, and bonuses. After considering the comments, under the final rules and in accordance with Section 13(q)(1)(C)(ii), we also are including dividends and payments for infrastructure improvements in the list of payments required to be disclosed. The final rules include instructions to clarify the types of taxes, fees, bonuses, and dividends that are covered. In addition, after considering the comments, we have determined to define the term "not de minimis." Unlike the proposed rules, which left the term "not de minimis" undefined, the final rules define "not de minimis" to mean any payment, whether a single payment or a series of related payments, that equals or exceeds $100,000 during the most recent fiscal year.

Consistent with Section 13(q) and the proposal, after considering the comments, we have decided to leave the term "project" undefined.

Consistent with the proposal, the final rules require a resource extraction issuer to disclose payments made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer to a foreign government or the U.S. Federal Government for the purpose of commercial development of oil, natural gas, or minerals. A resource extraction issuer will be required to disclose payments made directly, or by any subsidiary, or entity under the control of the resource extraction issuer. Therefore, a resource extraction issuer must disclose payments made by a subsidiary or entity under the control of the resource extraction issuer where the subsidiary or entity is consolidated in the resource extraction issuer's financial statements included in its Exchange Act reports, as well as payments by other entities it controls as determined in accordance with Rule 12b–2. A resource extraction issuer may be required to provide the disclosure for entities in which it provides proportionately consolidated information. A resource extraction issuer will be required to determine whether it has control of an entity for purposes of the final rules based on a consideration of all relevant facts and circumstances.[29]

We are adopting the definition of "foreign government" consistent with the definition in Section 13(q), as proposed. A "foreign government" includes a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government. As proposed, the final rules clarify that "Federal Government" means the United States Federal Government. The final rules do not require disclosure of payments made to subnational governments in the United States. Consistent with the proposal, the final rules clarify that a company owned by a foreign government is a company that is at least majority-owned by a foreign government.

After considering the comments, the final rules we are adopting require resource extraction issuers to provide the required disclosure about payments in a new annual report, rather than in the issuer's existing Exchange Act annual report as proposed. We are adopting amendments to new Form SD to require the disclosure.[30] Similar to the proposal, the Form SD will require issuers to include a brief statement in the body of the form in an item entitled, "Disclosure of Payments By Resource Extraction Issuers," directing users to detailed payment information provided in an exhibit to the form. As adopted, in response to comments, the final rules require resource extraction issuers to file Form SD on EDGAR no later than 150 days after the end of the issuer's most recent fiscal year. The final rules will require resource extraction issuers to present the payment information in one exhibit to new Form SD rather than in two exhibits, as was proposed. The required exhibit must provide the information using the XBRL interactive data standard.[31] Because the XBRL exhibit will be automatically rendered into a readable form available on EDGAR, we are not requiring a separate HTML or ASCII exhibit in addition to the XBRL exhibit. Under the final rules, and as required by the statute, a resource extraction issuer must submit the payment information using electronic tags that identify, for any payments made by a resource extraction issuer to a foreign government or the U.S. Federal Government:

- The total amounts of the payments, by category;
- The currency used to make the payments;
- The financial period in which the payments were made;
- The business segment of the resource extraction issuer that made the payments;
- The government that received the payments, and the country in which the government is located; and
- The project of the resource extraction issuer to which the payments relate.[32]

In addition, a resource extraction issuer must provide the type and total amount of payments made for each project and the type and total amount of payments made to each government in interactive data format. Unlike the proposal, in response to comments we received, the final rules require resource extraction issuers to file rather than furnish the payment information.

Under the final rules, a resource extraction issuer will be required to comply with the new rules and form for fiscal years ending after September 30, 2013. For the first report filed for fiscal years ending after September 30, 2013, a resource extraction issuer may provide

[29] *See* Exchange Act Rule 12b–2 for the definition of "control." *See also* note 315.

[30] In another release we are issuing today, we are adopting rules to implement the requirements of Section 1502 of the Dodd-Frank Act and requiring issuers subject to those requirements to file the disclosure on Form SD. *See* Conflict Minerals, Release 34–67716 (August 22, 2012) ("Conflict Minerals Adopting Release"). Because of the order of our actions, we are adopting Form SD in that release and we are amending the form in this release, but we intend for the form to be used equally for these two separate disclosure requirements and potentially others that would benefit from placement in a specialized disclosure form.

[31] As proposed, an issuer would have been required to submit two exhibits—one in HTML or ASCII and the other in XBRL. As discussed below, we have decided to require only one exhibit for technical reasons and to reduce the compliance burden of the final rules.

[32] *See* Item 2.01(a) of Form SD (17 CFR 249.448).

a partial year report if the issuer's fiscal year began before September 30, 2013. The issuer will be required to provide a report for the period beginning October 1, 2013 through the end of its fiscal year. For any fiscal year beginning on or after September 30, 2013, a resource extraction issuer will be required to file a report disclosing payments for the full fiscal year.

B. Definition of "Resource Extraction Issuer" and Application of the Disclosure Requirements

1. Proposed Rules

In accord with Section 13(q), the proposed rules would have applied to issuers meeting the definition of "resource extraction issuer" and would have defined the term to mean an issuer that is required to file an annual report with the Commission and that engages in the commercial development of oil, natural gas, or minerals. Consistent with Section 13(q), the proposed rules would not have provided any exemptions from the disclosure requirements for resource extraction issuers. The Proposing Release further clarified that the proposed rules would apply to companies that fall within the definition of resource extraction issuer whether or not they are owned or controlled by governments.

2. Comments on the Proposed Rules

We received a variety of comments regarding the proposed rules and the application of the disclosure requirements. Numerous commentators supported the Commission's proposed definition and application of the disclosure requirements, including that the rules should not provide any exemptions from the disclosure requirements.[33] Noting an absence of statutory language regarding exemptions, several commentators stated that the legislative intent underlying Section 1504 was to provide the broadest possible coverage of extractive companies so as to create a level playing field.[34]

Most commentators that addressed the issue supported including issuers that are owned or controlled by governments within the definition of resource extraction issuer, as proposed.[35] Commentators favored such inclusion because it would be consistent with the intent of the statute to hold all resource extraction issuers accountable for payments to governments,[36] would adhere to EITI's universality principle that payment disclosure in a given country should involve all extractive industry companies operating in that country,[37] and would avoid anti-competitive effects because many government-owned companies are the largest in the industry.[38] Another commentator stated that, while it did not believe government-owned entities should be exempt from the payment disclosure rules, it opposed requiring a government-owned entity to disclose payments made to the government that controls it. According to that commentator, such payments are not "made to further commercial development," but rather are "distributions to the entity's controlling shareholder (or to itself), and requiring them to be disclosed is inappropriate as a matter of comity."[39] Another commentator sought an exemption for payments made by a foreign government-owned company to a subsidiary or entity controlled by it.[40]

Several other commentators supported exemptions for certain categories of issuers or for certain circumstances.[41] For example, while opposing a general exemption for smaller reporting companies, some commentators supported an exemption for a small entity having $5 million or less in assets on the last day of its most recently completed fiscal year.[42] Other commentators opposed an exemption for smaller companies because of their belief that those companies generally face greater equity risk from their

[33] *See* letters from Association of Forest Communities in Guatemala (March 8, 2012) ("Guatemalan Forest Communities"), Batirente (February 28, 2011), BC Investment Management Corporation (March 2, 2011) ("bcIMC"), Bon Secours Health System (March 1, 2011) ("Bon Secours"), California State Teachers' Retirement System (March 1, 2011) ("CalSTRS"), Calvert Investments (March 1, 2011) ("Calvert"), Catholic Relief Services and Committee on International Justice and Peace (February 9, 2011) ("CRS"), Derecho Ambiente y Recursos Naturales DAR (March 23, 2012) ("Derecho"), EarthRights International (December 2, 2010) (pre-proposing letter) ("ERI pre-proposal"), EarthRights International (January 26, 2011), (September 20, 2011), (February 3, 2012), (February 7, 2012) (respectively, "ERI 1," "ERI 2," "ERI 3," and "ERI 4"), Earthworks (March 2, 2011), Extractive Industries Working Group (March 2, 2011) ("EIWG"), Global Financial Integrity (March 1, 2011) ("Global Financial 2"), Global Witness (February 25, 2011) ("Global Witness 1"), Global Witness (February 24, 2012) (with attachments) ("Global Witness 2"), Global Witness (February 24, 2012) ("Global Witness 3"), Greenpeace (March 8, 2012), Grupo FARO (February 13, 2012), Philippe Le Billon (March 2, 2012) ("Le Billon"), Libyan Transparency Association (February 22, 2012) ("Libyan Transparency"), National Civil Society Coalition on Mineral Resource Governance of Senegal (February 14, 2012) ("National Coalition of Senegal"), Newground Social Investment (March 1, 2011) ("Newground"), Nigeria Union of Petroleum and Natural Gas Workers (July 8, 2011) ("NUPENG"), ONE (March 2, 2011), ONE Petition (February 23, 2012), Oxfam America (February 21, 2011) ("Oxfam 1"), Petroleum and Natural Gas Senior Staff Association of Nigeria (June 27, 2011) ("PENGASSAN"), PGGM Investments (March 1, 2011) ("PGGM"), PricewaterhouseCoopers LLP (March 2, 2011) ("PWC"), Publish What You Pay U.S. (November 22, 2010) (pre-proposing letter) ("PWYP pre-proposal"), Publish What You Pay U.S. (February 25, 2011) ("PWYP 1"), Railpen Investments (February 25, 2011), Representative Barney Frank, Representative Jose Serrano, Representative Norman Dicks, Representative Henry Waxman, Representative Maxine Waters, Representative Donald Payne, Representative Nita Lowey, Representative Betty McCollum, Representative Barbara Lee, Representative Jesse Jackson, Jr., Representative Alcee Hastings, Representative Gregory Meeks, Representative Rosa DeLauro, and Representative Marcy Kaptur (February 15, 2012) ("Rep. Frank *et al.*"), Revenue Watch Institute (February 17, 2011) ("RWI 1"), Peter Sanborn (March 12, 2011) ("Sanborn"), Senator Benjamin Cardin, Senator John Kerry, Senator Patrick Leahy, Senator Charles Schumer, and Representative Barney Frank (March 1, 2011) ("Sen. Cardin *et al.* 1"), Senator Benjamin Cardin, Senator John Kerry, Senator Patrick Leahy, Senator Carl Levin, and Senator Charles Schumer (January 31, 2012) ("Sen. Cardin *et al.* 2"), Senator Carl Levin (February 1, 2011) ("Sen. Levin 1"), Social Investment Forum (March 2, 2011) ("SIF"), George Soros (February 23, 2011) and (February 21, 2012) ("Soros 1" and "Soros 2", respectively), Syena Capital Management LLC (February 17, 2011) ("Syena"), Ta'ang Students and Youth Organization ("TSYO"), TIAA–CREF (March 2, 2011) ("TIAA"), U.S. Agency for International Development (July 15, 2011) ("USAID"), United Steelworkers (March 29, 2011) ("USW"), WACAM (February 2, 2012), and World Resources Institute (March 1, 2011) ("WRI"), and letters designated as Type A and Type B. Other commentators generally voiced their support for strong rules under Section 1504. *See* letters from Cambodians for Resource Revenue Transparency (February 7, 2012) ("Cambodians"), Conflict Risk Network (February 7, 2012), Bill and Melinda Gates Foundation (February 9, 2012) ("Gates Foundation"), Global Witness 2, Barbara and Richard Hause (February 24, 2012), Network for the Fight Against Hunger in Cameroon (February 20, 2012) ("RELUFA 3"), Oxfam America (March 7, 2012) ("Oxfam 3"), Gradye Parsons (February 15, 2012), Representative Raul M. Grijalva (November 15, 2011), Reverend Jed Koball (February 10, 2012), and letters designated as Type C.

[34] *See, e.g.*, letters from Calvert, Global Witness 1, Oxfam 1, PWYP 1, Sen. Cardin *et al.* 1, Sen. Levin 1, and WRI.

[35] See letters from American Petroleum Institute (January 28, 2011) ("API 1"), Chevron Corporation (January 28, 2011) ("Chevron"), Exxon Mobil (January 31, 2011) ("ExxonMobil 1"), Le Billon, PWYP 1, and Royal Dutch Shell plc (January 28, 2011) ("RDS 1").

[36] *See* letter from PWYP 1.

[37] *See* letters from API 1 and ExxonMobil 1.

[38] *See* letters from Chevron and RDS 1.

[39] See letter from Cleary Gottlieb Steen & Hamilton (March 2, 2011) ("Cleary").

[40] *See* letter from Statoil ASA (February 22, 2011) ("Statoil").

[41] *See, e.g.*, letters from API 1, API (August 11, 2011) ("API 2") and API (May 18, 2012) ("API 5"), ExxonMobil 1, Cleary, New York State Bar Association, Securities Regulation Committee (March 1, 2011) ("NYSBA Committee"), PetroChina Company Limited (February 28, 2011) ("PetroChina"), Petroleo Brasileiro S.A. (February 21, 2011) ("Petrobras"), Rio Tinto plc (March 2, 2011) ("Rio Tinto"), RDS 1, and Statoil.

[42] See letters from API 1 and ExxonMobil 1. Those commentators otherwise supported the application of the payment disclosure requirements to all classes of issuers.

operations in host countries than larger issuers.[43]

In addition, some commentators supported an exemption for circumstances in which issuers were subject to other resource extraction payment disclosure requirements, such as host country law, stock exchange listing requirements, or an EITI program.[44] Commentators believed that issuers should be able to satisfy their obligations under Section 13(q) and the related rules by providing the disclosure reported under applicable home country laws, listing rules, or the EITI.[45] Commentators asserted that this would minimize an issuer's burden of having to comply with multiple transparency standards and avoid potentially confusing duplicative disclosure.[46] Other commentators, however, opposed providing an exemption for issuers based on other reporting requirements because such an exemption would result in an unlevel playing field and loss of comparability.[47] Some commentators asserted that because there are not currently any other national extractive disclosure regulatory regimes equivalent to Section 13(q), providing such an exemption would be premature.[48] In addition, several commentators maintained that Section 13(q) was intended to go beyond the disclosure provided under the EITI.[49]

Many commentators supported an exemption from the disclosure requirements when the required payment disclosure is prohibited under the host country's laws.[50] Some commentators stated that the laws of China, Cameroon, Qatar, and Angola would prohibit disclosure required under Section 13(q) and expressed concern that other countries would enact similar laws.[51] Commentators stated that without an appropriate exemption, Section 13(q) would become a "business prohibition" statute that would force issuers to choose between leaving their operations in certain countries or breaching local law and incurring penalties in order to comply with the statute's requirements.[52] Either outcome, according to commentators, would adversely affect investors, efficiency, competition, and capital formation.[53] Some commentators further suggested that failure to adopt such an exemption could encourage foreign issuers to deregister from the U.S. market.[54] Other commentators maintained that comity concerns must be considered when the Section 13(q) disclosure requirements conflict with foreign law.[55] One commentator suggested that an exemption would be consistent with Executive Order 13609, which directs federal agencies to take certain steps to "reduce, eliminate, or prevent unnecessary differences in [international] regulatory requirements."[56]

Other commentators opposed an exemption for host country laws prohibiting disclosure of payment information because they believed it would undermine the purpose of Section 13(q) and create an incentive for foreign countries that want to prevent transparency to pass such laws, thereby creating a loophole for companies to avoid disclosure.[57] Commentators also disputed the assertion that there are foreign laws that specifically prohibit disclosure of payment information.[58] Those commentators noted that most confidentiality laws in the extractive industry sector relate to the

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[43] *See* letters from Global Witness 1, PWYP 1, Sen. Cardin *et al.* 1, and Soros 1.

[44] *See, e.g.*, letters from API 1, British Petroleum p.l.c. (February 11, 2011 and July 8, 2011) (respectively "BP 1" and "BP 2"), Cleary, ExxonMobil 1, NYSBA Committee, Petrobras, Rio Tinto, RDS 1, Royal Dutch Shell (July 11, 2011) ("RDS 3"), Statoil, and Vale S.A. (March 2, 2011) ("Vale"). In addition, two commentators requested that the Commission align the rules with the reporting requirements to be adopted by the DOI for the U.S. EITI. *See* letters from NMA (June 15, 2012) ("NMA 3") and Northwest Mining Association (June 29, 2012) ("NWMA").

[45] *See, e.g.*, letters from API 1, ExxonMobil 1, and RDS 1 (suggesting such an approach if home country requirements are at least as rigorous as Section 13(q)); AngloGold Ashanti (January 31, 2011) ("AngloGold"), BHP Billiton Limited (July 28, 2011) ("BHP Billiton"), and Vale (suggesting such an approach if disclosure is made based on EITI principles); BP 2 and RDS 3 (supporting a global common standard for transparency disclosure and, alternatively, suggesting such an approach if disclosure is made in a broadly similar manner based on EITI principles); Cleary, NYSBA Committee, Petrobras, Rio Tinto, and Statoil (suggesting such an approach if disclosure is made pursuant to home country requirements regardless of whether those requirements follow EITI principles); and Cleary, NYSBA Committee, and Statoil (suggesting alternatively such an approach if disclosure is made based on EITI principles if the company is a participant in an EITI program).

[46] *See, e.g.*, letters from Cleary, Rio Tinto, and Statoil.

[47] *See, e.g.*, letters from ERI 1, Global Witness 1, PWYP 1, Rep. Frank *et al.*, Sen. Cardin *et al.* 1, and Sen. Levin 1.

[48] *See, e.g.*, letter from PWYP 1. In this regard, after noting that the European Commission ("EC") is developing legislative proposals for extractive industry reporting rules in the European Union ("EU"), one commentator stated that "it is critical that country-by-country and project-by-project disclosure regulations are adopted across other major markets to ensure a level playing field and consistent reporting across countries." Letter from Publish What You Pay U.K. (April 28, 2011) ("PWYP U.K."). The EC subsequently published proposals for extractive industry payment disclosure requirements. *See* discussion in note 82. After the EC published the proposals, PWYP urged the Commission to take the initiative and promptly adopt final rules so that the EC can harmonize its extractive disclosure requirements with the Section 13(q) rules. *See* letter from Publish What You Pay (December 19, 2011) ("PWYP 2"). The EC proposals are currently pending.

[49] *See* letters from Global Witness 1, PWYP 1, and Sen. Benjamin Cardin (December 1, 2010) (pre-proposal letter) ("Cardin pre-proposal").

[50] *See* letters from API 1, API 2, API 5, AngloGold Ashanti (January 31, 2011) ("AngloGold"), Spencer Bachus, Chairman of the U.S. House of Representatives Committee on Financial Services, and Gary Miller, Chairman of the U.S. House of Representatives Subcommittee on International Monetary Policy, Committee on Financial Services (March 4, 2011) ("Chairman Bachus and Chairman Miller"), Barrick Gold Corporation (February 28, 2011) ("Barrick Gold"), BP 1, Chamber of Commerce Institute for 21st Century Energy (March 2, 2011) ("Chamber Energy Institute"), Chevron, Cleary, ExxonMobil 1, ExxonMobil (March 15, 2011) ("ExxonMobil 2"), International Association of Oil and Gas Producers (January 27, 2011) ("IAOGP"), NMA 2, NYSBA Committee, Nexen Inc. (March 2, 2011) ("Nexen"), PetroChina, Petrobras, PWC, Rio Tinto, RDS 1, Royal Dutch Shell (May 17, 2011) ("RDS 2"), Royal Dutch Shell (August 1, 2011) ("RDS 4"), Senator Lisa Murkowski and Senator John Cornyn (February 28, 2012) ("Sen. Murkowski and Sen. Cornyn"), Split Rock International, Inc. (March 1, 2011) ("Split Rock"), Statoil, Talisman Energy Inc. ("Talisman") (June 23, 2011), and Vale. *See also* letter from Cravath, Swaine & Moore LLP, Cleary Gottlieb Steen & Hamilton LLP, Davis Polk & Wardwell LLP, Shearman & Sterling LLP, Simpson Thacher & Bartlett LLP, Skadden, Arps, Slate, Meagher & Flom LLP, Sullivan & Cromwell LLP, and Wilmer Cutler Pickering Hale and Dorr LLP (November 5, 2010) (pre-proposal letter) ("Cravath *et al.* pre-proposal").

[51] *See* letters from API 1 and ExxonMobil 1. *See also* letter from RDS 1 (mentioning China, Cameroon, and Qatar).

[52] *See* letters from Barrick Gold, Cleary, NYSBA Committee, Rio Tinto, and Statoil; *see also* letter from API 5.

[53] *See, e.g.*, letters from API 1, ExxonMobil 1, and RDS 1; *see also* letter from API 5. Several commentators noted that the Commission has a statutory duty to consider efficiency, competition, and capital formation when adopting rules. *See* letter from American Petroleum Institute (January 19, 2012) ("API 3"), Cravath *et al.* pre-proposal, Senator Mary L. Landrieu (March 6, 2012), and Sen. Murkowski and Sen. Cornyn.

[54] *See* letters from Cleary, Royal Dutch Shell (October 25, 2010) (pre-proposal letter) ("RDS pre-proposal"), Split Rock, and Statoil. *See also* letter from Branden Carl Berns (December 7, 2011) ("Berns") (maintaining that some foreign issuers subject to Section 13(q) with modest capitalizations on U.S. exchanges might choose to delist in response to competitive advantages enjoyed by issuers not subject to Section 13(q)).

[55] *See* letters from API 5 and NMA 2.

[56] *See* letter from API 5. We note that the responsibilities of federal agencies under Executive Order 13609 are to be carried out "[t]o the extent permitted by law" and that foreign regulatory approaches are to be considered "to the extent feasible, appropriate, and consistent with law." *See* Proclamation No. 13609, 77 FR 26413 (May 4, 2012).

[57] *See, e.g.*, letters from Cambodians, EG Justice (February 7, 2012) ("EG Justice 2"), Global Witness 1, Grupo Faro, Human Rights Foundation of Monland (March 8, 2011 and July 15, 2011) (respectively, "HURFOM 1" and "HURFOM 2"), National Coalition of Senegal, PWYP 1, Rep. Frank *et al.*, Sen. Cardin *et al.* 1, Sen. Cardin *et al.* 2, Sen. Levin 1, Soros 2, U.S. Agency for International Development (July 15, 2011) ("USAID"), and WACAM.

[58] *See, e.g.*, letters from ERI 3, Global Witness 1, PWYP 1, Publish What You Pay (December 20, 2011) ("PWYP 3"), and Rep. Frank *et al.*

confidentiality of geological and other technical data, and in any event, contain specific provisions that allow for disclosures to stock exchanges.[59]

Many commentators also sought an exemption from the disclosure requirements for payments made under existing contracts that contain confidentiality clauses prohibiting such disclosure.[60] According to commentators, while some contracts may permit the disclosure of information to comply with an issuer's home country laws, regulations, or stock exchange rules, those contractual provisions only allow the contracting party, not its parent or affiliate companies, to make the disclosure.[61] Some commentators also sought an exemption from the requirements for payments made under future contracts containing confidentiality clauses.[62]

Other commentators opposed an exemption based on confidentiality clauses in contracts on the grounds that such an exemption was not necessary.[63] Commentators maintained that most contracts include an explicit exception for information that must be disclosed by law, and, in cases where such language is not explicit, it generally would be read into any such contract under judicial or arbitral review.[64] Commentators further stated that an exemption based on contract confidentiality would undermine Section 13(q) by creating incentives for issuers to craft such contractual provisions.[65]

Several commentators supported an exemption for situations when, regardless of the existence of a contractual confidentiality clause, such disclosure would jeopardize commercially or competitively sensitive information.[66] Other commentators expressed doubt that disclosure of payment information would create competitive disadvantages because much of the information is already available from third-party service providers or through the large number of joint ventures between competitors in the extractive industries.[67] Commentators also expressed concern that providing an exemption for commercially or competitively sensitive information would frustrate Congress' intent to achieve payment transparency and accountability.[68]

Some commentators believed that the disclosure of detailed payment information would jeopardize the safety and security of a resource extraction issuer's operations or employees and requested an exemption in such circumstances.[69] Other commentators believed that detailed payment disclosure was critical for workers and their communities to achieve benefits from investment transparency, including a decrease in unrest and conflict and increased stability and safety.[70]

Some commentators requested that the Commission extend the disclosure requirements to foreign private issuers that are exempt from Exchange Act reporting obligations but publish their annual reports and other material home country documents electronically in English pursuant to Exchange Act Rule 12g3–2(b).[71] Those commentators asserted that requiring such issuers to comply with the disclosure requirements would help ameliorate anti-competitive concerns. Other commentators, however, opposed extending the disclosure required under Section 13(q) to companies that are exempt from Exchange Act registration and reporting because it would discourage use of the Rule 12g3–2(b) mechanism[72] and because such an extension would be inconsistent with the premise of Rule 12g3–2(b).[73]

3. Final Rules

Consistent with the proposal, we are adopting final rules that define the term "resource extraction issuer" as it is defined in Section 13(q). The final rules will apply to all U.S. companies and foreign companies that are engaged in the commercial development of oil, natural gas, or minerals and that are required to file annual reports with the Commission, regardless of the size of the company or the extent of business operations constituting commercial development of oil, natural gas, or minerals.[74] Consistent with the proposal, the final rules will apply to a company, whether government-owned or not, that meets the definition of resource extraction issuer.[75] Any failure to include government-owned companies within the scope of the

[59] *See* letters from Global Witness 1, Susan Maples, J.D., Post-Doctoral Research Fellow, Columbia University School of Law (March 2, 2011) ("Maples"), Network for the Fight Against Hunger in Cameroon (March 14, 2011 and July 11, 2011) (respectively, "RELUFA 1" and "RELUFA 2"), and PWYP 1.

[60] *See* letters from API 1, AngloGold, Barrick Gold, Chairman Bachus and Chairman Miller, BP 1, Chamber Energy Institute, Chevron, Cleary, ExxonMobil 1, IAOGP, NMA 2, NYSBA Committee, Nexen, PetroChina, Petrobras, PWC, Rio Tinto, RDS 1, Split Rock, Statoil, and Vale.

[61] *See* letters from API 1 and ExxonMobil 1.

[62] *See* letters from AngloGold and NMA 2. AngloGold suggested conditioning the exemption on an issuer having made a good faith determination that it would not have been able to enter into the contract but for agreeing to a confidentiality provision.

[63] *See* letters from Global Witness 1, Maples, Oxfam (March 20, 2012) ("Oxfam 3"), and PWYP 1.

[64] *See, e.g.*, letters from Oxfam 3 and PWYP 1. *See also* letter from SIF citing the "official Production Sharing Contract of the government of Equatorial Guinea" and noting that it explicitly states that companies are permitted to share all information relating to the Contract or Petroleum Operations in the following instances: "To the extent that such data and information is required to be furnished in compliance with any applicable laws or regulation" (Article 20.1.1c) and "[i]n conformity with the requirements of any stock exchange having jurisdiction over a Party[.]" (Article 20.1.1d)).

[65] *See, e.g.*, letters from Global Witness 1 and Oxfam 1.

[66] *See* letters from American Exploration and Production Council (January 31, 2011) ("AXPC"), API 1, Chamber Energy Institute, Chevron, ExxonMobil 1, IAOGP, Local Authority Pension Fund Forum (January 31, 2011) ("LAPFF"), NMA 2, Rio Tinto, RDS 1, and United States Council for International Business (February 4, 2011) ("USCIB").

[67] *See* letters from PWYP 1 and RWI 1; *see also* letter from Global Witness 1 (noting a study finding that the majority of disclosures that would be required pursuant to Section 13(q) would already be known to actors within the industry).

[68] *See, e.g.*, letter from Global Witness 1. Another commentator stated that "to the extent that Section 13(q)'s reporting obligations result in some competitive disadvantage to regulated issuers, Congress already accepted this risk when it determined that pursuing the goals of promoting transparency and good governance was of paramount importance—even at the cost of an incidental burden on issuers * * * As with the Foreign Corrupt Practices Act, Congress made the affirmative choice to set a higher standard for global corporate practice. Other countries have already started to follow Congress' lead in this area * * * Strong U.S. leadership with respect to transparency in the extractive industries will make it easier for foreign governments to adopt similar reporting requirements, which in turn will serve to level the playing field. Letter from Oxfam 1.

[69] *See* letters from API 1, Spencer Bachus, Chairman of the U.S. House of Representatives Committee on Financial Services (August 21, 2012) ("Chairman Bachus"), Chevron, ExxonMobil 1, NMA 2, Nexen, PetroChina, and RDS 1.

[70] *See* letters from NUPENG, PENGASSAN, PWYP 1, and USW.

[71] *See* letters from API 1, Calvert, ExxonMobil 1, Global Witness 1, RWI 1, and RDS 1.

[72] *See* letter from NYSBA Committee.

[73] *See* letter from NMA 2 and NYSBA Committee.

[74] *See* new Exchange Act Rule 13q–1.

[75] As discussed below, a resource extraction issuer, including a government-owned resource extraction issuer, will be required to provide the payment disclosure if the other requirements of the rule are met. Contrary to some commentators' suggestions, we are not providing a carve-out from the rules for payments made by a government-owned resource extraction issuer to its controlling government because we believe it would be inconsistent with the purpose of the statute. We note a government-owned resource extraction issuer would only disclose payments made to the government that controls it if those payments were made for the purpose of commercial development of oil, natural gas, or minerals and the payments are within the categories of payments that would be required to be disclosed under the rules.

disclosure rules could raise competitiveness concerns.[76]

Although some commentators urged us to provide exemptions for certain categories of issuers,[77] in light of the statutory purpose of Section 13(q),[78] we have decided not to adopt exemptions from the disclosure requirement for any category of resource extraction issuers, including smaller issuers and foreign private issuers. We believe the transparency objectives of Section 13(q) are best served by requiring disclosure from all resource extraction issuers. In addition, we agree with commentators that providing an exemption for smaller reporting companies or foreign private issuers could contribute to an unlevel playing field and raise competitiveness concerns for larger companies and domestic companies.[79] We also note that some commentators opposed an exemption for smaller companies because of their belief that those companies generally face greater equity risk from their operations in host countries than larger issuers.[80]

The final rules also do not permit resource extraction issuers to satisfy the disclosure requirements adopted under Section 13(q) by providing disclosures required under other extractive transparency reporting requirements, such as under home country laws, listing rules, or an EITI program. Section 13(q) does not provide such an accommodation and, as noted by some commentators, in some respects the statute extends beyond the disclosure required under other transparency initiatives.[81] In addition, we note that transparency initiatives for resource extraction payment disclosure are continuing to develop.[82] Therefore, we believe it would be premature to permit issuers to satisfy their disclosure obligation by complying with other extractive transparency reporting regimes or by providing the disclosure required by those regimes in lieu of the disclosure required by the rules we are adopting under Section 13(q).[83]

Consistent with Section 13(q) and the proposed rules, we also are not providing an exemption for any situations in which foreign law may prohibit the required disclosure. Although some commentators asserted that certain foreign laws currently in place would prohibit the disclosure required under Section 13(q), other commentators disagreed and asserted that currently no foreign law prohibits the disclosure.[84] Further, as noted above, some commentators believed that we should adopt final rules providing an exemption from the disclosure requirements where foreign laws prohibit the required disclosure, including laws that may be adopted in the future,[85] while others believed that providing such an exemption would be inconsistent with the statute and would encourage countries to adopt laws specifically prohibiting the required disclosure.[86] While we understand commentators' concerns regarding the situation an issuer may face if a country in which it does business or would like to do business prohibits the disclosure required under Section 13(q),[87] the final rules we are adopting do not include an exemption for situations in which foreign law prohibits the disclosure. We believe that adopting such an exemption would be inconsistent with the structure and language of Section 13(q)[88] and, as some commentators have noted,[89] could undermine the statute by encouraging

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[76] *See* note 38 and accompanying text.

[77] *See* note 41 and accompanying text.

[78] *See* note 7 and accompanying text.

[79] *See* notes 33 and 34 and accompanying text.

[80] *See* letters from Global Witness 1, PWYP 1, Sen. Cardin *et al.* 1, and Soros 1.

[81] *See* note 49 and accompanying text.

[82] One recent development is the European Commission's issuance in October 2011 of proposed directives that would require companies listed on EU stock exchanges and large private companies based in EU member states to disclose their payments to governments for oil, gas, minerals, and timber. *See* the European Commission's press release concerning the proposal, which is available at: *http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1238&format=HTML&aged=0&language=EN&guiLanguage=en*. The EU proposal differs from the final rules we are adopting in several respects. For example, the EU proposal would apply to large, private EU-based companies as well as EU-listed companies engaged in oil, natural gas, minerals, and timber, whereas the final rules apply only to Exchange Act reporting companies engaged in oil, natural gas, and mining. The EU proposal would require disclosure of payments that are material to the recipient government, whereas the final rules require disclosure of payments that are not de minimis. Further, the EU proposal would apply to exploration, discovery, development, and extraction activities, whereas the final rules apply to exploration, extraction, processing, and export activities. In addition, while both the EU proposal and final rules require payment disclosure per project and government, the EU proposal would base project reporting on a company's current reporting structure whereas, as discussed below, the final rules leave the term "project" undefined. *See also* letter from PWYP 2. Other jurisdictions have introduced, but have not adopted, transparency initiatives. *See* letter from ERI 4 and note 14 and accompanying text.

[83] In this regard, we are not persuaded by comments suggesting that we should align our rules with any reporting requirements that may be adopted by the DOI as part of U.S. EITI. DOI is continuing its efforts to develop a U.S. EITI program and is currently working to form the stakeholder group. In addition, the scope of EITI programs generally differs from the scope of the requirements of Section 13(q). An EITI program adopted by a particular country generally requires disclosure of payments to that country's governments by companies operating in that country, but does not require disclosure of payments made by those companies to foreign governments. The disclosure requirements are developed country by country. In contrast, Section 13(q) requires disclosure of payments to the federal and foreign governments by resource extraction issuers. As noted elsewhere in this release, the requirements of the statute differ from the EITI in a number of respects.

[84] *Compare* letters from API 1, Barrick Gold, Cleary, ExxonMobil 1, NMA 2, NYSBA Committee, Rio Tinto, RDS 1, and Statoil with letters from EarthRights International (February 3, 2012) ("ERI 3"), Global Witness, PWYP, Publish What You Pay (December 20, 2011) ("PWYP 2"), Maples, and Rep. Frank *et al.* Several of the comment letters from issuers and industry associations assert that existing laws in Angola, Cameroon, China, and Qatar prohibit, or in some situations may prohibit, disclosure of the type required by Section 13(q). One commentator submitted translations of Despacho 385/06, issued by the Minister of the Angola Ministry of Petroleum, as amended by Despacho 409/06 (the "*Angola Order*") and a letter dated December 23, 2009, from the Deputy Premier, Minister of Energy & Industry, of the State of Qatar (the "*Qatar Directive*"). *See* letter from ExxonMobil 2. Another commentator submitted a translation of certain sections of Decree No. 2000/465 relating to the Cameroon Petroleum Code, a copy of a legal opinion from Cameroon counsel, and a copy of a legal opinion from Chinese counsel. *See* letter from RDS 1. We are not aware of any other examples submitted on the public record of foreign laws purported to prohibit disclosure of payments by resource extraction issuers. Other commentators have submitted contrary data, arguing that the laws of Angola, Cameroon, China, and Qatar do not prohibit a resource extraction issuer from complying with Section 13(q) and the final rules, and providing examples of companies that have disclosed payment information relating to resource development activities in Angola, Cameroon, and China. *See* letter from ERI 3. One commentator submitted a legal opinion stating that "[n]othing in Cameroonian law prevents oil companies from publishing data on revenues they pay to the state derived from oil contracts signed with the government."

[85] *See, e.g.*, API 1, ExxonMobil 1, and RDS 1.

[86] *See, e.g.*, letters from Cambodians, EG Justice (February 7, 2012) ("EG Justice 2"), Global Witness 1, Grupo Faro, HURFOM 1 and HURFOM 2, National Coalition of Senegal, PWYP, Rep. Frank *et al.*, Sen. Cardin *et al.*, Sen. Cardin *et al.* 2, Sen. Levin 1, Soros 2, US Agency for International Development (July 15, 2011) ("USAID"), and WACAM.

[87] *See, e.g.*, API 1, ExxonMobil 1, and RDS 1.

[88] As noted by some commentators, Section 23(a)(2) requires us, when adopting rules, to consider the impact any new rule would have on competition. *See, e.g.*, letters from API 1, API 3, Chairman Bachus, Cravath et al pre-proposal, and ExxonMobil 1. Specifically, Section 23(a)(2) requires us "to consider * * * the impact any such rule or regulation would have on competition" in making rules pursuant to the Exchange Act. Further, the section states that the Commission "shall not adopt any such rule * * * which would impose a burden on competition not necessary or appropriate in furtherance of [the Exchange Act]." As discussed further below, we recognize the final rules may impose a burden on competition; however, in light of the language and purpose of Section 13(q), which is now part of the Exchange Act, we believe the rules we are adopting pursuant to the provision and any burden on competition that may result are necessary in furtherance of the purpose of the Exchange Act, including Section 13(q) of the Exchange Act.

[89] *See, e.g.*, letters from Cambodians, EG Justice (February 7, 2012) ("EG Justice 2"), Global Witness 1, Grupo Faro, HURFOM 1 and HURFOM 2, National Coalition of Senegal, PWYP, Rep. Frank *et al.*, Sen. Cardin *et al.*, Sen. Cardin *et al.* 2, Sen. Levin 1, Soros 2, USAID, and WACAM.

countries to adopt laws, or interpret existing laws, specifically prohibiting the disclosure required under the final rules.

Consistent with Section 13(q) and the proposed rules, the final rules do not provide an exemption for instances when an issuer has a confidentiality provision in a relevant contract, as requested by some commentators.[90] We understand that contracts typically allow for disclosure to be made when required by law for reporting purposes.[91] Although some commentators maintained that those types of contractual provisions only allow the contracting party, not its parent or affiliate companies, to make the disclosure,[92] the final rules we are adopting do not include an exemption for confidentiality provisions in contracts because we believe this issue can be more appropriately addressed through the contract negotiation process.[93] As noted by some commentators, a different approach might encourage a change in practice or an increase in the use of confidentiality provisions to circumvent the disclosure required by the final rules.[94] In addition, including an exemption from the disclosure requirements for payments made under existing contracts that contain confidentiality clauses prohibiting such disclosure, as suggested by some commentators,[95] would frustrate the purpose of Section 13(q).

Although some commentators sought an exemption for commercially or competitively sensitive information, regardless of the existence of a confidentiality provision in a contract,[96] the final rules do not provide such an exemption. We note that commentators disagreed on the need for an exemption for commercially or competitively sensitive information.[97] While we understand commentators' concerns about potentially being required to provide commercially or competitively sensitive information,[98] we also are cognizant of other commentators' concerns that such an exemption would frustrate the purpose of Section 13(q) to promote international transparency efforts.[99] We note that in situations involving more than one payment, the information will be aggregated by payment type, government, and/or project, and therefore may limit the ability of competitors to use the information to their advantage.

We note that some commentators sought an exemption for circumstances in which a company believes that disclosure might jeopardize the safety and security of its employees and operations,[100] while other commentators opposed such an exemption and noted their belief that increased transparency would instead increase safety for employees.[101] We understand issuers' concerns about the safety of their employees and operations; however, in light of commentators' disagreement on this issue, including the belief by some commentators that disclosure will improve employee safety, and the fact that the statute seeks to promote international transparency efforts, we are not persuaded that such an exemption is warranted and we are not including it in the final rules. We also note that neither the statute nor the final rules require disclosure regarding the names or location of employees.

The final rules do not extend the disclosure requirements to foreign private issuers that are exempt from Exchange Act registration pursuant to Rule 12g3–2(b). Foreign private issuers relying on Rule 12g3–2(b) are not required to file annual reports with the Commission and thus, they do not fall within the plain definition of resource extraction issuer provided in the statute. In addition, we believe that such an extension would be inconsistent with the premise of Rule 12g3–2(b).[102] Issuers that are exempt from Exchange Act registration pursuant to Rule 12g3–2(b) are not subject to reporting requirements under the Exchange Act, including any requirement to file an annual report.

C: Definition of "Commercial Development of Oil, Natural Gas, or Minerals"

1. Proposed Rules

Consistent with Section 13(q), the proposed rules defined "commercial development of oil, natural gas, or minerals" to include the activities of exploration, extraction, processing, export and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity. In proposing the definition, we intended to capture only activities that are directly related to the commercial development of oil, natural gas, or minerals, but not activities that are ancillary or preparatory, such as the manufacture of a product used in the commercial development of oil, natural gas, or minerals. In the Proposing Release, we noted that commercial development would not include transportation activities for a purpose other than export. In addition, we noted, as an example, that an issuer engaged in the removal of impurities, such as sulfur, carbon dioxide, and water, from natural gas after extraction but prior to its transport through the pipeline would be included in the definition of commercial development because such removal is generally considered to be a necessary part of the processing of natural gas in order to prevent corrosion of the pipeline.

2. Comments on the Proposed Rules

Commentators supported various aspects of the proposed definition[103] while suggesting clarifications or alternative approaches to the definition of commercial development. For example, numerous commentators suggested defining commercial development to include upstream activities (exploration and extraction of resources) only.[104] Commentators noted that Section 13(q) is entitled "Disclosure of Payments by Resource Extraction Issuers," and as such, the statute "is directed toward those issuers who are engaged in extractive activities, or what are commonly referred to as 'upstream activities.'"[105] Commentators also noted that the EITI focuses on upstream activities[106] and that the statute directs the Commission "to consider consistency with EITI guidelines in the rules it develops."[107] Several commentators noted they believed defining commercial development to include only upstream activities would be consistent with the Commission's existing definition of "oil and gas producing activities" in Regulation S–X Rule 4–10.[108] In addition, commentators

[90] *See, e.g.*, letters from API 1, Chevron, Cleary, ExxonMobil 1, NMA 2, and RDS 1.

[91] *See* letters from Global Witness 1, Maples, and PWYP 1.

[92] *See* letters from API 1 and ExxonMobil 1.

[93] *See* letter from Maples.

[94] *See* letters from Global Witness and Oxfam.

[95] *See* note 60 and accompanying text.

[96] *See* note 66 and accompanying text.

[97] *See* notes 66 and 67 and accompanying text.

[98] *See* note 66 and accompanying text.

[99] *See* note 68 and accompanying text.

[100] *See* note 69 and accompanying text.

[101] *See* note 70 and accompanying text.

[102] *See* note 73 and accompanying text.

[103] *See, e.g.*, letters from API 1, AngloGold, BP 1, CRS, Global Financial Integrity 2, NMA 2, and PWYP 1.

[104] *See* letters from API 1, AXPC, Barrick Gold, BP 1, Chevron, ExxonMobil 1, NMA 2, Petrobras, PWC, RDS 1, and Statoil.

[105] *See* letters from API 1 and ExxonMobil 1.

[106] *See, e.g.*, letters from API 1 and NMA 2.

[107] *See* letters from API 1 and ExxonMobil 1.

[108] *See, e.g.*, letters from API 1, Chevron, ExxonMobil 1, and RDS 1. Rule 4–10(a)(16) defines "oil and gas producing activities" to include:

(A) The search for crude oil, including condensate and natural gas liquids, or natural gas ("oil and gas") in their natural states and original locations;

Continued

noted that adopting a definition of commercial development that is based on the definition of "oil and gas producing activities" in Regulation S–X would align it with a widely understood and accepted industry definition.[109] According to commentators advocating this approach, "commercial development of oil, natural gas, or minerals" would include "exploration, extraction, field processing and gathering/transportation activities to the first marketable location."[110] Some commentators suggested clarifying, either in the regulatory text or in the adopting release, that the definition would include field processing activities prior to the refining or smelting phase, such as upgrading of bitumen and heavy oil and crushing and processing of raw ore, as well as transport activities related to the export of oil, natural gas, or minerals to the first marketable location.[111] In focusing exclusively on mining activities, one commentator stated that the definition of "commercial development" should include exploration, extraction, and production, and activities of processing and export to the extent that they are associated with production.[112] Under that approach, the definition would include steps in production prior to the smelting or refining phase, such as crushing of raw ore, processing of the crushed ore, and export of processed ore to the smelter, but would not include the actual smelting or refining. Several commentators stated that the definition should exclude transportation and other midstream or downstream activities, including export.[113] According to some of those commentators, "'export' activities are not always directly associated with oil and gas producing activities, and can often be undertaken by issuers that are not engaged in 'resource extraction' at all."[114] They believed that requiring the reporting of payments by such issuers goes beyond the intended scope of the statute. One commentator urged us to state explicitly that "commercial development" does not include transportation activities and that transportation activities include the underground storage of natural gas.[115] Another commentator stated that an issuer should be allowed to choose whether to include transportation in the definition of "commercial development" as long as it discloses the basis for its definition.[116]

Other commentators stated that, at a minimum, the definition of "commercial development" must include the activities of exploration, extraction, processing, and export.[117] One commentator argued that, although the EITI does not include processing and export activities in its minimum disclosure requirements, the definition of "commercial development" must include those activities to be consistent with the plain language of Section 13(q) and because Congress intended the statute to go beyond the EITI's requirements.[118] Another commentator suggested expanding the proposed definition to include not just upstream activities, but also midstream activities (activities involved in trading and transport of resources), and downstream activities (activities involved in refining, ore processing, and marketing of resources).[119] The commentator agreed with the proposal that the definition should not include activities of a manufacturer of a product used in the commercial development of oil, natural gas, or minerals.

Some commentators requested further clarification that covered transport activities include not just those related to export, but those related to the processing or marketing of resources, whether intra-country or cross-border, and whether by pipeline, rail, road, air, ship, or other means.[120] Two commentators requested that the Commission define "transportation activities" to include pipelines and security arrangements associated with a pipeline within a host country.[121]

Some commentators agreed with the proposal that "commercial development" should exclude activities that are ancillary or preparatory to commercial development.[122] One commentator suggested that the term focus on activities that "directly relate to, and provide material support for, the physical process of extracting and processing ore and producing minerals from that ore, including the export of ore to the smelter."[123] The commentator further noted that activities that "do not directly and materially further this process, such as development of infrastructure and the community, as well as security support, generally would fall outside this definition, unless they include payments to governments that are expressly required by concession, contract, law, or regulation."[124] Another commentator requested that we provide further detail about the extractive activities to which the rules would apply.[125]

3. Final Rules

Consistent with Section 13(q) and the proposal, the final rules define "commercial development of oil, natural gas, or minerals" to include the activities of exploration, extraction, processing, and export, or the acquisition of a license for any such activity. As we noted in the Proposing Release, the statutory language sets forth a clear list of activities in the definition and gives us discretionary authority to include other significant activities relating to oil, natural gas, or minerals under the definition of "commercial development." As described above, the final rules we are adopting generally track the language in the statute, and except for where the language or approach of Section 13(q) clearly deviates from the EITI, the final rules are consistent with the EITI. In

(B) The acquisition of property rights or properties for the purpose of further exploration or for the purpose of removing the oil or gas from such properties;

(C) The construction, drilling, and production activities necessary to retrieve oil and gas from their natural reservoirs, including the acquisition, construction, installation, and maintenance of field gathering and storage systems, such as:

(1) Lifting the oil and gas to the surface; and

(2) Gathering, treating, and field processing (as in the case of processing gas to extract liquid hydrocarbons); and

(D) Extraction of saleable hydrocarbons, in the solid, liquid, or gaseous state, from oil sands, shale, coalbeds, or other nonrenewable natural resources which are intended to be upgraded into synthetic oil or gas, and activities undertaken with a view to such extraction.

(ii) Oil and gas producing activities do not include:

(A) Transporting, refining, or marketing oil and gas;

(B) Processing of produced oil, gas or natural resources that can be upgraded into synthetic oil or gas by a registrant that does not have the legal right to produce or a revenue interest in such production;

(C) Activities relating to the production of natural resources other than oil, gas, or natural resources from which synthetic oil and gas can be extracted; or

(D) Production of geothermal steam. (Instructions omitted.)

[109] *See* letters from API 1 and ExxonMobil 1.

[110] *See, e.g.*, letter from API 1.

[111] *See* letters from AXPC, API 1, Barrick Gold, BP 1, Chevron, ExxonMobil 1, NMA 2, Petrobras, PWC, RDS 1, and Statoil.

[112] *See* letter from NMA 2.

[113] *See* letters from API 1, Barrick Gold, ExxonMobil 1, National Fuel Gas Supply Corporation (March 1, 2011) ("National Fuel"), and NMA 2.

[114] *See* letter from API 1. *See also* letter from ExxonMobil 1.

[115] *See* letter from National Fuel.

[116] *See* letter from Rio Tinto.

[117] *See* letters from CRS and PWYP 1.

[118] *See* letter from PWYP 1.

[119] *See* letter from Calvert.

[120] *See* letters from Calvert, CRS, Earthworks, EIWG, HURFOM 1, PWYP pre-proposal, PWYP 1, and WRI.

[121] *See* letters from PWYP 1 and Syena; *see also* letter from Le Billon (suggesting coverage of transportation in general, security services, and trading).

[122] *See* letters from NMA 2 and Statoil.

[123] Letter from NMA 2.

[124] Letter from NMA 2.

[125] *See* letter from Syena.

instances where the language or approach of Section 13(q) clearly deviates from the EITI, the final rules track the statute rather than the EITI. The definition of "commercial development" in Section 13(q) is broader than the activities covered by the EITI and thus clearly deviates from the EITI; therefore, we believe the definition of the term in the final rules should be consistent with Section 13(q).

As noted above, we received significant comment on this aspect of the proposal. Some commentators sought a more narrow definition than proposed, while other commentators sought a broader definition. We are not persuaded that we should narrow the scope of the definition in Section 13(q) by re-defining "commercial development" to only include upstream activities [126] or using the definition of "oil and gas producing activities" in Rule 4–10.[127] Nor are we persuaded that we should expand the covered activities [128] beyond those identified in the statute.[129] Under the final rules, the definition of commercial development includes all of the activities specified in the statutory definition, even though the statute includes activities beyond what is currently contemplated by the EITI.[130]

Section 13(q) grants us the discretionary authority to include other significant activities relating to oil, natural gas, or minerals under the definition of "commercial development." [131] In deciding whether to expand the statutory list of covered activities, we have considered both commentators' views and the need to promote consistency with EITI principles. We are not persuaded that we should extend the rules to activities beyond the statutory list of activities comprising "commercial development" because we are mindful of imposing additional costs resulting from adopting rules that extend beyond Congress' clear directive.

As noted in the Proposing Release, the definition of "commercial development" is intended to capture only activities that are directly related to the commercial development of oil, natural gas, or minerals. It is not intended to capture activities that are ancillary or preparatory to such commercial development. Accordingly, we would not consider a manufacturer of a product used in the commercial development of oil, natural gas, or minerals to be engaged in the commercial development of the resource. For example, in contrast to the process of extraction, manufacturing drill bits or other machinery used in the extraction of oil would not fall within the definition of commercial development.

In response to commentators' requests for clarification of the activities covered by the final rules, we also are providing examples of activities covered by the terms "extraction," "processing," and "export." We note, however, that whether an issuer is a resource extraction issuer will depend on its specific facts and circumstances.

As we noted in the Proposing Release, "extraction" includes the production of oil and natural gas as well as the extraction of minerals. Under the final rules, "processing" includes field processing activities, such as the processing of gas to extract liquid hydrocarbons, the removal of impurities from natural gas after extraction and prior to its transport through the pipeline, and the upgrading of bitumen and heavy oil. Processing also includes the crushing and processing of raw ore prior to the smelting phase. We do not believe that "processing" was intended to include refining or smelting,[132] and we note that refining and smelting are not specifically listed in Section 13(q). In addition, as some commentators noted, including refining or smelting within the final rules under Section 13(q) would go beyond what is currently contemplated by the EITI, which does not include refining and smelting activities.[133]

We believe that "export" includes the export of oil, natural gas, or minerals from the host country. We disagree with those commentators who maintained that "export" means the removal of the resource from the place of extraction to the refinery, smelter, or first marketable location.[134] Adopting such a definition would be contrary to the plain meaning of export,[135] and nothing in Section 13(q) or the legislative history suggests that Congress meant "export" to have such a meaning; [136] thus, we believe such a definition would be contrary to the intent of Section 13(q). We also are not persuaded by the argument presented by some commentators [137] that the final rules should be limited only to upstream activities because the reference in the title of Section 13(q) to "Resource Extraction Issuers" demonstrates Congressional intent that the statute should apply only to issuers engaged in extractive activities.[138] Accordingly, under the final rules, "commercial development" includes the export of oil, natural gas, or minerals and, therefore, the definition of

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[126] *See* note 104 and accompanying text.

[127] *See* note 108 and accompanying text.

[128] *See* note 119 and accompanying text.

[129] We believe the phrase "as determined by the Commission" at the end of the definition of "commercial development" in Section 13(q) requires the Commission to identify any "other significant actions" that would be covered by the rules. *See* 15 U.S.C. 78m(q)(1)(A). As noted above, we are not expanding the list of activities covered by the definition of "commercial development." Therefore, to avoid confusion as to the scope of the activities covered by the rules, the final rules do not include the phrase "and other significant actions relating to oil, natural gas, or minerals."

[130] In the Proposing Release, we noted our understanding that the EITI criteria primarily focus on exploration and production activities. *See, e.g., Implementing the EITI,* at 24. We note that although export payments are not typically included under the EITI, some EITI programs have reported export taxes or related duties. *See* the 2005 EITI Report of Guinea, the 2008–2009 EITI Report of Liberia, and the 2006–2007 EITI Report of Sierra Leone, ovoiloble ot *http://eiti.org/document/eitireports.*

[131] *See* 15 U.S.C. 78m(q)(1)(A).

[132] The Commission's oil and gas disclosure rules identify refining and processing separately in the definition of "oil and gas producing activities," which excludes refining and processing (other than field processing of gas to extract liquid hydrocarbons by the company and the upgrading of natural resources extracted by the company other than oil or gas into synthetic oil or gas). *See* Rule 4–10(a)(16)(ii) of Regulation S–X [17 CFR 210.4–10(a)(16)(ii)] and note 108. In addition, we note that in another statute adopted by Congress, the Sudan Accountability and Divestment Act of 2007 (SADA), relating to resource extraction activities, the statute specifically identifies "processing" and "refining" separately in defining "mineral extraction activities" and "oil-related activities." 110 P.L. No. 174 (2007). Specifically, Section 2(7) of SADA defines "mineral extraction activities" to mean "exploring, extracting, processing, transporting, or wholesale selling of elemental minerals or associated metal alloys or oxides (ore) * * *." Section 2(8) of SADA defines "oil-related activities" to mean in part "exporting, extracting, producing, refining, processing, exploring for, transporting, selling, or trading oil * * *." The inclusion of "processing" and "refining" in SADA, in contrast to the language of Section 13(q), suggests that the terms have different meanings. Absent designation by the Commission, we do not believe that "refining" was intended to be included in the scope of the express terms in Section 13(q).

[133] *See, e.g.,* letters from API and NMA 2.

[134] *See* notes 111 and 112 and accompanying text.

[135] For example, Merriam-Webster dictionary defines "export" to mean "to carry or send (as a commodity) to some other place (as another country)." Merriam-Webster Dictionary, *http://www.merriam-webster.com/dictionary/export* (last visited August 15, 2012). *See also* letters from CRS, Global Financial Integrity 2, and PWYP 1 (stating that exclusion of export activities would be inconsistent with plain language of statute).

[136] *See* note 118 and accompanying text.

[137] *See* note 105 and accompanying text.

[138] The statutory definition of "commercial development" includes activities, such as processing and export, that go beyond mere extractive activities. In this regard, we note that "the title of a statute and the heading of a section cannot limit the plain meaning of the text * * *. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain." *Brotherhood of Railroad Trainmen* v. *Boltimore & Ohio Roilrood Co.,* 331 U.S. 519, 528–29 (1947); *see also Intel Corporotion* v. *Advanced Micro Devices, Inc.,* 542 U.S. 241, 256 (2004) (quoting *Trainmen*).

"resource extraction issuer" will capture an issuer that engages in the export of oil, natural gas, or minerals. We note that these definitions could require companies that may only be engaged in exporting oil, natural gas, or minerals and that may not have engaged in exploration, extraction, or processing of those resources to provide payment disclosure.

Consistent with the proposal, the definition of "commercial development" in the final rules does not include transportation in the list of covered activities.[139] Section 13(q) does not include transportation in the list of activities covered by the definition of "commercial development." In addition, including transportation activities within the final rules under Section 13(q) would go beyond what is currently contemplated by the EITI, which focuses on exploration and production activities and does not explicitly include transportation activities.[140] Thus, the final rules do not require a resource extraction issuer to disclose payments made for transporting oil, natural gas, or minerals for a purpose other than export.[141] As recommended by several commentators, transportation activities generally would not be included within the definition[142] unless those activities are directly related to the export of the oil, natural gas, or minerals. For example, under the final rules, transporting a resource to a refinery or smelter, or to underground storage prior to exporting it, would not be considered "commercial development," and therefore, an issuer would not be required to disclose payments related to those activities.

In an effort to emphasize substance over form or characterization and to reduce the risk of evasion, as discussed in more detail below, we are adding an anti-evasion provision to the final rules.[143] The provision requires disclosure with respect to an activity or payment that, although not in form or characterization of one of the categories specified under the final rules, is part of a plan or scheme to evade the disclosure required under Section 13(q).[144] Under this provision, a resource extraction issuer could not avoid disclosure, for example, by re-characterizing an activity that would otherwise be covered under the final rules as transportation.

Consistent with the proposal, the definition of "commercial development" in the final rules would not include marketing in the list of covered activities. Section 13(q) does not include marketing in the list of activities covered by the definition of "commercial development." In addition, including marketing activities within the final rules under Section 13(q) would go beyond what is currently contemplated by the EITI, which focuses on exploration and production activities and does not include marketing activities.[145] Thus, the final rules do not include marketing in the list of covered activities in the definition of "commercial development."[146]

D. Definition of "Payment"

Section 13(q) defines "payment" to mean a payment that:

- Is made to further the commercial development of oil, natural gas, or minerals;
- Is not de minimis; and
- Includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with EITI's guidelines (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.

1. Types of Payments

a. Proposed Rules

In the Proposing Release, we explained that we interpret Section 13(q) to provide that the types of payments that are included in the statutory language should be subject to disclosure under our rules to the extent the Commission determines that the types of payments and any "other material benefits" are part of the "commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals." Consistent with Section 13(q), we proposed to require resource extraction issuers to disclose payments of the types identified in the statute because of our preliminary belief that they are part of the "commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals." We noted that the types of payments listed in Section 13(q) generally are consistent with the types of payments the EITI suggests should be disclosed and expressed our belief that this is evidence that the payment types are part of the commonly recognized revenue stream. As noted above, Section 13(q) provides that our determination should be consistent with the EITI's guidelines, to the extent practicable. Therefore, we are including all the payments listed above in the final rules because they are included in the EITI, which indicates they are part of the commonly recognized revenue stream. Guidance for implementing the EITI suggests that a country's disclosure requirements might include the following benefit streams:[147] Production entitlements; profits taxes; royalties; dividends; bonuses, such as signature, discovery, and production bonuses; fees, such as license, rental, and entry fees; and other significant benefits to host governments, including taxes on corporate income, production, and profits but excluding taxes on consumption.[148]

We did not propose specific definitions for each payment type, although we stated that fees and bonuses identified as examples in the EITI would be covered by the proposed rules. In addition, we provided an instruction to the rules to clarify the taxes a resource extraction issuer would be required to disclose. Under the proposal, resource extraction issuers would have been required to disclose taxes on corporate profits, corporate income, and production, but would not have been required to disclose taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes, because consumption taxes are not typically disclosed under the EITI. We did not propose any other "material benefits" that should be disclosed. Thus, we did not propose to require disclosure of dividends, payments for infrastructure improvements, or social or community payments because those types of payments are not included in the statutory list of payments. We recognized that it may be appropriate to

[139] Adopting a definition of "commercial development" that does not include transport activities other than in connection with export is consistent with the EITI, which generally does not require the disclosure of transportation-related payments. *See Implementing the EITI*, at 35.

[140] *See* letters from API 1, ExxonMobil 1, and NMA 2.

[141] In addition, we note that Section 13(q) does not include transporting in the list of covered activities, unlike another federal statute—the SADA—that specifically includes "transporting" in the definition of "oil and gas activities" and "mineral extraction activities." The inclusion of "transporting" in SADA, in contrast to the language of Section 13(q), suggests that the term was not intended to be included in the scope of Section 13(q).

[142] *See, e.g.*, letters from API, Barrick Gold, National Fuel, and NMA 2.

[143] *See* Section II.D.1.c.

[144] *See* Instruction 9 to Item. 2.01 of Form SD.

[145] *See* letters from API 1 and ExxonMobil 1.

[146] For similar reasons, the definition of "commercial development" does not include activities relating to security support. *See* Section II.D. below for a related discussion of payments for security support.

[147] Under the EITI, benefit streams are defined as being any potential source of economic benefit which a host government receives from an extractive industry. *See EITI Source Book*, at 26.

[148] *EITI Source Book*, at 27–28.

provide more specific guidance about the particular payments that should be disclosed. We requested comment intended to elicit detailed information about what types of payments should be included in, or excluded from, the rules; what additional guidance may be helpful or necessary; and whether there are "other material benefits" that should be specified in the list of payments subject to disclosure because they are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.

b. Comments on the Proposed Rules

Several commentators supported the proposal and stated that it was not necessary to provide further guidance regarding the types of payments covered or to define "other material benefits" that are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[149] Those commentators noted that the proposed types of payments were largely consistent with the benefit streams listed in the EITI Source Book and represented the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. Another commentator agreed the payment types should be based on the benefit streams outlined in the EITI Source Book, and suggested that we provide some limited guidance on the types of payments that should be disclosed to "ensure consistency of presentation and to facilitate the interpretation of the rules."[150]

Several other commentators, however, urged the Commission to adopt a broader, more detailed, and non-exhaustive list of payment types.[151] For example, in addition to the statutory list of payments, some commentators suggested the rule specify as fees required to be disclosed a wide range of fees, including concession fees, entry fees, leasing and rental fees, which are covered under the EITI, as well as acreage fees, pipeline and other transportation fees, fees for environmental, water and surface use, land use, and construction permits, customs duties, and trade levies.[152] Other commentators opposed the disclosure of any fees or permits that are not unique to the resource extraction industry or that represent ordinary course payments for goods and services to government-owned entities acting in a commercial capacity.[153]

Some commentators agreed that, as proposed, resource extraction issuers should have to disclose taxes on corporate profits, corporate income, and production, but should not be required to disclose taxes levied on consumption.[154] Commentators expressed concern, however, that because corporate income taxes are measured at the entity level, it would be difficult to derive a disaggregated, per project amount for those tax payments.[155] A couple of those commentators noted that compounding this difficulty is the fact that the total amount of income tax paid is a net amount reflecting tax credits and other tax deductions included under commercial arrangements with the host government. Tax credits and deductions may result from offsetting results from one set of projects against credits and deductions of other projects, according to some commentators, and therefore deriving an income tax payment by individual project would be very difficult.[156] Other commentators opposed requiring the disclosure of payments for corporate income taxes because those payments are generally applicable to any business activity and are not specifically made to further the commercial development of oil, natural gas, or minerals.[157] Still other commentators believed that issuers should have to disclose payments for consumption and other types of taxes, including value added taxes, withholding taxes, windfall or excess profits taxes, and environmental taxes.[158] One commentator believed consumption and other taxes should be disclosed to the extent they are "discriminatory taxes targeted at specific industries, as opposed to taxes of general applicability."[159]

Several commentators requested expansion of the proposed list of payment types to include specifically at least those types typically disclosed under the EITI, such as signature, discovery, and production bonuses, and dividends.[160] With regard to dividends, commentators noted that a government or government-owned company often owns shares in a holding company formed to develop and produce resources.[161] In those situations, an issuer may pay dividends to the government or government-controlled company in lieu of royalties or production entitlements.[162] One commentator further stated that, unlike the equity share that a private operator would enjoy, in those situations the government participates on a preferential basis not available to other entities.[163] According to commentators, dividends paid to the government or government-owned company in those situations would be a material benefit, reportable under the EITI, and part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[164] Focusing on the mining industry, one commentator explained that "[o]wnership in the share capital of a holding company that owns a mine is an alternative structure to a production entitlement or royalty interest, and dividends paid are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals."[165]

Other commentators, however, opposed requiring disclosure of dividend payments.[166] According to one commentator, dividends are indirect payments that are outside the core elements of the revenue stream for the commercial development of oil, natural gas or minerals, and therefore should be excluded.[167] Another commentator opposed the inclusion of dividends because of its belief that dividend payments are not generally associated with a particular project.[168] A third commentator believed that, because "the term 'dividends' relates to amounts received by the host country government as a shareholder in a state enterprise[,]" dividend payments "essentially are inter-governmental transfers" and therefore are more

[149] *See* letters from API 1, Chevron, ExxonMobil 1, NMA 2, PetroChina, RDS 1, and Statoil.

[150] *See* letter from BP 1.

[151] *See* letters from Calvert, CRS, Earthworks, Global Witness 1, Le Billon, ONE, PWYP 1, TIAA, and WRI.

[152] *See* letters from Earthworks (supporting PWYP), CRS, Global Witness 1, Le Billon, ONE, PWYP pre-proposal, and PWYP 1.

[153] *See* letters from Cleary and Vale.

[154] *See* letters from API 1, ExxonMobil 1, NMA 2, and RDS 1.

[155] *See* letters from API 1, BHP Billiton, BP 1, ExxonMobil 1, IAOGP, Petrobras, Statoil, and Talisman.

[156] *See* letters from API 1 and ExxonMobil 1.

[157] *See* letters from Akin Gump Strauss Hauer & Feld LLP (March 2, 2011) and Cleary.

[158] *See* letters from Barrick Gold, Earthworks, and PWYP 1.

[159] Letter from AngloGold.

[160] *See* letters from AngloGold, Barrick Gold, ERI 1, Earthworks, ExxonMobil 1, Global Witness 1, ONE, and PWYP 1.

[161] *See* letters from API 1, AngloGold, ERI 1, and ExxonMobil 1.

[162] *See* letters from AngloGold and ERI 1.

[163] *See* letter from ERI 1. This commentator noted that a significant portion of the revenue recognized by the government in such cases comes from its "equity stake in the operation—often known as the production share—or from dividends."

[164] *See* letters from API 1, AngloGold, ExxonMobil 1, and PWYP 1.

[165] *See* letter from AngloGold.

[166] *See* letters from NMA 2, RDS 1, and Statoil.

[167] *See* letter from Statoil.

[168] *See* letter from RDS 1.

appropriately reported by the government in an EITI reporting country.[169]

Many commentators supported the inclusion of in-kind payments, particularly in connection with production entitlements.[170] A couple of commentators requested that the Commission add language to the rule text to make explicit that issuers would be permitted to report payments in cash or in kind.[171] Another commentator stated that the Commission should provide instructions concerning how to disclose a production entitlement in kind, including which unit of measure to use, whether to provide a monetary value, and, if so, which currency to use.[172] A couple of commentators suggested allowing companies to report the payments at cost or, if not determinable, at fair market value.[173]

Some commentators did not believe that we need to further identify "other material benefits" that are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[174] Other commentators, however, either urged us to provide a broad, non-exclusive definition of "other material benefits" or to specify that certain types of payments should be included under that category because they are part of the commonly recognized revenue stream.[175]

Some commentators suggested that "other material benefits" should include payments for infrastructure improvements because natural resources are frequently located in remote or undeveloped areas, which requires resource extraction issuers, particularly mining companies, to make payments for infrastructure improvements that are generally viewed as part of the cost of doing business in those areas.[176] One commentator stated that payments for infrastructure improvements should be considered part of the commonly recognized revenue stream to the extent that they constitute part of the issuer's overall relationship with the government according to which the issuer engages in the commercial development of oil, natural gas, or minerals, while voluntary payments for infrastructure improvements should be excluded.[177] Another commentator believed that payments for infrastructure improvements should be disclosed even if not required by contract if an issuer undertakes them to build goodwill with the local population.[178]

Other commentators opposed requiring the disclosure of payments for infrastructure improvements.[179] One commentator maintained that voluntary payments for infrastructure improvements should not be covered by the rules because they do not constitute part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[180] Other commentators acknowledged that infrastructure improvements are often funded by issuers as part of the commercial development of oil and gas resources, but those commentators nevertheless believed that such payments should be excluded because they are typically not material compared to the primary types of payments required to be disclosed under Section 13(q).[181] Another commentator stated that payments for infrastructure improvements are of a de minimis nature compared to the overall costs of the commercial development of oil, natural gas, or minerals and, in many cases, are paid to private parties and not to government agencies.[182]

Several commentators recommended defining "other material benefits" to include social or community payments related to, for example, improvements of a host country's schools, hospitals, or universities.[183] While some commentators believed that, at a minimum, social or community payments should be included if required under the investment contract or the law of the host country,[184] other commentators suggested that voluntary social or community payments should be included as "other material benefits" because they represent an in-kind contribution to the state that, given their frequency, constitute part of the commonly recognized revenue stream of resource extraction.[185] One commentator noted that the Board of the EITI approved a revision to the EITI rules that would encourage EITI participants to disclose social payments that are material.[186] Some commentators also sought to include within the scope of "other material benefits" other types of payments, such as payments for security, personnel training, technology transfer, and local content and supply requirements, if required by the production contract.[187]

Several other commentators, however, maintained that social or community payments or other ancillary payments are considered indirect benefits under EITI guidelines, are typically not material, and therefore are not part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[188] Another commentator stated that payments for social and community needs and ancillary payments should be excluded from the final rules unless they are expressly required by the concession contract, law, or regulation.[189]

c. Final Rules

While we are adopting the list of payment types largely as proposed, we are making some additions and clarifications to the list of payment types in response to comments. Specifically, the final rules are consistent with the definition of payment in Section 13(q) and state that the term "payment" includes:

- Taxes;
- Royalties;
- Fees;
- Production Entitlements;
- Bonuses;
- Dividends; and

[169] Letter from NMA 2.

[170] *See* letters from API 1, AngloGold, Barrick Gold, ERI 1, EG Justice (March 29, 2011), ExxonMobil 1, HURFOM 1, Le Billon, NMA 2, Petrobras, RDS 1, TIAA, and WRI. One commentator noted that payments in kind for "infrastructure barter deals" have greatly increased over the past decade. *See* letter from Le Billon.

[171] *See* letters from ERI 1 and NMA 2.

[172] *See* letter from Petrobras.

[173] *See* letters from AngloGold and NMA 2. NMA also suggested requiring companies to report in-kind payments in the currency of the country in which it is made and not requiring conversion of all payments to the reporting currency.

[174] *See* letters from API 1, ExxonMobil 1, PetroChina, and RDS 1.

[175] *See, e.g.*, letters from AngloGold, Barrick Gold, ERI 1, Earthworks, Global Witness 1, ONE, PWYP 1, Sen. Levin 1, and WRI.

[176] *See, e.g.*, letters from ERI 1, Global Witness 1, and PWYP 1.

[177] *See* letter from AngloGold.

[178] *See* letter from ERI 1.

[179] *See* letters from API 1, ExxonMobil 1, NMA 2, RDS 1, and Statoil.

[180] *See* letter from NMA 2.

[181] *See* letters from API 1 and ExxonMobil 1. *See also* letter from Statoil (stating that payments for infrastructure improvements are indirect payments that are not part of the core elements of the revenue stream for the commercial development of oil, natural gas, or minerals).

[182] *See* letter from RDS 1.

[183] *See* letters from AngloGold, Barrick Gold, ERI 1, Earthworks, EG Justice, ONE, PWYP 1, Sen. Levin 1, and WRI.

[184] *See* letters from AngloGold, EG Justice (noting that in at least one country, Equatorial Guinea, companies engaged in upstream oil activities are required by that country's hydrocarbons law to invest in the country's development), ONE, and PWYP 1.

[185] *See* letters from Barrick Gold, ERI 1, Earthworks, and WRI.

[186] *See* letter from PWYP 1.

[187] *See, e.g.*, letters from ERI 1, Global Witness 1, and PWYP 1.

[188] *See* letters from API 1, ExxonMobil 1, PetroChina, RDS 1, and Statoil.

[189] *See* letter from NMA 2.

• Payments for infrastructure improvements.[190]

As we noted in the Proposing Release and above, we interpret Section 13(q) to provide that the types of payments that are included in the statutory language should be subject to disclosure under our rules to the extent that the Commission determines that the types of payments and any "other material benefits" are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. As noted, the statute provides that our determination should be consistent with the EITI's guidelines, to the extent practicable. Therefore, we are including all the payments listed above in the final rules because they are part of the commonly recognized revenue stream. We do not believe the final rules should include a broad, non-exhaustive list of payment types or category of "other material benefits," as was suggested by some commentators,[191] because we do not believe including a broad, non-exclusive category would be consistent with our interpretation that the Commission must determine the "material benefits" that are part of the commonly recognized revenue stream. Thus, under the final rules, resource extraction issuers will be required to disclose only those payments that fall within the specified list of payment types in the rules, which include payment types that we have determined to be material benefits that are part of the commonly recognized revenue stream, and that otherwise meet the definition of "payment."

We agree generally with those commentators who stated that it would be appropriate to add the types of payments included under the EITI but not explicitly mentioned under Section 13(q) to the list of payment types required to be disclosed because their inclusion under the EITI is evidence that they are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[192] Accordingly, the final rules add dividends to the list of payment types required to be disclosed.[193] The final rules clarify in an instruction that a resource extraction issuer generally need not disclose dividends paid to a government as a common or ordinary shareholder of the issuer as long as the dividend is paid to the government under the same terms as other shareholders. The issuer will however be required to disclose any dividends paid to a government in lieu of production entitlements or royalties.[194] We agree with the commentators that stated ordinary dividends would not comprise part of the commonly recognized revenue stream because such dividend payments are not made to further the commercial development of oil, natural gas, or minerals,[195] except in cases where the dividend is paid to a government in lieu of production entitlements or royalties.

The final rules also include, in the list of payment types subject to disclosure, payments for infrastructure improvements, such as building a road or railway. Several commentators stated that, because resource extraction issuers often make payments for infrastructure improvements either as required by contract or voluntarily, those payments constitute other material benefits that are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[196] We further note that some EITI participants have included infrastructure improvements within the scope of their EITI program, even though those payments were not required under the EITI until recently.[197] In February 2011 the EITI Board issued revised EITI rules[198] that require participants to develop a process to disclose infrastructure payments under an EITI program.[199] Thus, including infrastructure payments within the list of payment types required to be disclosed under the final rules will make the rules more consistent with the EITI, as directed by the statute.

Under the final rules, consistent with the recommendation of some commentators,[200] a resource extraction issuer must disclose payments that are not de minimis that it has made to a foreign government or the U.S. Federal Government for infrastructure improvements if it has incurred those payments, whether by contract or otherwise, to further the commercial development of oil, natural gas, or minerals. For example, payments required to build roads to gain access to resources for extraction would be covered by the final rules. If an issuer is obligated to build a road rather than paying the host country government to build the road, the issuer would be required to disclose the cost of building the road as a payment to the government to the extent that the payment was not de minimis.[201]

The final rules do not require a resource extraction issuer to disclose social or community payments, such as payments to build a hospital or school, because it is not clear that these types of payments are part of the commonly recognized revenue stream. We note commentators' views on whether social or community payments should be included varied more than their views on whether payments for infrastructure improvements should be included. Further, this treatment of social or community payments is consistent with the EITI, which encourages, but does not require, EITI participants to include social payments and transfers in EITI

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[190] Under Section 13(q) and the final rules, the term "payment" is defined as a payment that is not de minimis, that is made to further the commercial development of oil, natural gas, or minerals, and includes specified types of payments. Thus, in determining whether disclosure is required, resource extraction issuers will need to consider whether they have made payments that fall within the specified types and otherwise meet the definition of payment.

[191] *See* note 175 and accompanying text.

[192] *See, e.g.*, letter from AngloGold.

[193] The EITI describes dividends as "dividends paid to the host government as shareholder of the national state-owned company in respect of shares and any profit distributions in respect of any form of capital other than debt or loan capital." *EITI Source Book*, at 27–28.

[194] *See* Instruction 7 to Item 2.01.

[195] *See* letters from Cleary and Statoil.

[196] *See* letters from AngloGold, Barrick Gold, ERI 1, Earthworks, EG Justice, Global Witness 1, ONE, and PWYP 1.

[197] *See* the 2009 EITI report for Ghana (reported under Mineral Development Fund contributions), the 2008 EITI report for the Kyrgyz Republic (reported under social and industrial infrastructure payments), the 2008–2009 EITI report for Liberia (reported under county and community contributions), and the 2008 EITI report for Mongolia (reported under donations to government organizations).

[198] *See EITI Rules 2011, available at http://eiti.org/document/rules.*

[199] *See* EITI Requirement 9(f) in *EITI Rules 2011*, at 24 ("Where agreements based on in-kind payments, infrastructure provision or other barter-type arrangements play a significant role in the oil, gas or mining sectors, the multi-stakeholder group is required to agree [to] a mechanism for incorporating benefit streams under these agreements in to its EITI reporting process * * *."). The EITI Board has established a procedure to implement the new rules. According to the procedure, any country admitted as an EITI candidate on or after July 1, 2011 must comply with the new rules. Compliant countries are encouraged to make the transition to the new rules as soon as possible. The procedure also establishes a transition schedule for countries that are implementing the EITI but are not yet compliant. *See* the EITI newsletter, *available at http://eiti.org/news-events/eiti-board-agrees-transition-procedures-2011-edition-eiti-rules.*

[200] *See* note 176 and accompanying text.

[201] For a discussion of the treatment of in-kind payments under the final rules, see the text accompanying note 212. We note some commentators suggested infrastructure payments are usually not material compared to the other types of payments required to be disclosed under Section 13(q) and that infrastructure payments are of a de minimis nature compared to the overall costs of commercial development. *See* API 1, ExxonMobil 1, RDS 1, and Statoil. As discussed further below, the not de minimis requirement applies to all payment types, not just infrastructure payments.

programs if the participants deem the payments to be material.[202]

Consistent with the proposal and Section 13(q), the final rules will require a resource extraction issuer to disclose fees, including license fees, and bonuses paid to further the commercial development of oil, natural gas, or minerals. In response to requests by some commentators,[203] we are adding an instruction to clarify that fees include rental fees, entry fees, and concession fees, and bonuses include signature, discovery, and production bonuses.[204] As commentators noted,[205] the EITI Source Book specifically mentions these types of fees and bonuses as payments that are typically disclosed by EITI participants.[206] We believe this demonstrates that these types of fees and bonuses are part of the commonly recognized revenue stream, and therefore the final rules include an instruction clarifying that disclosure of these payments is required. The fees and bonuses identified are not an exclusive list, and there may be other fees and bonuses a resource extraction issuer would be required to disclose. A resource extraction issuer will need to consider whether payments it makes fall within the payment types covered by the rules.

Consistent with the proposal and Section 13(q), the final rules will require a resource extraction issuer to disclose taxes. In addition, the final rules include an instruction, as proposed, to clarify that a resource extraction issuer will be required to disclose payments for taxes levied on corporate profits, corporate income, and production, but will not be required to disclose payments for taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes.[207] This approach is consistent with the statute, which includes taxes in the list of payment types required to be disclosed, and with the EITI.[208] In response to concerns expressed about the difficulty of allocating certain payments that are made for obligations levied at the entity level, such as corporate taxes, to the project level,[209] the final rules provide that issuers may disclose those payments at the entity level rather than the project level.[210]

We are not persuaded that there are other types of payments that currently constitute material benefits that are part of the commonly recognized revenue stream. Therefore, the final rules do not include any additional payment types in the list of payment types resource extraction issuers must disclose.

As previously noted, many commentators supported the inclusion of in-kind payments, particularly in connection with production entitlements.[211] Under the final rules, resource extraction issuers must disclose payments of the types identified in the rules that are made in kind.[212] Because Section 13(q) specifies that the final rules require the disclosure of the type and total amount of payments made for each project and to each government, issuers will need to determine the monetary value of in-kind payments.[213] Consistent with suggestions we received on disclosing these types of payments,[214] the final rules specify that issuers may report in-kind payments at cost, or if cost is not determinable, fair market value, and provide a brief description of how the monetary value was calculated.[215]

Finally, a resource extraction issuer may not conceal the true nature of payments or activities that otherwise would fall within the scope of the final rules, or create a false impression of the manner in which it makes payments, in order to circumvent the disclosure requirements. As suggested by one commentator,[216] to address the potential for circumvention of the disclosure requirements, the final rules include an anti-evasion provision. This provision is intended to emphasize the substance over the form or characterization of an activity or payment. For example, a resource extraction issuer that typically engages in a particular activity that otherwise would be covered under the definition of commercial development of oil, natural gas, or minerals, and that changes the way it categorizes the same activity after the issuance of final rules to avoid disclosing payments related to the activity may be viewed as seeking to evade the disclosure requirements. Similarly, a resource extraction issuer that typically makes payments of the type that would otherwise be covered under the final rules and that changes the way it categorizes or makes payments after issuance of the final rules so that the payments are not technically required to be disclosed may be viewed as seeking to evade the disclosure requirements. The final rules will require disclosure with respect to activities or payments that, although not in form or characterization of one of the categories specified under the final rules, are part of a plan or scheme to evade the disclosure requirements under Section 13(q).[217]

2. The "Not De Minimis" Requirement

a. Proposed Rules

Section 13(q) and the proposal define payment, in part, to be a payment that is "not de minimis." Neither the statute nor the proposed rules define "not de minimis." Under Section 13(q) and the proposal, if the other standards for disclosure are met, resource extraction issuers would be required to disclose payments made that are "not de minimis."

Under the EITI, countries are free to establish a materiality level for disclosure.[218] Section 13(q) established

[202] *See* EITI Requirement 9(g) in *EITI Rules 2011*, at 24. Resource extraction issuers could, of course, voluntarily include information about these types of payments in their disclosure on Form SD.

[203] *See* note 160 and accompanying text.

[204] *See* Instruction 6 to Item 2.01 of Form SD.

[205] *See, e.g.*, letters from API 1 and ExxonMobil 1.

[206] *See* the *EITI Source Book*, at 28.

[207] *See* Instruction 5 to Item 2.01 of Form SD.

[208] The EITI Source Book specifically mentions the inclusion of taxes levied on income, production or profits and the exclusion of taxes levied on consumption, such as value-added taxes, personal income taxes or sales taxes. *See* the *EITI Source Book*, at 28.

[209] *See* note 155 and accompanying text.

[210] *See* discussion in Section II.F.2.c below.

[211] *See* note 170 and accompanying text. In-kind payments include, for example, making a payment to a government in oil rather than a monetary payment.

[212] We note that this is consistent with the reporting of production entitlements under the EITI. *See* the *EITI Source Book*, at 27.

[213] Although a couple of commentators suggested that issuers be permitted to report payments in cash or in kind, we note that Section 13(q) requires the type and total amount of payments made for each project and to each government, and total amount of payments by category. In order for issuers to provide a these total amounts, we believe it is necessary to provide a monetary value for any in-kind payments. Thus, the final rules require that issuers provide a monetary value for payments made in kind. In addition, in light of the requirement in Section 13(q) to tag the information to identify the currency in which the payments were made, the final rules instruct issuers providing a monetary value for in-kind payments to tag the information as "in kind" for purposes of the currency tag.

[214] *See* note 173 and accompanying text.

[215] *See* Instruction 1 to Item 2.01 of Form SD.

[216] *See* letter from Sen. Levin (February 17, 2012) ("Sen. Levin 2").

[217] *See* Instruction 9 to Item 2.01 of Form SD.

[218] For example, countries may establish a materiality level based on the size of payments or the size of companies subject to disclosure. *See Implementing the EITI*, at 30. The EITI Source Book notes that a benefit stream is material "if its omission or misstatement could distort the final EITI report" for the country. *EITI Source Book*, at 26. Because there is no pre-determined materiality level prescribed for all countries implementing the EITI, the multi-stakeholder group in each EITI-implementing country determines the threshold for disclosure that is appropriate for that country. *See Implementing the EITI*, at 31. The EITI recommends the following alternatives for considering a benefit stream to be material:

"Alternative 1: [if it is] more than A% of the host government's estimated total production value for the reporting period;

Alternative 2: [if it is] more than B% of the company's estimated total production value in the host country for the reporting period; or

the threshold for payment disclosure as "not de minimis" rather than requiring disclosure of "material" payments. Given the use of the phrase "not de minimis," we stated in the Proposing Release our preliminary belief that "not de minimis" does not equate with a materiality standard. In doing so, we noted that that the term "de minimis" is generally defined as something that is "lacking significance or importance" or "so minor as to merit disregard." [219] We also noted that we preliminarily believed that the term is sufficiently clear and that further explication was unnecessary.

b. Comments on the Proposed Rules

We received significant comment on this aspect of the proposal. Some commentators agreed that it is not necessary to define "not de minimis." [220] Two of those commentators suggested that an issuer should be required to disclose the methodology used to determine what is "not de minimis." [221] One commentator noted that "not de minimis" is a commonly-understood term.[222]

Most commentators that addressed the issue urged the Commission to define "not de minimis." [223] Several commentators stated that the Commission should avoid adopting a definition that uses one or more quantitative measures and, instead, should define "not de minimis" to mean material.[224] According to those commentators, a definition based on materiality would be consistent with the EITI and the Commission's longstanding disclosure regime.[225] One commentator stated that adopting a definition of "not de minimis" based on materiality would encourage "reasonable consistency of disclosure across all issuers" and result "in the disclosure of all material facts necessary for investors" without the Commission having to provide further guidance on how to determine materiality.[226]

Other commentators, however, agreed with our belief that "not de minimis" does not equate with material.[227] Several commentators noted that a provision of the U.S. federal tax code includes the following definition of "de minimis": "[a] property or service the value of which is * * * so small as to make accounting for it unreasonable or administratively impracticable." [228] One commentator stated that if we were to adopt a qualitative, principle-based standard when defining de minimis, it should be based on "the relevance of a payment in relation to a country's size" rather than with regard to a company's overall payments, assets or similar metric:[229] A few commentators requested "that a reasonable minimum threshold for payments to be reported should be set" without suggesting a particular minimum threshold.[230]

Several commentators urged us to adopt a definition of "not de minimis" based on one or more quantitative measures.[231] Commentators stated that such a definition was necessary to provide clarity regarding the disclosure requirements.[232] Two commentators suggested using an absolute dollar amount in the definition because they believed that such a standard would be easier to apply than a percentage, would reduce compliance costs, and would help ensure consistent disclosure and comparability.[233] Another commentator similarly believed that the use of an absolute dollar amount would help level the playing field among issuers.[234]

Commentators offered various suggestions for a quantitative threshold. Some commentators suggested requiring the reporting of payments above $10,000.[235] In addition, numerous commentators signed a petition supporting a de minimis threshold "in the low thousands (U.S. dollars) to prevent millions of dollars from going unreported." [236] Several commentators suggested that we should define "not de minimis" using a standard similar to a listing standard of the London Stock Exchange's Alternative Investment Market ("AIM"), which requires disclosure of any payment made to any government or regulatory authority by an oil, gas, or mining company registrant that, alone or as a whole, is over £10,000, or approximately $15,000.[237] One commentator suggested a reporting threshold "in the tens of

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Alternative 3: [if it is] more than USD C million [or local currency D million]."

EITI Source Book, at 27.

[219] *See* the definition of "de minimis" in Merriam-Webster Dictionary, *available at http://www.merriam-webster.com/dictionary/deminimis*. We note, in contrast, that Rule 12b–2 under the Exchange Act [17 CFR 240.12b–2] defines "material" when used to qualify a requirement for the furnishing of information as to any subject, as limited to information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered. *See also* Rule 405 under the Securities Act [17 CFR 230.405]. In addition, the U.S. Supreme Court has held that, in a securities fraud suit, an omitted fact is material if there is a substantial likelihood that its disclosure would have been considered significant by a reasonable investor. *See Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988) and *TSC Industries. Inc.*, *et al.* v. *Northway, Inc.*, 426 U.S. 438 (1976).

[220] *See* letters from Cleary, Global Witness 1, NMA 2, PetroChina, and Rio Tinto.

[221] *See* letters from NMA 2 and Rio Tinto.

[222] *See* letter from Global Witness 1. This commentator suggested that, in the alternative, we should define the term as an amount that meets or exceeds the lesser of (1) $1,000.for an individual payment or $15,000 in the aggregate over a period, or (2) a particular percentage of the issuer's per project expenditures. It also noted that it believes "not de minimis" should be assessed relative to the total expenditures on a project and not relative to the size or valuation of the entity making the payments.

[223] *See, e.g.*, letters from AngloGold, Barrick Gold, BP 1, CalSTRS, Calvert, CRS, Earthworks, Harrington Investments, Inc. (January 19, 2011) ("HII), RDS 1, Sen. Levin 1, and SIF.

[224] *See* letters from API 1, BP 1, Chevron, ExxonMobil 1, RDS 1, and Statoil.

[225] *See, e.g.*, letters from API 1 and Chevron. According to one commentator, adopting a definition based on specific quantitative measures rather than existing materiality guidance would "substantially increase the likelihood of overburdening issuers and users with large volumes of unnecessary and immaterial detail * * * and significantly increase the regulatory burden and cost of compliance." *See* letter from Chevron. *See also* letters from API 1 and ExxonMobil 1. Other commentators believed that an issuer should be able to rely on materiality principles for guidance when determining whether a payment is "not de minimis," but did not think that a definition of "not de minimis" was necessary. *See* letters from Cleary, NMA 2, PetroChina, and Rio Tinto.

[226] *See* letter from API 1.

[227] *See, e.g.*, letters from Barrick Gold, Calvert, ERI 1, Global Witness 1, HURFOM 1, PWYP 1, and TIAA.

[228] Letter from Calvert (quoting 26 U.S.C. § 132(e)(1)); *see also* letters from Global Witness 1, PWYP 1, and TIAA.

[229] *See* letter from PWYP 1.

[230] *See* letters from Derecho, Greenpeace, and Guatemalan Forest Communities.

[231] *See* letters from AngloGold, Barrick Gold, CalSTRS, CRS, Earthworks, HII, PWYP 1 (suggesting both qualitative and quantitative standards), RWI 1, Sen. Levin 1, and SIF. Another commentator noted that we have adopted objective standards in other contexts and requested that we do so for the definition of "not de minimis." That commentator further suggested that we may need to adopt different quantitative standards for large-cap and small-cap companies, but it did not recommend particular standards. *See* letter from AXPC.

[232] *See* letters from Barrick Gold and Talisman.

[233] *See* letters from AngloGold (recommending defining "de minimis" to mean "any payment or series of related payments made at the tax-paying entity level which in the aggregate is less than U.S.$1,000,000") and CRS (recommending an amount "significantly less than $100,000" and as an aggregate of payments of the same type during the reporting period covered).

[234] *See* letter from Talisman (noting that it currently reports payments in excess of one million dollars and supporting a minimum level of reporting of one million dollars).

[235] *See* letters designated "Type B" (suggesting $10,000 threshold without elaboration) and letter from Le Billon (stating that a "minimal value of $10,000 would be consistent with many legislations seeking to track financial flows, e.g. for the purpose of money laundering").

[236] ONE Petition.

[237] *See* letters from CalSTRS, HII, RWI 1, Sen. Levin 1, SIF, and WACAM. Several commentators suggested defining the term further to require disclosure of any individual payment that exceeded $1,000 as well as payments of the same type that in the aggregate exceeded $15,000. *See* letters from Earthworks, Global Witness 1, Global Witness 3, and PWYP 1.

thousands."[238] Another commentator believed that we should provide a specific threshold and that it should be significantly less than $100,000.[239] The commentator further stated that the threshold should be defined as an aggregate of payments of the same type during the reporting period covered. Another commentator suggested using an absolute dollar amount that would vary depending on the size of an issuer's market capitalization.[240]

One commentator suggested defining "de minimis" to mean "any payment or series of related payments made at the tax-paying entity level which in the aggregate is less than U.S.$1,000,000."[241] Another commentator similarly suggested using an absolute dollar amount threshold of $1,000,000 while noting that it currently reports payments in excess of that amount. According to that commentator, its "experience supports [$1,000,000] as the minimum level of reporting to ensure that the objectives of revenue transparency are met while not clouding the data with largely irrelevant information."[242] One commentator, however, opposed a "not de minimis" threshold of $1,000,000 because it believed such a threshold would exclude many payments made in the extractive industry.[243] Another commentator similarly cautioned against setting the "not de minimis" threshold too high because it would leave important payment streams undisclosed and could encourage companies and governments to structure payments in future contracts in a way that would avoid the disclosure requirement.[244].

Other commentators suggested adopting a quantitative definition of "not de minimis" that uses a relative measure, either alone or with an absolute dollar amount.[245] One commentator suggested defining "not de minimis" to mean five percent or more of an issuer's upstream expenses or revenues.[246] Another commentator suggested defining "not de minimis" as the lesser of two percent of the issuer's consolidated expenditures and $1,000,000.[247] According to that commentator, using a standard based on the lesser of a dollar amount or a percentage of expenses would reflect the size of a company but still ensure the disclosure of significant payments by a larger company.[248]

c. Final Rules

We have determined to adopt a definition of "not de minimis" to provide clear guidance regarding when a resource extraction issuer must disclose a payment.[249] We have considered whether to define the term using a materiality standard, as some commentators have recommended.[250] We continue to believe that given the use of the phrase "not de minimis" in Section 13(q) rather than use of a materiality standard, which is used elsewhere in the federal securities laws and in the EITI,[251] "not de minimis" was not intended to equate to a materiality standard.

More fundamentally, for purposes of Section 13(q), we do not believe the relevant point of reference for assessing whether a payment is "not de minimis" is the particular issuer. Rather, because the disclosure is designed to further international transparency initiatives regarding payments to governments for the commercial development of oil, natural gas, or minerals, we think the better way to consider whether a payment is "not de minimis" is in relation to host countries. We recognize that issuers may have difficulty assessing the significance of particular payments for particular countries or recipient governments and, as explained below, are adopting a $100,000 threshold that, we believe, will facilitate compliance with the statute by providing clear guidance regarding the payments that resource extraction issuers will need to track and report and will promote the transparency goals of the statute. In addition, we believe the threshold we are adopting will result in a lesser compliance burden than would otherwise be associated with the final rules if a lower threshold were used because issuers may track and report fewer payments than they would be required to report if a lower threshold was adopted.

Of the suggested approaches for defining "not de minimis," we believe that a standard based on an absolute dollar amount is the most appropriate because it will be easier to apply than a qualitative standard or a relative quantitative standard based on a percentage of expenses or revenues of the issuer,[252] or some other fluctuating measure, such as a percentage of the host government's or issuer's estimated total production value in the host country for the reporting period. Using an absolute dollar amount threshold for disclosure purposes should help reduce compliance costs and may also promote consistency and comparability.[253]

The final rules define "not de minimis"[254] to mean any payment, whether made as a single payment or series of related payments, that equals or exceeds $100,000 during the most recent fiscal year.[255] The final rules provide that in the case of any arrangement providing for periodic payments or installments (*e.g.*, rental fees), a resource extraction issuer must consider the aggregate amount of the related periodic payments or installments of the related payments in determining whether the payment threshold has been met for that series of payments, and accordingly, whether disclosure is required.[256] As discussed further below, we considered a variety of alternatives when considering what, if any, definition would be appropriate for "not de minimis."

We believe that a $100,000 threshold is more appropriate than, and an acceptable compromise to, the amounts

[238] *See* letter from Global Movement for Budget Transparency, Accountability and Participation (March 30, 2012) ("BTAP").

[239] See letter from CRS. *See also* letter from PWYP 1 (stating that $100,000 would not be an appropriate de minimis threshold because $100,000 could exceed the annual payments, such as lease rents or license fees, in some projects).

[240] *See* letter from AXPC. That commentator, however, did not specify any particular dollar amount or corresponding size of market capitalization.

[241] *See* letter from AngloGold.

[242] Letter from Talisman.

[243] *See* letter from ERI 3 (referring to disclosure in Sierra Leone's 2010 EITI Report and noting that a $1,000,000 threshold would exclude payments for half of the companies reporting in Sierra Leone). *See also* ONE Petition (urging the Commission to adopt a final rule that "sets the de minimis threshold in the low thousands (U.S. dollars) to prevent millions of dollars from going unreported").

[244] See letter from Rep. Frank *et al.*

[245] *See* letters from Barrick Gold and RDS 1 (RDS suggested a quantitative definition if the Commission determines not to define the term as "material").

[246] *See* letter from RDS 1.

[247] See letter from Barrick Gold (suggested "consolidated expenditures" but did not provide an explanation of the term).

[248] *See* letter of Barrick Gold.

[249] See, *e.g.*, letters from Barrick Gold and Talisman.

[250] *See* note 224 and accompanying text.

[251] *See* note 218 and accompanying text.

[252] *See* notes 231–233 and accompanying text.

[253] *See* note 233 and accompanying text. Furthermore, some commentators who suggested a relative standard did not provide definitions, or suggested a standard based on upstream payments only even though the required disclosure includes additional payments.

[254] *See* Item 2.01(c)(7) of Form SD.

[255] For example, a resource extraction issuer that paid a $150,000 signature bonus would be required to disclose that payment. As another example, a resource extraction issuer obligated to pay royalties to a government annually and that paid $10,000 in royalties on a monthly basis to satisfy its obligation would be required to disclose $120,000 in royalties.

[256] See Item 2.01(c)(7) of Form SD. This is similar to other instructions in our rules requiring disclosure of a series of payments. *See*, e.g., Instructions 2 and 3 to Item 404(a) of Regulation S–K (17 CFR 229.404(a)).

suggested by commentators.[257] Commentators supporting an absolute dollar amount differed widely on the amount best suited for the threshold, with commentators suggesting an amount in the "low thousands" of U.S. dollars,[258] $10,000,[259] $15,000,[260] an amount less than $100,000,[261] and $1,000,000.[262] We are not adopting a threshold in the low thousands of U.S. dollars, $10,000, or $15,000 threshold. In light of the comments received, we are concerned that those amounts could result in undue compliance burdens and raise competitive concerns for many issuers. While supporters of a $15,000 threshold noted its similarity to the AIM listing requirement, we do not believe that applying the threshold used in that listing requirement is appropriate for purposes of Section 13(q) because that threshold was designed to apply to the smaller companies that comprise the AIM market.[263]

Although a few commentators suggested we use $1,000,000 as the threshold,[264] including one commentator that stated it reports payments to governments in excess of $1,000,000,[265] we do not believe that $1,000,000 would be an appropriate threshold. While many EITI-reporting companies have reported payments in excess of $1,000,000,[266] we note that the EITI provides that countries may establish a "materiality" level for disclosure, which, as noted, is different from the "not de minimis" standard in Section 13(q). We agree with those commentators that cautioned against setting the threshold too high so as to leave important payment streams undisclosed.[267] Adopting $100,000 as the "not de minimis" threshold furthers the purpose of Section 13(q) and will result in a lesser compliance burden than would otherwise be associated with the final rules if a lower threshold were used.

Although adoption of a $100,000 threshold may be viewed as somewhat high by some commentators[268] and may result in some smaller payments not being reported, we believe this threshold strikes an appropriate balance between concerns about the potential compliance burdens of a lower threshold and the need to fulfill the statutory directive that payments greater than a "de minimis" amount be covered. We acknowledge that a "not de minimis" definition based on a materiality standard, or a much higher amount, such as $1,000,000, would lessen commentators' concerns about the compliance burden and potential for competitive harm.[269] We believe, however, that use of the term "not de minimis" in Section 13(q) indicates that a threshold quite different from a materiality standard, and significantly less than $1,000,000, is necessary to further the transparency goals of the statute.

In adopting the final rules, we believe an absolute, rather than relative, threshold may make the requirement easier for issuers to comply with and allow for increased comparability of payment disclosures. We considered adopting a threshold that would have required disclosure of the lesser of a specific dollar amount or a percentage of expenses, as suggested by commentators.[270] We determined not to adopt such an approach because we agree with other commentators that noted such an approach would be more difficult for issuers to comply with, could raise the compliance costs associated with tracking and reporting the information, and would make comparability of disclosure more difficult.[271] For similar reasons, we decided not to adopt a threshold that exclusively used a percentage threshold based on an issuer's expenses or revenues, or some other fluctuating measure. We note that exclusively using a percentage threshold based on an issuer's expenses or revenues could result in larger companies having a higher payment threshold for disclosure than contemplated by the "de minimis" language in the statute.

3. The Requirement To Provide Disclosure for "Each Project"

a. Proposed Rules

As noted in the proposal, Section 13(q) requires a resource extraction issuer to disclose information regarding the type and total amount of payments made to a foreign government or the Federal Government for each project relating to the commercial development of oil, natural gas, or minerals, but it does not define the term "project."[272] Consistent with Section 13(q), the proposed rules would have required a resource extraction issuer to disclose payments made to governments by type and total amount per project. The proposed rules did not define "project" in light of the fact that neither Section 13(q) nor our current disclosure rules include a definition of the term. In addition, the EITI does not define the term or provide guidance on how it should be defined.

b. Comments on the Proposed Rules

Two commentators supported the proposed approach of leaving the term "project" undefined to allow flexibility for different types and sizes of businesses.[273] Most commentators that addressed the issue supported defining the term "project,"[274] but they disagreed as to the appropriate definition, with recommendations ranging from defining a "project" as each individual lease or license to defining it as a country. One commentator stated that leaving the term undefined "would create significant uncertainty for issuers and

[257] The Proposing Release solicited comment on a wide range of absolute dollar amounts for the "de minimis" threshold, and requested data to support the definitions suggested by commentators. *See* Part II.D.2. of the Proposing Release. We received little data that was helpful. Although one commentator submitted data regarding payments made by some oil companies for tuition, rent, and living expenses for the students and relatives of officials in Equatorial Guinea, those payments are not within the list of payments types specified by Section 13(q). *See* letter from Sen. Levin 2. Another commentator noted that, based on Sierra Leone's 2007 EITI Reconciliation Report (published in 2010), a $1 million threshold would result in non-disclosure of over 40% of payments made by mining companies and all payments made by half of EITI reporting companies in that country. *See* letter from ERI 3. Although the letter provides information about payments made to Sierra Leone, it appears that the companies for which data is provided would not be subject to the reporting requirements under Section 13(q) and the related rules.

[258] *See* ONE Petition.

[259] *See* letters designated Type B and letter from Le Billon.

[260] *See* letters from CalSTRS, ERI 3, HII, RWI 1, Sen. Levin 1, SIF, and WACAM.

[261] *See* letters from CRS and PWYP 1.

[262] *See* letters from AngloGold and Talisman; *see also* letter from Barrick Gold.

[263] We also note that the AIM requirement differs from the disclosure required by Section 13(q) and the final rules in that the AIM only requires disclosure of payments by extractive issuers as an initial listing requirement and does not impose an ongoing reporting requirement related to those payments.

[264] *See* letters from AngloGold, Barrick Gold, and Talisman.

[265] *See* letter from Talisman.

[266] *See, e.g.*, the 2009 EITI Report for Ghana (regarding payment of royalties, corporate taxes, and dividends); the 2006–2008 EITI Report for Nigeria (regarding payment of petroleum taxes, royalties and signature bonuses); the 2004–2007 EITI Report for Peru (regarding payment of corporate income taxes and royalties); and the 2009 EITI Report for Timor Leste (regarding payment of petroleum taxes).

[267] *See* letters from ERI 3 and Rep. Frank *et al.*

[268] *See, e.g.*, letters from CRS (supporting a "not de minimis" threshold that is significantly less than $100,000) and PWYP 1 (supporting a "not de minimis" threshold of $1,000 for individual payments and $15,000 for payments in the aggregate); *see also* letter from ERI 3.

[269] *See* notes 224, 241, and 242 and accompanying text.

[270] *See* note 247 and accompanying text.

[271] *See* note 233 and accompanying text.

[272] The legislative history does not provide an indication as to how we should define the term.

[273] *See* letters from Cleary and NMA 2.

[274] *See, e.g.*, letters from API 1, Calvert, Chevron, PWYP 1, RDS 1, and Sen. Levin 1.

result in disclosures that are not comparable from issuer to issuer." [275] Several commentators urged us to adopt a definition of project that would not impede the ability of companies to compete for extractive industry contracts, but did not provide a particular definition.[276] One of those commentators recommended broadly defining "project" so that issuers would not have to disclose disaggregated price and cost information that could have anti-competitive effects.[277] Another of those commentators stated that we must adopt a definition of "project," among other definitions, that is "narrowly tailored to prevent a competitive imbalance for those SEC-registered companies which make payments to governments for the privilege of extracting natural resources." [278]

Some commentators suggested that we permit a resource extraction issuer to treat all of its operations in a single country as a project.[279] Commentators asserted that doing so would be consistent with the EITI and would prevent issuers from incurring tens of millions of dollars in compliance costs.[280] One commentator stated that defining "project" to require country-level disclosure would be consistent with Item 1200 of Regulation S–K, which treats an individual country as the lowest geographic level at which comprehensive oil and gas disclosures must be provided.[281] Commentators that opposed defining "project" as a country stated that such a definition would be inconsistent with the statute and Congressional intent.[282]

Other commentators supported defining "project" consistent with the definition of "reporting unit." [283] According to one of those commentators, using a definition consistent with reporting unit "would allow issuers to collect information on a basis with which they already are familiar, and draw upon established internal controls over financial reporting ("ICFR"), instead of having to reallocate and assign payments arbitrarily at a lower or different level than which they manage their operations, and incurring cost and burden beyond their existing ICFR systems." [284]

Other commentators stated that there are relatively limited instances in which resource extraction issuers make payments to governments at the entity level (for example, the payment of corporate income taxes), and that fact should have no bearing on the definition of "project." [285] Those commentators noted that issuers could be permitted to report at the entity level those payments that are levied at the entity level that are not associated with a specific project.

Several commentators suggested defining the term in relation to a particular geologic resource. For example, "project" could be defined to mean technical and commercial activities carried out within a particular geologic basin or province to explore for, develop, and produce oil, natural gas, or minerals.[286] Two commentators further suggested that the definition could specify the covered activities to include acreage acquisition, exploration studies, seismic data acquisition, exploration drilling, reservoir engineering studies, facilities engineering design studies, commercial evaluation studies, development drilling, facilities construction, production operations, and abandonment.[287] The definition could further state that a project may consist of multiple phases or stages.[288]

Other commentators, however, opposed a definition of "project" based on a particular geologic basin or province.[289] Those commentators maintained that, because multiple companies often conduct activities in a single geologic basin, and because a basin may span more than one country, such a definition would be counter to the "company-by-company" and "country-by-country" reporting requirements of Section 13(q) and would be of limited use to citizens and investors. Commentators further stated that a definition of "project" based on a particular geologic basin would have no relation to the level at which royalty rates, tax payments, and other rights and fiscal obligations are assigned.[290]

Some commentators supported defining "project" to mean a material project,[291] while others opposed such a definition.[292] The commentators that supported defining the term to be a material project asserted that doing so would enable issuers to rely on traditional principles of materiality when determining what constitutes a project.[293] One commentator stated that materiality "should be determined with reference to the issuer's total worldwide government payments and other qualitative factors." [294] Commentators that opposed defining "project" as a material project stated that such a definition is not supported by the plain

[275] Letter from API 1.

[276] *See* letters from Chairman Bachus and Chairman Miller, Timothy J. Muris and Bilal Sayyed (March 2, 2011) ("Muris and Sayyed"), and Split Rock.

[277] *See* letter from Muris and Sayyed.

[278] Letter from Chairman Bachus and Chairman Miller.

[279] *See* letters from AXPC, AngloGold, Barrick Gold, bclMC, BHP Billiton, BP 1, Hispanic Leadership Fund (February 27, 2012), Petrobras, PWC, RDS 1, Sen. Murkowski and Sen. Cornyn, and Statoil. *See also* letters from API 1 and ExxonMobil 1 (stating that under certain circumstances, an issuer should be permitted to treat operations in a country as a project, for example, when all of an issuer's operations in a country relate to a single geologic basin or province).

[280] *See* letters from API 1, ExxonMobil 1, Petrobras, and RDS 1.

[281] *See* letter from PWC.

[282] *See, e.g.*, letters from Calvert, Earthworks, Global Financial 2, Global Witness 1, HURFOM 2, ONE, Oxfam 1, PWYP 1, Rep. Frank *et al.*, and Sen. Cardin *et ol* 1. *See olso* letter from Gates Foundation and Le Billon.

[283] *See* letters from API 1, Chevron, ExxonMobil 1, NMA 2, Rio Tinto, and Talisman. Generally, the commentators did not specify what they meant by reporting unit, but we assume that they were referring to a reporting unit as used for financial reporting purposes. *See olso* note 305.

[284] Letter from NMA 2. In this regard, we note that the European Commission proposed disclosure requirements that would require companies that are registered or listed in the European Union to report payments to governments on a country and project basis where those payments had been attributed to a specific project. The reporting on a project basis would be made on the basis of companies' current reporting structures. *See Proposal for Directive on tronsporency requirements for listed companies and proposols on country by country reporting—frequently osked questions*, COM (2011) MEMO/11/734 (October 25, 2011), *available at http://europo.eu/rapid/pressReleosesAction.do?reference=MEMO/11/734&format=HTML&aged=0*. As noted above, the proposals are currently pending.

[285] *See* letters from Global Witness 1 and PWYP 1 (stating that a limited disclosure accommodation could be given in the relatively few instances that payments are made at the entity level). *See also* letter from Calvert (define "project" at the lease or license level except where payments originate at the entity level).

[286] *See* letters from API 1, API 3, Chairman Bachus, BP 1, Chamber Energy Institute, Chevron, ExxonMobil 1, IAOGP, Sen. Murkowski and Sen. Cornyn, Statoil, and USCIB.

[287] *See* letters from API 1 and ExxonMobil 1.

[288] *See* letters from API 1 and ExxonMobil 1.

[289] *See, e.g.*, letters from ERI 3, Gates Foundation, Oxfam (February 6, 2012) ("Oxfam 2"), Petition from Angolan citizens and Angolan civil society organizations (March 13, 2012) ("Angolan citizens"), Rep. Frank *et al.*, and Soros 2.

[290] *See, e.g.*, letters from Gates Foundation, Oxfam 2, and Rep. Frank *et ol.*

[291] *See* letters from API 1, API 2, API 3, Chamber Energy Institute, Chevron, Cravath *et ol.* pre-proposal, ExxonMobil 1, IAOGP, PetroChina, RDS 1, Sen. Murkowski and Sen. Cornyn, and Statoil.

[292] *See* letters from Global Witness 1, Oxfam 1, PWYP 1, and ERI 2. Oxfam and PWYP stated that should the Commission define "project" as a material project, it should clarify that, when determining the materiality of a project, consideration should be given to the significance of a project to a country and its citizens in addition to its significance to an issuer. According to PWYP, "[t]he disclosure of projects that are material to the country would allow comparability across projects and meet the intent of the statute to provide information of use to hold governments accountable."

[293] *See* letters from API 1, Chamber Energy Institute, Chevron, ExxonMobil 1, IAOGP, PetroChina, RDS 1, and Statoil.

[294] Letter from API 1.

language of Section 13(q) and would result in inconsistent disclosures.[295]

Several commentators urged the Commission to adopt a definition of "project" in relation to each lease, license, or other concession-level arrangement entered into by a resource extraction issuer.[296] In particular, one commentator urged us to adopt a definition of "project" as "any oil, natural gas or mineral exploration, development, production, transport, refining or marketing activity from which payments above the de minimis threshold originate at the lease or license level, except where these payments originate from the entity level."[297] The commentators supporting a definition of "project" in relation to a lease or license asserted that such an approach would be appropriate because they believed the intent of Section 13(q) was to go beyond the EITI standards, and it would enable investors and others to evaluate the risks faced by issuers operating in resource-rich countries.[298]

According to some commentators, concerns expressed about compliance costs associated with project-level reporting "inflate their likely impact" because most issuers already have internal systems in place for recording payments that would be required to be disclosed under Section 13(q) and many issuers already report payments at the project level or are moving towards project-level disclosure.[299] Another commentator stated that project-level disclosure "would have an extremely beneficial impact on improving investment risk assessment and would provide further levels of corporate and sovereign accountability."[300] That commentator further suggested that consistently applying the rules to all resource extraction issuers would diminish anti-competitive concerns.[301]

c. Final Rules

After carefully considering the comments, we have determined, consistent with the proposal, to leave the term "project" undefined in the final rules. We continue to believe that not adopting a definition of "project" has the benefit of giving issuers flexibility in applying the term to different business contexts depending on factors such as the particular industry or business in which the issuer operates, or the issuer's size. As noted above, neither Section 13(q) nor our rules include a definition of "project," and the EITI does not define the term. In view of concerns expressed by some commentators with regard to leaving the term undefined,[302] we are providing some guidance about the meaning of the term.

We understand that the term "project" is used within the extractive industry in a variety of contexts. While there does not appear to be a single agreed-upon application in the industry, we note that individual issuers routinely provide disclosure about their own projects in their Exchange Act reports and other public statements, and as such, we believe "project" is a commonly used term whose meaning is generally understood by resource extraction issuers and investors. In this regard, we note that resource extraction issuers routinely enter into contractual arrangements with governments for the purpose of commercial development of oil, natural gas, or minerals. The contract defines the relationship and payment flows between the resource extraction issuer and the government,[303] and therefore, we believe it generally provides a basis for determining the payments, and required payment disclosure, that would be associated with a particular "project."

We considered defining "project" by reference to a materiality standard as it is used under the federal securities laws, as suggested by some commentators.[304] We recognize that such an approach may reduce compliance burdens for issuers; however, we believe that approach would be inconsistent with Congress' intent to provide more detailed disclosure than would be provided using such a materiality standard and would not result in the transparency benefits that the statute seeks to achieve. In addition, based on Congress' use of the terms "de minimis" and "material" in other provisions of Section 13(q), we believe that if it intended to limit the disclosure requirement to "material projects" it would have drafted the statutory language accordingly.

While we considered defining the term as a reporting unit[305] as suggested by some commentators,[306] we have decided against that approach. We appreciate the potential benefits to issuers from defining the term consistent with reporting unit and thereby allowing issuers to collect information on a basis with which they already are familiar and according to established financial reporting systems.[307] We also appreciate the concerns some commentators expressed regarding the need to disaggregate and allocate payments in a potentially arbitrary manner, which could increase costs and not provide meaningful information to investors.[308] Nonetheless, for the same reasons we declined to provide a definition of "project" based on materiality, we do not believe that requiring disclosure at the reporting unit level would be consistent with the use of the term "project" in Section 13(q). We also do not believe that a plain reading of the statutory language and the common use of the term "project" would lead one to think that a reporting unit would be a project. Based on Congress' intention to promote international transparency efforts, we believe that Congress intended a greater level of transparency than would be achieved if we defined "project" as a reporting unit.

We also appreciate the concerns some commentators expressed regarding potential definitions of "project" and

[295] *See* letters from Global Witness 1, Oxfam 1, and PWYP 1.

[296] *See* letters from Angolan citizens, BTAP, California Public Employees Retirement System (February 28, 2011) ("CalPERS"), Calvert, Cambodians, Derecho, Earthworks, ERI 2, Gates Foundation, Global Financial 2, Global Witness 1, Global Witness 2, Global Witness 3, Greenpeace, Grupo Faro, Guatemalan Forest Communities, Libyan Transparency, Arlene McCarthy, Member of the European Parliament (March 13, 2012) ("McCarthy"), NUPENG, Office of Natural Resources Revenue, US Department of the Interior (August 4, 2011) ("ONRR"), ONE, ONE Petition, Oxfam 1, Oxfam 2, PENGASSAN, PWYP pre-proposal, PWYP 1, PWYP (December 20, 2011) (nine page letter plus appendix) ("PWYP 4"), PWYP (February 23, 2012) ("PWYP 5"), Rep. Frank *et al.*, RWI 1, Revenue Watch Institute (February 27, 2012) ("RWI 2"), Sen. Cardin *et al.* 1, Soros 2, Syena, TIAA, and WACAM. *See also* letters designated as Type B (stating that a project should be "defined as our Interior Department does it"). *But see* the letter from King & Spalding LLP (September 8, 2011) ("King & Spalding") (objecting to ONRR's request for lease by lease payment disclosure because such a disclosure requirement would conflict with ONRR's duty under the Outer Continental Shelf Lands Act to protect the confidentiality of lease-level oil and gas exploration and production information submitted to the agency by a company operating under a federal lease or permit).

[297] Letter from Calvert.

[298] *See, e.g.*, letters from CRS, Global Witness 1, Oxfam 1, PWYP 1, and RWI 1.

[299] Letter from RWI 1; *see also* letters from PWYP 1 and ERI 2.

[300] Letter from Syena.

[301] *See id.*

[302] *See* note 275 and accompanying text.

[303] *See* letter from TIAA (stating that "disclosure requirements should shed light on the financial relationship between companies and host governments by linking the definition of "project" to the individual contracts between the issuer and host country").

[304] *See* note 291 and accompanying text.

[305] Accounting Standards Code ("ASC") 350–20–20 defines a reporting unit as an operating segment, or a segment that is one level below an operating segment.

[306] *See* note 283 and accompanying text.

[307] *See* note 284 and accompanying text.

[308] *See, e.g.*, letters from API 1 and NMA 2.

the need to disaggregate and allocate payments made at the entity level in a potentially arbitrary manner, which could increase costs and would not provide meaningful information to investors.[309] We do not believe that resource extraction issuers should be required to disaggregate and allocate payments to projects for payments that are made for obligations levied on the issuer at the entity level rather than the project level. Consistent with the suggestion of some commentators,[310] the final rules we are adopting will permit a resource extraction issuer to disclose payments at the entity level if the payment is made for obligations levied on the issuer at the entity level rather than the project level.[311] Thus, if an issuer has more than one project in a host country, and that country's government levies corporate income taxes on the issuer with respect to the issuer's income in the country as a whole, and not with respect to a particular project or operation within the country, the issuer would be permitted to disclose the resulting income tax payment or payments without specifying a particular project associated with the payment.[312]

We believe the term "project" requires more granular disclosure than country-level reporting. Section 13(q) clearly requires project-level reporting, and we believe the statutory requirement to provide interactive data tags identifying the government that received the payment and the country in which that government is located is further evidence that reference to "project" was intended to elicit disclosure at a more granular level than country-level reporting.[313]

4. Payments by "a Subsidiary * * * or an Entity Under the Control of * * *"

a. Proposed Rules

Consistent with Section 13(q),[314] the proposed rules would have required a resource extraction issuer to disclose payments made by the issuer, a subsidiary, or an entity under the control of the resource extraction issuer, to a foreign government or the U.S. Federal Government for the purpose of commercial development of oil, natural gas, or minerals. Under the proposal, and consistent with Section 13(q), a resource extraction issuer would have been required to provide disclosure if control is present. Consistent with the definition of control under the federal securities laws,[315] a resource extraction issuer would have been required to make a factual determination as to whether it has control of an entity based on a consideration of all relevant facts and circumstances. At a minimum, a resource extraction issuer would have been required to disclose payments made by a subsidiary or entity under the issuer's control if the issuer must provide consolidated financial information for the subsidiary or other entity in the issuer's financial statements included in its Exchange Act reports.

b. Comments on the Proposed Rules

Several commentators stated that we should rely on the current definitions of "control" and "subsidiary" under Exchange Act Rule 12b–2,[316] or as those terms are used under U.S. GAAP or IFRS, and we need not adopt new definitions of those terms for purposes of this rulemaking because the current definitions are well-understood by both extractive issuers and investors.[317] When applying those definitions, however, commentators held a variety of views regarding the entities for which resource extraction issuers should be required to provide the required payment information.

Some commentators believed that whether an issuer has control over an entity is consistent with whether it must consolidate that entity for purposes of the issuer's financial reporting. Those commentators suggested the rules should only require an issuer to report payments for an entity that it must either fully or proportionately consolidate for U.S. financial reporting purposes and not require disclosure of payments of equity investees for which no consolidation is required.[318] Some commentators further stated that an issuer should not have to report payments corresponding to its proportional interest in a joint venture unless it makes such payments directly to the host government.[319] The commentators noted that, under such an approach, proportional payments made to the joint venture operator would not be reported.[320]

One commentator supported requiring an issuer to disclose payments only for entities that it must consolidate because that approach would provide a bright-line test that is easy to administer and because it would be consistent with the EITI.[321] The commentator further stated that an issuer should be required to disclose payments made on behalf of a joint venture, regardless of control, when the payments are disproportionate to the issuer's interest in the joint venture.[322]

Other commentators believed that, in addition to requiring disclosure of payments made by consolidated entities, the rules also should require disclosure of payments:

- Made by or on behalf of unconsolidated equity investees and joint venture partners on a proportionate share basis where a facts and circumstances test determines that the issuer possesses control;[323]
- Made by the issuer's non-reporting parent or other related entity on behalf or for the benefit of the issuer when the issuer is the alter ego or instrumentality of the parent or related entity[324] or when the issuer "controls, is controlled by, or is under common control with" the non-reporting parent or related entity, and the subsidiary would

[309] *See, e.g.*, letters from API 1, Muris and Sayyed, and NMA 2.

[310] *See* note 285 and accompanying text.

[311] *See* Instruction 2 to Item 2.01 of Form SD.

[312] One commentator provided, as an example, a situation where the payment of corporate income taxes is calculated on the basis of all projects in a given jurisdiction. *See* letter from Global Witness 1.

[313] *See* 15 U.S.C. 78m(q)(2)(D)(ii)(V).

[314] *See* 15 U.S.C. 78m(q)(2)(A).

[315] Under Exchange Act Rule 12b–2 [17 CFR 240.12b–2] and Rule 1.02 of Regulation S–X [17 CFR 210.1.02], "control" (including the terms "controlling," "controlled by" and "under common control with") is defined to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise." The rules also define "subsidiary" ("A 'subsidiary' of a specified person is an affiliate controlled by such person directly, or indirectly through one or more intermediaries. (*See also* 'majority-owned subsidiary,' 'significant subsidiary,' and 'totally-held subsidiary.')").

[316] *See id.*

[317] *See* letters from API 1, AngloGold, BP 1, ERI 1, ExxonMobil 1, PWC, and RDS 1.

[318] *See* letters from API 1, BP 1, ExxonMobil 1, and RDS 1. Other commentators agreed that the final rules should define control to mean consolidated entities only but opposed using the definition of control under Exchange Act Rule 12b–2 on the grounds that the existing definition could include companies that are not consolidated and regarding which an issuer would lack access to the underlying accounting data for the controlled entities' payments. *See* letters from Barrick Gold, Cleary, GE, NMA 2, NYSBA Committee, Petrobras, Rio Tinto, and Statoil. One commentator further observed that restricting the definition of control to consolidated entities would avoid the possible overstating of resource extraction payments that might occur if payments by equity investees are required to be disclosed. *See* letter from Rio Tinto.

[319] *See* letters from API 1, ExxonMobil 1, and RDS 1.

[320] *See id.*

[321] *See* letter from AngloGold.

[322] *See* letter from AngloGold. This commentator provided an example in which an issuer that is a 50% partner in a joint venture would have to disclose payments made on behalf of that joint venture if the payments include the share attributable to the other joint venture partner in circumstances where the other partner is unwilling or unable to make its share of the payments.

[323] *See* letters from Earthworks and PWYP 1.

[324] *See* letter from Conflict Risk Network (February 28, 2011) ("Conflict Risk").

otherwise be required to disclose those payments under Section 13(q);[325]

- Made by an entity that is contractually obligated to collect funds and make payments to various parties, including the host government, on behalf of an issuer;[326] and
- Made by one party to a joint venture that has guaranteed the debt of another joint venture party in an off-balance sheet transaction.[327]

Some commentators believed that a foreign government-owned or controlled entity should not have to report certain payments made to its parent government[328] or to a subsidiary or other entity controlled by it.[329] Another commentator stated that a wholly-owned subsidiary of an Exchange Act reporting parent should not have to disclose payments as long as the subsidiary's parent has included the subsidiary's payments in the parent's Exchange Act report.[330]

c. Final Rules

We are adopting this requirement as proposed, consistent with the statutory language of Section 13(q). The final rules require a resource extraction issuer to provide disclosure of payments made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer to a foreign government or the U.S. Federal Government for the purpose of the commercial development of oil, natural gas, or minerals.[331] "Control" and "subsidiary" are terms defined as in Exchange Act Rule 12b–2.[332] Therefore, a resource extraction issuer must disclose payments made by a subsidiary or entity under the control of the resource extraction issuer where the subsidiary or entity is consolidated in the resource extraction issuer's financial statements included in its Exchange Act reports,[333] as well as payments by other entities it controls as determined in accordance with Rule 12b–2. A resource extraction issuer may be required to provide the disclosure for entities in which it provides proportionately consolidated information.[334]

We understand that resource extraction issuers commonly engage in commercial development of oil, natural gas, or minerals through joint ventures, as an operator of a joint venture, or through an equity investment.[335] In these situations a resource extraction issuer will be required to determine whether it has control of an entity based on a consideration of all relevant facts and circumstances.[336] Following the definition of control under the federal securities laws, such as in Rule 12b–2, a resource extraction issuer will be required to determine whether it has control of an entity for purposes of Rule 13q–1 based on a consideration of all relevant facts and circumstances.[337] We continue to believe that a facts-and-circumstances determination of control consistent with the federal securities laws is preferable to a bright-line rule limiting disclosure to payments made only by consolidated entities because it is consistent with the statutory language. Limiting the scope of the requirement to situations in which an issuer provides consolidated financial information for an entity may limit the rules more narrowly than the intended scope of the statute because a resource extraction issuer may have control over an unconsolidated entity that makes payments that would be covered by Section 13(q) and the final rules. Thus; an issuer that engages in joint ventures or contractual arrangements will need to consider whether it has control to determine whether it must disclose payments.

We disagree with commentators who suggested that the definition of "control" not track Rule 12b–2 and instead be entirely consistent with the use of the term for purposes of financial reporting. While determinations made pursuant to the relevant accounting standards applicable for financial reporting may be indicative of whether control exists, we do not believe it is determinative in all cases. We note the suggestion by some commentators to adopt a definition of control that does not track Rule 12b–2 and specifically addresses unconsolidated equity investees.[338] We are not adopting such a definition because we believe it is appropriate and consistent with the statute to use the same definition of control used for other purposes under the Exchange Act, and because issuers should already be familiar with applying that definition. A resource extraction issuer is required to make a facts-and-circumstances determination as to whether the equity investee is an entity under the control of the resource extraction issuer under the final rules.

E. Definition of "Foreign Government"

1. Proposed Rules

Consistent with Section 13(q), the proposed rules would have required a resource extraction issuer to disclose payments made to a foreign government or the Federal Government. Under Section 13(q), Congress defined "foreign government" to mean a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, while granting the Commission authority to determine the scope of the definition.[339] The proposed rules would have defined the term consistent with the statute. In addition, the proposed definition of "foreign government" explicitly included both a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government. The proposed rules would have clarified that the term "Federal Government" means the United States Federal Government. The proposed rules would have further clarified that a company owned by a foreign government is a company that is at least

[325] *See* letters from HURFOM 1, PWYP 1, and WRI.

[326] *See* letters from ERI pre-proposal and Le Billon.

[327] *See id.*

[328] *See* letter from Cleary.

[329] *See* letter from Statoil.

[330] *See* letter from API 1.

[331] With respect to payments by an Exchange Act reporting company meeting the definition of resource extraction issuer that also is a wholly-owned subsidiary of an Exchange Act reporting parent that is a resource extraction issuer, consistent with some commentators' suggestions, the subsidiary will not be required to separately disclose payments to governments provided that the subsidiary's parent has included the subsidiary's payments in the parent's Form SD. The subsidiary must file its own Form SD indicating that the required disclosure was provided in the parent's Form SD. *See* Instruction 8 to Item 2.01 of Form SD.

[332] *See* note 315 above.

[333] This would be the case whether the resource extraction issuer provides consolidated financial information under U.S. Generally Accepted Accounting Principles ("GAAP"), International Financial Reporting Standards as issued by the International Accounting Standards Board ("IFRS"), or another comprehensive basis of accounting other than U.S. GAAP or IFRS.

[334] Proportionate consolidation may be used in a variety of circumstances in which an issuer may or may not have control, and therefore resource extraction issuers will need to make a facts-and-circumstances determination, as discussed below.

[335] *See, e.g.*, letters from API 1, ERI pre-proposal, NMA 2, and PWYP 1. *See also* Ernst & Young, *Navigating Joint Ventures in the Oil and Gas Industry* (2011), *available at http://www.ey.com/Publication/vwLUAssets/Navigating_joint_ventures_in_oil_and_gas_industry/$FILE/Navigating_joint_ventures_in_oil_and_gas_industry.pdf*.

[336] As we noted in the Proposing Release, if a resource extraction issuer makes a payment to a third party to be paid to the government on its behalf, the rules will require disclosure of that payment. Similarly, where an entity makes payments (that are otherwise covered by the definition of payment) to a foreign government as a paying agent for a resource extraction issuer, pursuant to a contractual obligation with the resource extraction issuer, the final rules require the resource extraction issuer to disclose these payments.

[337] We expect that a determination in accordance with consolidation guidance generally would be the same as under Rule 12b–2.

[338] *See* letters from Earthworks and PWYP 1.

[339] *See* 15 U.S.C. 78m(q)(1)(B).

majority-owned by a foreign government.

2. Comments on the Proposed Rules

Commentators generally supported the proposed definition of foreign government.[340] Some of those commentators noted that inclusion of foreign subnational governments is appropriate because issuers frequently make payments to subnational governments and that including them would be consistent with the EITI.[341] Some commentators also supported the proposed clarification regarding the meaning of "Federal Government"[342] and agreed that the term did not include state governments.[343] Those commentators believed that extending the disclosure requirement to states and other subnational governments in the United States would go beyond the scope of the statute. A few commentators explicitly supported the proposed clarification regarding the meaning of "a company owned by a foreign government."[344]

Some commentators, however, suggested alternative approaches to the definition of foreign government.[345] A few commentators supported adopting the statutory definition of "foreign government" and suggested limiting the rule to require resource extraction issuers to disclose only those payments made to foreign national governments. According to those commentators, it would be unfair to require disclosure of payments to foreign subnational governments because Section 13(q) does not require disclosure of payments to subnational governments in the United States. Thus, limiting the requirement to disclose payments only to foreign national governments would promote consistency and fairness.[346] One commentator stated that defining "foreign government" to mean only a foreign national government would be consistent with the plain meaning of Section 13(q).[347] According to that commentator, the fact that the statute requires an issuer to include electronic tags identifying both the recipient government for each payment and the country in which that government is located does not mean that Congress intended to include foreign subnational governments within the definition of foreign government. Rather, according to that commentator, because the statutory definition of foreign government includes departments, agencies and instrumentalities of a foreign government, Congress intended only that an issuer would use the recipient government tag to identify the specific department, agency or instrumentality receiving the payment. In addition, one commentator noted that it has a substantial number of provincial government leases and that it would be overburdened by reporting payments on a subnational level.[348] A few commentators supported adoption of the proposed definition of "foreign government" and also suggested requiring the disclosure of payments made to U.S. subnational governments because extractive companies may make substantial payments to U.S. subnational governments.[349]

Some commentators requested the Commission clarify that whether an issuer will be required to disclose payments made to a foreign government-owned company would depend on whether the foreign government controls that company.[350] One of those commentators suggested that whether control exists should be determined by a facts-and-circumstances analysis, which could result in the conclusion that a non-majority owned company is controlled by a foreign government.[351] The commentator believed the analysis should consider whether the government has provided working capital to the company, and whether the government has the ability to direct economic or policy decisions of the company, appoint or remove directors or management, restrict the composition of the board, or veto the decisions of the company.[352] The other commentator suggested we also "[should] look at the extent to which the government has control over the company and also the extent of advances and payments by the company to the government."[353]

Other commentators suggested that the Commission clarify whether an issuer will be required to disclose payments made to a foreign government-owned company would depend on the capacity in which the company is acting.[354] According to the commentators, if the government-owned company is acting as the agent of the government, the issuer should have to disclose payments made to the government-owned company.[355] If the government-owned company is acting in the capacity of a commercial partner with the issuer, and the government-owned company is the operator of the joint venture, the issuer should not have to disclose payments "for capital or operating cash calls" made to the government-owned company.[356] Two commentators asserted that an issuer also should not have to disclose payments to a government-owned company acting in the capacity of a commercial vendor of goods and services.[357] Other commentators believed that Section 13(q) requires the disclosure of all payments to a government or government-owned company whether for "rent, security, food and water, use of roads and airports" or for capital contributions.[358]

3. Final Rules

After considering the comments, we are adopting the definition of "foreign government" consistent with the definition in Section 13(q), as proposed. A "foreign government" includes a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.[359] Although we acknowledge the concerns of commentators that sought to limit the definition of foreign government to foreign national governments,[360] we continue to believe that the definition also should include foreign subnational governments. The adopted definition is not only consistent with Section 13(q), which requires an issuer to identify, for each disclosed payment, the government that received the payment, and the country in which the government is located,[361] but it also is consistent with the EITI, which recognizes that payments to subnational governments may have to be included within the scope of an EITI program.[362] As noted in the proposal, if a resource

[340] *See* letters from API 1, AngloGold, Barrick Gold, BP 1, Calvert, CRS, Earthworks, EIWG, ExxonMobil 1, PWYP 1, RDS 1, and WRI.

[341] *See* letters from API 1, AngloGold, Barrick Gold, BP 1, Calvert, CRS, Earthworks, EIWG, ExxonMobil 1, PWYP 1, RDS 1, and WRI.

[342] *See* letters from API 1, BP 1, Calvert, ExxonMobil 1, NYSBA Committee, and RDS 1.

[343] *See* letters from API 1, BP 1, Calvert, ExxonMobil 1, NYSBA Committee, and RDS 1.

[344] *See* letters from API 1, ExxonMobil 1, and PetroChina.

[345] *See, e.g.*, letters from NMA 2, Statoil, and Talisman.

[346] *See* letters from NMA 2, Statoil, and Talisman.

[347] *See* letter from Statoil.

[348] *See* letter from Talisman.

[349] *See* letters from AngloGold, Barrick Gold, and Earthworks.

[350] *See* letters from PetroChina and PWYP 1.

[351] *See* letter from PWYP 1.

[352] *See* letter from PWYP 1.

[353] *See* letter from PetroChina.

[354] *See* letters from API 1, Cleary, ExxonMobil 1, and Vale.

[355] *See* letters from API 1 and ExxonMobil 1.

[356] *See* letters from API 1 and ExxonMobil 1.

[357] *See* letters from Cleary and Vale.

[358] *See* letters from PWYP 1 and Sen. Levin 1.

[359] *See* Item 2.01(c)(2) of Form SD.

[360] *See, e.g.*, letter from Statoil.

[361] *See* 15 U.S.C. 78m(q)(2)(D)(ii)(V).

[362] *See Implementing the EITI*, at 34.

extraction issuer makes a payment that meets the definition of payment to a third party to be paid to the government on its behalf, disclosure of that payment is covered under the rules.

In addition, as proposed, the final rules clarify that a company owned by a foreign government is a company that is at least majority-owned by a foreign government.[363] As noted above, some commentators requested that we clarify the circumstances in which an issuer will be required to disclose payments made to a foreign government-owned company. The final rules specify the types of payments that will be required to be disclosed, and resource extraction issuers will need to consider whether the payments being made to a foreign government-owned company fall within the categories of payments for which the final rules require disclosure.

As proposed, the final rules clarify that "Federal Government" means the United States Federal Government.[364] Although we acknowledge that there is a difference in the final rules between requiring disclosure of payments to foreign subnational governments and not requiring payments to state or local governments in the United States, we believe that Section 13(q) is clear in only requiring disclosure of payments made to the Federal Government in the United States and not to state and local governments. As we noted in the proposal, typically the term "Federal Government" refers only to the U.S. national government and not the states or other subnational governments in the United States.

F. Disclosure Required and Form of Disclosure

1. Annual Report Requirement

a. Proposed Rules

As noted in the proposal, Section 13(q) mandates that a resource extraction issuer provide the payment disclosure required by that section in an annual report, but otherwise does not specify the location of the disclosure, either in terms of a specific form or in terms of location within a specific form. The proposed rules would have required a resource extraction issuer to provide the payment disclosure in exhibits to its Exchange Act annual report filed on Form 10–K, Form 20–F, or Form 40–F. In addition, the proposed rules would have required a resource extraction issuer to include a brief statement in the body of the annual report directing investors to detailed information about payments provided in the exhibits.

b. Comments on Proposed Rules

Some commentators supported the proposed approach,[365] while other commentators opposed requiring the disclosure in Exchange Act annual reports on Form 10–K, Form 20–F, and Form 40–F and suggested alternative approaches.[366]

Commentators asserted that it would be difficult to provide the payment disclosure, which could be voluminous, within the same time period for Exchange Act annual reports. Those commentators maintained that additional time is necessary to provide the required information.[367] Otherwise, according to commentators, due to resource constraints, issuers may be unable to file their Exchange Act annual reports on a timely basis if they are required to provide the new payment disclosure at the same time that they must meet their existing obligations with respect to Exchange Act annual reports.[368] Commentators further maintained that the payment disclosures are largely cash-based, unaudited, of little relevance to most financial statement users, and should not be subject to certification requirements, whereas the financial statement information in an existing Exchange Act annual report is accrual-based, audited, of primary importance to most financial statement users, and subject to certification requirements.[369] Those commentators believed that keeping the payment disclosure separate from the financial statements and corresponding disclosure would avoid confusion.

Many commentators supported requiring a resource extraction issuer to make the payment disclosure in a new annual report form or under cover of a Form 8–K or Form 6–K, rather than in an existing Exchange Act annual report.[370] Some commentators supported using only Forms 8–K or 6–K,[371] while other commentators favored using only a new annual report.[372] One commentator opposed using Form 8–K for the Section 13(q) disclosure because Form 8–K is the "venue for time-sensitive disclosures of unique changes to a company" whereas, according to that commentator, the Section 13(q) disclosure consists of "standard, material financial disclosures that should be included in the primary documents filed in the Exchange Act annual report."[373]

Some commentators supporting a new annual report form believed the potential benefits of providing the disclosure on a new form rather than in an Exchange Act annual report outweighed the potential costs associated with the new form.[374] Commentators suggested that the required disclosure could be due 150 or 180 days or some other lengthy period following the end of the issuer's fiscal year.[375] Two commentators believed that the reporting period for the resource extraction issuer disclosure should be the calendar year as opposed to the fiscal year as is the case for existing Exchange Act annual reports because the calendar year approach would facilitate review and compilation by the Commission and analysis by users.[376] Other commentators, however, suggested that disclosure should be required for the issuer's fiscal year.[377]

Several commentators that supported a deadline for the disclosure separate from the due date for the Exchange Act annual report opposed allowing the disclosure to be provided in an amendment to the Form 10–K, Form 20–F, and Form 40–F.[378] According to those commentators, such an amendment could be misconstrued as a correction of an error or omission or as a restatement.[379] Other commentators stated that if the Commission decides to require inclusion of the disclosure in an Exchange Act annual report, it would be reasonable to permit an issuer to

[363] *See* Instruction 4 to Item 2.01 of Form SD.

[364] *See* Item 2.01(a) of Form SD.

[365] *See* letters from Calvert, Earthworks, HURFOM 1, ONE, PGGM, PWYP 1, RWI 1, and Soros 1.

[366] *See, e.g.*, letters from API 1, AngloGold, Barrick Gold, BP 1, Chevron, Cleary, ExxonMobil 1, NMA 2, NYSBA Committee, Nexen, PetroChina, Petrobras, RDS 1, and Statoil.

[367] *See* letters from API 1, AngloGold, Barrick Gold, BP 1, Cleary, ExxonMobil 1, NMA 2, NYSBA Committee, Nexen, Petrobras, and RDS 1.

[368] *See* letter from Cleary; *see also* letters from Barrick Gold and Petrobras.

[369] *See* letters from API 1, AngloGold, Barrick Gold, Cleary, ExxonMobil 1, NMA 2, and NYSBA Committee.

[370] *See* letters from API 1, Barrick Gold, Chevron, Cleary, ExxonMobil 1, NYSBA Committee, and RDS 1.

[371] *See* letters from AngloGold, Nexen, PetroChina, and Petrobras.

[372] *See* letters from NMA 2 and Statoil.

[373] Letter from Calvert.

[374] *See* letters from API 1 and Cleary.

[375] *See* letters from API 1, AngloGold, Barrick Gold, BP 1, Chevron, Cleary, ExxonMobil 1, NMA 2, NYSBA Committee, Nexen (supporting 180 days), PetroChina, Petrobras, RDS 1 (supporting 150 days), and Statoil.

[376] *See* letters from API 1 and ExxonMobil 1.

[377] *See* letters from AngloGold and RDS 1.

[378] *See* letters from API 1, AngloGold, ExxonMobil 1, NMA 2, and RDS 1.

[379] *See id.*

disclose the information in an amendment to the annual report.[380]

Some commentators suggested permitting issuers to submit the payment disclosure on a confidential basis.[381] These commentators stated that the Commission could then use the confidentially submitted information to prepare a public compilation, which would consist of information only at the country or other highly aggregated level. The commentators asserted that Section 13(q)(3), which is entitled "Public Availability of Information," requires the Commission to make public a compilation of the information required to be submitted under Section 13(q)(2). According to the commentators, the statute does not require the submitted information itself to be publicly available.[382] Commentators argued that the payment information should be submitted confidentially at a disaggregated level and that the public compilation by the Commission could be presented on "an aggregated, per-country or similarly high-level basis."[383] According to those commentators, this approach would satisfy the specific text of the statute and fulfill the underlying goal of promoting the international transparency regime of the EITI.[384]

In contrast, other commentators strongly disagreed with the interpretation that Section 13(q) should be read as to not require the public disclosure of the payment information submitted in annual reports and that the Commission may choose to make public only a compilation of the information.[385] One commentator stated that the "compilation would be in addition to the public availability of the original company data and in no way is expected to replace the availability of that data."[386] Two commentators supporting the proposed approach requested that the Commission clarify that the statutorily-required compilation would function both as an online database and summary report, which would allow users to download data in bulk, in addition to allowing users to search by country and company, as well as by year or multiple years of reporting.[387]

Two commentators stated that, to the extent the new rules require the payment disclosure to be in an existing Exchange Act annual report, the rules should provide that the officer certifications required by Exchange Act Rules 13a–14(a) and (b) and 15d–14(a) and (b) do not extend to exhibits or disclosures required pursuant to Section 13(q).[388]

c. Final Rules

After considering the comments, we have determined that resource extraction issuers should provide the required disclosure about payments in a new annual report, separate from the issuer's existing Exchange Act annual report. We are requiring the disclosure on new Form SD.[389] As noted above, Section 13(q) does not specify a location for the disclosure. We believe requiring resource extraction issuers to provide the payment disclosure in new Form SD will facilitate interested parties' ability to locate the disclosure and address issuers' concerns about providing the disclosure in their Exchange Act annual reports on Forms 10–K, 20–F, or 40–F.[390] Similar to the proposal, Form SD requires issuers to include a brief statement in the body of the form in an item entitled, "Disclosure of Payments By Resource Extraction Issuers," directing investors to the detailed payment information provided in the exhibits to the form.

We considered commentators' suggestions about requiring the disclosure in a Form 8–K or Form 6–K,[391] and we determined not to require the disclosure in those forms because we continue to believe, and agree with commentators that noted, the resource extraction payment disclosure differs from the disclosure required by those forms.[392] In this regard, we note that Section 13(q) requires us to issue final rules requiring the disclosure in an annual report rather than requiring the disclosure to be provided on a more rapid basis, such as disclosure of material corporate events that are required to be filed on a current basis on Form 8–K.[393] In addition, we are persuaded by the comments asserting that it would be preferable to use a different form rather than to extend the deadline for the disclosure to be filed and require an amendment to Form 10–K, Form 20–F, or Form 40–F, which might suggest a change or correction had been made to a previous filing,[394] and therefore we are not adopting that approach. We also believe that requiring the disclosure in a new form, rather than in issuers' Exchange Act annual reports, should alleviate some commentators' concerns about the disclosure being subject to the officer certifications required by Rules 13a–14 and 15d–14 under the Exchange Act[395] and will allow us to adjust the timing of the submission.

While Section 13(q) mandates that a resource extraction issuer include the payment disclosure required by that section in an annual report, it does not specifically mandate the time period in which a resource extraction issuer must provide the disclosure. Although two commentators believed that the reporting period for the resource extraction disclosure should be the calendar year, other commentators suggested that the fiscal year should be the reporting period for Form SD.[396] We believe that the fiscal year is the more appropriate reporting period for the payment disclosure because, to the extent that resource extraction issuers are able to use part of the tracking and reporting systems that issuers already have established for their public reports

[380] *See* letters from Cleary, NMA 2, and NYSBA Committee. Cleary and NYSBA Committee supported this approach if the Commission decided not to require the disclosure in a new annual report form or under cover of Form 8–K or 6–K.

[381] *See* letters from API 1, Chevron, ExxonMobil 1, Nexen, and RDS 1.

[382] *See* letters from API 1, Chevron, ExxonMobil 1, Nexen, and RDS 1.

[383] *See* letters from API 1 and ExxonMobil 1. *See also* letters from Chevron, Nexen, and RDS 1.

[384] *See* letters from API 1 and ExxonMobil 1. *See also* letters from Chevron and RDS 1.

[385] *See* letters from Calvert, PWYP 1, RWI 1, Sen. Cardin *et al.* 1, Sen. Cardin *et al.* 2, and Sen. Levin 1.

[386] Letter from Sen. Cardin *et al.* 1.

[387] *See* letters from PWYP 1 and USW.

[388] *See* letters from Cleary and NYSBA Committee.

[389] Form SD is a new disclosure form to be used for specialized disclosure not included within an issuer's periodic or current reports. In addition to resource extraction issuer payment disclosure, Form SD also will be used to provide the disclosure required by the rules implementing Section 1502 of the Dodd-Frank Act. The Commission adopted Form SD at the same time as the final rules implementing that provision. *See* Conflict Minerals Adopting Release.

[390] *See* notes 366–370 and accompanying text. As noted, under the proposed rules, a resource extraction issuer would have been required to furnish the payment information in its annual report on Form 10–K, Form 20–F, or Form 40–F. As such, investment companies that are registered under the Investment Company Act of 1940 ("registered investment companies") would not have been subject to the disclosure requirement because those companies are not required to file Form 10–K, Form 20–F, or Form 40–F. Our decision to require this disclosure in a new form is not intended to change the scope of companies subject to the disclosure requirement. Therefore, consistent with the proposal, registered investment companies that are required to file reports on Form N–CSR or Form N–SAR pursuant to Rule 30d–1 under the Investment Company Act (17 CFR 270.30d–1) will not be subject to the final rules.

[391] *See* note 371 and accompanying text.

[392] *See, e.g.*, letter from Calvert.

[393] A Form 8–K report is required to be filed or furnished within four business days after the occurrence of one or more of the events required to be disclosed on the Form, unless the Form specifies a different deadline, *e.g.*, for disclosures submitted to satisfy obligations under Regulation FD (17 CFR 243.100 *et seq.* *See* General Instruction B.1 of Form 8–K (17 CFR 249.308).

[394] *See* note 379 and accompanying text.

[395] *See* note 369.

[396] *Compare* note 376 with note 377.

to track and report payments under Section 13(q), their compliance costs should be reduced.

After considering the comments expressing concern about the difficulty of providing the payment disclosure within the current annual reporting cycle,[397] we believe it is reasonable to provide a filing deadline for Form SD that is later than the deadline for an issuer's Exchange Act annual report. Therefore, consistent with some commentators' suggestions regarding timing,[398] the final rules require resource extraction issuers to file Form SD on EDGAR no later than 150 days after the end of the issuer's most recent fiscal year.

We are not persuaded by commentators that the statute allows resource extraction issuers to submit, or that it mandates resource extraction issuers submit, the payment information confidentially to us and have the Commission make public only a compilation of the information.[399] We believe that Section 13(q) contemplates that resource extraction issuers will provide the disclosure publicly. Section 13(q) refers to "disclosure" and specifies that the final rules require an issuer to include the information "in an annual report." Our existing disclosure requirements under the Exchange Act require companies to publicly file annual, quarterly, and current reports; the requirements generally do not provide for non-public reports.[400] We do not believe that Congress intended for a different approach with respect to the information required under Section 13(q). In this regard, we note that the disclosure required under Section 13(q)(2) must be submitted in an interactive data format, which suggests that Congress intended for the information to be available for public analysis. Requiring resource extraction issuers to provide the payment information in interactive data format will enable users of the information to extract the information that is of the most interest to them and to compile and compare it in any manner they find useful. We also note that the provision regarding the public compilation does not require the Commission to publish a compilation; rather, it states that the Commission shall make a public compilation of the information available online "to the extent practicable."[401] Further, Section 13(q)(3)(B) states that "[n]othing in [Section 13(q)(3)] shall require the Commission to make available online information other than the information required to be submitted [under the provision requiring the Commission to issue rules to require resource extraction issuers to provide payment disclosure]." We believe these provisions, when read together and with the statute's transparency goal, mean that the statutory intent is for the disclosure made by resource extraction issuers to be publicly available, and under the final rules, the disclosure will be available on Form SD on EDGAR. We note that, in this regard, the EITI approach is fundamentally different from Section 13(q). Under the EITI, companies and the host country's government generally each submit payment information confidentially to an independent administrator selected by the country's multi-stakeholder group, frequently an independent auditor, who reconciles the information provided by the companies and the government, and then the administrator produces a report.[402] In addition, it is not clear that having the information submitted confidentially to the Commission would necessarily address commentators' concerns about confidentiality because the information may well be subject to disclosure under the Freedom of Information Act.[403]

2. Exhibits and Interactive Data Format Requirements

a. Proposed Rules

The proposed rules would have required a resource extraction issuer to submit the payment disclosure on an unaudited, cash basis. The disclosure would have been required to be presented in two exhibits to a Form 10–K, Form 20–F, or Form 40–F, as appropriate. One exhibit would be in HTML or ASCII format, which would have enabled investors to easily read the disclosure about payments without additional computer programs or software. The other exhibit would be in XBRL format, which would have satisfied the requirement in Section 13(q) that the payment information be submitted in an interactive data format. Consistent with the statute, the proposed rules would have required an issuer to submit the payment information using electronic tags that identify, for any payments made by a resource extraction issuer to a foreign government or the U.S. Federal Government:

- The total amounts of the payments, by category;
- The currency used to make the payments;
- The financial period in which the payments were made;
- The business segment of the resource extraction issuer that made the payments;
- The government that received the payments, and the country in which the government is located; and
- The project of the resource extraction issuer to which the payments relate.

In addition, a resource extraction issuer would have been required to provide the type and total amount of payments made for each project and the type and total amount of payments made to each government in the XBRL format.

As noted above, Section 13(q) requires the Commission, to the extent practicable, to make available online, to the public, a compilation of the information required under paragraph (2)(A) of that section.[404] The statute does not specify the content, form or frequency of the compilation. We solicited comment on the compilation without proposing any specific requirements for it.

b. Comments on the Proposed Rules

Numerous commentators supported the proposed submission of the payment information on an unaudited, cash

[397] *See* note 367 and accompanying text.

[398] *See* notes 375–377 and accompanying text.

[399] *See* note 381 and accompanying text.

[400] We note that in certain limited instances, an issuer may request confidential treatment regarding information that otherwise would be required to be disclosed, such as commercial information obtained from a person and that is privileged or confidential. *See, e.g.*, Exchange Act Rule 24b–2 (17 CFR 240.24b–2). For example, an issuer may be permitted to omit certain information from an exhibit filed with an Exchange Act report if that information is commercial and disclosure would likely result in substantial competitive harm. The Commission's staff is of the view that issuers generally are not permitted to omit information that is required by an applicable disclosure requirement. *See* Division of Corporation Finance Staff Legal Bulletins Nos. 1 (February 28, 1997) and 1A (July 11, 2001, as amended), *available at http://www.sec.gov/interps/legal/slbcf1r.htm*.

[401] Specifically, Section 13(q)(3)(A) provides that "[t]o the extent practicable, the Commission shall make available online, to the public, a compilation of the information required to be submitted under the rules issued under paragraph (2)(A)."

[402] *See EITI Source Book*, at 23 ("It will be necessary to appoint an administrator to collect and evaluate the revenue data provided by companies and government. It is essential that there is stakeholder trust in the administrator's impartiality and competency. The administrator may be a private audit firm, an individual or an existing or specially created official body that is universally regarded as independent of, and immune to influence by, the government.")

[403] 5 U.S.C. 552.

[404] *See* Section 13(q)(3)(A). The information required under Section 13(q)(2)(A) includes the type and total amount of payments made by resource extraction issuers to foreign governments or the U.S. Federal Government for the purpose of the commercial development of oil, natural gas, or minerals on a per project and per government basis.

basis.[405] After noting that Section 13(q) neither requires the payment information to be audited nor provided on an accrual basis, those commentators stated that such a requirement would significantly increase issuers' implementation and ongoing reporting costs without providing a benefit to investors. One commentator further noted that "auditors would have to develop specific additional procedures to be able to provide assurance regarding the completeness and accuracy of the information provided."[406]

Other commentators, however, suggested requiring the payment information to be audited, presented on both a cash and accrual basis, and filed as part of the issuer's audited financial statements.[407] One of the commentators stated that an audit requirement would enhance investor protection and be consistent with the EITI because one of the basic criteria of EITI implementation is that the reported payment data be audited.[408] Another commentator similarly believed that requiring the payment information to be audited and submitted on a cash basis would improve comparability with EITI-related data, which it noted is subject to audit and reported on a cash basis. That commentator further suggested that the payment information also be reported on an accrual basis to accommodate the needs of all potential users of the data.[409]

Several commentators supported the proposed requirement to use XBRL to tag the payment disclosure because XBRL is currently used by many registrants when filing their financial statements in their Exchange Act annual reports.[410] Some commentators further supported a requirement to prepare the payment disclosure in either ASCII or HTML in addition to XBRL.[411] Those commentators noted that the requirement would provide the Commission with the ability to extract, analyze, and accumulate XBRL information while also providing investors and others the ability to view directly the information. Several commentators requested that the Commission delay implementation of the tagging requirement until an appropriate XBRL taxonomy for the payment information is available.[412]

Other commentators suggested permitting an issuer to choose between XBRL, XML, or some other format that would enable the electronic tagging of all of the information specified in Section 13(q).[413] According to those commentators, such a flexible approach would recognize that some issuers may prefer to use XBRL because that standard is already being implemented, while others may prefer to use XML or some other format because it is less expensive than XBRL and more consistent with a cash-based report.[414] One of the commentators noted that "XBRL conversion of data can be time consuming and result in delay" and requested that the rules permit an issuer to "use any format that would allow users to click through the information in a standard file type to reach data sorted by each of the electronic tags specified in the Act."[415] One commentator opposed a requirement to provide the payment information in XBRL format.[416] The commentator stated that the Commission has limited the implementation of XBRL to only financial statements and stated there was not "any justifiable reason for a departure from this stated scope."[417]

Some commentators expressed views about specific electronic tags. For example, commentators suggested various approaches regarding the requirement to electronically tag information about the currency used to make the payments. Some commentators opposed having to present payment information in dual currencies—in the local currency in which the payments were made and, if different, in the issuer's reporting currency—and further opposed having to electronically tag the dual currency presentations.[418] Those commentators stated that an issuer should only have to present and electronically tag payment information in its reporting currency, which is typically the U.S. dollar.[419] Other commentators opposed a requirement to reconcile payments made in the host country's currency to an issuer's reporting currency or U.S. dollars.[420] Those commentators either supported a requirement to present payments in the currency in which they were made[421] or to permit issuers to choose between presenting payments in either the local currency or its reporting currency as long as the issuer discloses the methodology for translation and exchange rates used.[422] Commentators noted that the EITI does not require currency conversion and urged the Commission to maintain flexibility in the final rules so that issuers can produce the required information in as efficient a manner as possible, in light of their reporting systems and any local requirements.[423] One commentator asserted that requiring disclosure of the host country currency and the reporting currency could unduly complicate the disclosure.[424]

Commentators also provided views on the proposed requirement to identify the business segment that made the payments. Some commentators suggested defining "business segment":

- According to how an issuer operates its business;[425]
- In a manner that is consistent with the definition used for financial reporting purposes;[426] or
- As a subsidiary if the parent company is making payments on behalf of the subsidiary.[427]

Some commentators opposed requiring an issuer to electronically tag the information to identify the business segment that made the payments on a basis other than as defined under GAAP. According to those commentators, a "definition that differs from GAAP would require companies to gather information in a manner that is not consistent with how the business is structured or how its accounting systems are designed."[428] One commentator stated that the business segment disclosure should be consistent with the Commission's reserve disclosures, which are associated with upstream operations.[429]

Several commentators opposed requiring an issuer to electronically tag

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[405] *See* letters from API 1, Anadarko Petroleum Corporation (March 2, 2011) ("Anadarko"), AngloGold, BP 1, Chevron, Ernst & Young (January 31, 2011) ("E&Y"), ExxonMobil 1, NMA 2, NYSBA Committee, Petrobras, PWC, and RDS 1.

[406] Letter from E&Y.

[407] *See* letters from PWYP 1 and RWI 1. Another commentator supported a requirement to submit the payment information solely on an accrual basis because that would be consistent with financial reporting requirements. *See* letter from Talisman.

[408] *See* letter from RWI 1.

[409] *See* letter from PWYP 1.

[410] *See* letters from API 1, Anadarko, AngloGold, BP 1, CalPERS, ExxonMobil 1, PWYP 1, and RDS 1.

[411] *See* letters from API 1, ExxonMobil 1, and PWYP 1.

[412] *See* letters from API 1, AngloGold, and ExxonMobil 1.

[413] *See* letters from Barrick Gold and NMA 2.

[414] *See* letters from Barrick Gold and NMA 2.

[415] Letter from Barrick Gold.

[416] *See* letter from PetroChina.

[417] Letter from PetroChina.

[418] *See* letters from API 1, BP 1, ExxonMobil 1, and RDS 1.

[419] *See* letters from API 1, BP 1, ExxonMobil 1, and RDS 1. One commentator supported requiring only the use of U.S. dollars, regardless of the issuer's reporting currency. *See* letter from RDS 1.

[420] *See* letters from Cleary, NMA 2, and Rio Tinto; *see also* letter from PWYP 1.

[421] *See, e.g.*, letters from NMA 2 and PWYP 1.

[422] *See* letter from Rio Tinto.

[423] *See* letters from Cleary and NMA 2.

[424] *See* letter from NMA 2.

[425] *See* letter from NMA 2.

[426] *See* letters from Cleary and NYSBA Committee.

[427] *See* letter from PWYP 1.

[428] Letters from API 1 and ExxonMobil 1.

[429] *See* letter from RDS 1.

each payment according to the project in which it relates because there are some types of payments that are made at the entity level or relate to numerous projects.[430] Those commentators urged us to permit an issuer to identify the government receiving the payments rather than requiring allocation of payments to a particular project in a potentially arbitrary manner.[431] Another commentator stated that an issuer should be allowed to omit the project tag for payments, such as taxes and dividends, which are levied at the entity level, as long as it provides all other required tags.[432]

As noted in Section II.F.1 above, some commentators were of the view that Section 13(q) only requires a compilation of resource extraction issuers' payment information, and not the annual reports containing the issuers' payment disclosures, to be made public, and suggested the compilation could present the payment disclosure only on an aggregated per country or similarly high-level basis.[433] Other commentators, however, strongly disagreed with that view and stated that the plain language of Section 13(q) clearly reveals Congress' intent to require the disclosure to investors of disaggregated payment information through the inclusion of that information in an issuer's annual report.[434] Towards that end, one commentator recommended that the compilation take the form of an online database and that a summary report be provided annually.[435]

c. Final Rules

We are adopting the requirement regarding the presentation of the mandated payment information substantially as proposed, except that a resource extraction issuer will be required to present the mandated payment information in only one exhibit to new Form SD instead of two exhibits, as proposed. Under the rule as proposed, an issuer would have been required to file one exhibit in HTML or ASCII and another exhibit in the XBRL interactive data format. In proposing the requirement, we noted our belief that requiring two exhibits would provide the information in an easily-readable format in addition to the electronically tagged data that would be readable through a viewer. After further consideration, we have decided to require only one exhibit formatted in XBRL because we believe that we can achieve the goal of the dual presentation with only one exhibit. Issuers will submit the information on EDGAR in XBRL format, thus enabling users of the information to extract the XBRL data, and at the same time the information will be presented in an easily-readable format by rendering the information received by the issuers.[436] We believe that requiring the information to be provided in this way may reduce the compliance burden for issuers.

Similar to the proposal, a resource extraction issuer also must include a brief statement in Item 2.01 of Form SD directing investors to the detailed information about payments provided in the exhibit. By requiring resource extraction issuers to provide the payment information in an exhibit, rather than in the form itself, anyone accessing EDGAR will be able to determine quickly whether an issuer filed a Form SD to satisfy the requirements of Section 13(q) and the related rules.

As noted above, Section 13(q) requires the submission of certain information in interactive data format.[437] Under the final rules, consistent with the proposal and tracking the statutory language, a resource extraction issuer must submit the payment information in XBRL using electronic tags that identify, for any payment required to be disclosed:

- The total amounts of the payments, by category;
- The currency used to make the payments;
- The financial period in which the payments were made;
- The business segment of the resource extraction issuer that made the payments;
- The government that received the payments, and the country in which the government is located; and
- The project of the resource extraction issuer to which the payments relate.[438]

In addition, a resource extraction issuer must provide the type and total amount of payments made for each project and the type and total amount of payments made to each government in interactive data format. In determining to require the use of XBRL as the interactive data format, we note that a majority of the commentators that addressed the issue supported the use of XBRL.[439] While some commentators suggested allowing a flexible approach to use an interactive data format of their preference,[440] we believe doing so may reduce the comparability of the information and may make it more difficult for interested parties to track payments made to a particular government or project; thus, we are not adopting such an approach.

As mentioned above, several commentators requested that we delay implementation of the tagging requirement until an appropriate XBRL taxonomy for the payment information is available.[441] We note that the staff is currently working to develop the taxonomy for the payment information, and we anticipate that the taxonomy will soon be published for comment. As such, and in light of the implementation period for the payment disclosure,[442] we do not believe it is necessary to provide a delay for the interactive data tagging requirement.

Consistent with the statute, the final rules require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments. As previously noted, the statute requires a resource extraction issuer to present the type and total amount of payments made for each project and to each government, without specifying how the issuer should report the total amounts. Although some commentators suggested requiring the reporting of payments only in the currency in which they were made,[443] we believe that the statutory requirements to provide a tag identifying the currency used to make the payment and the requirement to provide the total amount of payments by payment type for each project and to each government constrain us to require that issuers perform some currency conversion to the extent necessary.

As noted in an instruction to Form SD, issuers will be required to report the amount of payments made for each payment type, and the total amount of payments made for each project and to each government in either U.S. dollars or the issuer's reporting currency.[444]

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[430] *See* letters from API 1, AngloGold, ExxonMobil 1, NMA 2, and RDS 1.

[431] *See* letters from API 1, AngloGold, ExxonMobil 1, NMA 2, and RDS 1.

[432] *See* letter from PWYP 1.

[433] *See* letters from API 1, Anadarko, Chamber Energy Institute, Chevron, ExxonMobil 1, Nexen, and RDS 1.

[434] *See* letters from Calvert, PWYP 1, RWI 1, and Sen. Cardin *et al.* 1.

[435] *See* letter from PWYP 1.

[436] Users of this information should be able to render the information by using software available free of charge on our Web site.

[437] 15 U.S.C. 78m(q)(2)(C) and 15 U.S.C. 78m(q)(2)(D)(ii).

[438] *See* Item 2.01(a) of Form SD.

[439] *See* note 410 and accompanying text.

[440] *See* note 413 and accompanying text.

[441] See letters from API 1, AngloGold, and ExxonMobil 1.

[442] See Section II.G.3. below.

[443] *See* note 421 and accompanying text.

[444] *See* Instruction 3 to Item 2.01 of Form SD. Currently, foreign private issuers may present their financial statements in a currency other than U.S. dollars for purposes of Securities Act registration

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Thus, in order to provide total amounts, issuers that make payments in other currencies will have to convert those payments into either U.S. dollars or the issuer's reporting currency. We understand issuers' concerns regarding the compliance costs relating to making payments in multiple currencies and being required to report the information in another currency.[445] To address these concerns, the final rules permit an issuer to choose between disclosing payments in either U.S. dollars or its reporting currency. In addition, an issuer may choose to calculate the currency conversion between the currency in which the payment was made and U.S. dollars or the issuer's reporting currency, as applicable, in one of three ways: (1) By translating the expenses at the exchange rate existing at the time the payment is made; (2) using a weighted average of the exchange rates during the period; or (3) based on the exchange rate as of the issuer's fiscal year end.[446] A resource extraction issuer must disclose the method used to calculate the currency conversion.[447]

Consistent with Section 13(q) and the proposal, the final rules do not require the resource extraction payment information to be audited or provided on an accrual basis. We note that, in this regard, the EITI approach is fundamentally different from Section 13(q). Under the EITI, companies and the host country's government generally each submit payment information confidentially to an independent administrator selected by the country's multi-stakeholder group, frequently an independent auditor, who reconciles the information provided by the companies and the government, and then the administrator produces a report.[448] In contrast, Section 13(q) requires us to issue final rules for disclosure of payments by resource extraction issuers; it does not contemplate that an administrator will audit and reconcile the information, or produce a report as a result of the audit and reconciliation. In addition, we recognize the concerns raised by some commentators that an auditing requirement for the payment information would significantly increase implementation and ongoing reporting costs. We believe that not requiring the payment information to be audited or provided on an accrual basis is consistent with Section 13(q) because the statute refers to "payments" and does not require the information to be included in the financial statements.[449] In addition, not requiring the information to be audited or provided on an accrual basis may result in lower compliance costs than otherwise would be the case if resource extraction issuers were required to provide audited information.

Consistent with the statute, the final rules require a resource extraction issuer to include an electronic tag that identifies the business segment of the resource extraction issuer that made the payments. As suggested by commentators,[450] we are defining "business segment" to mean a business segment consistent with the reportable segments used by the resource extraction issuer for purposes of financial reporting.[451] We believe that defining "business segment" in this way will enable issuers to report the information according to how they currently report their business operations, which should help to reduce compliance costs.

We note that some of the electronic tags, such as those pertaining to category, currency, country, and financial period will have fixed definitions and will enable interested persons to evaluate and compare the payment information across companies and governments. Other tags, such as those pertaining to business segment, government, and project, will be customizable to allow issuers to enter information specific to their business. To the extent that payments, such as corporate income taxes and dividends, are made for obligations levied at the entity level, issuers may omit certain tags that may be inapplicable (*e.g.*, project tag, business segment tag) for those payment types as long as they provide all other electronic tags, including the tag identifying the recipient government.[452]

As discussed in greater detail above, we agree with those commentators who stated that the public compilation was not intended to be a substitute for the payment disclosure required of resource extraction issuers under Section 13(q),[453] and we have not yet determined the content, form, or frequency of any such compilation.[454] We note that users of the information will be able to compile the information in a manner that is most useful to them by using the electronically-tagged data filed by resource extraction issuers.

3. Treatment for Purposes of Securities Act and Exchange Act

a. Proposed Rules

As noted in the proposal, the statutory language of Section 13(q) does not specify that the information about resource extraction payments must be "filed," rather, it states that the information should be "include[d] in an annual report[.]"[455] As proposed, the rules would have required the disclosure of payment information to be "furnished" rather than "filed" and not subject to liability under Section 18 of the Exchange Act, unless the issuer explicitly states that the resource extraction disclosure is filed under the Exchange Act.

b. Comments on the Proposed Rules

Numerous commentators stated their belief that the payment disclosure should be furnished rather than filed and, therefore, not subject to Exchange Act Section 18 liability.[456] Such commentators expressed the view that the nature and purpose of the Section 13(q) disclosure requirements is not primarily for the protection of investors but, rather, to increase the accountability of governments for the proceeds they receive from their natural resources and, thus, to support the commitment of the Federal Government

and Exchange Act registration and reporting. *See* Rule 3–20 of Regulation S–X (17 CFR 210.3–20).

[445] *See, e.g.*, letters from API 1, BP 1, ExxonMobil 1, NMA 2, and RDS 1. We note that the EITI recommends that oil and natural gas participants report in U.S. dollars, as the quoted market price is in U.S. dollars. It also recommends that mining companies be permitted to use the local currency because most benefit streams for those companies are paid in the local currency. The EITI also suggests that companies may decide to report in both U.S. dollars and the local currency. *See* the *EITI Source Book*, at 30.

[446] *See* Instruction 3 to Item 2.01 of Form SD.

[447] *See id.*

[448] *See EITI Source Book*, at 23 ("It will be necessary to appoint an administrator to collect and evaluate the revenue data provided by companies and government. It is essential that there is stakeholder trust in the administrator's impartiality and competency. The administrator may be a private audit firm, an individual or an existing or specially created official body that is universally regarded as independent of, and immune to influence by, the government.").

[449] *See* note 405 and accompanying text.

[450] *See* note 426 and accompanying text.

[451] *See* Item 2.01(c)(4) of Form SD. The term "reportable segment" is defined in FASB ASC Topic 280, *Segment Reporting*, and IFRS 8, *Operating Segments*.

[452] *See* note 432 and accompanying text.

[453] *See* note 434 and accompanying text.

[454] In this regard, we note that members of Congress, including one of the sponsors of the provision, submitted a comment letter stating "Section 1504 requires companies to report the information in an interactive format so that the information is readily usable by investors and the public—the basic intent of the section. Section 1504 also suggests that if practicable, the SEC can make a compilation of all the data available to investors and the public for ease of use. This compilation would be in addition to the public availability of the original company data and in no way is expected to replace the public availability of that data." *See* letter from Sen. Cardin *et al.* 1.

[455] 15 U.S.C. 78m(q)(2)(A).

[456] *See* letters from API 1, AngloGold, Barrick Gold, BP 1, Cleary, ExxonMobil 1, NMA 2, NYSBA Committee, PetroChina, PWC, and RDS 1.

to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.[457] One commentator stated that "requiring [the disclosure to be filed] could indirectly increase the costs of Securities Act disclosures that incorporate the filing by reference (raising underwriting, auditing, and perhaps even credit rating costs)."[458] Two commentators requested that if the final rules require an issuer to include the disclosure in an existing Exchange Act annual report, the rules should not extend the officer certifications required by Exchange Act Rules 13a–14, 13a–15, 15d–14, and 15d–15 to that disclosure.[459]

Numerous other commentators disagreed with the proposal and urged the Commission to require the payment disclosures to be filed rather than furnished and subject to Section 18 liability.[460] Several commentators believed that the plain language of the statute requires filing of the disclosure.[461] Commentators also asserted that one of the goals of Section 13(q) is to enhance investor protection from risks inherent in the extractive industries, and therefore the nature and purpose of Section 13(q) is not qualitatively different than other disclosure that has historically been required under Section 13.[462] According to those commentators, the best way to enhance investor protection would be to require that resource extraction payment disclosures be filed rather than furnished; otherwise, investor confidence in the accuracy of the disclosures would be undermined.[463] Some commentators stated that requiring the disclosure to be furnished rather than filed would deprive investors of causes of action in the event that the disclosure is false or misleading.[464]

In addition, several commentators opposed extending the disclosure requirements to registration statements under the Securities Act.[465] In opposing such an extension of the requirements, one commentator stated that "the purpose of these disclosures is not to inform investors * * * so there is no logical reason for such inclusion. Also, inclusion would raise nettlesome concerns relating to liability, and directors' and underwriters' due diligence obligations, for no good reason."[466] Other commentators, however, believed that the Commission should require the inclusion of the payment information in Securities Act registration statements.[467]

c. Final Rules

Although the proposed rules would have required the payment information to be furnished, after considering the comments, the final rules we are adopting require resource extraction issuers to file the payment information on new Form SD. As discussed above, commentators disagreed as to whether the required information should be furnished or filed,[468] and Section 13(q) does not state how the information should be submitted. In reaching our conclusion that the information should be "filed" instead of "furnished" we note that the statute defines "resource extraction issuer" in part to mean an issuer that is required to file an annual report with the Commission,[469] which, as commentators have noted, suggests that the annual report that includes the required payment information should be filed.[470] Additionally, many commentators believed that investors would benefit from the payment information being "filed" and subject to Exchange Act Section 18 liability.[471] Some commentators asserted that allowing the information to be furnished would diminish the importance of the information.[472] Some commentators believed that requiring the information to be filed would enhance the quality of the disclosure.[473] In addition, some commentators argued that the information required by Section 13(q) differs from the information that the Commission permits issuers to furnish and that the information is qualitatively similar to disclosures that are required to be filed under Exchange Act Section 13.[474]

Other commentators supporting the proposal that the disclosure be furnished argued that the information is not material to investors.[475] We note, however, other commentators, including investors, argued that the information is material.[476] Given the disagreement, and that materiality is a fact specific inquiry, we are not persuaded that this is a reason to provide that the information should be furnished. Additionally, while we appreciate the comments that the payment information should be furnished and not subject to Section 18 liability, we note that Section 18 does not create strict liability for filed information. Rather, it states that a person shall not be liable for misleading statements in a filed document if it can establish that it acted in good faith and had no knowledge that the statement was false or misleading.[477] As noted

[457] *See, e.g.*, letters from API 1 and AngloGold.

[458] *See* letter from NMA 2.

[459] *See* letters from Cleary and NYSBA Committee.

[460] *See* letters from Bon Secours, Calvert, CRS, Earthworks, EIWG, ERI, ERI 2, Global Financial 2, Global Witness 1, Greenpeace, HII, HURFOM 1, HURFOM 2, Newground, ONE, Oxfam 1, PGGM, PWYP 1, RWI 1, Sanborn, Sen. Cardin *et al.* 1, Sen. Cardin *et al.* 2, Sen. Levin 1, Soros 1, TIAA, USAID, USW, and WRI.

[461] *See* letters from Calvert, Global Witness 1, PWYP 1, and Sen. Cardin *et al.* 1.

[462] *See, e.g.*, letters from Global Witness 1, PWYP 1, Sen. Cardin *et al.* 1, and Sen. Levin 1; *see also* letter from Sen. Cardin *et al.* 2.

[463] *See, e.g.*, letters from Global Witness 1, PWYP 1, and Sen. Levin 1.

[464] *See* letters from Global Witness 1, Oxfam 1, PWYP 1, Sen. Cardin *et al.* 1, and Sen. Levin 1; *see also* letter from Sen. Cardin *et al.* 2.

[465] *See* letters from API 1, AngloGold, Cleary, ExxonMobil 1, NMA 2, NYBSA Committee, RDS 1 and Statoil.

[466] Letter from NYSBA Committee.

[467] *See* letters from Calvert, Earthworks, and PWYP 1.

[468] *Compare* letters from API 1, AngloGold, Barrick Gold, BP 1, Cleary, ExxonMobil 1, NMA 2, NYSBA Committee, PetroChina, PWC, and RDS 1 (supporting a requirement to furnish the disclosure) with letters from Bon Secours, Calvert, Earthworks, EIWG, ERI, ERI 2, Global Financial 2, Global Witness 1, HII, HURFOM 1, HURFOM 2, Newground, ONE, Oxfam 1, PGGM, PWYP 1, RWI 1, Sanborn, Sen. Cardin *et al.* 1, Sen. Cardin *et al.* 2, Sen. Levin 1, Soros 1, TIAA, USAID, USW, and WRI (supporting a requirement to file the disclosure).

[469] 15 U.S.C. 78m(q)(1)(D)(i).

[470] *See* letters from Global Witness 1, PWYP 1, and Sen. Cardin *et al.*

[472] *See* letters from Calvert and Global Witness 1.

[473] *See* letters from HURFOM, Global Witness 1, and PWYP 1.

[474] *See* letters from ERI 1, HII, Oxfam 1, PGGM, PWYP 1, Sen. Cardin *et al.* 1, and Soros 1.

[475] *See* letters from API 1, ExxonMobil 1, and RDS 1; *see also* letter from AngloGold.

[476] *See* letters from Calvert, ERI 1, Soros 1, Global Financial Integrity (January 28, 2011) ("Global Financial Integrity 1"), Global Witness 1, HII, Oxfam, Sanborn, PGGM, PWYP 1, Sen. Cardin *et al.* 1, and TIAA.

[477] Exchange Act Section 18(a) provides: "Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant." A plaintiff asserting a claim under Section 18 would need to meet the elements of the statute to establish a claim, including reliance and damages. In addition, we note that issuers that fail to comply with the final rules could also be violating Exchange Act Sections 13(a) and (q) and 15(d), as applicable. Issuers also would be subject to potential liability under Exchange Act Section 10(b) [15 U.S.C. 78j] and Rule

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above, because the disclosure is in a new form, rather than in issuers' Exchange Act annual reports, the filed disclosure is not subject to the officer certifications required by Rules 13a–14 and 15d–14 under the Exchange Act.

We also note a commentator stated that filing the disclosure would require auditors to consider whether the resource extraction payment disclosures are materially inconsistent with the financial statements thereby increasing the cost.[478] We note however, that unlike the proposal, the disclosure will not be required in the Form 10–K but instead will be required in new Form SD, which does not include audited financial statements, and therefore will not be subject to this potential increased cost.

G. Effective Date

1. Proposed Rules

In the Proposing Release, we requested comment on whether we should provide a delayed effective date for the final rules and whether doing so would be consistent with the statute.

2. Comments on the Proposed Rules

Some commentators believed that the final rules should be effective for fiscal years ending on or after April 15, 2012, without exception.[479] One of those commentators believed that providing exceptions would go against the principle of equal treatment of issuers.[480] Another commentator stated that implementation of the final rules should not be delayed because "companies have known of the possibility of disclosure regulations for many years."[481]

Other commentators suggested delaying the effective date of the final rules because compliance with the final rules would necessitate significant changes to resource planning systems.[482] Commentators maintained that we have the flexibility to delay the effective date because Section 13(q) states that the disclosure must be provided not earlier than for the fiscal year ending one year after issuance of the final rules.[483] Some commentators stated that an effective date for 2012 is feasible only if the scope of the required disclosure is limited.[484] These commentators suggested further delaying the effective date if the final rules include, among other things, an audit requirement, downstream activities, a granular definition of project (*e.g.*, a definition that precludes disclosure at the country or entity level), preparation of disclosures on a cash basis, or required reporting in multiple currencies.[485] Some commentators urged the delay of the effective date due to the need to implement new accounting standards.[486] Commentators suggested that we require compliance with the rule for 2013, 2014, or 2015.[487]

Some commentators believed that all resource extraction issuers should be subject to the same effective date.[488] One commentator suggested a phase-in approach requiring large accelerated filers to provide the disclosure for fiscal years ending on or after July 1, 2012 and for all others to provide the disclosure for fiscal years ending on or after July 1, 2013.[489] The commentator believed that a phase-in approach would reduce costs for smaller issuers because it would enable those issuers to observe how larger issuers comply with the new rules.[490] Another commentator stated that a phase-in would be appropriate for smaller reporting companies.[491]

3. Final Rules

Under the final rules, a resource extraction issuer will be required to comply with new Rule 13q–1 and Form SD for fiscal years ending after September 30, 2013. The final rules will require a resource extraction issuer to file with the Commission for the first time an annual report that discloses the payments it made to governments for the purpose of the commercial development of oil, natural gas, or minerals. Based on the comments we received, we understand that resource extraction issuers will need time to undertake significant changes to their reporting systems and processes to gather and report the payment information. Even for those issuers that provide some payment disclosure voluntarily or as part of an EITI program, compliance with the final rules will likely require changes in their reporting systems.[492] In light of this, we believe it is appropriate to provide all issuers with a reasonable amount of time to make such changes and to allow a transition period for reporting. Therefore, the final rules provide that for the first report filed for fiscal years ending after September 30, 2013, a resource extraction issuer may provide a partial year report if the issuer's fiscal year began before September 30, 2013. The issuer will be required to provide a report for the period beginning October 1, 2013 through the end of its fiscal year. For example, a resource extraction issuer with a December 31, 2013 fiscal year end will be required to file a report disclosing payments made from October 1, 2013–December 31, 2013. For any fiscal year beginning on or after September 30, 2013, a resource extraction issuer will be required to file a report disclosing payments for the full fiscal year.

We believe that requiring compliance with the final rules for fiscal years ending after September 30, 2013 and providing a transition period in which partial year reports are permitted will provide time for issuers to effect the changes in their reporting systems necessary to gather and report the payment information required by the final rules.[493] We recognize that adoption of this compliance date and transition period means that most companies will provide partial year reports for the first report required under the rules. We believe this result is required, however, to enable issuers to make the changes to their reporting systems necessary to achieve full compliance with the final rules.

If any provision of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or

10b–5 [17 CFR 240.10b–5], promulgated thereunder, for any false or misleading material statements in the information disclosed pursuant to the rule.

[478] *See* letter from PWC.

[479] *See* letters from Earthworks and PWYP 1. A third commentator urged the Commission to follow the statutory effective date because of the current consideration by the EC of extractive industry disclosure rules in the EU, which could follow the U.S. standard. *See* letter from PWYP U.K.

[480] *See* letter from PWYP 1.

[481] *See* letter from Earthworks.

[482] *See* letters from API 1, ExxonMobil 1, Chevron, and RDS 1.

[483] *See* letters from Cleary and NMA 2.

[484] *See* letters from API 1, Chevron, ExxonMobil 1, and NMA 2.

[485] *See* letters from API 1, Chevron, ExxonMobil 1, and NMA 2.

[486] *See* letters from Nexen, PetroChina, PWC, and RDS 1.

[487] *See* letters from Barrick Gold (fiscal year 2013), PetroChina (fiscal years ending on or after December 31, 2015); PwC (annual periods beginning after December 31, 2012).

[488] *See* letters from API 1, Chevron, ExxonMobil 1, and RDS 1.

[489] *See* letter from AngloGold.

[490] *See id.*

[491] *See* letter from Cleary.

[492] For example, issuers reporting under EITI programs that require material information to be reported at the country level will likely need to further develop their systems to gather and report information at the project level and meeting the "not de minimis" threshold.

[493] In this regard, we note changes required to internal tracking and reporting systems will likely be specific to the particular company and therefore we believe it is unlikely that smaller issuers would benefit from a phase-in that would allow them to observe how larger issuers comply with the new rules.

application. Moreover, if any portion of Form SD not related to resource extraction disclosure is held invalid, such invalidity shall not affect the use of the form for purposes of disclosure pursuant to Section 13(q).

III. Economic Analysis

A. Introduction

As discussed in detail above, we are adopting the new rules and amendment to Form SD discussed in this release to implement Section 13(q), which was added to the Exchange Act by Section 1504 of the Act. The new rules and revised form will require a resource extraction issuer to disclose in an annual report filed with the Commission on Form SD certain information relating to payments made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer to a foreign government or the U.S. Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. The information will include the type and total amount of payments made for each project of the issuer relating to the commercial development of oil, natural gas, or minerals as well as the type and total amount of payments made to each government. We expect that the final rules will affect in substantially the same way both U.S. companies and foreign companies that meet the definition of "resource extraction issuer," which is an issuer that is required to file an annual report with the Commission and engages in the commercial development of oil, natural gas, or minerals.

Since Congress adopted Section 13(q) in July 2010, we have sought comment on our implementation of the provision and provided opportunities for commentators to provide input. Members of the public interested in making their views known were invited to submit comment letters in advance of when the official comment period for the proposed rules opened, and the public had the opportunity to submit comment on the proposal during the comment period. In addition, in response to the suggestion by some commentators that we extend the comment period to allow the public additional time to thoroughly consider the matters addressed in the Proposing Release and to submit comprehensive responses, we extended the comment period for an additional 30 days [494] and have continued to receive comment letters after the extended deadline, all of which we have considered. We believe interested parties have had ample opportunity to review the proposed rules, as well as the comment letters, and to provide views on the proposal, other comment letters, and data to inform our consideration of the final rules. Accordingly, we do not believe that a re-proposal is necessary.

The Proposing Release cited some pre-proposal letters we received from commentators indicating the potential impact of the proposed rules on competition and capital formation. In addition to requesting comment throughout the Proposing Release on the proposals and on potential alternatives to the proposals, the Commission also solicited comment in the Proposing Release on whether the proposals, if adopted, would promote efficiency, competition, or capital formation, or have an impact or burden on competition. We also requested comment on the potential effect on efficiency, competition, or capital formation should the Commission not adopt certain exceptions or accommodations. As discussed throughout this release, we received many comments addressing the potential economic and competitive impact of the proposed rules. Indeed, many commentators provided multiple comment letters to support, expand upon, or contest views expressed by other commentators.[495]

Section 13(q) of the Exchange Act requires us to issue rules to implement the disclosure requirement for certain payments made by resource extraction issuers to the Federal Government and foreign governments. Congress intended that the rules issued pursuant to Section 13(q) would increase the accountability of governments to their citizens in resource-rich countries for the wealth generated by those resources.[496] This type of social benefit differs from the investor protection benefits that our rules typically strive to achieve. We understand that the statute is seeking to achieve this benefit by mandating a new disclosure requirement under the Exchange Act that requires resource extraction issuers to identify and report payments they make to governments and that supports international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.[497] In addition, some commentators stated that the information disclosed pursuant to Section 13(q) would benefit investors, by among other things, helping investors model project cash flows and assess political risk, acquisition costs, and management effectiveness.[498] Moreover, investors and other market participants, as well as civil society in countries that are resource-rich, may benefit from any increased economic and political stability and improved investment climate that transparency promotes. Commentators and the sponsors of Section 13(q) also have noted that the United States has an interest in promoting accountability, stability, and good governance.[499]

We are sensitive to the costs and benefits of the final rules, and Exchange Act Section 23(a)(2) requires us, when adopting rules, to consider the impact that any new rule would have on competition. In addition, Section 3(f) of the Exchange Act requires us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. We have considered the costs and benefits

[494] *See* Exchange Act Release No. 34–67395 (January 28, 2011), 76 FR 6111 (February 3, 2011), *available at http://www.sec.gov/rules/proposed/2011/34-63795.pdf.* This robust, public input has allowed us to more fully consider how to develop the final rules.

[495] *See, e.g.*, letters from API 1, API 2, API 3, American Petroleum Institute (February 13, 2012), ExxonMobil 1, ExxonMobil 2, ExxonMobil 3, Global Witness 1, Global Witness 2, Global Witness 3, PWYP 1, PWYP 2, PWYP 3, PWYP 4, PWYP 5, ERI 1, ERI 2, ERI 3, ERI 4, Oxfam 1, Oxfam 2, RELUFA 1, RELUFA 2, RELUFA 3, RWI 1, RWI 2, RDS 1, RDS 2, RDS 3, RDS 4, Sen. Cardin *et al.* 1, Sen. Cardin *et al.* 2, Sen. Levin 1, Sen. Levin 2, Soros 1, and Soros 2. One commentator urged us to re-propose the rules in order to give the public an additional opportunity to comment on and inform the Commission's assessment of the economic impact of the proposed rules. *See* letter from API 3. As described above, we believe interested parties have had ample opportunity to review the proposed rules, as well as the comment letters, and to provide views and data to inform our consideration of the economic effects of the final rules.

[496] *See* note 7 and accompanying text.

[497] *See* note 8 and accompanying text.

[498] *See, e.g.*, letters from Calvert, CALPERS, and Soros 1.

[499] *See, e.g.*, letter from Sen. Cardin (February 28, 2012) (includes a transcript of testimony from Secretary of State Hilary Rodham Clinton before the Senate Foreign Relations Committee). *See also* statement from Senator Cardin regarding the provision ("* * * Transparency helps create more stable governments, which in turn allows U.S. companies to operate more freely—and on a level playing field—in markets that are otherwise too risky or unstable."), 156 Cong. Rec. S5870 (daily ed. Jul. 15, 2010) (statement of Sen. Cardin); and Senator Lugar regarding the provision ("* * * Transparency empowers citizens, investors, regulators, and other watchdogs and is a necessary ingredient of good governance for countries and companies alike * * *. Transparency also will benefit Americans at home. Improved governance of extractive industries will improve investment climates for our companies abroad, it will increase the reliability of commodity supplies upon which businesses and people in the United States rely, and it will promote greater energy security." 156 Cong. Rec. S3816 (daily ed. May 17, 2010) (statement of Sen. Lugar)).

imposed by the rule and form amendments we are adopting, as well as their effects on efficiency, competition, and capital formation. Many of the economic effects of the rules stem from the statutory mandate, while others are affected by the discretion we exercise in implementing the Congressional mandates. The discussion below addresses the costs and benefits resulting from both the statute and our exercise of discretion, and the comments we received about these matters. In addition, as discussed elsewhere in this release, we recognize that the rules will impose a burden on competition, but we believe that any such burden that may result is necessary in furtherance of the purposes of Exchange Act Section 13(q).

After analyzing the comments and taking into account additional data and information, we believe it is likely that the total initial cost of compliance for all issuers is approximately $1 billion and the ongoing cost of compliance is between $200 million and $400 million. We reach these estimates by considering carefully all comments we received on potential costs. We relied particularly on those comment letters that provided quantification and were transparent about their methodologies. As discussed in more detail below, after thoroughly considering each comment letter, we determined that it was appropriate to modify and/or expand upon some of the submitted estimates and methodologies to reflect data and information submitted by other commentators, as well as our own judgment, experience, and expertise. Our considered estimate of the total costs thus reflects these synthesized data and analyses. We consider the full range of these costs in the following sections, although where it is possible to discuss separately the costs and benefits related to our discretionary choices in the rules, we attempt to do so.[500]

Given the specific language of the statute and our understanding of Congress' objectives, we believe it is appropriate for the final rules generally to track the statutory provision. Our discretionary authority to implement Section 13(q) is limited, and we are committed to executing the Congressional mandate. Throughout this release, and in the following economic analysis, we discuss the benefits and costs arising from both the new reporting requirement mandated by Congress and from those choices in which we have exercised our discretion. Sections III.B. and III.C. below provide a narrative discussion of the costs and benefits of resulting from the mandatory reporting requirement and our exercise of discretion, respectively. In Section III.D. below, based on commentators' estimates and our estimates, we provide a quantitative discussion of the costs associated with the final rules as adopted.[501]

B. Benefits and Costs Resulting From the Mandatory Reporting Requirement

1. Benefits

As noted above, Congress intended that the rules issued pursuant to Section 13(q) would increase the accountability of governments to their citizens in resource-rich countries for the wealth generated by those resources.[502] In addition, commentators and the sponsors of Section 13(q) also have noted that the United States has an interest in promoting accountability, stability, and good governance.[503] Congress' goal of enhanced government accountability through Section 13(q) may result in social benefits that cannot be readily quantified with any precision.[504] We also note that while the objectives of Section 13(q) do not appear to be ones that will necessarily generate measurable, direct economic benefits to investors or issuers, investors have stated that the disclosures required by Section 13(q) have value to investors and can "materially and substantially improve investment decision making."[505]

Many commentators stated that they support the concept of increasing transparency of resource extraction payments.[506] While commentators stated that a benefit of increasing transparency is increased government accountability, some commentators also noted that the new disclosure requirements would help investors assess the risks faced by resource extraction issuers operating in resource-rich countries.[507] To the extent that investors want information about payments to assess these risks, the rules may result in increased investment by those investors and thus may increase capital formation.

Several commentators noted that the statutory requirement to provide project-level disclosure significantly enhances the benefits of the mandatory reporting required under Section 13(q).[508] One commentator stated that the benefits to civil society of project-level reporting are significantly greater than those of country-level reporting.[509] This commentator stated that project-level data will enable civil society groups, representing local communities, to know how much their governments earn from the resources that are removed from their respective territories and empower them to advocate for a fairer share of revenues, double-check government-published budget data, and better calibrate their expectations from the extractive companies.[510] This commentator further stated that project-level reporting will enable both local government officials and civil society groups to monitor the revenue that flows back to the regions from the central government and ensure that they receive what is promised—a benefit that would be unavailable if revenue streams were not differentiated below the country level.[511] Another commentator noted that project-level reporting would shine greater light on dealings between resource extraction issuers and governments, thereby providing companies with "political cover to sidestep government requests to engage in potentially unethical activities."[512]

One commentator noted the benefits to investors of project-level reporting.[513] One benefit cited by this commentator is that project-level reporting will enable investors to better understand the risk profiles of individual projects within a given country, which may vary greatly depending on a number of factors such as regional unrest, personal interest by powerful government figures, degree of community oppression, and environmental sensitivity.[514] This commentator indicated that project-level disclosures will enable investors to

[500] As discussed above, our discretionary choices are informed by the statutory mandate and thus, discussion of the benefits and costs of those choices will necessarily involve the benefits and costs of the underlying statute.

[501] As noted below, Congress' goal of enhanced accountability through Section 13(q) is an intended social benefit that cannot be readily quantified with any precision, and therefore, our quantitative analysis focuses on the costs.

[502] *See* note 7 and accompanying text.

[503] *See* note 499 and accompanying text.

[504] These benefits could ultimately be quite significant given the per capita income of the potentially affected countries.

[505] Calvert (March 1, 2011). *See* note 498 and accompanying text.

[506] *See, e.g.*, letters from API 1, Calvert, Chamber Energy Institute, ExxonMobil 1, Global Witness 1, Oxfam 1, Petrobras, PWYP 1, RDS 1; and Statoil.

[507] *See, e.g.*, letters from Calvert, ERI 2, Global Witness 1, and Oxfam 1.

[508] *See, e.g.*, letters from Global Witness 1, Oxfam 1, PWYP 1, RWI 1, and Svena.

[509] *See* letter from ERI 1; *see also* letter from Gates Foundation.

[510] *See* letter from ERI 1; *see also* letter from Gates Foundation (stating that it is important to seek disclosure below the country level, that project-level disclosure will give both citizens and investors valuable information, and that defining "project" as a geologic basin or province would be of limited use to both citizens and investors).

[511] *See* letter from ERI 1.

[512] *See* letter from EG Justice.

[513] *See* letter from ERI 2.

[514] *See id.*

better understand these risks, whereas country-level reporting would allow companies to mask particularly salient projects by aggregating payments with those from less risky projects.[515] The commentator noted that unusually high signing bonus payments for a particular project may be a proxy for political influence, whereas unusually low tax or royalty payments may signal that a project is located in a zone vulnerable to attacks or community unrest.[516] A further benefit of project-level disclosures is that it would assist investors in calculations of cost curves that determine whether and for how long a project may remain economical, using a model that takes into account political, social, and regulatory risks.[517]

There also may be a benefit to investors given the view expressed by some commentators that new disclosure requirements would help investors assess the risks faced by resource extraction issuers operating in resource-rich countries. To the extent that the required disclosure will help investors in pricing the securities of the issuers subject to the requirement mandated by Section 13(q), the rules could improve informational efficiency. One commentator indicated that project-level disclosures will promote capital formation by reducing information asymmetry and providing more security and certainty to investors as to extractive companies' levels of risk exposure.[518] One commentator was of the view that improved transparency regarding company payments of royalties, taxes, and production entitlements on a country level would provide institutional investors, such as the commentator, with the necessary information to assess a company's relative exposure to country-specific risks including political and regulatory risks, and would contribute to good governance by host governments.[519] Similarly, another commentator was of the view that in countries where governance is weak, the resulting corruption, bribery, and conflict could negatively affect the sustainability of a company's operations, so Section 13(q) would benefit companies' operations and investors' ability to more effectively make investment decisions.[520] One commentator anticipated benefits of lower capital costs and risk premiums as a result of improved stability stemming from the statutory requirements and lessened degree of uncertainty promoted by greater transparency.[521] This same commentator believed that the disclosure standardization imposed through Section 13(q) would be of particular benefit to long-term investors by providing a model for data disclosure as well as help to address some of the key challenges faced by EITI implementation.[522] Another commentator maintained that transparency of payments is a better indicator of risk for extractive companies than the bond markets and is also a better indicator of financial performance.[523]

2. Costs

Many commentators stated that the reporting regime mandated by Section 13(q) would impose significant compliance costs on issuers. Several commentators addressed Paperwork Reduction Act ("PRA")-related costs specifically,[524] while others discussed the costs and burdens to issuers generally as well as costs that could have an effect on the PRA analysis.[525] As discussed further in Section III.D. below, in response to comments we received, we have provided our estimate of both initial and ongoing compliance costs. In addition, also in response to comments, we have made several changes to our PRA estimates that are designed to better reflect the burdens associated with the new collections of information.

Some commentators disagreed with our industry-wide estimate of the total annual increase in the collection of information burden and argued that it underestimated the actual costs that would be associated with the rules.[526] Some commentators stated that, depending upon the final rules adopted, the compliance burdens and costs caused by implementation and ongoing compliance with the rules would be significantly greater than those estimated by the Commission.[527] Significantly, however, in general these commentators did not provide any quantitative analysis to support their estimates.[528]

Some commentators noted that modifications to issuers' core enterprise resource planning systems and financial reporting systems will be necessary to capture and report payment data at the project level, for each type of payment, government payee, and currency of payment.[529] Commentators provided examples of such modifications including establishing additional granularity to existing coding structures (*e.g.*, splitting accounts that contain both government and non-government payment amounts), developing a mechanism to appropriately capture data by "project," building new collection tools within financial reporting systems, establishing a trading partner structure to identify and provide granularity around government entities, establishing transaction types to accommodate types of payment (*e.g.*, royalties, taxes, bonuses, etc.), and developing a systematic approach to handle "in-kind" payments.[530] These commentators estimated that the resulting initial implementation costs would be in the tens of millions of dollars for large issuers and millions of dollars for many small issuers.[531] Two commentators also estimated that total industry costs for initial implementation of the final rules could amount to hundreds of millions of dollars.[532]

These commentators also noted, however, that these costs could be increased significantly depending on the scope of the final rules.[533] For example, commentators suggested that these cost estimates could be greater depending on the how the final rules define "project," and whether the final rules require reporting of non-consolidated entities, require "net" and accrual reporting, or include an audit requirement.[534] Another commentator

[515] *See id.*

[516] *See id.*

[517] *See* letter from Calvert Asset Management Company and SIF (November 15, 2010) (pre-proposal letter).

[518] *See* letter from ERI 2.

[519] *See* letter from PGGM. This commentator also noted that the disclosure required by Section 13(q) would provide in-country activists with information to hold their governments accountable.

[520] *See* letter from CalPERS.

[521] *See* letter from Hermes.

[522] *See* letter from Hermes.

[523] *See* letter from Vale Columbia Center (December 16, 2011).

[524] *See* letters from API 1, API 2, Barrick Gold, ERI 2, ExxonMobil 1, ExxonMobil (October 25, 2011) ("ExxonMobil 3"), NMA 2, Rio Tinto, RDS 1, and RDS 4.

[525] *See, e.g.*, letters from BP 1, Chamber Energy Institute, Chevron, Cleary, Hermes, and PWYP 1.

[526] *See* letters from API 1 and ExxonMobil 1.

[527] *See* letters from API 1, API 2, API 3, Barrick Gold, ExxonMobil 1, NMA 2, Rio Tinto, and RDS 1.

[528] *See* letters from API 1 and ExxonMobil 1. ExxonMobil 1 does provide estimated implementation costs of $50 million if the definition of "project" is narrow and the level of disaggregation is high across other reporting parameters. This estimate is used in our analysis of the expected implementation costs.

[529] *See* letters from API 1 and ExxonMobil 1. *See also* letter from RDS 1.

[530] *See* letters from API 1 and ExxonMobil 1.

[531] *See* letters from API 1, ExxonMobil 1, and RDS 1. These commentators did not describe how they defined small and large issuers.

[532] *See* letters from API 1 and ExxonMobil 1.

[533] *See* letters from API 1, ExxonMobil 1, and RDS 1.

[534] *See* letters from API 1, ExxonMobil 1, and RDS 1. As previously discussed, the final rules do not require the payment information to be audited or reported on an accrual basis, so commentators'

Continued

estimated that the initial set up time and costs associated with the rules implementing Section 13(q) would require 500 hours to effect changes to its internal books and records, and $100,000 in IT consulting, training, and travel costs.[535] One commentator representing the mining industry estimated that start-up costs, including the burden of establishing new reporting and accounting systems, training local personnel on tracking and reporting, and developing guidance to ensure consistency across reporting units, would be at least 500 hours for a mid-to-large sized multinational company.[536]

Two commentators stated that arriving at a reliable estimate for the ongoing annual costs of complying with the rules would be difficult because the rules were not yet fully defined, but suggested that a "more realistic" estimate than the estimate included in the Proposing Release is hundreds of hours per year for each large issuer with many foreign locations.[537] Commentators also indicated that costs related to external professional services would be significantly higher than the Commission's estimate, resulting primarily from XBRL tagging and higher printing costs, although these commentators noted that it is not possible to estimate these costs until the final rules are fully defined.[538]

One commentator estimated that ongoing compliance with the rules implementing Section 13(q) would require 100–200 hours of work at the head office, an additional 100–200 hours of work providing support to its business units, and 40–80 hours of work each year by each of its 120 business units, resulting in a total of approximately 4,800–9,600 hours and costs approximating between $2,000,000 to $4,000,000.[539] One commentator, a large multinational issuer, estimated an additional 500 hours each year, including time spent to review each payment to determine if it is covered by the reporting requirements and ensure it is coded to the appropriate ledger accounts.[540] Another commentator representing the mining industry estimated that the annual burden for a company with a hundred projects or reporting units, the burden could "easily reach nearly" 10 times the estimate set out in the Proposing Release.[541] This commentator noted that its estimate takes into account the task of collecting, cross-checking, and analyzing extensive and detailed data from multiple jurisdictions around the world, as well as the potential for protracted time investments (a) seeking information from certain non-consolidated entities that would be considered "controlled" by the issuer, (b) attempting to secure exceptions from foreign confidentiality restrictions, (c) obtaining compliance advice on the application of undefined terms such as "not de minimis" and "project" and implementing new systems based upon those definitions, (d) responding to auditor comments or queries concerning the disclosure, which, although not in the financial statements would, under the proposed rules, be a furnished exhibit to Form 10–K or equivalent report for foreign issuers, and (e) any necessary review of Section 13(q) disclosures in connection with periodic certifications under the Sarbanes-Oxley Act.[542] This commentator also noted that the estimate in the Proposing Release did not adequately capture the burden to an international company with multiple operations where a wide range of personnel will need to be involved in capturing and reviewing the data for the required disclosures as well as for electronically tagging the information in XBRL format.[543] A number of commentators submitted subsequent letters reiterating and emphasizing the potential of the proposed rules to impose substantial costs.[544]

Other commentators believed that concerns over compliance costs have been overstated.[545] One commentator stated that most issuers already have internal systems in place for recording payments that would be required to be disclosed under Section 13(q) and that many issuers currently are subject to reporting requirements at a project level.[546] Another commentator anticipated that while the rules will likely result in additional costs to resource extraction issuers, such costs would be marginal in scale because in the commentator's experience many issuers already have extensive systems in place to handle their current reporting requirements, and any adjustments needed as a result of Section 13(q) could be done in a timely and cost-effective manner.[547] Another commentator believed that issuers could adapt their current systems in a cost-effective manner because issuers should be able to adapt a practice undertaken in one operating environment to those in other countries without substantial changes to the existing systems and processes of an efficiently-run enterprise.[548]

Another commentator stated that, in addition to issuers already collecting the majority of information required to be made public under Section 13(q) for internal record-keeping and audits, U.S. issuers already report such information to tax authorities at the lease and license level.[549] This commentator added that efficiently-run companies should not have to make extensive changes to their existing systems and processes to export practices undertaken in one operating environment to another.[550]

One commentator, while not providing competing estimates, questioned the accuracy of the assertions relating to costs from industry participants.[551] This commentator cited the following factors which led it to question the cost assertions from industry participants: (i) Some issuers already report project-level payments in certain countries in one form or another and under a variety of regimes; (ii) some EITI countries are already moving toward project-level disclosure; and (iii) it is unclear whether issuers can save much time or money by reporting government payments at the material project or country level.[552] This commentator also explained that issuers must keep records of their subsidiaries' payments to governments as part of the books and records provisions of the

concerns about possible costs associated with these items should be alleviated. *See* Section II.F.2.c. above.

[535] *See* letter from Barrick Gold.

[536] *See* letter from NMA 2.

[537] *See* letters from API 1 and ExxonMobil 1 (each noting that estimates would increase if the final rules contain an audit requirement, or if the final rules are such that issuers are not able to automate material parts of the collection and reporting process).

[538] *See* letters from API 1 and ExxonMobil 1.

[539] *See* letter from Rio Tinto. These estimates exclude initial set-up time required to design and implement the reporting process and develop policies to ensure consistency among business units. They also assume that an audit is not required.

[540] *See* letter from Barrick Gold.

[541] *See* letter from NMA 2. The estimate provided in the Proposing Release was for the PRA analysis.

[542] *See* letter from NMA 2.

[543] *See* letter from NMA 2.

[544] *See* letters from API 2, ExxonMobil 3, and RDS 4.

[545] *See* letters from ERI 2, Oxfam 1, PWYP 1, and RWI 1.

[546] *See* letter from RWI 1. This commentator stated that issuers already have internal systems in place for reporting requirements at the project level "as [RWI] believe[s] that term should be defined" and provides examples (e.g., Indonesia requires reporting at the production sharing agreement level; companies in the U.S. report royalties by lease).

[547] *See* letter from Hermes.

[548] *See* letter from RWI 1.

[549] *See* letter from PWYP 1.

[550] *See* letter from PWYP 1 (citing statement made by Calvert Investments at a June 2010 IASB-sponsored roundtable).

[551] *See* letter from ERI 2.

[552] *See id.*

Foreign Corrupt Practices Act, so the primary costs of reporting these payments will be in the presentation of the data rather than any need to institute new tracking systems.[553] This commentator indicated that to the extent that issuers may need to implement new accounting and reporting systems to keep track of government payments, then issuers presumably will need to develop mechanisms for receiving and attributing information on individual payments regardless of the form the final rules take.[554] The commentator also observed that the proposed rules simply would require companies to provide the payment information in its raw form, rather than requiring them to process it and disclose only those payments from projects they deem to be "material," which could result in savings to issuers of time and money by allowing them to submit data without having to go through a sifting process.[555] This commentator observed that none of the commentators who submitted cost estimates attempted to quantify the savings that would "supposedly accrue" if disclosure were limited to "material" projects, as compared to disclosure of all projects, and noted that the Commission was not required to accept commentators' bare assertions that their "marginal costs would be reduced very significantly."[556]

One commentator disagreed that issuers already report the payment information required by Section 13(q) for tax purposes.[557] According to that commentator, "[t]his is a simplistic view, and the problem is that tax payments for a specific year are not necessarily based on the actual accounting results for that year."[558] This commentator also noted that tax reporting and payment periods may differ.[559]

Some commentators suggested that the statutory language of Section 13(q) gives the Commission discretion to hold individual company data in confidence and to use that data to prepare a public report consisting of aggregated payment information by country.[560] Other commentators strongly disagreed with the interpretation that Section 13(q) could be read not to require the public disclosure of the payment information submitted in annual reports and that the Commission may choose to make public only a compilation of the information.[561] The commentators suggesting the Commission make public only a compilation of information submitted confidentially by resource extraction issuers argued such an approach would address many of their concerns regarding disclosure of commercially sensitive or legally prohibited information and would significantly mitigate the costs of the mandatory disclosure under Section 13(q). As noted above, we have not taken this approach in the final rules because we believe Section 13(q) requires resource extraction issuers to provide the payment disclosure publicly and does not contemplate confidential submissions of the required information. As a result, the final rules require public disclosure of the information. We note that in situations involving more than one payment, the information will be aggregated by payment type, government, and/or project, and therefore may limit the ability of competitors to use the information to their advantage.

To the extent public disclosure of this information could result in costs related to competitive concerns, we note that even if we permitted issuers to provide the information confidentially to us and we were to publish a compilation of the information, interested parties might still be able to obtain the information pursuant to the Freedom of Information Act (FOIA).[562] Section 13(q) does not state that it provides any special protection from FOIA disclosure for information required to be submitted. Thus, the same competitive concerns could still exist.

One commentator expressed concerns with the proposed requirement to prepare the payment disclosures on the cash-basis of accounting, and noted that because registrants' existing reporting processes and accounting systems are based on the accrual method of accounting (and require certain payments to be capitalized), the proposal would impose a burden on resource extraction issuers' accounting groups to develop new information system, processes, and controls.[563]

Several commentators stated that the Commission should define "not de minimis" to mean material.[564] According to those commentators, a definition based on materiality would be consistent with the EITI and the Commission's longstanding disclosure regime, and would encourage consistency of disclosure across issuers.[565] Although a materiality-based definition might result in reduced compliance costs for issuers, we continue to believe that given the use of the phrase "not de minimis" in Section 13(q) rather than use of a materiality standard, which is used elsewhere in the federal securities laws and in the EITI,[566] "not de minimis" does not equate to a materiality standard.

Consistent with Section 13(q), the final rules require resource extraction issuers to disclose payments made by a subsidiary or entity under the control of the issuer. Some commentators suggested that we limit the requirement to disclose only those payments made by an issuer and its subsidiaries for which consolidated financial information is provided. Although limiting the requirement might result in reduced compliance costs for issuers, we do not believe it would be appropriate to do so because the statute specifically states that resource extraction issuers must disclose payments made by subsidiaries and entities under the control of the issuer.

The final rules clarify that the term "foreign government" includes foreign subnational governments and define the term to explicitly include both a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government. Thus, resource extraction issuers will be required to provide information about payments made to foreign subnational governments. This broad definition may increase disclosure costs compared to a less detailed definition, but we believe Section 13(q) requires this broader definition, because Section 13(q) defines the term "foreign government" and requires issuers to include an electronic tag identifying the government that received the payments, and the country in which the government is located. The statutory requirement to provide electronic tags for both the government that received the payments and the

[553] *See id.*

[554] *See id.*

[555] *See id.*

[556] *See id.*

[557] *See* letter from Rio Tinto.

[558] *See id.*

[559] *See id.*

[560] *See* note 381 and accompanying text.

[561] *See* letters from Calvert, PWYP 1, RWI 1, Sen. Cardin *et al.* 1, Sen. Cardin *et al.* 2, and Sen. Levin 1.

[562] FOIA requires all federal agencies to make specified information available to the public, including the information required to be filed publicly under our rules. To the extent that the information required to be filed does not fall within one of the exemptions in FOIA (*e.g.*, FOIA 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)) the information required to be filed would not be protected from FOIA disclosure.

[563] *See* letter from PWC.

[564] *See* note 224 and accompanying text.

[565] *See* notes 225 and 226 and accompanying text.

[566] *See* note 251 and accompanying text.

country in which the government is located indicates that the intent of the statute is to include foreign subnational governments in the definition of "foreign governments." This clarification should further the statutory goal of increasing transparency with regard to the payments made to foreign governments.

In addition to direct compliance costs, we expect that the statute could result in significant economic effects. Issuers that have a reporting obligation under Section 13(q) could be put at a competitive disadvantage with respect to private companies and foreign companies that are not subject to the reporting requirements of the United States federal securities laws and therefore do not have such an obligation. For example, such competitive disadvantage could result from, among other things, any preference by the government of the host country to avoid disclosure of covered payment information, or any ability of market participants to use the information disclosed by reporting issuers to derive contract terms, reserve data, or other confidential information. With respect to the latter concern, the potential anti-competitive effect of the required disclosures may be tempered because, under the statute, only the amount of covered payments needs to be disclosed, not the manner in which such payments are determined or other contract terms. Some commentators have stated that confidential production and reserve data can be derived by competitors or other interested persons with industry knowledge by extrapolating from the payment information required to be disclosed.[567] Other commentators have argued, however, that such extrapolation is not possible, and that information of the type required to be disclosed by Section 13(q) would not confer a competitive advantage on industry participants not subject to such disclosure requirements.[568] Any competitive impact of Section 13(q) should be minimal in those jurisdictions in which payment information of the types covered by Section 13(q) is already publicly available.[569] In addition, the competitive impact may be reduced to the extent that other jurisdictions, such as the EU, adopt laws to require disclosure similar to the disclosure required by Section 13(q) and the related rules.[570] If the requirement to disclose payment information does impose a competitive disadvantage on an issuer, such issuer possibly may be incented to sell assets affected by such competitive disadvantage at a price that does not fully reflect the value of such assets, absent such competitive impact.[571] Additionally, resource extraction issuers operating in countries which prohibit, or may in the future prohibit, the disclosure required under the final rules could bear substantial costs.[572] Such costs could arise because issuers may have to choose between ceasing operations in certain countries or breaching local law, or the country's laws may have the effect of preventing them from participating in future projects. Some commentators asserted that four countries currently have such laws,[573] although other commentators disputed the assertion that there are foreign laws that specifically prohibit disclosure of payment information.[574] A foreign private issuer with operations in a country that prohibits disclosure of covered payments, or foreign issuer that is domiciled in such country, might face different types of costs—it might decide it is necessary to delist from an exchange in the United States, deregister, and cease reporting with the Commission,[575] thus incurring a higher cost of capital and potentially limited access to capital in the future. In addition, it is possible that more countries will adopt laws prohibiting the disclosure required by the final rules. Shareholders, including U.S. shareholders, might suffer an economic and informational loss if an issuer decides it is necessary to deregister and cease reporting under the Exchange Act in the United States.

Addressing other potential costs, one commentator referred to a potential economic loss borne by shareholders, without quantifying such loss, which the commentator believed could result from highly disaggregated disclosures of competitively sensitive information causing competitive harm.[576] The commentator also noted resource extraction issuers could suffer competitive harm because they could be excluded from many future projects altogether.[577] Another commentator noted that tens of billions of dollars of capital investments would potentially be put at risk if issuers were required to disclose, pursuant to our rules, information prohibited by the host country's laws or regulations.[578] One commentator also noted that because energy underlies every aspect of the economy, these negative impacts have repercussions well beyond resource extraction issuers.[579]

As discussed above, several commentators suggested that we adopt exemptions or modify the disclosure requirements to mitigate the adverse impact of the Section 13(q) reporting requirement.[580] One commentator indicated that the final rules should be "aligned and coordinated" with the process being developed by the DOI to fulfill the United States' commitment to implementing the EITI.[581] We considered alternatives to the approach we are adopting in the final rules, including providing certain exemptions from the disclosure requirements mandated by Section 13(q), but we believe that adopting any of the alternatives would be inconsistent with Section 13(q) and would undermine Congress' intent to promote international transparency efforts. In

[567] *See* letters from API 1, ExxonMobil 1, and RDS 1.

[568] *See* letters from PWYP 1 and Oxfam 1.

[569] PWYP provides examples of countries in which payments are publicly disclosed on a lease or concession level. *See* letter from PYWP 3.

[570] One commentator suggested that if both the US and EU implement disclosure requirements regarding payments to governments "around 90% of the world's extractive companies will be covered by the rules." *See* letter from Arlene McCarthy (August 10, 2012) (Arlene McCarthy is a member of the European Parliament and the parliamentary draftsperson on the EU transparency rules for the extractive sector).

[571] For example, a study on divestitures of assets finds that companies that undertake voluntary divestitures have positive stock price reactions but finds that companies forced to divest assets due to action undertaken by the antitrust authorities suffer a decrease in shareholder value. *See* Kenneth J. Boudreaux, "Divestiture and Share Price." Journal of Financial and Quantitative Analysis 10 (September 1975), 619–26. G. Hite and J. Owers. "Security Price Reactions around Corporate Spin-Off Announcements." Journal of Financial Economics 12 (December 1983), 409–36 (finding that firms spinning off assets because of legal/regulatory difficulties experience negative stock returns).

[572] *See* notes 52 and 53 and accompanying text.

[573] *See* letters from API 1 and ExxonMobil 1. *See also* letter from RDS 1 (mentioning China, Cameroon, and Qatar).

[574] *See, e.g.*, letters from ERI 3, Global Witness 1, PWYP 1, PWYP 3, and Rep. Frank *et al.*

[575] *See* letter from Berns.

[576] *See* letter from API 1.

[577] *See id.*

[578] *See* letter from RDS 4.

[579] *See* letter from API 1.

[580] *See, e.g.*, notes 50, 60, and 66 and accompanying text.

[581] *See* letter from NMA 3. *See also* note 14. Referring to Executive Orders 13563 and 13610, the commentator suggested that we align the final rules with the process being developed by DOI so that "extractive industries are not subject to contradictory or overlapping reporting processes." As we have described above, the final rules are generally consistent with the EITI, except where the language of Section 13(q) clearly deviates from the EITI. In these instances, the final rules generally track the statute because, on these specific points, we believe the statutory language demonstrates that Congress intended the final rules to go beyond what is required by the EITI. In this regard, we view the reporting regime mandated by Section 13(q) as being complementary to, rather than duplicative of, host country transparency initiatives implemented under the EITI.

Section 13(q) Congress mandated that we adopt rules with a specific scope and features (*e.g.*, "not de minimis" threshold, project level reporting, and electronic tagging). To faithfully effectuate Congressional intent, we do not believe it would be appropriate to adopt provisions that would frustrate, or otherwise be inconsistent with, such intent. Consequently, we believe the competitive burdens arising from the need to make the required disclosures under the final rules are necessary by the terms of, and in furtherance of the purposes of, Section 13(q).

A number of factors may serve to mitigate the competitive burdens arising from the required disclosure. We note there were differences in opinion among commentators as to the applicability of host country laws.[582] Moreover, the widening global influence of the EITI and the recent trend of other jurisdictions to promote transparency, including listing requirements adopted by the Hong Kong Stock Exchange and proposed directive of the European Commission, may discourage governments in resource-rich countries from adopting new prohibitions on payment disclosure.[583] Reporting companies concerned that disclosure required by Section 13(q) may be prohibited in a given host country may also be able to seek authorization from the host country in order to disclose such information, reducing the cost to such reporting companies resulting from the failure of Section 13(q) to include an exemption for conflicts with host country laws.[584] Commentators did not provide estimates of the cost that might be incurred to seek such an authorization.

Not providing any exemptions should improve the transparency of the payment information because users of the Section 13(q) disclosure can obtain more information about payments than would otherwise be the case if the final rules provided an exemption. To the extent that other jurisdictions are developing and planning to adopt similar initiatives (*e.g.*, EU), the advantage to foreign companies not listed in the U.S. might diminish over time. Further, not providing any exemptions also improves the comparability of payment information among resource extraction issuers and across countries. As such, it may increase the benefit to users of the Section 13(q) disclosure. In addition, in light of the absence of an exemption from the disclosure requirement for foreign laws that prohibit the payment disclosure, countries may be less incentivized to enact laws prohibiting the disclosure.

Unlike many of the Commission's rulemakings, the compliance costs imposed by disclosure requirement mandated by Section 13(q) are intended to achieve social benefits. As noted above, the cost of compliance for this provision will be borne by the shareholders of the company thus potentially diverting capital away from other productive opportunities which may result in a loss of allocative efficiency.[585] Such effects may be partially offset if increased transparency of resource extraction payments reduces rent-seeking behavior by governments of resource-rich countries and leads to improved economic development and higher economic growth. A number of economic studies have shown that reducing corruption results in higher economic growth through more private investments, better deployment of human capital, and political stability.[586]

C. Benefits and Costs Resulting From Commission's Exercise of Discretion

As discussed in detail in Section II, we have revised the rules from the Proposing Release to address comments we received while remaining faithful to the language and intent of the statute as adopted by Congress. In addition to the statutory benefits and costs noted above, we believe that the use of our discretion in implementing the statutory requirements will result in a number of benefits and costs to issuers and users of the payment information. We discuss below the choices we made in implementing the statute and the associated benefits and costs. We are unable to quantify the impact of each of the decisions we discuss below with any precision because reliable, empirical evidence regarding the effects is not readily available to the Commission. Thus, in this section, our discussion on the costs and benefits of our individual discretionary choices is qualitative. In Section III.D. below, we present a quantified analysis on the overall costs of the final rules that include all aspects of the implementation of the statute.

1. Definition of "Commercial Development of Oil, Natural Gas, or Minerals"

Consistent with the proposal, the final rules define "commercial development of oil, natural gas, or minerals" to include exploration, extraction, processing, and export, or the acquisition of license for any such activity. As described above, the final rules we are adopting generally track the language in the statute, and except for where the language or approach of Section 13(q) clearly deviates from the EITI, the final rules are consistent with the EITI. In instances where the language or approach of Section 13(q) clearly deviates from the EITI, the final rules track the statute rather than the EITI. The definition of "commercial development" in Section 13(q) sets forth a clear list of activities that appears to include activities beyond what is currently contemplated by the EITI, and thus, clearly deviates from the EITI. Therefore, we believe the definition of the term in the final rules should be consistent with Section 13(q). The final rules we are adopting do not include additional activities, such as transportation or marketing, because those activities are not included in Section 13(q) and because the EITI does not explicitly include those activities. We believe defining the term in this way is consistent with Congress' goal of promoting international transparency efforts. To the extent that the definition of "commercial development" is consistent with the activities typically included in EITI programs, the final rules may promote consistency and comparability of disclosure made pursuant to Section 13(q) and the related rules and EITI programs, which may further Congress' goal of supporting international transparency promotion efforts. We recognize that limiting the definition to this list of specified activities could result in costs to users of the payment information to the extent that disclosure about additional activities, such as refining, smelting, marketing, or stand-alone transportation

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[582] *See* note 84.

[583] *See* notes 15 and 48.

[584] The Angola Order indicates that the Minister of Petroleum may provide formal authorization for the disclosure of information regarding a reporting company's activities in Angola. *See* letter from ExxonMobil 2. *See also* letter from PWYP 2 ("Current corporate practice suggests that the Angolan government regularly provides this authorization. For instance, Statoil regularly reports payments made to the Angolan government." (internal citations omitted)). The legal opinions submitted by Royal Dutch Shell with its comment letter also indicate that disclosure of otherwise restricted information may be authorized by government authorities in Cameroon and China, respectively. *See* letter from RDS 2.

[585] *See* letter from Chevron; *see also* letter from Chairman Bachus and Chairman Miller.

[586] *See* Paolo Mauro, "Corruption and Growth." *Quarterly Journal of Economics*. 110, 681–712 (1995); Pak Hung Mo, "Corruption and Economic Growth." *Journal of Comparative Economics* 29, 66–79 (2001); K. Gyimah-Brempong, "Corruption, economic growth, and income inequality in Africa", Economics of Governance 3, 183–209 (2002); K. Blackburn, N. Bose, and E.M. Haque, "The Incidence and Persistence of Corruption in Economic Development", Journal of Economic Dynamics and Control 30, 2447–2467 (2006); Pierre-Guillaume Méon and Khalid Sekkat, "Does corruption grease or sand the wheels of growth?", Public Choice 122, 69–97 (2005).

services (that is, transportation that is not otherwise related to export), would be useful to users of the information.

As noted above, to promote the goals of the provision, the final rules include an anti-evasion provision that requires disclosure with respect to an activity or payment that, although not in form or characterization one of the categories specified under the final rules, is part of a plan or scheme to evade the disclosure required under Section 13(q).[587] Under this provision, a resource extraction issuer could not avoid disclosure, for example, by re-characterizing an activity that would otherwise be covered under the final rules as transportation. We recognize that adding this requirement may increase the compliance costs for some issuers; however, we believe this provision is appropriate in order to minimize evasion and improve the effectiveness of the disclosure, thereby furthering Congress' goal.

We considered requiring disclosure about additional activities such as refining, smelting, marketing, or stand-alone transportation services, but determined not to include those activities in the definition of "commercial development" for the reasons described above and because it would unnecessarily increase compliance costs for issuers. We also considered adopting a definition of "commercial development" that omitted one or more of the statutorily-listed activities, such as "export," as some commentators had suggested.[588] We decided against that alternative because, although it might result in less costs for issuers, the plain language of Section 13(q) does not support that approach.

In response to commentators' request for clarification of the activities covered by the final rules, we also are providing guidance about the activities covered by the terms "extraction," "processing," and "export." The guidance should reduce uncertainty about the scope of the activities that give rise to disclosure obligations under Section 13(q) and the related rules, and therefore should facilitate compliance and help to lessen the costs associated with the disclosure requirements.

2. Types of Payments

In the final rules we added two additional categories of payments to the list of payment types that must be disclosed—dividends and payments for infrastructure improvements. We included these payment types in the final rules because, based on the EITI and the comments we received on the proposal, we believe they are part of the commonly recognized revenue stream.[589] Defining the term "payment" to include dividends[590] and payments for infrastructure improvements (*e.g.*, building a road) in the list of payment types required to be disclosed under the final rules should promote consistency with EITI reporting and improve the effectiveness of the disclosure, thereby furthering Congress' goal of supporting international transparency promotion efforts. Defining "payment" to include dividends and payments for infrastructure improvements also could help alleviate competitiveness concerns by imposing similar disclosure requirements on issuers that make such payments and issuers that make other types of payments, such as royalties, production entitlements, or fees, required to be disclosed under the final rules.

As discussed earlier, resource extraction issuers will incur costs to provide the payment disclosure for the payment types identified in the statute, such as the costs associated with modifications to the issuers' core enterprise resource planning systems and financial reporting systems to capture and report the payment data at the project level, for each type of payment, government payee, and currency of payment.[591] The addition of dividends and payments for infrastructure improvements to the list of payment types for which disclosure is required may increase some issuers' costs of complying with the final rules. For example, issuers may need to add these types of payments to their tracking and reporting systems. We understand that these types of payments are more typical for mineral extraction issuers than for oil firms,[592] and therefore only a subset of the issuers subject to the final rules might be affected.

The final rules do not require disclosure of certain other types of payments, such as social or community payments. We recognize that excluding those payments reduces the overall level of disclosure; however, we have not included those payments as required payment types under the final rules because commentators disagreed as to whether they are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals and the EITI does not require the disclosure of social or community payments.[593] In addition, by not including these types of payments, the final rules should benefit issuers by avoiding additional compliance costs for disclosure that does not clearly enhance the effectiveness of the disclosure required under Section 13(q).

Resource extraction issuers that predominantly make payments that must be disclosed pursuant to the final rules may be at a competitive disadvantage as compared to resource extraction issuers that predominately make payments that are not identified in the final rules. To the extent that other types of payments could be used to substitute for explicitly defined payments, resource extraction issuers may try to circumvent the required disclosures by shifting to other, not explicitly defined payments, and away from the types of payments listed in the final rules. This could have the effect of reducing the transparency contemplated by the statute. For example, the exclusion of social or community payments might encourage issuers to mask other payments, such as infrastructure improvement payments, as social or community payments to avoid reporting under the rules, limiting the effectiveness of the disclosure. As noted above, to promote the goals of Section 13(q), the final rules include an anti-evasion provision that requires disclosure with respect to an activity or payment that, although not in form or characterization of one of the categories specified under the final rules, is part of a plan or scheme to evade the disclosure required under Section 13(q).[594] Under this provision, a resource extraction issuer could not avoid disclosure, for example, by re-characterizing or re-configuring a payment as one that is not required to be disclosed. We considered, as an alternative to an anti-evasion provision, defining terms broadly to cover a wider range of activities, but

[587] *See* Instruction 9 to Item 2.01 of Form SD.

[588] *See, e.g.*, letters from API 1 and ExxonMobil 1.

[589] *See* notes 164, 176, and 177 and accompanying text.

[590] The final rules generally do not require the disclosure of dividends paid to a government as a common or ordinary shareholder of the issuer as long as the dividend is paid to the government under the same terms as other shareholders. The issuer will be required to disclose dividends paid to a government in lieu of production entitlements or royalties. *See* Instruction 7 to Item 2.01 of Form SD.

[591] *See* note 529 and accompanying text.

[592] *See, e.g.*, letters from PWYP 1 and Global Witness 1; *see also* Chapter 19 "Advancing the EITI in the Mining Sector: Implementation Issues" by Sefton Darby and Kristian Lempa, in *Advancing the EITI in the Mining Sector: A Consultotion with Stakeholders* (EITI 2009).

[593] *See* note 185 and accompanying discussion, above (citing commentators suggesting that social or community payments constitute part of the commonly recognized revenue stream of resource extraction) and note 188 and accompanying discussion, above (citing commentators maintaining that social or community payments are not part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals).

[594] *See* Instruction 9 to Item 2.01 of Form SD.

determined that more expansive definitions could increase compliance costs for resource extraction issuers and that an anti-evasion provision should result in lower compliance costs and would accomplish the statute's transparency goals.

As discussed above, the final rules clarify that the term "fees" includes license fees, rental fees, entry fees, and other considerations for licenses or concessions, and the term "bonuses" includes signature, discovery, and production bonuses. In addition, the final rules clarify that a resource extraction issuer will be required to disclose payments for taxes levied on corporate profits, corporate income, and production, but will not be required to disclose payments for taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes. These clarifications are consistent with the EITI and, therefore, should help promote comparability and support international transparency promotion efforts. Moreover, these clarifications should benefit issuers by reducing uncertainty about the types of payments required to be disclosed under Section 13(q) and the related rules, and therefore should facilitate compliance and help mitigate costs. On the other hand, inclusion of these specific types of fees, taxes, and bonuses could increase compliance costs for issuers, particularly for issuers that have not participated in an EITI program and would not track or report these items except for our clarification.

Under the final rules, issuers may disclose payments that are made for obligations levied at the entity level, such as corporate income taxes, at that level rather than the project level. This accommodation should help reduce compliance costs for issuers without interfering with the goal of achieving increased payment transparency.

Under the final rules, issuers must disclose payments made in-kind. This requirement is consistent with the EITI and should help further the goal of supporting international transparency promotion efforts and enhance the effectiveness of the disclosure. We have provided issuers with some flexibility in reporting in-kind payments. Resource extraction issuers may report in-kind payments at cost, or if cost is not determinable, at fair market value, which we believe should facilitate compliance with Section 13(q) and potentially lower compliance costs. This requirement could impose costs to the extent that issuers have not previously had to value their in-kind payments, or they use a different method to value those payments.

3. Definition of "Not De Minimis"

Section 13(q) requires the disclosure of payments that are "not de minimis," but leaves the term "not de minimis" undefined. In the final rules we define "not de minimis" to mean any payment, whether made as a single payment or a series of related payments, that equals or exceeds $100,000. Although we considered leaving "not de minimis" undefined, as we had proposed, we were convinced by commentators that defining this term should help to promote consistency in payment disclosures and reduce uncertainty about what payments must be disclosed under Section 13(q) and the related rules, and therefore should facilitate compliance.[595] As noted above, because the primary purpose of Section 13(q) is to further international transparency efforts regarding payments to governments for the commercial development of oil, natural gas, or minerals, we believe that whether a payment is "not de minimis" should be considered in relation to a host country. We recognize that issuers may have difficulty assessing the significance of particular payments for particular countries or recipient governments; therefore, we are adopting a $100,000 threshold that we believe will provide clear guidance about payments that are "not de minimis" and promote the transparency goals of the statute.

We considered adopting a definition of "not de minimis" that was based on a qualitative principle or a relative quantitative measure rather than an absolute quantitative standard.[596] We chose the absolute quantitative approach for several reasons. An absolute quantitative approach will promote consistency of disclosure and, in addition, will be easier for issuers to apply than a definition based on either a qualitative principle or relative quantitative measure.[597] Moreover, using an absolute dollar amount threshold for disclosure purposes should also reduce compliance costs by reducing the work necessary to determine what payments must be disclosed.

Therefore, in choosing the "de minimis" amount, we selected an amount that we believe strikes an appropriate balance in light of varied commentators' concerns and the purpose of the statute. Although some commentators suggested various thresholds,[598] no commentator provided data to assist us in determining an appropriate threshold amount.

We considered other absolute amounts but chose $100,000 as the quantitative threshold in the definition of "not de minimis." We decided not to adopt a lower threshold because we are concerned that such an amount could result in undue compliance burdens and raise competitive concerns for many issuers. As previously noted, we believe a $100,000 threshold is more appropriate than, and an acceptable compromise to, the amounts suggested by commentators because it furthers the purpose of Section 13(q) and may result in a lesser compliance burden than otherwise would be the case if a lower threshold was used.[599] In addition, to prevent issuers from breaking down their payments into amounts smaller than $100,000 and thus avoiding disclosure, we provide an instruction in the final rules noting that in the case of any arrangement providing for periodic payments or installments of the same type, a resource extraction issuer must consider the aggregate amount of the related periodic payments or installments of the related payments in determining whether the payment threshold has been met for that series of payments, and accordingly, whether disclosure is required.

We also considered defining "not de minimis" in terms of a materiality standard, which would generally suggest, consistent with commentators views, a threshold larger than $100,000. Such an alternative would likely have resulted in lower compliance costs for issuers. We also could have chosen to use a larger number, such as $1,000,000, to define "not de minimis," which again would have resulted in lower compliance costs. Although a "not de minimis" definition based on a materiality standard, or a much higher amount, such as $1,000,000, could lessen competitive concerns, setting the threshold too high could leave important payment streams undisclosed, reducing the potential benefits to be derived from Section 13(q). In addition, we believe that use of the term "not de minimis" in Section 13(q) indicates that a threshold quite different from a materiality standard and significantly less than $1,000,000 is necessary to further the transparency goals of the statute. While the $100,000 threshold may result in some smaller payments not being reported, we believe this threshold strikes an appropriate

[595] *See* notes 223 and 231–233 and accompanying text.

[596] As previously noted, we declined to adopt a "not de minimis" definition based on a materiality principle because that alternative is not supported by the language of Section 13(q). *See* note 566 and accompanying text.

[597] *See* note 252 and accompanying text.

[598] *See* notes 235–243 and accompanying text.

[599] *See* notes 257–267 and accompanying text.

balance between concerns about the potential compliance burdens of a lower threshold and the need to fulfill the statutory directive for resource extraction issuers to disclose payments that are "not de minimis."

4. Definition of "Project"

Section 13(q) requires a resource extraction issuer to disclose information regarding the type and total amount of payments made to a foreign government or the Federal Government for each project relating to the commercial development of oil, natural gas, or minerals, but it does not define the term "project." As noted above, the final rules leave the term undefined, but we have provided some guidance about the term. Leaving the term "project" undefined should provide issuers some flexibility in applying the term to different business contexts depending on factors such as the particular industry or business in which the issuer operates, or the issuer's size.

As noted above, resource extraction issuers routinely enter into contractual arrangements with governments for the purpose of commercial development of oil, natural gas, or minerals. The contract defines the relationship and payment flows between the resource extraction issuer and the government, and therefore, it would serve as the basis for determining a "project." We understand that the term "project" is used within the extractive industry in a variety of contexts, and that individual issuers routinely provide disclosure about their own projects in their Exchange Act reports and other public statements. To the extent that the meaning of "project" is generally understood by resource extraction issuers and investors, leaving the term undefined should not impose undue costs.

Resource extraction issuers may incur costs in determining their "projects." Leaving the term undefined in the final rules may result in higher costs for some resource extraction issuers than others if an issuer's determination of what constitutes a "project" would result in more granular information being disclosed than another issuer's determination of what constitutes a "project." We anticipate that these costs may diminish over time as resource extraction issuers become familiar with how other resource extraction issuers determine their "projects." In addition, we recognize that leaving the term "project" undefined may not result in the transparency benefits that the statute seeks to achieve as effectively as would be the case if we adopted a definition because resource extraction issuers' determination of what constitutes a "project" may differ, which could reduce the comparability of disclosure across issuers. Inconsistent disclosure may be mitigated to some extent by the guidance we are providing about the term.

We considered defining "project" at the country level. A number of commentators asserted that this approach would further lower their compliance burdens.[600] While we recognize that approach would reduce compliance burdens for issuers, we did not adopt it because we believe it would be inconsistent with Congress' intent to provide more detailed disclosure than at the country level and would not effectively result in the transparency benefits that the statute seeks to achieve.[601] We believe the statutory requirement to provide interactive data tags identifying the government that received the payment and the country in which that government is located is further evidence that statutory reference to "project" was intended to elicit disclosure at a more granular level than country-level reporting.

We also considered defining "project" as a reporting unit, as suggested by some commentators.[602] We decided against that approach because we believe that requiring disclosure at the reporting unit level would be inconsistent with the use of the term "project" in Section 13(q). In this regard we note that it is not uncommon for an issuer to define a reporting unit as a geographic region (for example, as a country or continent), which would result in aggregated payment disclosure that is inconsistent with the transparency goal of the statute.

As suggested by some commentators, we considered defining "project" in relation to a particular geologic resource, such as a "geologic basin" or "mineral district."[603] We decided not to adopt this approach because, as noted by some commentators,[604] a geologic basin or mineral district may span more than one country, which would be counter to the country-by-country reporting required by Section 13(q). In addition, we understand that defining the term in this manner may not reflect how resource extraction issuers enter into contractual arrangements for the extraction of resources, which define the relationship and payment flows between the resource extraction issuer and the government. For these reasons, we believe that defining "project" as a "geologic basin" may be inconsistent with the use of the term "project" in Section 13(q) and may not result in the transparency benefits that the statute seeks to achieve.

In addition, we considered defining "project" by reference to a materiality standard as it is used under the federal securities laws, as suggested by some commentators.[605] While such an approach could reduce compliance burdens for issuers, we did not adopt it because we believe it would be inconsistent with Congress' intent to provide more detailed disclosure than would be provided using such a materiality standard and would not result in the transparency benefits that the statute seeks to achieve.

To comply with the final rules, a resource extraction issuer could be required to implement systems to track payments at a different level of granularity than what it currently tracks, which could result in added compliance and implementation costs. We expect, however, that to the extent resource extraction issuers' systems currently track "projects" or information by reference to its contractual arrangements, such costs should be reduced. Not defining the term "project" under the final rules could result in added compliance costs when compared to the alternative of adopting a definition suggested by some commentators. By not defining "project" as "country," "reporting unit," "geologic basin," or "material project," as some commentators suggested,[606] issuers could incur costs relating to implementation of systems to track payment information at a more granular level than what their current systems track. In addition, by leaving the term undefined rather than adopting one of the definitions suggested by commentators, the final rules may effectively require disclosure that may result in voluminous information and increase the costs to issuers to track and report.

5. Annual Report Requirement

Section 13(q) provides that the resource extraction payment disclosure must be "include[d] in an annual report." The final rules require an issuer to file the payment disclosure in an annual report on new Form SD, rather than furnish it in one of the existing Exchange Act annual report forms as proposed. Form SD will be due no later

[600] *See* letters from API 1, ExxonMobil 1, Petrobras, and RDS 1.

[601] *See* note 313 and accompanying text.

[602] *See* note 283 and accompanying text.

[603] *See* note 286 and accompanying text.

[604] *See* note 290 and accompanying text.

[605] *See* note 291 and accompanying text.

[606] *See* notes 279, 283, 286, and 291 and accompanying text.

than 150 days after the end of the issuer's most recent fiscal year. This should lessen the burden of compliance with Section 13(q) and the related rules because issuers generally will not have to incur the burden and cost of providing the payment disclosure at the same time that it must fulfill its disclosure obligations with respect to an Exchange Act annual report.[607] An additional benefit is that this requirement also would provide information to users in a standardized manner for all issuers rather than in different annual report forms depending on whether a resource extraction issuer is a domestic or foreign filer. In addition, requiring the disclosure in new Form SD, rather than in issuers' Exchange Act annual reports, should alleviate concerns about the disclosure being subject to the officer certifications required by Exchange Act Rules 13a–14 and 15d–14, thus potentially lowering compliance costs.

Resource extraction issuers will incur costs associated with preparing and filing new Form SD; however, we do not believe the costs associated with filing a new form to provide the disclosure instead of furnishing the disclosure in an existing form will be significant.

Requiring covered issuers to file, instead of furnish, the payment information in Form SD may increase the ability of investors to bring suit, for instance under Section 18 of the Exchange Act. This may improve the avenues of redress available to investors if issuers fail to comply with the new disclosure requirements. Because this could improve investors' ability to seek redress, it is possible that resource extraction issuers may be more accountable for and more likely to make the required disclosure. This, in turn, may provide benefits to investors to the extent they use the information to make investment decisions. On the other hand, our decision to require issuers to file, rather than furnish, the payment information will potentially subject issuers to litigation under Section 18 and may cause issuers to take greater care in preparing the disclosures, thereby increasing issuers' costs of complying with the rules.[608]

Finally, some commentators noted the potential for their cost estimates to increase if the final rules required the payment information to be audited. Consistent with Section 13(q) and the proposal, the final rules do not require the resource extraction payment information to be audited or provided on an accrual basis. Not requiring the payment information to be audited or provided on an accrual basis is consistent with Section 13(q) because the statute requires the Commission to issue final rules for disclosure of payments by resource extraction issuers and, unlike the EITI, does not contemplate that an administrator will audit and reconcile the information, or produce a report as a result of the audit and reconciliation. In addition, not requiring the payment information to be audited or provided on an accrual basis may result in lower compliance costs than otherwise would be the case if resource extraction issuers were required to provide the information on an accrual basis or audited information.[609] A potential cost associated with not requiring an audit is that users of the information may perceive non-audited information as less reliable than audited information.

6. Exhibit and Interactive Data Requirement

Section 13(q) requires the payment disclosure to be electronically formatted using an interactive data standard. Under the proposed rules, a resource extraction issuer would have been required to provide the disclosure in two exhibits—one in HTML and one in XBRL. The final rules require a resource extraction issuer to provide the required payment disclosure in one exhibit to Form SD. The exhibit must be formatted in XBRL and provide all of the electronic tags required by Section 13(q) and the final rules. We have decided to require only one exhibit formatted in XBRL because we believe that we can achieve the goal of the dual presentation with only one exhibit. Issuers will submit the information on EDGAR in XBRL format, thus enabling users of the information to extract the XBRL data, and at the same time the information will be presented in an easily-readable format by rendering the information received by the issuers.[610] We believe that requiring the information to be provided in this way may reduce the compliance burden for issuers as compared to requiring a second exhibit formatted in HTML. In addition, we believe that, to the extent requiring the specified information to be presented in XBRL format promotes consistency and standardization of the information, increases the usability of the payment disclosure, and reduces compliance costs, a benefit results to both issuers and users of the information.

Our choice of XBRL as the required interactive data standard may increase compliance costs for some issuers; however, Congress expressly required interactive data tagging. The electronic formatting costs will vary depending upon a variety of factors, including the amount of payment data disclosed and an issuer's prior experience with XBRL. While most issuers are already familiar with XBRL because they currently use XBRL for their annual and quarterly reports filed with the Commission, issuers not already filing reports using XBRL (*i.e.* foreign private issuers that report pursuant to International Financial Reporting Standards (IFRS)) will incur some start-up costs associated with XBRL. We do not believe that the ongoing costs associated with this data tagging would be greater than filing the data in XML.

Consistent with the statute, the final rules require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments. The statute does not otherwise specify how the resource extraction issuer should present the type and total amount of payments for each project or to each government. We understand that resource extraction issuers may make payments in any number of currencies, and as a result, providing total amounts may be difficult. If multiple currencies are used to make payments for a specific project or to a government, a resource extraction issuer may choose to provide the total amount per project or per government in U.S. dollars or the issuer's reporting currency. A resource extraction issuer could incur costs associated with converting payments made in multiple currencies to U.S. dollars or its reporting currency. Given the statute's tagging requirements and requirements for disclosure of total amounts, we believe reporting in one currency is required. The final rules provide flexibility to issuers in how to perform the currency conversion, which may result in lower compliance costs because it enables issuers to choose the option that works best for them. To the extent issuers choose different options to perform the conversion, it may result in less comparability of the payment

[607] For example, a resource extraction issuer may potentially be able to save resources to the extent that the timing of its obligations with respect to its Exchange Act annual report and its obligations to provide payment disclosure allow for it to allocate its resources, in particular personnel, more efficiently.

[608] While the potential for litigation may increase costs, we note that Section 18 claims have not been prevalent in recent years and a plaintiff asserting a claim under Section 18 would need to meet the elements of the statute, including materiality, reliance, and damages. *See* Louis Loss and Joel Seligman, Ch. 11 "Civil Liability," Subsect. c "False Filings [§ 18]," *Fundamentals of Securities Regulation* (3rd Ed. 2005).

[609] *See* note 405 and accompanying text.

[610] Users of this information should be able to render the information by using software available on our Web site at no cost.

information and, in turn, could result in costs to users of the information.

D. Quantified Assessment of Overall Economic Effects

As noted above, Congress intended that the rules issued pursuant to Section 13(q) would increase the accountability of governments to their citizens in resource-rich countries for the wealth generated by those resources.[611] In addition, commentators and the sponsors of Section 13(q) also have noted that the United States has an interest in promoting accountability, stability, and good governance.[612] Congress' goal of enhanced government accountability through Section 13(q) is intended to result in social benefits that cannot be readily quantified with any precision. We also note that while the objectives of Section 13(q) do not appear to be ones that will necessarily generate measurable, direct economic benefits to investors or issuers, investors have stated that the disclosures required by Section 13(q) have value to investors and can "materially and substantially improve investment decision making."[613] As noted previously, the benefits are inherently difficult to quantify and thus our quantitative assessment of the overall economic effects focuses on the costs of complying with the rules.

To assess the economic impact of the final rules, we estimated the initial and ongoing costs of compliance using the quantitative information supplied by commentators using two different methods. In the first method, we estimate the cost of compliance for the average company and then multiply this number by the total number of affected issuers (1,101). In the second method, we separately estimate the costs of compliance for small issuers (issuers with less than $75 million in market capitalization) and for large issuers (issuers with $75 million or more in market capitalization). For initial compliance costs, we received estimates from Barrick Gold and ExxonMobil.[614] We use these numbers to estimate a lower and an upper bound, respectively, on initial compliance costs.

Our methodology to estimate both initial and ongoing compliance costs takes the specific company estimates from Barrick Gold and ExxonMobil and applies these costs, as a percentage of total assets, to the average issuer and small and large issuers. Both Barrick Gold and ExxonMobil are very large issuers and their compliance costs may not be representative of other types of issuers. Thus, we believe it is appropriate to scale these costs to the size of the issuer. While a portion of the compliance costs will most likely be fixed (*i.e.*, they will not vary with the size of the issuer), we expect that a portion of those costs will be variable. For example, we expect larger, multinational issuers to have more complex payment tracking systems compared to smaller, single country based issuers. Thus, in our analysis we assume that compliance costs will tend to increase with firm size. Commentators did not provide any information regarding what fraction of compliance costs would be fixed versus variable.

Barrick Gold estimated that it would require 500 hours for initial changes to internal books and records and processes, and 500 hours for ongoing compliance costs. At an hourly rate of $400,[615] this amounts to $400,000 (1,000 hours × $400) for hourly compliance costs. Barrick Gold also estimated that it would cost $100,000 for initial IT/consulting and travel costs for a total initial compliance cost of $500,000. As a measure of size, Barrick Gold's total assets as of the end of fiscal year 2009 were approximately $25 billion.[616] As a percentage of Barrick Gold's total assets, initial compliance costs are estimated to be 0.002% ($500,000/$25,075,000,000).

A similar analysis for ExxonMobil estimated initial compliance costs using its estimate of $50 million. ExxonMobil's total assets as of the end of 2009 were approximately $233 billion and the percentage of initial compliance costs to total assets is 0.021% ($50,000,000/$233,323,000,000). Therefore, the lower bound of initial compliance costs to total assets is 0.002% based upon estimates from Barrick Gold and the upper bound is 0.021% based upon estimates from ExxonMobil.

Below is a summary of how we calculated the initial compliance costs as a percentage of total assets:

Initial compliance cost estimates		Calculation
Total number of affected issuers	1,101	
Barrick Gold compliance costs (lower bound):		
Number of hours for initial changes to internal books and records and processes	500	
Number of hours for annual compliance costs	500	
Initial number of compliance hours	1,000	500 + 500
Hourly cost	$400	
Initial hourly compliance costs	$400,000	1,000 * $400
Initial IT/consulting/travel costs	$100,000	
Total initial total compliance costs	$500,000	$400,000 + $100,000
Barrack Gold's 2009 total assets (Compustat)	$25,075,000,000	
Initial compliance costs as a percentage of total assets using Barrick Gold (lower bound)	0.002%	$500,000/$25,075,000,000
ExxonMobil compliance costs (upper bound):		
Initial compliance costs	$50,000,000	
ExxonMobil's 2009 total assets (Compustat)	$233,323,000,000	
Initial compliance costs as a percentage of total assets using ExxonMobil (upper bound)	0.021%	$50,000,000/$233,323,000,000

[611] *See* note 7 and accompanying text.

[612] *See* note 499 and accompanying text.

[613] *See* letter from Calvert. *See* note 498 and accompanying text.

[614] *See* letter from Barrick Gold and ExxonMobil 1. NMA also provided initial compliance hours that are similar to Barrick Gold. *See* letter from NMA 2.

[615] This is the rate we use to estimate outside professional costs for purposes of the PRA. Although we believe actual internal costs may be less in many instances, we are using this rate to arrive at a conservative estimate of hourly compliance costs.

[616] All data on total assets is obtained from Compustat, which is a product of Standard and Poor's. In addition to considering total assets as a measure of firm size, we also considered using market capitalization. Although both measures will fluctuate, we believe that market capitalization will fluctuate more and the resulting percentage would then be sensitive to the measurement date chosen. As a result, we believe that using total assets as a measure of size is more appropriate.

We apply these two ratios to the average issuer (Method 1) and to small and large issuers (Method 2). In Method 1, we calculate the average total assets of all affected issuers to be approximately $4.4 billion.[617] Applying the ratio of initial compliance costs to total assets (0.002%) from Barrick Gold, we estimate the lower bound of total initial compliance costs for all issuers to be $97 million (0.002% × $4,422,000,000 × 1,101). Applying the ratio of initial compliance costs to total assets (0.021%) from ExxonMobil, we estimate the upper bound of total initial compliance costs for all issuers to be $1 billion (0.021% × $4,422,000,000 × 1,101). The table below summarizes the upper and lower bound of total initial compliance costs using Method 1:

Method 1: Average company compliance costs		Calculation
Average total assets of all affected issuers (Compustat)	$4,422,000,000	
Average initial compliance costs per issuer using Barrick Gold percentage of total assets (lower bound)	88,440	$4,422,000,000*0.002%
Total initial compliance costs using Barrick Gold (lower bound)	97,372,440	$88,440*1,101
Average initial compliance costs per issuer using Exxon Mobil's percentage of total assets (upper bound)	928,620	4,422,000,000*0.021%
Total initial compliance costs using ExxonMobil (upper bound)	1,022,410,620	928,620 * 1,101

In Method 2, we conduct a similar analysis for small and large issuers. We estimate the proportion of issuers that are small issuers (63%) and the proportion of issuers that are large issuers (37%).[618] Next, we calculate the average total assets of small issuers in 2009 ($509 million) and large issuers ($4.5 billion) and apply the ratios of initial compliance costs to total assets estimated using the estimates from Barrick Gold (lower bound) and ExxonMobil (upper bound) for each type of issuer. In this analysis, we assume that the ratio of initial compliance costs to total assets does not vary by size. Therefore, small issuers have a lower bound estimate of initial compliance costs of $7 million (0.002% × $509,000,000 × 63% × 1,101) and an upper bound of $74 million (0.021% × $509,000,000 × 63% × 1,101). Large issuers have a lower bound estimate of initial compliance costs of $37 million (0.002% × $4,504,000,000 × 37% × 1,101) and an upper bound of $385 million (0.021% × $4,504,000,000 × 37% × 1,101). The sum of these two numbers provides an estimate of $44 million ($7,061,153 + $36,704,037) for the lower bound and $460 million ($74,142,111 + $385,306,841) for the upper bound of initial compliance costs.

Method 2: By small and large issuers		
Percentage of small issuers (market capitalization <$75m)	63%	
Percentage of large issuers (market capitalization = >$75m)	37%	
Average total assets of small issuers in 2009 (Compustat)	$509,000,000	
Average total assets of large issuers in 2009 (Compustat)	$4,504,000,000	
Initial compliance costs for average small issuer.		
Initial compliance costs for a small issuer using Barrick Gold (lower bound)	$10,180	0.002%*$509,000,000
Total initial compliance costs for small issuers using Barrick Gold (lower bound)	$7,061,153	$10,180*1,101*63%
Initial compliance costs for a small issuer using ExxonMobil (upper bound)	$106,890	0.021%*$509,000,000
Total initial compliance costs for small issuers using ExxonMobil (upper bound)	$74,142,111	$106,890*1,101*63%
Initial compliance costs for average large issuer.		
Initial compliance costs for a large issuer using Barrick Gold (lower bound)	$90,080	0.0020%*4,504,000,000
Total initial compliance costs for large issuers using Barrick Gold (lower bound)	$36,695,890	$90,080*1,101*37%
Initial compliance costs for a large issuer using ExxonMobil (upper bound)	$945,840	0.021%*4,504,000,000
Total initial compliance costs for large issuers using ExxonMobil (upper bound)	$385,306,841	$945,840*1,101*37%
Total initial compliance costs for small and large issuers using Barrick Gold (lower bound)	$43,757,043	$7,061,153 + $36,695,890
Total initial compliance costs for small and large issuers using ExxonMobil (upper bound)	$459,448,952	$74,142,111 + $385,306,841

In summary, using the two methods, the range of initial compliance costs is as follows:[619]

[617] We determined this average by identifying the SIC codes that will be affected by the rulemaking and then obtaining from Compustat the total assets for fiscal year 2009 of all affected issuers. We then calculated the average of those total assets.

[618] For purposes of this analysis, we classify as small issuers those whose market capitalization is less than $75 million and we classify the rest of the affected issuers as large issuers.

[619] The total estimated compliance cost for PRA purposes is $234,829,000 ([332,164 hrs * $400/hr] + $101,963,400). The compliance costs for PRA purposes would be encompassed in the total estimated compliance costs for issuers. As discussed in detail below, our PRA estimate includes costs related to tracking and collecting information about different types of payments across projects, governments, countries, subsidiaries, and other controlled entities. The estimated costs for PRA purposes are calculated by treating compliance costs as fixed costs, so despite using similar inputs for calculating compliance costs under Methods 1 and 2 above, the PRA estimate differs from the lower and upper bounds calculated above. The PRA estimate is, however, within the range of total compliance costs estimated using commentators' data.

Initial compliance costs	Method 1: Average issuer analysis	Method 2: Small and large issuer analysis
Using Barrick Gold (lower bound)	$97,372,440	$43,757,043
Using ExxonMobil (upper bound)	1,022,410,620	459,448,952

We acknowledge limitations on our analysis. First, the analysis is limited to two large issuers' estimates from two different industries, mining and oil and gas, and the estimates may not accurately reflect the initial compliance costs of all affected issuers. Second, we assume that compliance costs are a constant fraction of total assets, but there may be substantial fixed costs to compliance that are underestimated by using a variable cost analysis. Third, commentators mentioned other potential compliance costs not necessarily captured in this discussion of compliance costs.[620] Because of these limitations, we believe that total initial compliance costs for all issuers are likely to be near the upper bound of approximately $1 billion. This estimate is consistent with two commentators' qualitative estimates of initial implementation costs.[621]

We also estimated ongoing compliance costs using the same two methods. We received quantitative information from three commentators, Rio Tinto, National Mining Association, and Barrick Gold, that we used in the analysis. Rio Tinto estimated that it would take between 5,000 and 10,000 hours per year to comply with the requirements, for a total ongoing compliance cost of between $2 million (5,000*$400) and $4 million (10,000*$400). We use the midpoint of their estimate, $3 million, as their expected ongoing compliance cost. The National Mining Association (NMA), which represents the mining industry, estimated that ongoing compliance costs would be 10 times our initial estimate, although it did not state specifically the number to which it referred. We believe NMA was referring to our proposed estimate of $30,000.[622] Although this is the dollar figure for total costs, NMA referred to it when providing an estimate of ongoing costs, so we do the same here, which would result in $300,000 (10*$30,000). Finally, Barrick Gold estimated that it would take 500 hours per year to comply with the requirements, or $200,000 (500*$400) per year. As with the initial compliance costs, we calculate the ongoing compliance cost as a percentage of total assets. Rio Tinto's total assets as of the end of fiscal year 2009 were approximately $97 billion and their estimated ongoing compliance costs as a percentage of assets is 0.003% ($3,000,000/$97,236,000,000). We calculated the average total assets of the mining industry to be $1.5 billion,[623] and using NMA's estimated ongoing compliance costs, we estimate ongoing compliance costs as a percentage of assets of 0.02% ($300,000/$1,515,000,000). Barrick Gold's total assets as of the end of fiscal year 2009 were approximately $25 billion and their estimated ongoing compliance costs as a percentage of assets is 0.0008% ($200,000/$25,075,000,000). We then average the percentage of ongoing compliance costs to get an estimate of 0.0079% of total assets.

Ongoing compliance costs		Calculation
Rio Tinto estimate of yearly compliance costs	$2,000,000–$4,000,000	(5,000–10,000)*$400
Average Rio Tinto estimate	$3,000,000	
Rio Tinto's 2009 total assets (Compustat)	$97,236,000,000	
Ongoing compliance costs as a percentage of Rio Tinto's total assets	0.003%	$3,000,000/$97,236,000,000
NMA estimate of 10 times SEC estimate in proposing release	$300,000	10*$30,000
Average total assets for all mining issuers (Compustat)	$1,515,000,000	
Ongoing compliance costs as a percentage of all mining issuers total assets (NMA)	0.02%	$300,000/$1,515,000,000
Barrick Gold estimate of 500 hours per year	$200,000	500*$400
Barrick Gold's 2009 total assets (Compustat)	$25,075,000,000	
Ongoing compliance costs as a percentage of Barrick Gold's total assets	0.0008%	$200,000/$25,075,000,000
Average ongoing compliance costs as a percentage of total assets for all three estimates: Rio Tinto, NMA and Barrick Gold	0.0079%	

We use the same two methods used to estimate initial compliance costs to estimate ongoing compliance costs: Method 1 for the average affected issuer and Method 2 for small and large issuers separately. In Method 1, we take the average total assets for all affected issuers, $4,422,000,000, and multiply it by the average ongoing compliance costs as a percentage of total assets (0.0079%) to get total ongoing compliance costs of approximately $385 million.

Method 1: Average company ongoing compliance costs		Calculation
Average 2009 total assets of all affected issuers (Compustat)	$4,422,000,000	
Average ongoing compliance costs per issuer using average percentage of total assets (lower bound)	$349,338	0.0079%*$4,422,000,000
Total ongoing compliance costs	$384,621,138	$349,338*1,101

[620] Those could include, for example, costs associated with the termination of existing agreements in countries with laws that prohibit the type of disclosure mandated by the rules, or costs of decreased ability to bid for projects in such countries in the future, or costs of decreased competitiveness with respect to non-reporting entities. Commentators generally did not provide estimates of such costs. As discussed further below, we have attempted to estimate the costs associated with potential foreign law prohibitions on providing the required disclosure. *See* Section III.D.

[621] *See* letters from API 1 and ExxonMobil 1. "Total industry costs just for the initial implementation could amount to hundreds of millions of dollars even assuming a favorable final decision on audit requirements and reasonable application of accepted materiality concepts."

[622] The $30,000 estimate was calculated as follows: [(52,931*$400) + $11,857,600]/1,101 = $30,000.

[623] We estimated this number by selecting only mining issuers, based on their SIC codes, obtaining their total assets as of the end of fiscal year 2009 from Compustat, and averaging the total assets of those issuers.

In Method 2, we estimate ongoing compliance costs separately for small and large issuers using the same proportion of issuers as in the analysis on initial compliance costs: small issuers (63%) and large issuers (37%). For small issuers, we take the average total assets in 2009 ($509,000,000)[624] and multiply it by the average ongoing compliance costs as a percentage of total assets (0.0079%) to get total ongoing compliance costs of approximately $28 million. For large issuers, we take the average total assets in 2009 ($4,504,000,000)[625] and multiply it by the average ongoing compliance costs as a percentage of total assets (0.0079%) to get total ongoing compliance costs of approximately $145 million. The sum of these two numbers provides an estimate of $173 million ($27,891,556 + $144,948,764) for total ongoing compliance costs for affected issuers. Comparing these two methods suggests that the ongoing compliance costs are likely to be between $200 million and $400 million.

Method 2: By small and large issuers		
Percentage of small issuers (market capitalization < $75m)	63%	
Percentage of large issuers (market capitalization = > $75m)	37%	
Average total assets of small issuers in 2009 (Compustat)	$509,000,000	
Average total assets of large issuers in 2009 (Compustat)	$4,504,000,000	
Yearly ongoing compliance costs for a small issuer	$40,211	0.0079%*$509,000,000
Total yearly ongoing compliance costs for small issuer	$27,891,556	$40,211*1,101*63%
Yearly ongoing compliance costs for a large issuer	$355,816	0.0079%*$4,504,000,000
Total yearly ongoing compliance costs for large companies	$144,948,764	$355,816*1,101*37%
Total yearly ongoing compliance costs for small and large issuers	$172,840,320	$27,891,556+$144,948,764

As discussed above in Section III.B., host country laws that prohibit the type of disclosure required under the final rules could lead to significant additional economic costs that are not captured by the compliance cost estimates above. We have attempted to assess the magnitude of these costs to the extent possible. We base our analysis on the four countries that, according to commentators, currently have some versions of such laws (although we do not know if such countries would, in fact, prohibit the required disclosure or whether there might be other countries).[626] We searched (through a text search in the EDGAR system) the Forms 10–K and 20–F of affected issuers for years 2009 and 2010 for any mention of Angola, Cameroon, China, or Qatar. An examination of many of the filings that mentioned one or more of these countries indicate that most filings did not provide detailed information on the extent of their operations in these countries.[627] Thus, we are unable to determine the total amount of capital that may be lost in these countries if the information required to be disclosed under the final rules is, in fact, prohibited by laws or regulations.

We can, however, assess if the costs of withdrawing from these four countries are in line with one commentator's estimate of tens of billions of dollars. We estimate the potential loss from terminating activities in a country with such laws by the present value of the cash flows that a firm would forgo. We assume that a firm would not suffer any substantial losses when redeploying or disposing of its assets in the host country under consideration. We then discuss how the presence of various opportunities for the use of those assets by the firm itself or another firm would affect the size of the firm's potential losses. We also discuss how these losses would be affected if a firm cannot redeploy the assets in question easily, or it has to sell them with a steep discount (a fire sale). In order to estimate the lost cash flows, we assume that the cash flows from the projects in one of these countries are a fraction of the firm's total cash flows, and this fraction is equal to the ratio of total project assets in the given country to the firm's total assets. Also, we assume that the estimated cash flows grow annually at the rate of inflation over the life of the project.

We were able to identify a total of 51 issuers that mentioned that they have operations in these countries (some operate in more than one country). The table below provides information from 19 of the 51 issuers with regard to projects disclosed in their Forms 10–K and 20–F.[628]

Issuer	Project assets ($ mil)	Project term (yrs)	Investments ($ mil)	Revenues ($ mil)	Expenses ($ mil)	Country
Issuer 1	7,320	25				Angola.
Issuer 2		20	18.8			Angola.
Issuer 3		21	1853			Angola.
Issuer 4	724	4		322.3		Angola.
Issuer 5	51.1			22		Cameroon.
Issuer 6		16				Cameroon.
Issuer 7			11.4			Angola.
Issuer 8				66.2	14	Angola.
Issuer 9	91.7			78.8		Qatar.

[624] We calculate this number by selecting all small issuers according to our classification scheme (market capitalization less than or equal to $75 million) and then averaging their total assets as of the end of fiscal year 2009.

[625] We calculate this number by selecting all large issuers according to our classification scheme (market capitalization $75 million or more) and then averaging their total assets as of the end of fiscal year 2009.

[626] See letters from API 1 and ExxonMobil 1 (mentioning Angola, Cameroon, China, and Qatar); *see also* letter from RDS 1 (mentioning Cameroon, China, and Qatar). Other commentators disputed the assertion that there are foreign laws that specifically prohibit disclosure of payment information. *See, e.g.*, letters from ERI 3, Global Witness 1, PWYP 1, Publish What You Pay (December 20, 2011) ("PWYP 3"), and Rep. Frank et al.

[627] We note that some issuers do not operate in those four countries, and thus, would not have any such information to disclose. Other issuers may have determined that they were not required to provide detailed information in their filings regarding their operations in those countries.

[628] As we noted, we identified 51 issuers that disclosed operations in at least one of the four countries, but only 19 of the issuers provided information with regard to projects in those countries that was specific enough to use in our analysis.

Issuer	Project assets ($ mil)	Project term (yrs)	Investments ($ mil)	Revenues ($ mil)	Expenses ($ mil)	Country
Issuer 10	364.7			158.1		Qatar.
Issuer 11	2.8			2.7		Qatar.
Issuer 12	86.1			27.1		Angola.
Issuer 13	722	25				Qatar.
Issuer 14			0.33			China.
Issuer 15		23				China.
Issuer 16	155		59	45		China.
Issuer 17	261.5					China.
Issuer 18				2.1	11.7	China.
Issuer 19	605.2			177.6		China.

From the issuers with information on projects in Angola, Cameroon, China, or Qatar, we select Issuer 1's and Issuer 4's Angola projects and Issuer 13's Qatar project because they reported data on both the firm assets involved in the projects in these countries and the terms of these projects. Other issuers reported some relevant information, but not enough, in our opinion, to meaningfully evaluate the cash flows of their projects. We supplemented the Angola data for the two issuers with firm financial information for the 2008 and 2009 fiscal years from Compustat. In addition, we obtained Issuer 1's and Issuer 13's weighted-average cost of capital (WACC) from Bloomberg, although data was not available on Issuer 4's WACC.[629] Instead, we assumed for these purposes it has a similar WACC as another issuer of a similar size for which WACC was available from Bloomberg. We assume that the purchasing power parity holds and thus use the U.S. inflation rate for 2009 as a constant growth rate for the projects' cash flows.[630]

In the table below we estimate the cash flows of Issuer 1's and Issuer 4's Angola projects and Issuer 13's Qatar project using a standard valuation methodology—the present value of discounted cash flows—and assuming a corporate tax rate of 30% for all three issuers. For Issuer 1, we estimate that a termination of its projects in Angola would result in lost cash flows of approximately $12 billion. For Issuer 4, the loss would be approximately $119 million. For Issuer 13, the loss would be approximately $392 million.

Financial information FY2009 ($ mil)	Issuer 1	Issuer 4	Issuer 13	Calculation
Earnings before interest and taxes (EBIT).	26,239	469	3,689	
Depreciation/Amortization	11,917	159	830	
Change in deferred taxes	−1,472	−59	0	
Capital expenditures	17,770	301	1,914	NetPP&E2009 − Net PP&E2008
Change in working capital	−19,992	−188	277	Working capital = Current assets − Current liabilities.
Tax rate (%)	30%	30%	30%	
Company free cash flow (FCF).	31,034	314	1,221	EBIT*(1 − tax rate) + Depreciation/Amortization + Change in Deferred taxes − Capital Expenditures − Change in Working Capital.
Firm total assets	233,323	6,143	19,393	
Angola/Qatar total assets	7,320	724	722	
Angola/Qatar FCF	974	37	45	Company FCF*(Angola or Qatar TA/Firm TA).
Term of Angola/Qatar project (years).	25	4	25	
Company cost of capital (WACC).	0.09	0.1098	0.1329	
U.S. 2009 inflation rate (i)	0.027	0.027	0.027	
Present value of Angola/Qatar FCFs.	11,966	119	392	Angola or Qatar FCF * [1/(WACC - i) − (1+ i) ^term of project/(WACC − i)*(WACC + 1) ^term of project].

Even though our analysis was limited to just three issuers, these estimates suggest commentators' concerns that the impact of such host country laws could add billions of dollars of costs to affected issuers, and hence have a significant impact on their profitability and competitive position, appear warranted. The assumption underlying these estimates is that each firm either sells its assets in that particular country at their accounting value or holds on to them but does not use them in other projects. The losses could be larger than the estimates in the table above if these firms are forced to sell their assets in the above-mentioned host countries at fire sale prices. In that case, the price discount will add to the loss of cash flows. While we do not have data on fire sale prices for the industries of the affected issuers, financial studies on other industries could provide some estimates. For example, a study on the airline industry[631] finds that planes sold by financially distressed airlines bring 10 to 20 percent lower prices than those sold by undistressed airlines. If we apply those percentages to the accounting value of the three issuers' assets in these host countries, this would add hundreds of millions of dollars to their potential losses. These costs also could be significantly higher than our estimates if we allow the cash

[629] In 2011, Issuer 4 was acquired by another issuer.

[630] Data on the U.S. inflation rate is obtained from the Bureau of Labor Statistics.

[631] *See* Todd Pulvino 1998. "Do Fire-Sales Exist? An Empirical Study of Commercial Aircraft Transactions." *Journal of Finance*, 53(3): 939–78.

flows of the project to grow annually at a rate higher than the rate of inflation.

Alternatively, a firm could redeploy these assets to other projects that would generate cash flows. If a firm could redeploy these assets relatively quickly and without a significant cost to projects that generate similar rates of returns as those in the above-mentioned countries, then the firm's loss from the presence of such host country laws would be minimal. The more difficult and costly it is for a firm to do so, and the more difficult it is to find other projects with similar rates of return, the larger the losses of the firm would be. Unfortunately, we do not have enough data to quantify more precisely the potential losses of firms under those various circumstances. Likewise, if the firm could sell those assets to a buyer (*e.g.*, a non-reporting issuer) that would use them for similar projects in the host country or elsewhere, then the buyer would likely pay the fair market value for those assets, resulting in minimal to no loss for the firm.

Overall, the results of our analysis concur with commentators that the presence of host country laws that prohibit the type of disclosure required under the final rules could be very costly. The size of the potential loss to issuers will depend on the presence of other similar opportunities, third parties willing to buy the assets at fair-market values in the above-mentioned host countries, and the ability of issuers to avoid fire sale of these assets.

As noted above, we considered alternatives to the approach we are adopting in the final rules, including providing certain exemptions from the disclosure requirements mandated by Section 13(q), but we believe that adopting any of the alternatives would be inconsistent with Section 13(q) and would undermine Congress' intent to promote international transparency efforts. To faithfully effectuate Congressional intent, we do not believe it would be appropriate to adopt provisions that would frustrate, or otherwise be inconsistent with, such intent. Consequently, we believe the competitive burdens arising from the need to make the required disclosures under the final rules are necessary by the terms of, and in furtherance of the purposes of, Section 13(q).

A number of factors may serve to mitigate the competitive burdens arising from the required disclosure. We note there were differences in opinion among commentators as to the applicability of host country laws.[632] Moreover, the widening global influence of the EITI and the recent trend of other jurisdictions to promote transparency, including listing requirements adopted by the Hong Kong Stock Exchange and proposed directives of the European Commission, may discourage governments in resource-rich countries from adopting new prohibitions on payment disclosure.[633] Reporting companies concerned that disclosure required by Section 13(q) may be prohibited in a given host country may also be able to seek authorization from the host country in order to disclose such information, reducing the cost to such reporting companies resulting from the failure of Section 13(q) to include an exemption for conflicts with host country laws.[634]

IV. Paperwork Reduction Act

A. Background

Certain provisions of the final rules contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[635] We published a notice requesting comment on the collection of information requirements in the Proposing Release for the rule amendments. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The title for the collection of information is:

- "Form SD" (a new collection of information).[636]

We are amending Form SD to contain disclosures required by Rule 13q-1, which will require resource extraction issuers to disclose information about payments made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer to foreign governments or the U.S. Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Form SD will be filed on EDGAR with the Commission.[637]

The new rules and amendment to the form implement Section 13(q) of the Exchange Act, which was added by Section 1504 of the Act. Section 13(q) requires the Commission to "issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including—(i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government."[638] Section 13(q) also mandates the submission of the payment information in an interactive data format, and provides the Commission with the discretion to determine the applicable interactive data standard.[639] We are adopting the requirement regarding the presentation of the mandated payment information substantially as proposed, except that a resource extraction issuer will be required to present the mandated payment information in only one exhibit to new Form SD instead of two exhibits, as proposed. We have decided to require only one exhibit formatted in XBRL because we believe that we can achieve the goal of the dual presentation with only one exhibit. The disclosure requirements apply equally to U.S. issuers and foreign issuers meeting the definition of a resource extraction issuer. As discussed in detail above, in adopting the final rules, we have made significant changes to the rules that were proposed.

Compliance with the rules by affected issuers is mandatory. Responses to the information collections will not be kept confidential and there is no mandatory retention period for the collection of information.

B. Summary of the Comment Letters

As proposed, the required disclosure would have been included in a resource extraction issuer's Form 10–K, Form 20–F, or Form 40–F, as appropriate. We estimated in the Proposing Release the number of issuers filing each of the forms that would likely be resource extraction issuers totaled 1,101

[632] See note 84 and accompanying text.

[633] *See* notes 15 and 48 and accompanying text.

[634] *See* note 584.

[635] 44 U.S.C. 3501 *et seq.*

[636] As previously noted, in another release we are issuing today, we are adopting rules to implement the requirements of Section 1502 of the Dodd-Frank Act and requiring issuers subject to those requirements to file the disclosure on Form SD. *See* note 30 and accompanying text (referencing the Conflict Minerals Adopting Release, Release 34–67716 (August 22, 2012).

[637] The information required by Rule 13q-1 and Form SD is similar to the information that would have been required under the proposal in Forms 10–K, 20–F, or 40–F and Item 105 of Regulation S–K. We do not believe that requiring the information to be filed in a Form SD, rather than furnishing it in an issuer's Exchange Act annual reports, will affect the hurden estimate.

[638] 15 U.S.C. 78m(q)(2)(A).

[639] 15 U.S.C. 78m(q)(2)(C) and (D).

issuers.[640] We estimated the total annual increase in the paperwork burden for all affected companies to comply with our proposed collection of information requirements to be approximately 52,932 hours of company personnel time and approximately $11,857,200 for the services of outside professionals. We also estimated in the Proposing Release that the annual incremental paperwork burden for each of Form 10–K, Form 20–F, and Form 40–F would be 75 burden hours per affected form.[641]

In the Proposing Release we requested comment on the PRA analysis. We received ten comment letters that addressed PRA-related costs specifically;[642] we also received a number of comment letters that discussed the costs and burdens to issuers generally that we considered in connection with our PRA analysis.[643] Section III.B.2 contains a detailed summary of these comments. As described above, some commentators disagreed with our industry-wide estimate of the total annual increase in the paperwork burden and argued that it underestimated the actual costs that would be associated with the rules.[644] Some commentators also stated that, depending upon the final rules adopted, the compliance burdens and costs caused by implementation and ongoing compliance with the rules would be significantly greater than those estimated by the Commission.[645]

We note that commentators did not object, or suggest alternatives, to our estimate of the number of issuers who would be subject to the proposed rules. As discussed below, we have made several changes to our estimates in response to comments on the estimates contained in the Proposing Release that are designed to better reflect the burdens associated with the new collection of information.

C. Revisions to PRA Reporting and Cost Burden Estimates

After considering the comments, and the changes we are making from the proposal, we have revised our PRA estimates for the final rules. As discussed above, we are adopting new Rule 13q–1 and an amendment to new Form SD to require resource extraction issuers to disclose the required payment information in a new form rather than including the disclosure requirements in existing Exchange Act annual reports. As described above, Rule 13q–1 requires resource extraction issuers to file the payment information required in Form SD. The collection of information requirements are reflected in the burden hours estimated for Form SD. Therefore, Rule 13q–1 does not impose any separate burden.

For purposes of the PRA, we continue to estimate that 1,101 issuers will be subject to Rule 13q–1. We have derived our burden estimates by estimating the average number of hours it would take an issuer to prepare and file the required disclosure. In deriving our estimates, we recognize that the burdens will likely vary among individual issuers based on a number of factors, including the size and complexity of their operations. We believe that some issuers will experience costs in excess of this average in the first year of compliance with the rules, and some issuers may experience less than these average costs. When determining these estimates, we have assumed that 75% of the burden of preparation is carried by the issuer internally and 25% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour.[646] The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours. As discussed above, we received estimates from some commentators expressed in burden hours and estimates from other commentators expressed in dollar costs. For purposes of this analysis and consistent with our approach with respect to the estimates provided in burden hours, we assume 25% of the dollar costs provided by commentators relate to costs for outside professionals.[647] We expect that the rules' effect will be greatest during the first year of their effectiveness and diminish in subsequent years. To account for this expected diminishing burden, we believe a three-year average of the expected burden during the first year with the expected ongoing burden during the next two years is a reasonable estimate. After considering the comments we received, we are revising our estimate of the PRA compliance burden hours and costs associated with the disclosure requirements.[648]

In arriving at our initial estimate in the Proposing Release we looked to the burden hours associated with the disclosure required by the oil and gas rules adopted in 2008, and estimated that the burden would be less based on our belief that the disclosure required by the proposed rules was less extensive than the oil and gas rules adopted in 2008. As discussed above, some commentators believed that our initial estimates did not adequately reflect the actual burden associated with complying with the proposed disclosure requirements.[649] Based on the comments we received, we have increased our estimate of the total annual compliance burden for all affected issuers to comply with the collection of information in our final rules to be approximately 332,123 hours of company personnel time and approximately $144,967,250 for the services of outside professionals, as discussed in detail below.

Some commentators estimated implementation costs of tens of millions

[640] For purposes of the PRA, we estimated that the number of resource extraction issuers that would annually file Form 10–K would be approximately 861, the number of such issuers that would annually file Form 20–F would be approximately 166, and the number of such issuers that would annually file Form 40–F would be approximately 74. We derived these estimates by determining the number of issuers that fall under SIC codes that pertain to oil, natural gas, and mining companies and, thus, are most likely to be resource extraction issuers. The estimate for Form 10–K was derived by subtracting from the total number of resource extraction issuers the number of issuers that file annual reports on Form 20–F and Form 40–F.

[641] In estimating 75 burden hours, we looked to the burden hours associated with the disclosure required by the oil and gas rules adopted in 2008, which estimated an increase of 100 hours for domestic issuers and 150 hours for foreign private issuers.

[642] *See* letters from API 1, API 2, Barrick Gold, ERI 2, ExxonMobil 1, ExxonMobil 3, NMA 2, Rio Tinto, RDS 1, and RDS 4.

[643] *See* letters from BP 1, Chamber Energy Institute, Chevron, Cleary, Hermes, and PWYP 1.

[644] *See* letters from API 1 and ExxonMobil 1.

[645] *See* letters from API 1, Barrick Gold, ExxonMobil 1, NMA 2, Rio Tinto, and RDS 1.

[646] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis we estimate that such costs would be an average of $400 per hour. This is the rate we typically estimate for outside legal services used in connection with public company reporting. We note that no commentators provided us with an alternative rate estimate for these purposes.

[647] The comment letters providing dollar estimates did not explain how they arrived at such estimates, or provide any calculations as to the cost per hour. As such, we have included 25% of the dollar cost estimate in our calculation of costs of outside professionals, but we were not provided with sufficient data to convert commentators' dollar cost estimates into burden hour estimates.

[648] Although the comments we received with respect to our PRA estimates related to the proposal to include the disclosure requirements in Forms 10–K, 20–F, and 40–F, we have considered these estimates in arriving at our estimate for Form SD because, although the disclosures will be provided pursuant to a new rule and in a new form, the disclosure requirements themselves are generally not impacted by moving the disclosure to a different form. In the Proposing Release we requested comment on whether the required disclosure should be provided in a new form. We believe that any additional burden created by the use of a new form, rather than existing annual reports, will be minimal. *See also* letters from API 1 and Cleary.

[649] *See* notes 526 and 527 and accompanying text.

of dollars for large filers, and millions of dollars for smaller filers.[650] These commentators did not describe how they defined "small" and "large" filers. One commentator provided an estimate of $50 million in implementation costs if the definition of "project" is narrow and the level of disaggregation is high across other reporting parameters, though it did not provide alternate estimates for different definitions of "project," leaving project undefined, or different levels of disaggregation.[651] We note that the commentator that provided this estimate is among the largest 20 oil and gas companies in the world,[652] and we believe that the estimate it provided may be representative of the costs to companies of similar large size, though it is likely not a representative estimate of the burden for resource extraction issuers that are smaller than this commentator. While we received estimates for smaller filers and an estimate for one of the largest filers, we did not receive data on companies of varying sizes in between the two extremes.

Similar to our economic analysis above, to account for the range of issuers who will be subject to the final rules, for purposes of this analysis, we have used the cost estimates provided by these issuers to calculate different cost estimates for issuers of different sizes based on either assets or market capitalization. We have estimated costs for small issuers (issuers with less than $75 million in market capitalization) and larger issuers (issuers with $75 million or more in market capitalization). We believe that initial implementation costs will be lowest for the smallest issuers and incrementally greater for larger issuers. Based on a review of market capitalization data of Exchange Act registrants filing under certain Standard Industry Classification codes, we estimate that there are approximately 699 small issuers and 402 large issuers.

We use Method 2 from our Economic Analysis above[653] for our estimate of total compliance burden. Barrick Gold's estimate[654] of 1,000 hours for compliance (500 hours for initial changes to internal books and records and 500 hours for initial compliance) is the starting point of the analysis.[655] Barrick Gold is a large accelerated filer, so we use 1,000 hours as the burden estimate for large issuers. In order to determine the number of hours for a small issuer, we scale Barrick Gold's estimate of the number of hours by the relative size of a small issuer. In the Economic Analysis above, the ratio of all small issuer total assets, $353 billion ($509,000,000 × 63% × 1,101), to all large issuer total assets, $1,835 billion ($4,504,000,000 × 37% × 1,101), is 19%. In order to be conservative, rather than using 19%, we estimate that the number of burden hours for small issuers will be 25% of the burden hours of large issuers, resulting in 250 hours.

We received comments and estimates on the PRA analysis both in hours necessary to comply with the rules and dollar costs of compliance, as discussed above. In the Economic Analysis above, we assume that the commentators' estimates represent total implementation costs, including both internal costs and outside professional costs. For purposes of this PRA analysis, we assume, as we have throughout the analysis, that 25% of this burden of preparation represents the cost of outside professionals.

We believe that the burden associated with this collection of information will be greatest during the implementation period to account for initial set up costs, but that ongoing compliance costs will be less than during the initial implementation period once companies have made any necessary modifications to their systems to capture and report the information required by the rules. Two commentators provided estimates of ongoing compliance costs: Rio Tinto provided an estimate of 5,000–10,000 burden hours for ongoing compliance,[656] while Barrick Gold provided an estimate of 500 burden hours for ongoing compliance. Based on market capitalization data, Rio Tinto is among the top five percent of resource extraction issuers that are Exchange Act reporting companies. We believe that, because of the size of this commentator, the estimate it provided may be representative of the burden for resource extraction issuers of a similar size, but may not be a representative estimate for resource extraction issuers that are smaller than this commentator. We believe that Barrick Gold is more similar to the average large issuer than Rio Tinto, and as such, we believe that Barrick Gold's estimate is a conservative estimate of the ongoing compliance burden hours because a comparison of the average total assets of a large issuer to Barrick Gold's total assets is 18% ($4,504,000,000/$25,075,000,000).[657] As discussed above, commentators' estimates on the burdens associated with initial implementation and ongoing compliance varied widely, with commentators noting that the estimates varied based on the size of issuer.[658] We note that some estimates may reflect the burden to a particular commentator, and, as such, may not be a representative estimate of the burden for resource extraction issuers that are smaller or larger than the particular commentator.[659] Accordingly, we have revised our estimate using an average of the figures provided to produce a reasonable estimate of the potential burden associated with the rules, recognizing they would apply to resource extraction issuers of different sizes. We are using 500 burden hours (Barrick Gold's estimate) for our estimate of ongoing compliance costs for large issuers and 125 (25% × 500) for small issuers. Thus, we estimate that the incremental collection of information burden associated with the final rules and form amendment will be 667 burden hours per large respondent [(1,000 + 500 + 500)/3 years] and 250 per small respondent [(500 + 125 +125)/3 years]. We estimate the final rules and form amendment will result in an internal burden to small resource extraction issuers of 131,063 hours (699 forms × 250 hours/form × .75) and to large resource extraction issuers of

[650] *See* letters from API 1 and ExxonMobil 1.

[651] *See* letter from ExxonMobil 1. Although the rules we are adopting differ from the assumptions made by the commentator, we do not believe we have a basis for deriving a different estimate.

[652] *See* letter from API (October 12, 2010) (pre-proposal letter) (ranking the 75 largest oil and gas companies by reserves and production).

[653] Method 2 estimates compliance costs separately for small and large issuers. *See* Section III.D. above. Because 63% of the issuers estimated to be subject to the final rules are small issuers, we believe that, for PRA purposes, Method 2 provides for a more accurate assessment of Form SD's compliance costs than Method 1, which is based on deriving an average of costs.

[654] We use Barrick Gold's estimate because it is the only commentator that provided a number of hours and dollar value estimates for initial and ongoing compliance costs. Although in the Economic Analysis section we used ExxonMobil's dollar value estimate to calculate an upper bound of compliance costs, we are unable to calculate the number of burden hours for purposes of the PRA analysis using ExxonMobil's inputs.

[655] As noted above, the costs for PRA purposes are only a portion of the costs associated with complying with the final rules.

[656] *See* letter from Rio Tinto. This commentator estimated 100–200 hours of work at the head office, an additional 100–200 hours of work providing support to its business units, and a total of 4,800–9,600 hours by its business units. We arrived at the estimated range of 5,000–10,000 hours by adding the estimates provided by this commentator (100 + 100 + 4,800 = 5,000, and 200 + 200 + 9,600 = 10,000).

[657] The average large issuer's total assets compared to Rio Tinto's total assets ($97 billion) is 4.5%. *See* note 625 for an explanation of the average large issuer's total assets.

[658] *See* letter from API 1 (estimating implementation costs in the tens of millions of dollars for large filers and millions of dollars for many smaller filers). This commentator did not explain how it defined small and large filers.

[659] We note, for example, one commentator's letter indicating that it had approximately 120 operating entities. *See* letter from Rio Tinto.

201,101 hours (402 forms × 667 hours/form × .75) for a total incremental company burden of 332,164 hours. Outside professional costs will be $17,475,000 (699 forms × 250 hours/form × .25 × $400) for small resource extraction issuers and $26,813,400 (402 forms × 667 hours/form × .25 × $400). As discussed above, one commentator, Barrick Gold, indicated that its initial compliance costs also would include $100,000 for IT consulting, training, and travel costs. To account for these costs, we have used Barrick Gold's estimate and applied the same 25% factor to derive estimated IT costs of $100,000 for large issuers and $25,000 for small issuers. Thus, we estimate total IT compliance costs for small issuers to be $17,475,000 (699 issuers × $25,000) and for large issuers to be $40,200,000 (402 issuers × $100,000). We have added the estimated IT compliance costs to the cost estimates for other professional costs discussed above to derive total professional costs of $34,950,000 for small issuers and $67,013,400 for large issuers. The estimated overall professional cost for PRA purposes is $101,963,400.

D. Revised PRA Estimate

The table below illustrates the annual compliance burden of the Form SD collection of information.

Issuer size	Annual responses	Incremental burden hours/form	Increase in burden hours	Increase in professional costs	Increase in IT costs/issuer	Total increase professional and IT costs
	(A)	(B)	(C) = (A*B)*0.75	(D)	(E)	(F) = (D) + (E)
Small	699	250	131,063	$17,475,000	$17,475,000	$34,950,000
Large	402	667	201,101	26,813,400	40,200,000	67,013,400
Total	1,101		332,164			101,963,400

Our PRA estimate is within the range of our estimates in the Economic Analysis section above.[660]

V. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Act Analysis ("FRFA") has been prepared in accordance with the Regulatory Flexibility Act.[661] This FRFA relates to the final rules we are adopting to implement Section 13(q) of the Exchange Act, which concerns certain disclosure obligations of resource extraction issuers. As defined by Section 13(q), a resource extraction issuer is an issuer that is required to file an annual report with the Commission, and engages in the commercial development of oil, natural gas, or minerals.

A. Reasons for, and Objectives of, the Final Rules

The final rules are designed to implement the requirements of Section 13(q) of the Exchange Act, which was added by Section 1504 of the Dodd-Frank Act. Specifically, the new rule and form amendment will require a resource extraction issuer to disclose in an annual report certain information relating to payments made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer to a foreign government or the United States Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. A resource extraction issuer will have to disclose the required payment information annually in new Form SD and include an exhibit with the required payment information formatted in XBRL.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on any aspect of the Initial Regulatory Flexibility Act Analysis ("IRFA"), including the number of small entities that would be affected by the proposed rules, the nature of the impact, how to quantify the number of small entities that would be affected, and how to quantify the impact of the proposed rules. We did not receive comments specifically addressing the IRFA; however, several commentators addressed aspects of the proposed rules that could potentially affect small entities. Some commentators supported an exemption for a "small entity" or "small business" having $5 million or less in assets on the last day of its most recently completed fiscal year.[662] Other commentators opposed an exemption for small entities and other smaller companies. Those commentators noted that, while smaller companies have more limited operations and projects, and therefore fewer payments to disclose as compared to larger companies, they generally take on greater risks due to the nature of their operations.[663]

C. Small Entities Subject to the Final Rules

The final rules will affect small entities that are required to file an annual report with the Commission under Section 13(a) or Section 15(d) of the Exchange Act, and are engaged in the commercial development of oil, natural gas, or minerals. Exchange Act Rule 0–10(a)[664] defines an issuer to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year. We believe that the final rules will affect some small entities that meet the definition of resource extraction issuer under Section 13(q). Based on a review of total assets for Exchange Act registrants filing under certain Standard Industry Classification codes, we estimate that approximately 196 oil, natural gas, and mining companies are resource extraction issuers and that may be considered small entities.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The final rules will add to the annual disclosure requirements of companies meeting the definition of resource extraction issuer, including small entities, by requiring them to file the payment disclosure mandated by Section 13(q) and the rules issued thereunder in new Form SD. The disclosure must include:

[660] Despite using Barrick Gold's estimate, our revised estimate of PRA professional costs of $101,963,400 is higher than the lower bound of compliance costs ($43,757,043) estimated under Method 2 in the Economic Analysis section, which is also based on Barrick Gold's estimate. This is mainly because we estimate the PRA costs as fixed costs for smaller and larger issuers, whereas in the Economic Analysis section, because of the nature of the data provided by commentators, we estimate the total compliance costs as variable costs.

[661] 5 U.S.C. 601.

[662] *See* letters from API 1, Chevron, ExxonMobil 1, and RDS 1.

[663] *See* letters from Calvert, Global Witness 1, Oxfam 1, PWYP 1, Sen. Cardin *et al.* 1, and Soros 1.

[664] 17 CFR 240.0–10(a).

- the type and total amount of payments made for each project of the issuer relating to the commercial development of oil, natural gas, or minerals; and
- The type and total amount of those payments made to each government.

A resource extraction issuer must provide the required disclosure in Form SD and in an exhibit formatted in XBRL. Consistent with the statute, the rules require an issuer to submit the payment information using electronic tags that identify, for any payments made by a resource extraction issuer to a foreign government or the U.S. Federal Government:

- The total amounts of the payments, by category;
- The currency used to make the payments;
- The financial period in which the payments were made;
- The business segment of the resource extraction issuer that made the payments;
- The government that received the payments, and the country in which the government is located; and
- The project of the resource extraction issuer to which the payments relate.

In addition, a resource extraction issuer will be required to provide the type and total amount of payments made for each project and the type and total amount of payments made to each government in XBRL format. The disclosure requirements will apply equally to U.S. and foreign resource extraction issuers.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with adopting the final rules, we considered, as alternatives, establishing different compliance or reporting requirements that take into account the resources available to smaller entities, exempting smaller entities from coverage of the disclosure requirements, and clarifying, consolidating, or simplifying disclosure for small entities.

The final rules are designed to implement the payment disclosure requirements of Section 13(q), which applies to resource extraction issuers regardless of size. While a few commentators supported an exemption from the disclosure requirements for small entities,[665] numerous other commentators opposed exempting small entities because that would be inconsistent with the statute and would contravene Congress' intent of creating a level playing field for all affected issuers.[666] We do not believe that exempting resource extraction issuers that are small entities, many of which are mining companies engaged in exploration activities that require payments to governments,[667] or adopting different disclosure requirements or additional delayed compliance for small entities, would be consistent with the statutory purpose of Section 13(q). For example, we do not believe that adopting rules permitting small entities to disclose payments at the country level would be consistent with the statutory purpose of Section 13(q). The statute is designed to enhance the transparency of payments by resource extraction issuers to governments. Adoption of different disclosure requirements for small entities would impede the transparency and comparability of the disclosure mandated by Section 13(q). In addition, it is not clear that adopting different standards or a delayed compliance date would provide small entities with a significant benefit. For example, small entities may have a limited number of projects in a limited number of countries and in some cases small entities may have only one project in a country.

We also have considered the alternative of using performance standards rather than design standards. We generally have used design rather than performance standards in connection with the final rules because we believe the statutory language, which requires the electronic tagging of specific items, contemplates the adoption of specific disclosure requirements. We further believe the final rules will be more useful to users of the information if there are specific disclosure requirements. Such requirements will help to promote transparent and comparable disclosure among all resource extraction issuers, which should help further the statutory goal of promoting international transparency of payments to governments. At the same time, we have determined to leave the term "project" undefined to give issuers flexibility in applying the term to different business contexts depending on factors such as the particular industry or business in which the issuer operates, or the issuer's size.

[665] *See* note 42 and accompanying text.

[666] *See* note 34 and accompanying text.

[667] *See* letters from Calvert and PWYP 1.

VI. Statutory Authority and Text of Final Rule and Form Amendments

We are adopting the rule and form amendments contained in this document under the authority set forth in Sections 3(b), 12, 13, 15, 23(a), and 36 the Exchange Act.

List of Subjects in 17 CFR Parts 240 and 249b

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, we are amending Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 is amended by adding an authority for § 240.13q–1 in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78n–1, 78o, 78o–4, 78p, 78q, 78s, 78u–5, 78w, 78x, 78dd(b), 78dd(c), 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.* and 8302; 18 U.S.C. 1350; 12 U.S.C. 5221(e)(3); and Pub. L. 111–203, Sec. 712, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

Section 240.13q–1 is also issued under sec. 1504, Pub. L. 111–203, 124 Stat. 2220.

* * * * *

■ 2. Add § 240.13q–1 to read as follows:

§ 240.13q–1 Disclosure of payments made by resource extraction issuers.

(a) A resource extraction issuer, as defined by paragraph (b) of this section, shall file a report on Form SD (17 CFR 249b.400) within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form.

(b) *Definitions.* For the purpose of this section:

(1) *Resource extraction issuer* means an issuer that:

(i) Is required to file an annual report with the Commission; and

(ii) Engages in the commercial development of oil, natural gas, or minerals.

(2) *Commercial development of oil, natural gas, or minerals* includes exploration, extraction, processing, and export of oil, natural gas, or minerals, or the acquisition of a license for any such activity.

PART 249b—FURTHER FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The authority citation for part 249b is amended by adding an authority for § 249b.400 to read as follows:

Authority: 15 U.S.C. 78a *et seq.*, unless otherwise noted.

* * * * *

Section 249b.400 is also issued under secs. 1502 and 1504, Pub. L. No. 111–203, 124 Stat. 2213 and 2220.

* * * * *

■ 4. Amend § 249b.400 by:
■ a. Designating the existing text as paragraph (a); and
■ b. Adding paragraph (b).

The addition reads as follows:

§ 249b.400 Form SD, Specialized Disclosure Report

(a) * * *

(b) This Form shall be filed pursuant to Rule 13q–1 (§ 240.13q–1) of this chapter by resource extraction issuers that are required to disclose the information required by Section 13(q) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(q)) and Rule 13q–1 of this chapter.

■ 5. Amend Form SD (as referenced in § 249b.400) by:
■ a. Adding a check box for Rule 13q–1;
■ c. Revising instruction A. under "General Instructions";
■ d. Redesignating instruction B.2. as B.3 and adding new instructions B.2. and B.4. under the "General Instructions"; and
■ e. Redesignating Section 2 as Section 3, adding new Section 2, and revising newly redesignated Section 3 under the "Information to be Included in the Report".

The addition and revision read as follows:

Note: The text of Form SD does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM SD

Specialized Disclosure Report

(Exact name of the registrant as specified in its charter)

(State or other jurisdiction of incorporation)

(Commission file number)

(Address of principle executive offices)

(Zip code)

(Name and telephone number, including area code, of the person to contact in connection with this report.)

Check the appropriate box to indicate the rule pursuant to which this form is being filed:

____ Rule 13p–1 under the Securities Exchange Act (17 CFR 240.13p–1) for the reporting period from January 1 to December 31, _____.

____ Rule 13q–1 under the Securities Exchange Act (17 CFR 240.13q–1) for the fiscal year ended _____.

GENERAL INSTRUCTIONS

A. Rule as to Use of Form SD.

This form shall be used for a report pursuant to Rule 13p–1 (17 CFR 240.13p–1) and Rule 13q–1 (17 CFR 240.13q–1) under the Exchange Act.

B. Information to be Reported and Time for Filing of Reports.

1. * * *

2. *Form filed under Rule 13q–1.* File the information required by Section 2 of this Form on EDGAR no later than 150 days after the end of the issuer's most recent fiscal year.

3. If the deadline for filing this form occurs on a Saturday, Sunday or holiday on which the Commission is not open for business, then the deadline shall be the next business day.

4. The information and documents filed in this report shall not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, unless the registrant specifically incorporates it by reference into a filing under the Securities Act or the Exchange Act.

* * * * *

INFORMATION TO BE INCLUDED IN THE REPORT

* * * * *

Section 2—Resource Extraction Issuer Disclosure

Item 2.01 Disclosure requirements regarding payments to governments

(a) A resource extraction issuer shall file an annual report on Form SD with the Commission, and include as an exhibit to this Form SD, information relating to any payment made during the fiscal year covered by the annual report by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer, to a foreign government or the United States Federal Government, for the purpose of the commercial development of oil, natural gas, or minerals. Specifically, a resource extraction issuer must file the following information in an exhibit to this Form SD electronically formatted using the eXtensible Business Reporting Language (XBRL) interactive data standard:

(1) The type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;

(2) The type and total amount of such payments made to each government;

(3) The total amounts of the payments, by category listed in (c)(6)(iii);

(4) The currency used to make the payments;

(5) The financial period in which the payments were made;

(6) The business segment of the resource extraction issuer that made the payments;

(7) The government that received the payments, and the country in which the government is located; and

(8) The project of the resource extraction issuer to which the payments relate.

(b) Provide a statement in the body of the Form SD that the specified payment disclosure required by this form is included in an exhibit to this form.

(c) For purposes of this item:

(1) The term *commercial development of oil, natural gas, or minerals* includes exploration, extraction, processing, and export of oil, natural gas, or minerals, or the acquisition of a license for any such activity.

(2) The term *foreign government* means a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government. As used in Item 2.01, foreign government includes a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.

(3) The term *financial period* means the fiscal year in which the payment was made.

(4) The term *business segment* means a business segment consistent with the reportable segments used by the resource extraction issuer for purposes of financial reporting.

(5) The terms "subsidiary" and "control" are defined as provided under § 240.12b–2 of this chapter.

(6) The term *payment* means an amount paid that:

(i) Is made to further the commercial development of oil, natural gas, or minerals;

(ii) Is not de minimis; and
(iii) Includes:
(A) Taxes;
(B) Royalties;
(C) Fees;
(D) Production entitlements;
(E) Bonuses;
(F) Dividends; and
(G) Payments for infrastructure improvements.

(7) The term *not de minimis* means any payment, whether made as a single payment or a series of related payments, that equals or exceeds $100,000. In the case of any arrangement providing for periodic payments or installments, a resource extraction issuer must consider the aggregate amount of the related periodic payments or installments of the related payments in determining whether the payment threshold has been met for that series of payments, and accordingly, whether disclosure is required.

Instructions

1. If a resource extraction issuer makes an in-kind payment of the types of payments required to be disclosed, the issuer must disclose the payment. When reporting an in-kind payment, an issuer must determine the monetary value of the in-kind payment and tag the information as "in-kind" for purposes of the currency. For purposes of the disclosure, an issuer may report the payment at cost, or if cost is not determinable, fair market value and should provide a brief description of how the monetary value was calculated.

2. If a government levies a payment, such as a tax or dividend, at the entity level rather than on a particular project, a resource extraction issuer may disclose that payment at the entity level. To the extent that payments, such as corporate income taxes and dividends, are made for obligations levied at the entity level, an issuer may omit certain tags that may be inapplicable (*e.g.*, project tag, business segment tag) for those payment types as long as it provides all other electronic tags, including the tag identifying the recipient government.

3. An issuer must report the amount of payments made for each payment type, and the total amount of payments made for each project and to each government, during the reporting period in either U.S. dollars or the issuer's reporting currency. If an issuer has made payments in currencies other than U.S. dollars or its reporting currency, it may choose to calculate the currency conversion between the currency in which the payment was made and U.S. dollars or the issuer's reporting currency, as applicable, in one of three ways: (a) by translating the expenses at the exchange rate existing at the time the payment is made; (b) using a weighted average of the exchange rates during the period; or (c) based on the exchange rate as of the issuer's fiscal year end. A resource extraction issuer must disclose the method used to calculate the currency conversion.

4. A company owned by a foreign government is a company that is at least majority-owned by a foreign government.

5. A resource extraction issuer must disclose payments made for taxes on corporate profits, corporate income, and production. Disclosure of payments made for taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes, is not required.

6. As used in Item 2.01(c)(6), fees include license fees, rental fees, entry fees, and other considerations for licenses or concessions. Bonuses include signature, discovery, and production bonuses.

7. A resource extraction issuer generally need not disclose dividends paid to a government as a common or ordinary shareholder of the issuer as long as the dividend is paid to the government under the same terms as other shareholders; however, the issuer will be required to disclose any dividends paid in lieu of production entitlements or royalties.

8. If an issuer meeting the definition of "resource extraction issuer" in Rule 13q–1(b)(1) is a wholly-owned subsidiary of a resource extraction issuer that has filed a Form SD disclosing the information required by Item 2.01 for the wholly-owned subsidiary, then such subsidiary shall not be required to separately file the disclosure required by Item 2.01. In such circumstances, the wholly-owned subsidiary would be required to file a notice on Form SD providing an explanatory note that the required disclosure was filed on Form SD by the parent and the date the parent filed the disclosure. The reporting parent company must note that it is filing the required disclosure for a wholly-owned subsidiary and must identify the subsidiary on Form SD. For purposes of this instruction, all of the subsidiary's equity securities must be owned, either directly or indirectly, by a single person that is a reporting company under the Act that meets the definition of "resource extraction issuer."

9. Disclosure is required under this paragraph in circumstances in which an activity related to the commercial development of oil, natural gas, or minerals, or a payment or series of payments made by a resource extraction issuer to a foreign government or the U.S. Federal Government for the purpose of commercial development of oil, natural gas, or minerals are not, in form or characterization, one of the categories of activities or payments specified in this section but are part of a plan or scheme to evade the disclosure required under Section 13(q).

Section 3—Exhibits

Item 3.01 Exhibits

List below the following exhibits filed as part of this report.

Exhibit 1.01—Conflict Minerals Report as required by Items 1.01 and 1.02 of this Form.

Exhibit 2.01—Resource Extraction Issuer Disclosure Report as required by Item 2.01 of this Form.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the duly authorized undersigned.

(Registrant)

By (Signature and Title)*

(Date)

*Print name and title of the registrant's signing executive officer under his or her signature.

* * * * *

By the Commission.
Dated: August 22, 2012.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–21155 Filed 9–11–12; 8:45 am]
BILLING CODE P

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Part III

Environmental Protection Agency

40 CFR Parts 9 and 60
Standards of Performance for Petroleum Refineries; Standards of Performance for Petroleum Refineries for Which Construction, Reconstruction, or Modification Commenced After May 14, 2007; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 60

[EPA–HQ–OAR–2007–0011; FRL–9672–3]

RIN 2060–AN72

Standards of Performance for Petroleum Refineries; Standards of Performance for Petroleum Refineries for Which Construction, Reconstruction, or Modification Commenced After May 14, 2007

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; lift stay of effective date.

SUMMARY: On June 24, 2008, the EPA promulgated amendments to the Standards of Performance for Petroleum Refineries and new standards of performance for petroleum refinery process units constructed, reconstructed or modified after May 14, 2007. The EPA subsequently received three petitions for reconsideration of these final rules. On September 26, 2008, the EPA granted reconsideration and issued a stay for the issues raised in the petitions regarding process heaters and flares. On December 22, 2008, the EPA addressed those specific issues by proposing amendments to certain provisions for process heaters and flares and extending the stay of these provisions until further notice. The EPA also proposed technical corrections to the rules for issues that were raised in the petitions for reconsideration. In this action, the EPA is finalizing those amendments and technical corrections and is lifting the stay of all the provisions granted on September 26, 2008 and extended until further notice on December 22, 2008.

DATES: The stay of the definition of "flare" in 40 CFR 60.101a, paragraph (g) of 40 CFR 60.102a, and paragraphs (d) and (e) of 40 CFR 60.107a is lifted and this final rule is effective on November 13, 2012. The incorporation by reference of certain publications listed in the final rule is approved by the Director of the Federal Register as of November 13, 2012.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2007–0011. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the EPA Docket Center, Standards of Performance for Petroleum Refineries Docket, EPA West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Ms. Brenda Shine, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Refining and Chemicals Group (E143–01), Environmental Protection Agency, Research Triangle Park, NC 27711, telephone number: (919) 541–3608; fax number: (919) 541–0246; email address: *shine.brenda@epa.gov*.

SUPPLEMENTARY INFORMATION: The information in this preamble is organized as follows:

I. General Information

A. Does this action apply to me?

Categories and entities potentially regulated by these final rules include:

Category	NAICS Code [1]	Examples of regulated entities
Industry	32411	Petroleum refiners.
Federal government		Not affected.
State/local/tribal government		Not affected.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your facility would be regulated by this action, you should examine the applicability criteria in 40 CFR 60.100 and 40 CFR 60.100a. If you have any questions regarding the applicability of this action to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Where can I get a copy of this document?

In addition to being available in the docket, an electronic copy of this final action is available on the World Wide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of this final action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control.

The EPA has created a redline document comparing the existing regulatory text of 40 CFR part 60, subpart Ja and the final amendments to aid the public's ability to understand the changes to the regulatory text. This document has been placed in the docket for this rulemaking (Docket ID No. EPA–HQ–OAR–2007–0011).

C. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of these final rules is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by November 13, 2012. Under section 307(b)(2) of the CAA, the requirements established by these final rules may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce these requirements.

Section 307(d)(7)(B) of the CAA further provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review." This section also provides a mechanism for us to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave. NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

II. Background Information

A. Executive Summary

1. Purpose of the Regulatory Action

This action finalizes amendments that were proposed on December 22, 2008, to address reconsideration issues related to the promulgation of new source performance standards (NSPS) for flares and process heaters on June 24, 2008. This action also lifts the stay that was granted on September 26, 2008 (73 FR 55751) and extended until further notice on December 22, 2008 (73 FR 78552) on the provisions at issue.

2. Summary of Major Provisions

Table 1 presents a summary of major changes to the rule since it was first promulgated on June 24, 2008. The following discussion is a summary of major provisions of this rule.

TABLE 1—SUMMARY OF MAJOR CHANGES SINCE JUNE 24, 2008, PROMULGATION

Affected source	Aspect	NSPS Ja (June 24, 2008)	NSPS Ja final
All Process Heater NO_X limits	Averaging time	24-hour rolling average	30-day rolling average.
Natural Draft Process Heaters	NO_X Emission Limits	40 ppmv	40 ppmv or 0.04 lb/MM BTU.
Forced Draft Process Heaters	NO_X Emission Limits	40 ppmv	60 ppmv or 0.06 lb/MM BTU.
Forced Draft Process Heaters with Co-fired (oil and gas) Burners.	NO_X Emission Limits	40 ppmv	150 ppmv or Weighted average based on oil at 0.40 lb/MM BTU and gas at 0.11 lb/MM BTU.
Natural Draft Process Heaters with Co-fired (oil and gas) Burners.	NO_X Emission Limits	40 ppmv	150 ppmv or weighted average based on oil at 0.35 lb/MM BTU and gas at 0.06 lb/MM BTU.
Process Heaters	Alternate Emission Standards	None	Case by case approval for some circumstances.
Flares	Applicability	New or reconstructed flare systems or existing flare systems that are physically altered to increase flow or to add new connections.	Similar, except specific list of connections that do not trigger applicability.
Fuel gas combustion devices	H_2S concentration limit	162 ppmv H_2S (3-hour average); 60 ppmv H_2S (annual rolling average).	162 ppmv H_2S (3-hour average); No 60 ppmv H_2S long term concentration limit for flares.
Flares	Compliance date for modified flares.	Comply with H_2S limit at start-up, and all other requirements within 1 year.	Comply with H_2S limit at start-up (except for modified flares not previously subject to the H_2S limit in 40 CFR part 60, subpart J or those with monitoring alternatives, or those complying with subpart J as specified in a consent decree, which comply no later than 3 years) and all other requirements within 3 years.
Flares	Flow limits	Flare system-wide flow limit of 250,000 scfd.	No limits.

TABLE 1—SUMMARY OF MAJOR CHANGES SINCE JUNE 24, 2008, PROMULGATION—Continued

Affected source	Aspect	NSPS Ja (June 24, 2008)	NSPS Ja final
Flares	Root Cause Analysis and Corrective Action (RCA/CA).	RCA/CA required on upsets or malfunctions in excess of 500,000 scfd or 500 lbs/day SO_2 from SSM.	RCA/CA required for 500,000 scfd above base load and 500 lbs SO_2 in any 24-hour period.
Flares	Flow monitoring	Continuous	Continuous except for intermittent/emergency only flares with water seal monitoring and limited releases.
Flares	Sulfur Monitoring	Continuous Total Reduced Sulfur (TRS).	Continuous TRS, using reference method 15A (Total Sulfur).

Affected process heaters are those that were modified, reconstructed or constructed after May 14, 2007. For these affected sources, these final amendments include concentration-based nitrogen oxide (NO_X) emissions limits and alternative heating value-based NO_X emissions limits, both determined daily on a 30-day rolling average basis. These final amendments establish limits of 40 parts per million by volume (ppmv) NO_X (or 0.04 pounds per million British thermal units (lb/MMBtu) and 60 ppmv NO_X (or 0.06 lb/MMBtu) for natural draft and forced draft process heaters, respectively. Co-fired process heaters, designed to operate on gaseous and liquid fuel (*e.g.*, oil), must meet either 150 ppmv NO_X or alternative heating value-based limits, weighted based on oil and gas use. The NSPS also contains an alternative compliance option that allows owners and operators to obtain EPA approval for a site-specific NO_X limit for process heaters that may have difficulty meeting the standards under certain situations. These final amendments also include monitoring, recordkeeping and reporting requirements necessary to demonstrate compliance with the NO_X emission standards.

For flares, these final amendments define a flare as a separate affected facility rather than a type of fuel gas combustion device. As such, these final amendments remove requirements for flares to comply with the performance standards for sulfur dioxide (SO_2) (expressed as a 162 ppmv short-term hydrogen sulfide (H_2S) concentration limit) and, instead, establish a separate suite of standards for flares. We are not finalizing the requirement in the December 22, 2008, proposed amendments for flares to meet the long-term 60 ppmv H_2S fuel gas concentration limit. As explained in section IV of this preamble, we determined that requiring refineries to ensure the fuel gas they send to their flares meets a long-term H_2S concentration of 60 ppmv is not appropriate for flares.

Affected flares are those that were modified, reconstructed or constructed after June 24, 2008. In general, a flare is modified if a connection is made into the flare header that can increase emissions from the flare. The NSPS specifically identifies certain connections to a flare that do not constitute a modification of the flare because they do not result in emissions increases.

The final amendments for flares include a suite of standards that apply at all times. This suite of standards requires refineries to: (1) Develop and implement a flare management plan; (2) conduct root cause analyses and take corrective action when waste gas sent to the flare exceeds a flow rate of 500,000 standard cubic feet per day (scfd) above the baseline flow or contains sulfur that, upon combustion, will emit more than 500 pounds (lb) of SO_2 in a 24-hour period; and (3) optimize management of the fuel gas by limiting the short-term concentration of H_2S to 162 ppmv during normal operating conditions.

The final amendments require that flares be equipped with flow and sulfur monitors except in cases where flares are used infrequently or are configured such that they cannot receive high sulfur gas. For flares that are configured such that they only receive inherently low sulfur gas streams, continuous sulfur monitors are not necessary because a root cause analysis will be triggered by an exceedance of the flow rate threshold long before they exceed the 500 lb SO_2 trigger in a 24-hour period.

For infrequently used flares, the NSPS allows for less burdensome monitoring, consisting of monitoring the differential pressure between the flare header and the flare water seal to determine if a gas release to the flare has occurred. Any instance where the pressure upstream of the water seal (expressed in inches of water) exceeds the water seal height triggers a requirement to perform a root cause analysis and corrective action analysis, unless the discharge is related to flare gas recovery system compressor cycling or a planned startup or shutdown (of a refinery process unit or ancillary equipment connected to the flare) following the procedures in the flare management plan. The NSPS also contains an alternative compliance option for refinery flares located in the South Coast Air Quality Management District (SCAQMD) or the Bay Area Air Quality Management District (BAAQMD). An affected flare subject to 40 CFR part 60, subpart Ja may elect to comply with SCAQMD Rule 1118 or both BAAQMD Regulation 12, Rule 11 and BAAQMD Regulation 12, Rule 12 as an alternative to complying with the requirements of subpart Ja.

3. Costs and Benefits

The provisions for flares and other fuel gas combustion devices (*i.e.*, process heaters and boilers) from the final June 2008 standards were stayed. The analysis for this final rule includes the same unit costs for the flare provisions as the final June 2008 rule but reflects recalculated total costs using data collected in the March 2011 information collection request (ICR) to update the number of flares. For the June 2008 standards, we estimated that 40 flares would be affected. We now anticipate that there will be 400 affected flares *that will be subject to this final rule*. Table 2 includes the recalculated cost estimates based on the updated number of flares since 2008, broken out by specific flare requirements. For the other fuel gas combustion devices, the total annualized costs for those provisions were estimated at $24 million (2006 dollars) in the June 2008 rule and remain the same. As discussed below, because there are no additional incremental costs associated with the other fuel gas combustion device provisions, we consider those annual costs accounted for in the final June 2008 standards. We are presenting these

costs and benefits here again, even though we estimate no changes to them, since these provisions will become effective upon this final action to lift the stay on certain provisions in the June 2008 rule. For the June 2008 rule, we estimated the benefits to be $220 million to $1.9 billion and $200 to $1.7 billion at a 3-percent discount rate and 7-percent discount rate, respectively.[1]

Cost impacts for flares are presented in Table 2. The estimated total capital cost of complying with the final amendments to 40 CFR part 60, subpart Ja for flares is $460 million dollars (2006 dollars). The estimated annual cost, including annualized capital costs, is a cost savings of about $79 million (2006 dollars) due to the replacement of some natural gas purchases with recovered flare gas and the retention of intermediate and product streams due to a reduction in the number of malfunctions associated with refinery process units and ancillary equipment connected to the flare. Note that not all refiners will realize a cost savings since we only estimate that refineries with high flare flows will install vapor recovery systems. Although the rule does not specifically require installation of flare gas recovery systems, we project that owners and operators of flares receiving high waste gas flows will conclude, upon installation of monitors, implementation of their flare management plans, and implementation of root causes analyses, that installing flare gas recovery would result in fuel savings by using the recovered flare gas where purchased natural gas is now being used to fire equipment such as boilers and process heaters. The flare management plan requires refiners to conduct a thorough review of the flare system so that flare gas recovery systems are installed and used where these systems are warranted. As part of the development of the flare management plan, refinery owners and operators must provide rationale and supporting evidence regarding the flare waste gas reduction options considered. In addition, consistent with Executive Order 13563 (Improving Regulation and Regulatory Review, issued on January 18, 2011), for facilities implementing flare gas recovery, we are finalizing provisions that would allow the owner or operator to reduce monitoring costs and the number of root cause analyses, corrective actions, and corresponding recordkeeping and reporting they would need to perform. The costs calculated for this rule, however, do not account for potential savings due to these provisions (reduced monitoring, root cause analysis, etc.). We estimate that the final requirements for flares will reduce emissions of SO_2 by 3,200 tons per year (tons/yr), NO_X by 1,100 tons/yr and volatile organic compounds (VOC) by 3,400 tons/yr from the baseline. The overall cost effectiveness is a cost savings of about $10,000 per ton of combined pollutants removed. We also estimate that the final requirements for flares will result in emissions reduction co-benefits of CO_2 equivalents by 1,900,000 metric tonnes per year, predominantly as a result of our estimate of the largest flares employing flare gas recovery, and to a lesser extent, as a result of the flow rate root cause analyses and corrective actions applicable to all flares.

TABLE 2—COST IMPACTS FOR PETROLEUM REFINERY FLARES SUBJECT TO AMENDED STANDARDS UNDER 40 CFR PART 60, SUBPART JA

[Fifth year after the effective date of these final rule amendments]

Subpart Ja requirements	Total capital cost ($1,000)	Total annual cost without credit ($1,000/yr)	Natural gas offset/product recovery credit ($1,000)	Total annual cost ($1,000/yr)	Annual emission reductions (tons SO_2/yr)	Annual emission reductions (tons NO_X/yr)	Annual emission reductions (tons VOC/yr)	Cost effectiveness ($/ton emissions reduced)
Majority of flares (approximately 360 flares)								
Flare Monitoring	72,000	12,000	0	12,000	0	0	0	
Flare gas recovery	0	0	0	0	0	0	0	
Flare Management	0	790	0	790	0	0	270	2,900
SO_2 RCA/CA	0	1,900	0	1,900	2,600	0	0	760
Flowrate RCA/CA		900	(6,700)	(5,800)	3.4	50	390	(13,000)
Subtotal[1]	72,000	16,000	(6,700)	9,000	2,600	50	660	2,700
Largest flares (approximately 40 flares)[2]								
Flare Monitoring	12,000	2,000	0	2,000	0	0	0	
Flare gas recovery	380,000	78,000	(170,000)	(90,000)	380	1,100	2,700	(22,000)
Flare Management	0	88	0	88	0	0	30	2,900
SO_2 RCA/CA	0	220	0	220	290	0	0	760
Flowrate RCA/CA	0	100	(740)	(640)	0.4	6	43	(13,000)
Subtotal[1]	390,000	81,000	(170,000)	(88,000)	660	1,100	2,800	(20,000)
Total[1]	460,000	96,000	(180,000)	(79,000)	3,200	1,100	3,400	(10,000)

[1] All estimates are rounded to two significant figures so numbers may not sum down columns.

[2] The EPA has conducted an alternative analysis that presents the costs and benefits of the rule assuming that no refiners will opt to install flare gas recovery systems as part of their flare management strategy. This analysis is presented in the Regulatory Impact Analysis in the discussion provided in the executive summary and in Section 4.1, available in the docket for this rulemaking.

We estimate the monetized benefits of this final regulatory action for all flares to be $260 million to $580 million (3-percent discount rate) and $240 million to $520 million (7-percent discount rate for health benefits and 3-percent discount rate for climate benefits). For small flares only, we estimate the monetized benefits are $170 million to $410 million (3-percent discount rate) and $150 million to $370 million (7-percent discount rate for health benefits

[1] It is important to note that the EPA has implemented several substantial changes to the benefits methodology since 2008, which makes it challenging to compare the benefits of the June 2008 rule to the benefits of the current rulemaking. The changes with the largest impact on the range of monetized benefits are the removal of the assumption of a threshold in the concentration-response function, the revision of the value-of-a-statistical-life, and the range of risk estimates from epidemiology studies rather than the range of risk estimates supplied by experts. See the regulatory impact analysis for the current rulemaking for more information regarding these changes, which is available in the docket.

and 3-percent discount rate for climate benefits). For large flares only, we estimate the monetized benefits are $93 million to $160 million (3-percent discount rate) and $88 million to $150 million (7-percent discount rate for health benefits and 3-percent discount rate for climate benefits). Several benefits categories, including direct exposure to SO_2 and NO_X benefits, ozone benefits, ecosystem benefits and visibility benefits are not included in these monetized benefits. All estimates are in 2006 dollars for the year 2017.

Although this final rule provides refiners with some additional compliance options and removes some requirements, such as the long-term H_2S limit for flares, the cost savings due this increased flexibility have not been calculated for inclusion in the benefit-cost analysis.

B. Background of the Refinery NSPS

Section 111(b)(1)(A) of the Clean Air Act (CAA) requires the EPA to establish federal standards of performance for new, modified and reconstructed sources for source categories which cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. The standard of performance must reflect the application of the best system of emission reductions (BSER) that (taking into consideration the cost of achieving such emission reductions, any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated (CAA section 111(a)(1)). If it is not feasible to prescribe or enforce a standard of performance, the Administrator may instead promulgate a design, equipment, work practice or operational standard, or a combination of these types of standards (CAA section 111(h)(1)). Since 1970, the NSPS have been successful in achieving long-term emissions reductions in numerous industries by assuring cost-effective controls are installed on newly constructed, reconstructed or modified sources.

The level of control prescribed by CAA section 111 historically has been referred to as "Best Demonstrated Technology" or BDT. In order to better reflect that CAA section 111 was amended in 1990 to clarify that "best systems" may or may not be "technology," the EPA is now using the term "best system of emission reduction" or BSER in its rulemaking packages. See, *e.g.*, 76 FR 52738, 52740 (August 23, 2011); 76 FR 63878, 63879 (October 14, 2011). As was done previously in analyzing BDT, the EPA uses available information and considers the emissions reductions achieved by the different systems available and the costs of achieving those reductions. The EPA also considers the "other factors" prescribed by the statute in its BSER analysis. After considering all of this information, the EPA then establishes the appropriate standard representative of BSER. Sources may use whatever system meets the standard.

Section 111(b)(1)(B) of the CAA requires the EPA to periodically review and, as appropriate, revise the standards of performance to reflect improvements in methods for reducing emissions. As a result of our periodic review of the NSPS for petroleum refineries (40 CFR part 60, subpart J), we proposed amendments to the current standards of performance and separate standards of performance for new process units (40 CFR part 60, subpart Ja) (72 FR 27278, May 14, 2007) and we subsequently promulgated those amendments and new standards (73 FR 35838, June 24, 2008). Following promulgation, we received three separate petitions for reconsideration from: (1) The American Petroleum Institute (API), the National Petrochemical and Refiners Association (NPRA) and the Western States Petroleum Association (WSPA) (collectively referred to as "Industry Petitioners"); (2) HOVENSA, LLC ("HOVENSA"); and (3) the Environmental Integrity Project, Sierra Club and Natural Resources Defense Council (collectively referred to as "Environmental Petitioners"). On September 26, 2008, the EPA issued a **Federal Register** notice (73 FR 55751) granting reconsideration of the following issues: (1) The newly promulgated flare modification provision[2]; (2) the "flare" definition; (3) the fuel gas combustion device sulfur limits as they apply to flares; (4) the flow limit for flares; (5) the total reduced sulfur and flow monitoring requirements for flares; and (6) the NO_X limit for process heaters. The EPA also granted Industry Petitioners' and HOVENSA's request for a 90-day stay for those same provisions under reconsideration. On December 22, 2008, three **Federal Register** notices (73 FR 78260, 73 FR 78546 and 73 FR 78549) were published to extend this stay until a final decision is reached on those issues.

In the September 26, 2008, **Federal Register** notice (73 FR 55751), we also identified other issues for which Petitioners requested reconsideration. We stated that, at that time, we were "taking no action on all of the other issues raised in the petitions but will consider all of the outstanding issues in a future notice." On December 29, 2009, we sent a letter to the Petitioners, through their counsel, stating that "[t]he Administrator has decided to grant reconsideration of all the remaining issues" and that "EPA will address the substantive aspects of the issues under reconsideration through notice and comment actions published in the **Federal Register**." A copy of the letter to the Petitioners can be found in the docket for this rulemaking (Docket Item No. EPA–HQ–OAR–2007–0011–0318).

In this action, we are finalizing the amendments for which we granted reconsideration and a stay as outlined in the September 26, 2008, notice and for which we proposed amendments on December 22, 2008. We are also addressing certain other minor issues raised by Industry Petitioners in this action, as discussed later in this preamble. We will take action on all of the remaining issues raised by Petitioners for reconsideration in future notices.

We received a total of 22 comments from the following groups on the proposed amendments during the public comment period: (1) Refineries, industry trade associations and consultants; (2) state and local environmental and public health agencies; (3) environmental groups; and (4) other members of the public. These final amendments reflect our full consideration of all of the comments we received. Detailed responses to the comments not included in this preamble, as well as more detailed summaries of the comments addressed in this preamble, are contained in *Standards of Performance for Petroleum Refineries: Background Information for Final Amendments—Summary of Public Comments and Responses*, dated December 2011, which is included in Docket ID No. EPA–HQ–OAR–2007–0011.

In summary, major comments on the proposed process heater requirements were related to the proposed NO_X concentration limits, the alternative heating value limits, consideration of turndown (*i.e.*, when a process heater is operated at less than 50-percent design capacity) and other factors that influence the achievable emissions

[2] The September 26, 2008, **Federal Register** notice (73 FR 55751) described the first issue for which the EPA granted reconsideration as "the definition of 'modification.'" However, because what we are actually reconsidering is the specific flare modification provision that applies to flares at petroleum refineries rather than the more generally applicable definition of "modification," we have revised the description of this issue as "the newly promulgated flare modification provision."

limits. In response, we are raising the limit for new forced draft process heaters from 40 ppmv NO_X at proposal to 60 ppmv NO_X. For both natural draft and forced draft process heaters, we are finalizing alternative heating value limits derived from a more direct numerical conversion of the NO_X concentration limit (*i.e.*, 0.04 lb/MMBtu for natural draft and 0.06 lb/MMBtu for forced draft). For newly constructed, modified and reconstructed natural draft and forced draft process heaters, we are reducing the averaging time for compliance from a 365-day rolling average to a 30-day rolling average applicable during periods of normal operation. We are also finalizing an alternative case-specific compliance option that allows owners and operators to obtain EPA approval for a site-specific NO_X limit in certain conditions such as turndown.

Major comments on the proposed requirements for flares were related to the definition of flare modification for purposes of triggering applicability to this rule, the proposed removal of the flare flow limit, clarification of flare monitoring requirements and clarification of the differences between the requirement for flares and the requirements for other fuel gas combustion devices. We address these comments by clarifying the definition of flare modification and by expanding the list included in the December 22, 2008, proposal, which specifies certain connections that do not constitute a modification of the flare because they do not result in emissions increases. We are finalizing the proposed removal of the flare flow limit and instead, we are promulgating a suite of work practice standards that apply to affected flares. Based on comments received on the December 22, 2008 proposal, we are finalizing definitions of "fuel gas combustion device" and "flare" to specify that a flare is a separate affected facility rather than a type of fuel gas combustion device. We are also finalizing amendments to clarify certain monitoring requirements and to provide additional monitoring alternatives under certain circumstances.

III. Summary of the Final Rules and Changes Since Proposal

NSPS for petroleum refineries (40 CFR part 60, subpart J) apply to the affected facilities at the refinery, such as fuel gas combustion devices (which include process heaters, boilers and flares), that commence construction, reconstruction or modification after June 11, 1973, but on or before May 14, 2007 (on or before June 24, 2008 for flares). The NSPS were originally promulgated on March 8, 1974, and have been amended several times. In this action, we are promulgating technical clarifications and corrections to subpart J.

New standards of performance for petroleum refineries (40 CFR part 60, subpart Ja) apply to flares that commence construction, reconstruction or modification after June 24, 2008, and other affected facilities at petroleum refineries, including process heaters and other fuel gas combustion devices that commence construction, reconstruction or modification after May 14, 2007. In this action, we are finalizing amendments to subpart Ja to address the issues raised by Petitioners regarding flares and process heaters. We are also finalizing technical corrections to subpart Ja for certain issues that were identified by Industry Petitioners in their August 21, 2008, supplement to their original administrative reconsideration request (Docket Item No. EPA–HQ–OAR–2007–0011–0246).

The following sections summarize the amendments in both 40 CFR part 60, subpart J and 40 CFR part 60, subpart Ja. Section IV contains the rationale for these amendments, while the amendments themselves follow the preamble.

A. What are the final amendments to the standards of performance for petroleum refineries (40 CFR part 60, subpart J)?

The final amendments add a new paragraph to 40 CFR 60.100 to allow 40 CFR part 60, subpart J affected sources the option of complying with subpart J by following the requirements in 40 CFR part 60, subpart Ja. The subpart Ja requirements are at least as stringent as those in subpart J, so providing this option will allow all process units in a refinery to follow the same requirements and simplify compliance. We are also removing the reference to 40 CFR 60.101a from the description of the applicability dates in 40 CFR 60.100(b) so as not to cause confusion over the definition of "flare" in subpart J. We are finalizing a correction to the value and units (in the metric system) for the allowable incremental rate of particulate matter (PM) emissions in 40 CFR 60.106(c)(1). We amended the units for this constant in 40 CFR 60.102(b) on June 24, 2008, and we are now correcting 40 CFR 60.106(c)(1) accordingly. Finally, we are finalizing a definition of "fuel gas" that incorporates the same clarifications regarding vapors from wastewater treatment units and marine tank vessel loading operations identified in the subpart Ja definition of "fuel gas" (described later in this preamble).

B. What are the final amendments to the standards of performance for process heaters (40 CFR part 60, subpart Ja)?

We proposed several amendments to the standards of performance for process heaters, including adding emission limits in units of lb/MMBtu, extending the emission limit averaging time from 24 hours to 365 days, raising the emission limit for modified and reconstructed forced draft process heaters and raising the emission limit for co-fired process heaters. After consideration of all of the public comments and our own additional analyses, we are finalizing the process heater requirements, as described in this section.

Table 3 presents a comparison of the proposed and final 40 CFR part 60, subpart Ja amendments for process heaters. The final amendments include four subcategories of process heaters: (1) Natural draft process heaters; (2) forced draft process heaters; (3) co-fired natural draft process heaters; and (4) co-fired forced draft process heaters. At proposal, all co-fired process heaters were included in one subcategory, for a total of three process heater subcategories, but, based on emissions data from co-fired process heaters, we divided natural draft and forced draft co-fired process heaters into separate subcategories with different emissions limits.

For each of the first two subcategories, the final amendments include a concentration-based NO_X emissions limit and a heating value-based NO_X emissions limit, both determined daily on a 30-day rolling average basis. For the natural draft process heater subcategory, the concentration-based NO_X emissions limit for newly constructed, modified and reconstructed natural draft process heaters is 40 ppmv (dry basis, corrected to 0-percent excess air) determined daily on a 30-day rolling average basis. The heating value-based NO_X emissions limit for newly constructed, modified and reconstructed natural draft process heaters is 0.040 lb/MMBtu higher heating value basis determined daily on a 30-day rolling average basis. The averaging time for both of these limits is shorter than the 365-day averaging time that was proposed, and the heating value-based NO_X emissions limit differs from the proposed limit in that it is a more direct numerical conversion from 40 ppmv NO_X. At proposal, we provided a longer averaging time so that short periods of turndown (*i.e.*, when a process heater is operating at less than 50-percent design

capacity) would not significantly affect the overall performance of the unit. Our analysis of the additional data that we obtained following the proposal supported revising all NO_X emissions limits to be on a 30-day rolling average basis, which is achievable for process heaters during periods of normal operation. These data indicate that process heaters equipped with ultra low NO_X burners meet the emission limits described above if compliance is determined on a 30-day rolling average basis. We are finalizing alternative compliance options that allow the owners and operator to establish site-specific limits applicable during certain conditions such as turndown. Section IV.A of this preamble provides additional information regarding the rationale and analyses leading to these final amendments.

For the second subcategory, forced draft process heaters, the concentration-based NO_X emissions limit for newly constructed, modified and reconstructed forced draft process heaters is 60 ppmv (dry basis, corrected to 0-percent excess air) determined daily on a 30-day rolling average basis. The heating value-based NO_X emissions limit for newly constructed, modified and reconstructed forced draft process heaters is 0.060 lb/MMBtu higher heating value basis determined daily on a 30-day rolling average basis. The higher limit for new forced draft process heaters (at proposal, the limit was 40 ppmv) is based on additional data and a re-evaluation of BSER, as described later in this preamble. As with natural draft process heaters, the averaging time for both of these limits is shorter than proposed, and the final heating value-based NO_X emissions limit is a more direct numerical conversion from 60 ppmv NO_X. Section IV.A of this preamble provides additional information regarding the rationale and analyses leading to these final amendments.

For each of these subcategories, a process heater need only meet either the concentration-based NO_X emissions limit or the heating value-based NO_X emissions limit. The refinery owner or operator may choose to comply with either limit at any time, provided that they are monitoring the appropriate variables to assess the heating value-based NO_X emissions limit. If the refinery owner or operator does not choose to monitor fuel composition, then they must comply with the concentration-based NO_X emissions limit.

TABLE 3—PROPOSED AND FINAL AMENDMENTS FOR PROCESS HEATERS

	Proposal (December 22, 2008)	Final
Averaging time	365-day rolling average	30-day rolling average.
Natural Draft NO_X Emission Limits	40 ppmv or 0.035 lb/MM BTU	40 ppmv or 0.04 lb/MM BTU.
Forced Draft NO_X Emission Limits	*New:* 40 ppmv or 0.035 lb/MM BTU *M/R:* 60 ppmv or 0.055 lb/MM BTU	60 ppmv or 0.06 lb/MM BTU.
Co-fired Burner (oil and gas) NO_X Emission Limits.	150 ppmv or Weighted average based on oil at 0.27 lb/MM BTU and gas at 0.08 lb/MM BTU.	150 ppmv or Weighted average based on oil at 0.40 lb/MM BTU and gas at 0.11 lb/MM BTU forced draft and weighted average based on oil at 0.35 lb/MM BTU and gas at 0.06 lb/MM BTU for natural draft.

As proposed, initial compliance with the heating value-based emissions limits will be demonstrated by conducting a performance evaluation of the continuous emission monitoring system (CEMS) in accordance with Performance Specification 2 in appendix B to 40 CFR part 60, with EPA Method 7 of 40 CFR part 60, appendix A–4 as the Reference Method, along with fuel flow measurements and fuel gas compositional analysis. The NO_X emission rate is calculated using the oxygen (O_2)-based F factor, dry basis according to EPA Method 19 of 40 CFR part 60, appendix A–7. Ongoing compliance with this NO_X emissions limit is determined using a NO_X CEMS and at least daily sampling of fuel gas heat content or composition to calculate a daily average heating value-based emissions rate, which is subsequently used to determine the 30-day average.

The third and fourth subcategories of process heaters are co-fired process heaters. A co-fired process heater is a process heater that employs burners that are designed to be supplied by both gaseous and liquid fuels. As described in more detail in section IV.A of this preamble, co-fired process heaters do not include gas-fired process heaters that have emergency oil back-up burners. There are two compliance options for each subcategory of co-fired process heaters: (1) 150 ppmv (dry basis, corrected to 0-percent excess air) determined daily on a 30 successive operating day rolling average basis; and (2) a source-specific daily average emissions limit. Unlike gas-fired process heaters, the owner or operator of a co-fired process heater must choose one emissions limit and show compliance with that limit. For co-fired natural draft process heaters, the daily average emissions limit is based on a limit of 0.06 lb/MMBtu for the gas portion of the firing and 0.35 lb/MMBtu for the oil portion of the firing. For co-fired forced draft process heaters, the daily average emissions limit is based on a limit of 0.11 lb/MMBtu for the gas portion of the firing and 0.40 lb/MMBtu for the oil portion of the firing. These limits are different than proposed, based on a re-evaluation of BSER with new data received during the public comment period. All of the requirements for emissions monitoring, recordkeeping and reporting for co-fired process heaters are the same as for the other process heater subcategories.

We are also finalizing an alternative compliance option that allows owners and operators to obtain EPA approval for a site-specific NO_X limit for certain process heaters. This compliance option was provided in the proposed amendments, but it was limited to (1) natural draft and forced draft modified or reconstructed process heaters that lack sufficient space to accommodate combustion modification-based technology and (2) natural draft and forced draft co-fired process heaters. In the final amendments, we are finalizing this compliance option for those process heaters mentioned above while also providing this compliance option for the following additional types of process heaters: (3) modified or reconstructed induced draft process heaters that have downwardly firing burners and (4) forced draft and natural draft process heaters that operate at low firing rates, or turndown, for an extended period of time. As we noted in the preamble to the proposed amendments, in limited cases, existing natural draft or forced draft process heaters have limited firebox size or other constraints such

that they cannot apply the BSER of ultra-low NO_X burners or otherwise meet the applicable limit and some co-fired units may not be able to achieve the NO_X limitations even with ultra-low NO_X burner control technology. In addition, commenters noted that downwardly fired process heaters with induced draft fans have similar NO_X control issues as forced draft heaters, but the definition of forced draft heater does not include these induced draft heaters (these are defined as natural draft process heaters). Therefore, we added a provision to allow induced draft process heaters with downwardly-firing burners to use the alternative compliance option.

Finally, we note that the emissions limits for forced draft and natural draft gas-fired process heaters are based on the performance of ultra-low NO_X burner control technologies. The ultra-low NO_X burner technology suppliers recommend operating with higher excess air rates at low firing rates (at or below approximately one-half of the maximum firing capacity), which causes higher NO_X concentrations at low firing rates. Therefore, all types of process heaters with ultra-low NO_X burner control technologies may be unable to meet the emissions limits if they are operated at low firing rates for an extended period of time. Requesting a site-specific emissions limit requires a detailed demonstration that the application of the ultra-low NO_X burner technology is not feasible or that the technology cannot meet the NO_X emissions limits given the conditions of the process heater (downward fired induced draft, co-fired or prolonged turndown); the refinery must also conduct source tests in developing a site-specific emissions limit for its process heater. This analysis must be submitted to and approved by the Administrator.

We are finalizing the proposed clarification that owners and operators of process heaters in any subcategory with a rated heating capacity of less than 100 million British thermal units per hour (MMBtu/hr) have the option of using CEMS. The final rule states that owners and operators of process heaters subject to 40 CFR part 60, subpart Ja should use CEMS to demonstrate compliance unless the heater is equipped with combustion modification-based technology (low-NO_X burners or ultra-low NO_X burners) with a rated heating capacity of less than 100 MMBtu/hr; owners and operators of those specific process heaters have the alternative option of biennial source testing to determine compliance. As requested by commenters, we have provided additional detail in the final rule regarding how to develop the O_2 operating limit, including provisions on how to develop an O_2 operating curve to ensure compliance with the NO_X emission limit at different process heater firing rates. We are requiring that owners and operators with process heaters in any subcategory that are complying using biennial source testing establish a maximum excess O_2 concentration operating limit or operating curve that can be met at all times, even during turndown, and comply with the O_2 monitoring requirements for ongoing compliance demonstration.

C. What are the final amendments to the standards of performance for flares (40 CFR part 60, subpart Ja)?

We proposed several amendments to the standards of performance for flares, including, but not limited to, amending the flare modification provision, removing the numerical limit on the flow rate to the flare, revising the flare management plan requirements to include a list of connections to the flare and an identification of baseline conditions, clarifying when a root cause analysis is required, revising the sulfur and flow monitoring requirements and providing additional time for compliance. After consideration of all of the public comments, and our own additional analyses, we are finalizing the flare requirements, as described in this section.

We did not propose to revise the definitions of "fuel gas combustion device" and "flare" on December 22, 2008. However, based on public comment and changes to the flare requirements, as described later in this section, we have decided to finalize revisions to these definitions to specify that, for purposes of 40 CFR part 60, subpart Ja, a flare is a separate affected facility rather than a type of fuel gas combustion device. This change makes clearer the differences between the requirements for flares and the requirements for fuel gas combustion devices, particularly in terms of sulfur and flow rate monitoring requirements and thresholds for root cause analyses and corrective action analyses. We are also making corrections, as needed, in numerous paragraphs throughout subpart Ja for consistency with the amended definitions (*e.g.*, adding "and flares," where applicable, to paragraphs with requirements for "fuel gas combustion devices").

We are finalizing the flare modification provision in 40 CFR 60.100a(c), as described below, to specify certain connections to a flare that do not constitute a modification of the flare because they do not result in emissions increases. On December 22, 2008, we proposed that the following types of connections to a flare would not be considered a modification of the flare: (1) Connections made to install monitoring systems to the flares; (2) connections made to install a flare gas recovery system; (3) connections made to replace or upgrade existing pressure relief or safety valves, provided the new pressure relief or safety valve has a set point opening pressure no lower and an internal diameter no greater than the existing equipment being replaced or upgraded; and (4) replacing piping or moving an existing connection from a refinery process unit to a new location in the same flare, provided the new pipe diameter is less than or equal to the diameter of the pipe/connection being replaced/moved. We are finalizing those proposed amendments and also adding the following types of connections to the list of connections to flares that are not modifications of flares: (1) Connections between flares; (2) connections for flare gas sulfur removal; and (3) connections made to install redundant flare equipment (such as a back-up compressor). We are also clarifying one of the proposed exemptions to indicate that connections made to upgrade or enhance components of flare gas recovery systems (*e.g.*, additional compressors or recycle lines) are not modifications.

We are not finalizing the proposed amendment to provide additional time for flares that need to install additional amine scrubbing and amine stripping columns to meet the requirement to limit the long-term concentration of H_2S to 60 ppmv (determined daily on a 365 successive calendar day rolling average basis) (hereafter referred to as the long-term 60 ppmv H_2S fuel gas concentration limit). Instead, based on comments received during the public comment period for the proposed amendments and our own additional analyses, we are removing the requirement for flares to meet the long-term 60 ppmv H_2S fuel gas concentration limit. As explained in section IV, we determined that requiring refineries to ensure the fuel gas they send to their flares meets a long-term H_2S concentration of 60 ppmv is not appropriate for flares.

We are promulgating final amendments for flares that include a suite of standards that apply at all times that are aimed at reducing SO_2 emissions from flares. These amendments include several provisions that were proposed on December 22,

2008, as well as others that differ from those proposed, but are a logical outgrowth of the proposed amendments. This suite of standards requires refineries to: (1) Develop and implement a flare management plan; (2) conduct root cause analyses and take corrective action when waste gas sent to the flare exceeds a flow rate of 500,000 standard cubic feet (scf) above the baseline flow to a flare in any 24-hour period (rather than the proposed threshold of 500,000 scf in any 24-hour period without considering the baseline); (3) conduct root cause analyses and take corrective action when the emissions from the flare exceed 500 lb of SO_2 in a 24-hour period (instead of 500 lb SO_2 above the emissions limit); and (4) optimize management of the fuel gas by limiting the short-term concentration of H_2S to 162 ppmv during normal operating conditions (determined hourly on a 3-hour rolling average basis). As explained further in preamble section IV.B, 40 CFR part 60, subpart J sets a performance standard for SO_2 (expressed as a 162 ppmv short-term H_2S concentration limit) in fuel gas entering fuel gas combustion devices. However, for this final rule, we have determined that flares should be treated separately from other fuel gas combustion devices because they meet the criteria set forth in CAA section 111(h)(2)(A) since emissions from a flare do not occur "through a conveyance designed and constructed to emit or capture such pollutant." The flare itself is not a "conveyance" that is "emitting" or "capturing" these pollutants. Instead, pollutants such as SO_2 are created in the flame that burns outside the flare tip. Therefore, we have determined that this suite of work practice standards, which includes optimization of fuel gas management (based on limiting concentration of H_2S to 160 ppmv) is more appropriate for flares, as opposed to the H_2S performance standard in subpart J, applicable to fuel gas systems. See section IV.B of this preamble for a more detailed explanation of these requirements. In this rule, we are using the term "normal operating conditions" to describe situations where the process is operating in a routine, predictable manner, such that the gases from the process are predictable, as opposed to less-predictable swings related to emergency situations during which the flare begins to operate as a safety device. All of these requirements will apply during the vast majority of the time. Under a very narrow and limited set of circumstances, such as when a flare is used as a safety device under emergency conditions,[3] the flare will be subject to all of these requirements except for the requirement to optimize management of the fuel gas.

In addition, we are specifying that, if a discharge exceeding either or both of the SO_2 or flow thresholds described above is the result of a planned startup or shutdown of a refinery process unit or ancillary equipment connected to the flare, and the flare management plan procedures for minimizing flow (which minimizes emissions) during that type of event are followed, a root cause analysis and corrective action analysis are not required. Finally, we are finalizing the proposed added provisions to ensure that owners and operators implement corrective actions on the findings of the SO_2 or flow rate root cause analyses and to specify a deadline for performing the corrective actions.

We are finalizing the proposed amendment to remove the 250,000 scfd 30-day average flow rate limit. Our rationale for this decision is explained in the preamble to the proposed amendments (73 FR 78530) and also in section IV of this preamble.

We are finalizing one proposed amendment to the flare management plan and adding several new requirements as a logical outgrowth of the proposed amendments, considering the public comments we received, to ensure compliance with the flare standards. First, as proposed, we are requiring a list of refinery process units and fuel gas systems connected to each affected flare. However, we are also adding a requirement for a simple process flow diagram showing the design of the flare, connections to the flare header and subheader system(s), and all gas lines associated with the flare. With these two requirements, we are clarifying that the flare management plan must include a diagram of the flare and connections, but the diagram need not be a detailed piping and instrumentation diagram that shows all process units and ancillary equipment connected to the flare. We are also requiring the owner and operator of an affected flare to assess and minimize flow to affected flares from these process units and fuel gas systems. Second, we are adding new requirements that the flare management plan include design and operation details about the affected flare, including tip diameter, type of flare, monitoring methods and a description of the flare gas recovery system, if present. The inclusion of these details will ensure that the rest of the flare management plan is reasonable and appropriate for that affected flare.

Third, as a logical outgrowth of the proposed amendments, considering the public comments we received, we are adding a new requirement for owners and operators to determine the baseline flow to each flare, including purge and sweep gas, and include this baseline flow in the flare management plan. As described later in this preamble, developing the baseline is important because the final threshold for the flare flow root cause analysis takes this baseline flow into consideration. Finally, we are adding a new requirement to minimize the volume of gas flared during maintenance of a flare gas recovery system.

We have decided to remove the requirement for the owner or operator to explain in the flare management plan how a root cause analysis and corrective action analysis will be conducted if the flow to the flare exceeds the specified threshold. Instead, all the requirements for determining when and how to conduct a root cause analysis and corrective action analysis, and the requirements for when and how to implement a corrective action, have been expanded, as described later in this section, and moved to 40 CFR 60.103a(c) through (e).

We are specifying that, for modified flares, the flare management plan must be developed and implemented by no later than November 11, 2015 or upon startup of the modified flare, whichever is later (the proposed amendments provided 18 months with an additional 6 months if the owner or operator committed to installing a flare gas recovery system). In addition, because of the lack of a direct flow limit and the addition of the baseline flow value, we are adding a requirement that the flare management plan must be submitted to the Administrator.

As with the flare management plan, the owner or operator of an affected flare must comply with the root cause analysis and corrective action analysis requirements within 3 years from the effective date of this final rule or upon startup of the modified flare, whichever is later.

We are finalizing several proposed amendments to the sulfur monitoring requirements and revising other requirements as a logical outgrowth of the proposed amendments, considering the public comments we received. We consolidated the proposed alternatives to monitor reduced sulfur compounds and total sulfur compounds into a

[3] *Background Information for New Source Performance Standards*, Vol. 3, Promulgated Standards (APTD–1352c; Publication No. EPA 450/2–74–003), pg 127 (February 1974) (*NSPS BID Vol. 3*).

provision that allows the use of total reduced sulfur monitoring. We also clarified the span requirements for these monitors and are allowing the use of cylinder gas audits for relative accuracy assessments. We are finalizing the H_2S monitoring alternative method for determining total sulfur content in the flare gas, as proposed, but we have clarified the span requirements for this monitor and are allowing the use of cylinder gas audits for relative accuracy assessments, similar to the total reduced sulfur monitor requirements. For refineries that measure SO_2 concentrations in the exhaust from a fuel gas combustion device that combusts gas representative of the gas discharged to the flare, we added an alternative to allow the owner or operator to use the existing SO_2 CEMS data to calculate the total sulfur content in the flare gas.

We received public comments stating that the flow and sulfur monitoring requirements for flares were too burdensome for flares that are used infrequently or that are configured such that they cannot receive high sulfur flare gas. Based on our evaluation of these comments, we are providing new alternatives to continuous flow and sulfur monitoring for certain flares. First, for flares that are configured such that they only receive inherently low sulfur gas streams described in 40 CFR 60.107a(a)(3)(i) through (iv) or (b), continuous sulfur monitors are not necessary because a root cause analysis will be triggered by an exceedance of the flow rate threshold long before they exceed the 500 lb SO_2 trigger in a 24-hour period.

Second, we are providing an alternative monitoring option for emergency flares, secondary flares and flares equipped with a flare gas recovery system designed, sized and operated to capture all flows (except flows resulting from planned startup and shutdown that are addressed in the flare management plan). If this option is applicable, the owner or operator may elect to continuously monitor the water seal height and the pressure in the flare header just upstream of the water seal rather than install total sulfur and flow monitoring systems. If this monitoring option is selected, any instance where the pressure upstream of the water seal (expressed in inches of water) exceeds the water seal height triggers a requirement to perform a root cause analysis and corrective action analysis, unless the discharge is related to flare gas recovery system compressor cycling or a planned startup or shutdown (of a refinery process unit or ancillary equipment connected to the flare) following the procedures in the flare management plan. An "emergency flare" is a flare that combusts gas exclusively released as a result of malfunctions (and not startup, shutdown, routine operations or any other cause) and is characterized as having four or fewer discharge events in any 365 consecutive calendar days.

Owners or operators of affected flares that have flare gas recovery systems with staged compressors that elect to use this monitoring option must identify these flares in their flare management plan, identify the time period required for the staged compressors to actively start to recover gas and identify the operating parameters monitored and procedures employed to minimize the duration of flaring during compressor staging. If a pressure exceedance is caused during compressor staging and the duration of the pressure exceedance is less than the time specified in the flare management plan, then a root cause analysis is not required and the pressure exceedance is not required to be reported. If a pressure exceedance is not attributable to compressor staging (*i.e.*, all staged compressors are active), if a pressure exceedance is the result of a planned startup and shutdown event during which the flare management plan is not followed or if the duration of a pressure exceedance attributable to compressor staging is greater than the time specified in the flare management plan, then a root cause analysis and corrective action analysis are required and the pressure exceedance must be reported. More than four pressure exceedances required to be reported, as described above and under 40 CFR 60.108a(d)(5) (hereafter referred to as "reportable pressure exceedances") in any 365 consecutive calendar days is an indication that the flare gas recovery system is not adequately sized, and the sulfur and flow monitors, as required in 40 CFR 60.107a(e) and (f), must be installed if that occurs.

Third, we are clarifying that monitors for flow and sulfur on the second flare in a staged flare configuration are not required where the water seal monitoring requirements adequately and appropriately address this scenario. Under most circumstances, the root cause analysis is expected to be triggered, based on the flow to or emissions from the primary flare. However, in cases where the capacity of the primary flare is small (less than 500,000 scfd), this may not always be the case. Additionally, we consider the water seal monitoring on the secondary flare to be appropriate to ensure that gases are not released to the secondary flare inadvertently. We clarify in this final rule that if a root cause analysis is triggered for the primary flare, releases to the secondary flare do not trigger an additional root cause analysis (*i.e.*, the releases may be treated as one event). However, if flow is diverted to the secondary flare, then a root cause analysis is required, even if a root cause analysis was not triggered for the primary flare, based on flow rate or SO_2 emissions. In addition, if flow is diverted to the secondary flare five or more times in a 365-day period, flow monitoring of the secondary flare is required. We anticipate that the upstream sulfur monitor on the primary flare can be used to determine the sulfur content of the gas diverted to the secondary flare.

In response to comments, we are also finalizing a new amendment providing an alternative compliance option in 40 CFR 60.103a(g) and 40 CFR 60.107a(h) for certain flares. Specifically, for refineries located in the SCAQMD, an affected flare subject to 40 CFR part 60, subpart Ja may elect to comply with SCAQMD Rule 1118 as an alternative to complying with the requirements for flares in 40 CFR 60.103a(a) through (e) and the associated monitoring provisions in 40 CFR 60.107a(e) and (f). Similarly, for refineries located in the BAAQMD, an affected flare subject to subpart Ja may elect to comply with both BAAQMD Regulation 12, Rule 11 and BAAQMD Regulation 12, Rule 12 as an alternative to complying with the requirements for flares in 40 CFR 60.103a(a) through (e) and the associated monitoring provisions in 40 CFR 60.107a(e) and (f). We are also finalizing specific provisions within the standards for owners or operators (and manufacturers of equipment) to submit a request for a determination of equivalence for "an alternative means of emission limitation" that will achieve a reduction in emissions at least equivalent to the reduction in emissions achieved under any of the final subpart Ja design, equipment, work practice or operational requirements in accordance with CAA section 111(h).

For fuel gas combustion devices and sulfur recovery plants, we are correcting and clarifying the threshold for a root cause analysis and corrective action analysis. The proposed root cause analysis threshold for both types of process units was 500 lb SO_2 above the emission limit, but the proposed amendments directed the owner or operator to compare the SO_2 emissions to "the period of the exceedance" for fuel gas combustion devices and "the entire 24-hour period" for sulfur recovery plants. That language meant that if one 12-hour average for a sulfur

recovery plant was above the emission limit, the owner or operator would have compared those emissions to the emissions allowed over an entire 24 hours to determine if root cause analysis was required. However, although a 12-hour average above the emission limit clearly means that more SO_2 was emitted than allowed by that emissions limit, it is possible that, since the time periods being compared were not analogous, the "allowed emissions" over 24 hours could be more than the actual emissions that made up the one 12-hour average. Upon further consideration, we see no reason for the requirements to be different for fuel gas combustion devices and sulfur recovery plants. Therefore, we are finalizing an amendment that states that the threshold for a root cause analysis and corrective action analysis for both sulfur recovery plants and fuel gas combustion devices is 500 lb above the emission limit during one or more consecutive periods of excess emissions [4] or any 24-hour period, whichever is shorter. This clarifying amendment is needed to ensure that the magnitude of the emissions limit exceedance is properly compared to what would have been emitted if the emissions were equivalent to the emissions limit based on the averaging time allowed for that emissions limit.

Finally, we are finalizing the amendments at 40 CFR 60.108a(c) and (d) mostly as proposed to clarify recordkeeping and reporting when a root cause analysis and corrective action analysis are required. These clarifications were needed to more clearly delineate the differences in the recordkeeping and reporting requirements for flares, fuel gas combustion devices and sulfur recovery plants. The differences between the proposed amendments and the final amendments are corrections to be consistent with changes to the root cause analysis and corrective action analysis requirements already described. We are also finalizing 40 CFR 60.108a(c), as proposed, to add recordkeeping requirements for the proposed monitoring option that is based on periodic manual sampling and analysis to determine the total sulfur-to-H_2S ratio.

[4] As noted above, the proposed amendments used the term "period of the exceedance" for fuel gas combustion devices. That term was intended to have the same meaning as a period of excess emissions (or multiple consecutive periods of excess emissions), as defined in 40 CFR 60.106a(b) or 40 CFR 60.107a(i)). Therefore, the final amendments refer to "one or more consecutive periods of excess emissions" rather than "period of the exceedance."

D. What are the final amendments to the definitions in 40 CFR part 60, subpart Ja?

We proposed amendments to a number of definitions in 40 CFR 60.101a. This section describes whether we are finalizing the amendments as proposed, finalizing an amendment different than (but as a logical outgrowth of) what was proposed or not finalizing the proposed amendment.

We are finalizing amendments to the definitions of "flexicoking unit" and "fluid coking unit," as proposed.

We are finalizing a definition of "delayed coking unit" that is different than the proposed amendments to clarify what pieces are included in a delayed coking unit. The final June 2008 rule did not explicitly describe the pieces of a delayed coking unit. We proposed to amend the definition in December 2008 to specify that a delayed coking unit "consists of the coke drums and associated fractionator." In the course of evaluating public comments on the proposed definition, we looked more closely at the operation of delayed coking units and determined that the fractionators, quench water system and coke cutting equipment are integral to the operation of a delayed coking unit. Therefore, we are revising the definition of "delayed coking unit" in these final amendments to include "the coke drums associated with a single fractionator and the associated fractionator; the coke drum cutting water and quench system, including the jet pump and coker quench water tank; process piping and associated equipment such as pumps, valves and connectors; and the coke drum blowdown recovery compressor system." Finally, to avoid any potential retroactive compliance issues that could arise for certain delayed coking units because of the changes to the definition of "delayed coking unit" between the proposal and the final rule, we are moving the date for determining applicability of NSPS subpart Ja for those newly constructed, reconstructed and modified delayed coking units specifically affected by this change from the date of the proposal to the promulgation date of these final amendments. See CAA section 111(a)(2).

We are finalizing definitions of "forced draft process heater," "natural draft process heater" and "co-fired process heater," which will enable owners and operators to determine the appropriate subcategory for each of their process heaters. Based on public comments, the final amendments have been revised slightly from the proposed definitions to clarify that induced draft systems are defined as natural draft process heaters and balanced draft systems are defined as forced draft process heaters. We are also revising the definition of "co-fired process heater" to clarify that this type of process heater does not include gas burners that have emergency oil back-up burners. We are finalizing the definition of "air preheat," as proposed, except that we are substituting the term "sensible" for "latent" to describe the heat recovered from exhaust gases.

We are finalizing the definitions of "flare gas recovery system" and "process upset gas," as proposed, and we are adding a new definition of "flare gas header system." We are finalizing a revision to the definition of "flare" to refer to the "flare gas header system" rather than repeat the components of the flare gas header system within the definition of flare. In addition, we are clarifying in the definition of "flare" that, in the case of an interconnected flare gas header system (*i.e.*, two or more flare tips share the same flare gas header system or are otherwise connected such that they receive flare gas from the same source), the "flare" includes each combustion device serviced by the interconnected flare gas header system and the interconnected flare gas header system.

We are finalizing definitions of "corrective action," "corrective action analysis" and "root cause analysis" with minor changes from proposal to update section references and to expand upon the types of factors that should be taken into consideration for root cause and corrective action analyses. We are adding definitions of "purge gas" and "sweep gas" to clarify the requirements of the flare minimization plan. We are also adding new definitions of "emergency flare," "cascaded flare system," "non-emergency flare," "primary flare" and "secondary flare" to clarify the types of flares that are and are not allowed to use the water seal monitoring alternative for flares.

We are finalizing the amendments to the definition of "petroleum refinery," as proposed. As we noted in the preamble to the proposed amendments, facilities that only produce oil shale or tar sands-derived crude oil for further processing using only solvent extraction and/or distillation to recover diluent that is then sent to a petroleum refinery are not themselves petroleum refineries. Facilities that produce oil shale or tar sands-derived crude oil and then upgrade these materials and produce refined products would be petroleum refineries. Additionally, facilities that produce oil shale or tar sands-derived

crude oil using any cracking process would be considered petroleum refineries.

We are not finalizing the proposed amendments to "refinery process unit" to avoid possible conflicts and confusion caused by having different definitions for "refinery process unit" in 40 CFR part 60, subparts J and Ja, but we are adding a new definition of "ancillary equipment" and using this term to clarify that the flare modification provisions and standards apply to the types of units listed in the proposed definition of "refinery process unit." Specifically, we are defining *ancillary equipment* as equipment used in conjunction with or that serve a refinery process unit. *Ancillary equipment* includes, but is not limited to, storage tanks, product loading operations, wastewater treatment systems, steam- or electricity-producing units (including coke gasification units), pressure relief valves, pumps, sampling vents and continuous analyzer vents.

We are amending the definition of "fuel gas," as proposed, to clarify that process units that gasify petroleum coke at a petroleum refinery are producing refinery fuel gases. We also proposed to amend the definition to state that gas generated by process units that calcine petroleum coke into anode grade coke is not fuel gas. Based on public comment, we are amending the definition to state that gas generated by coke calciners producing all premium grade coke (rather than just anode grade coke, as proposed) is not fuel gas. Also upon consideration of public comments, we are amending the definition of "fuel gas" to clarify which vapor streams we intended to exclude. The proposed definition indicated that vapors collected and combusted to comply with specific standards were not considered fuel gas. The final amended definition clarifies that vapors that are collected and combusted in a thermal oxidizer or flare installed to control emissions from wastewater treatment units other than those processing sour water, marine tank vessel loading operations and asphalt processing units are not considered fuel gas, regardless of whether the action is required by another standard.

Finally, we are finalizing several proposed amendments to the definition of "sulfur recovery plant" to clarify the intent of the definition. We are correcting the spelling of "H_2S." We are also clarifying that multiple units recovering sulfur from a common source of sour gas produced at a refinery are considered one sulfur recovery plant. In addition, we are clarifying that loading facilities downstream of the sulfur pits are not part of the sulfur recovery plant (the proposed definition only specified secondary sulfur storage vessels).

E. What are the final technical corrections to 40 CFR part 60, subpart Ja?

See Table 4 of this preamble for miscellaneous technical corrections that we are finalizing throughout 40 CFR part 60, subpart Ja. As mentioned previously, some of these technical corrections are in response to straightforward issues raised by Industry Petitioners in their August 21, 2008, supplement to their original petition for reconsideration (Docket Item No. EPA–HQ–OAR–2007–0011–0246). Other technical corrections are needed to correct typographical errors and to correct equation and paragraph designations.

TABLE 4—TECHNICAL CORRECTIONS TO 40 CFR PART 60, SUBPART JA

Section	Technical correction and reason
60.102a(f)(1)(ii)	Replace "300 ppm by volume of reduced sulfur compounds and 10 ppm by volume of hydrogen sulfide (HS_2), each calculated as ppm SO_2 by volume (dry basis) at zero percent excess air" with "300 ppmv of reduced sulfur compounds and 10 ppmv of H_2S, each calculated as ppmv SO_2 (dry basis) at 0-percent excess air" for consistency of units and to correct a typographical error.
60.104a(d)(4)(ii)	Redesignate Equation 3 as Equation 5 to provide for the addition of new Equations 3 and 4.
60.104a(d)(4)(iii)	Redesignate Equation 4 as Equation 6 to provide for the addition of new Equations 3 and 4.
60.104a(d)(4)(v)	Redesignate Equation 5 as Equation 7 to provide for the addition of new Equations 3 and 4.
60.104a(d)(8)	Redesignate Equation 6 as Equation 8 to provide for the addition of new Equations 3 and 4.
60.104a(f)(3)	Redesignate Equation 7 as Equation 9 to provide for the addition of new Equations 3 and 4. Replace "hourly" with "3-hour" in the definition of the new Equation 9 variable "Opacity limit" and replace "source test runs" with "source test" in the definition of the new Equation 9 variable "$Opacity_{st}$" to clarify the information required for new Equation 9.
60.104a(h)(5)(iv)	Redesignate the reference to Equation 6 as a reference to Equation 8 to provide for the addition of new Equations 3 and 4.
60.105a(b)	Replace "in § 60.102a(b)(1) shall comply with the requirements in paragraphs (b)(1) through (3) of this section" with "in § 60.102a(b)(1) that uses a control device other than fabric filter or cyclone shall comply with the requirements in paragraphs (b)(1) and (2) of this section" to clarify applicability of the requirements and remove the reference to a nonexistent paragraph.
60.105a(b)(1)	Replace "according to the requirements in paragraph (b)(1)(i) through (iii) of this section" with "according to the applicable requirements in paragraphs (b)(1)(i) through (v) of this section" to clarify and correct paragraph reference.
60.105a(b)(1)(ii)(A)	Replace "alterative" with "alternative" to correct the use of an incorrect word.
60.105a(i)(5)	Replace "Except as provided in paragraph (i)(7) of this section, all rolling 7-day periods" with "All rolling 7-day periods" to remove the reference to a nonexistent paragraph.
60.107a(a)(2)(i)	Replace "320 ppmv H_2S" with "300 ppmv H_2S" to make the span value for a H_2S monitor consistent with the span value in 40 CFR part 60, subpart J.
60.108a(d)(5)	Replace "the information described in paragraph (e)(6) of this section" with "the information described in paragraph (c)(6) of this section" to correct the reference to a nonexistent paragraph.

IV. Summary of Significant Comments and Responses

As previously noted, we received a total of 22 comments addressing the proposed amendments. These comments were received from refineries, industry trade associations, consultants, state and local environmental and public health agencies, environmental groups and members of the public. Brief summaries of the major comments and our complete responses to those comments are included in the following sections. A summary of the remainder of the

comments received during the comment period and responses thereto, as well as more detailed summaries of the comments addressed in this preamble, can be found in *Standards of Performance for Petroleum Refineries: Background Information for Final Amendments—Summary of Public Comments and Responses*, which is included in the docket for the final amendments (Docket ID No. EPA–OAR–HQ–2007–0011). The docket also contains further details on all the analyses summarized in the responses below.

In responding to the public comments, we re-evaluated the cost and emission reduction impact estimates of some of the control options and re-evaluated the related BSER determinations. In our BSER determinations, we took all relevant factors into account consistent with other agency decisions.

A. Process Heaters

Comment: Commenters stated that new forced draft process heaters cannot meet the proposed emissions limit of 40 ppmv NO_X, so the EPA should revise the emissions limits for new forced draft process heaters to be the same as the limit for modified and reconstructed forced draft process heaters (60 ppmv NO_X). One commenter referenced a general technical document written by a process heater burner manufacturer regarding a new forced draft process heater at their refinery to support the assertion that new process heaters cannot meet the proposed limit without selective catalytic reduction or other add-on controls. Another commenter also requested higher emissions limits for new forced draft process heaters with air preheat.

Response: The commenters provided only limited and theoretical data to support their argument that new forced draft process heaters cannot meet the 40 ppmv (or 0.040 lb/MMBtu) NO_X emissions limit. Specifically, the John Zink white paper cited by the commenter (submitted as an attachment to Docket Item No. EPA–HQ–OAR–2007–0011–0296) stated only that the 40 ppmv emissions limit could not be "guaranteed" for a new forced draft process heater, based on the design conditions, which included air preheat. Actual NO_X performance data for that commenter's new forced draft process heaters are not available, as those particular process heaters are not yet operational. As such, the actual performance of these forced draft process heaters is still in question. However, we acknowledge that we only have data for one new forced draft process heater without air preheat that is currently operating that could meet a 40 ppmv NO_X emissions limit on a 365-day average. We conducted additional data evaluations to determine appropriate limits and averaging times for all process heaters at normal operating conditions while considering this and other public comments we received. As part of the data analysis effort, we obtained a year's worth of hourly CEMS data for the new forced draft process heater without air preheat capable of meeting 40 ppmv on a 365-day average. As discussed later in this section, our analysis of the additional data that we obtained following the proposal supported revising all NO_X emissions limits to be on a 30-day average basis. The data indicate that the 30-day averages for the new forced draft process heater without air preheat capable of meeting 40 ppmv on a 365-day average exceeded 40 ppmv 15 percent of the time, but none of the 30-day averages exceeded 60 ppmv NO_X.

Consequently, we are raising the NO_X emissions limit (while concurrently reducing the averaging time) for all new forced draft process heaters to be equivalent to the emissions limit for modified and reconstructed forced draft process heaters (*i.e.*, 60 ppmv or 0.060 lb/MMBtu with a 30-day averaging period). Furthermore, based on the information provided by the commenters, as well as the available performance data for existing forced draft process heaters with air preheat that have been retrofitted with ultra-low NO_X burners, we also conclude that the 60 ppmv (or 0.060 lb/MMBtu) on a 30-day rolling average basis adequately accommodates forced draft process heaters that use air preheat. Based on our review of CEMS data for new and retrofitted forced draft process heaters, we conclude that 60 ppmv (or 0.060 lb/MMBtu) on a 30-day rolling average basis is BSER for new, reconstructed or modified forced draft process heaters. (For additional details, see *Revised NO_X Impact Estimates for Process Heaters*, in Docket ID No. EPA–HQ–OAR–2007–0011.)

Comment: Commenters asserted that the heating value-based emissions limits (*i.e.*, the limits in units of lb/MMBtu) should be numerically equivalent to the concentration-based emissions limits (*e.g.*, 40 ppmv should be equivalent to 0.040 lb/MMBtu rather than 0.035 lb/MMBtu).

Response: In August 2008, Industry Petitioners provided the EPA with suggestions for revising the process heater standards (Docket Item No. EPA–HQ–OAR–2007–0011–0257). One of their recommendations was to include emissions limits based on heating value (lb/MMBtu) to account for hydrogen content variations in the fuel gas. They suggested that, on an annual basis, most natural draft process heaters could meet 0.035 lb/MMBtu and all other process heaters could meet 0.055 lb/MMBtu. We evaluated these suggested emissions limits and determined that they were reasonably equivalent to the concentration-based limits we were proposing. We also requested comment on their use and their equivalency, as described in the preamble to the proposed amendments (see 73 FR 78527). Industry commenters now assert that the emissions limit numerically equivalent to the 40 ppmv concentration limit is 0.040 lb/MMBtu and the emissions limit numerically equivalent to the 60 ppmv concentration limit is 0.060 lb/MMBtu.

We note that, as discussed in the preamble to the proposed amendments, the exact conversion from ppmv to lb/MMBtu depends on the hydrogen content of the fuel gas. However, our calculations generally support the more direct numerical conversion suggested by commenters over the typical range of hydrogen concentrations expected in the fuel gas (see *Revised NO_X Impact Estimates for Process Heaters*, in Docket ID No. EPA–HQ–OAR–2007–0011). Therefore, we are finalizing heating value-based emissions limits of 0.040 lb/MMBtu and 0.060 lb/MMBtu for natural draft process heaters and forced draft process heaters, respectively, based on direct numerical conversions from the concentration-based emissions limits.

We are also clarifying that the owner or operator must demonstrate that the process heater is in compliance with either the applicable concentration-based or heating value-based NO_X limit. The heating value-based NO_X emission rate is calculated using the oxygen (O_2)-based F factor, which is the ratio of combustion gas volume to heat input. Ongoing compliance with this NO_X emissions limit is determined using a NO_X CEMS and at least daily sampling of fuel gas heat content or composition to calculate a daily average heating value-based emissions rate, which is subsequently used to determine the 30-day average.

Specifically, if the F factor is determined at least daily, the owner or operator may elect to calculate both a 30-day rolling average NO_X concentration (ppmv, dry basis, corrected to 0-percent excess air) and a 30-day rolling average NO_X emission factor (in lb/MMBtu) and demonstrate that the process heater is in compliance with either one of these limits. For most

fuel gas systems, the alternative emissions limits are expected to be identical; however, there may be instances where a process heater may be complying with one of the emissions limits and not the other. For example, a process heater combusting fuel gas with very high hydrogen content may have an average NO_X concentration above the 60 ppmv limit, but below the 0.060 lb/MMBtu limit, largely due to the concentration limit being determined on a dry basis (and understanding that the combustion of hydrogen produces only water and not carbon dioxide). Provided that the appropriate monitoring is conducted, an affected source would only be out of compliance if it exceeds both the concentration-based limit and the heating value-based limit at the same time. However, to have the option to determine compliance with the alternative heating value-based emissions limit, the refinery owner or operator must, at least daily, determine the F factor (dry basis) for the fuel gas according to the monitoring provisions in 40 CFR 60.107a(d). If the F factor is not determined at least daily, the heating value-based alternative cannot be used. Generally, fuel gas heating value is important to the overall operation of refinery boilers and process heaters; as such, refiners maintain their fuel gas within an operating range that they need to fire these sources, often by mixing with natural gas, etc., so we anticipate that most, if not all, refiners will already have this information available on a daily basis.

Comment: Several commenters addressed the need for the rule to address turndown, which is a period of time when process heaters are firing below capacity. Commenters stated that during these periods, the NO_X concentrations will likely be above the emissions limits, but the mass of NO_X emissions is no greater than when the heater is operating at full capacity because the lower firing rate results in a lower exhaust flow rate. Commenters noted that turndown conditions could exist for extended periods, so special provisions are needed for these conditions. Commenters requested a mass-based emission rate (lb/MMBtu limit multiplied by the heater's rated capacity) that would apply when the process heater is firing at less than full capacity (some commenters suggested 50 percent of capacity; one commenter suggested 70-percent capacity as a cutoff). One commenter also noted that process heaters must often operate at higher O_2 levels during turndown and requested that the proposed maximum O_2 operating limit not apply when small furnaces that are not required to install CEMS are firing at less than full capacity.

Response: In our proposed amendments, we provided a longer averaging time (365-day average) so that short periods of turn-down would not significantly affect the overall performance of the unit. However, according to the commenters, the longer averaging time does not adequately address turndown conditions. Therefore, we re-evaluated the available data, including our existing data and additional data provided by the industry, to determine the appropriate emissions limits during different types of operation, including turndown. The additional data provided by Industry and our evaluation of those data are included in the docket for the final amendments (Docket ID No. EPA–OAR–HQ–2007–0011). Based on our analysis of the data (described in greater detail in the next paragraph), we concluded that a 30-day averaging period is appropriate for the NO_X emission limits under most operating scenarios.

Upon examination of all available CEMS data, we determined that, for periods of normal operation (*i.e.*, firing at 50 percent or more of design capacity), the proposed NO_X emissions limits of 40 and 60 ppmv were not achievable for all process heaters using a 24-hour averaging period (the averaging period included in the final June 2008 rule). From the available data, short-term fluctuations in the NO_X concentrations of process heaters using ultra-low NO_X burners caused them to exceed a 24-hour average limit somewhat frequently, but a 30-day average provided adequate time to average out the short-term fluctuations. We note that a few of the process heaters operated at relatively high excess O_2 concentrations at normal conditions (*i.e.*, at exhaust O_2 concentrations of 6 percent or more). These units had periods of excess emissions above the 30-day average emission limits, but we rejected the performance of these process heaters as BSER because of the high exhaust O_2 concentrations for these units during normal (*i.e.*, non-turndown) firing rates. That is, these process heaters were not being operated optimally for reducing NO_X emissions. Furthermore, when these process heaters were operated at the lower range of exhaust concentrations for the unit (although generally higher than what would be considered optimal excess O_2 concentrations for reducing NO_X emissions), the process heater could meet the applicable 40 or 60 ppmv emissions limit on a 30-day averaging period. Based on our review of CEMS data for process heaters with ultra-low NO_X burners that operated at excess O_2 concentrations less than 6 percent (*i.e.*, operated in a manner consistent with proper low NO_X burner operation), all such process heaters could comply with the final NO_X emissions limits on a 30-day average basis. Consequently, we revised the basic emissions limits to be on a 30-day average.

As described previously in this section, we conclude that the applicable 40 or 60 ppmv emissions limit on a 30-day averaging period is achievable for process heaters during periods of normal operation. Our next step was to evaluate the achievability of the emissions limits during turndown conditions and alternative approaches for establishing emissions limitations where necessary. The following paragraphs describe our analysis of the data, including our evaluation of alternative methods for accommodating turndown conditions and our rationale for providing the site-specific alternative for extended turndown conditions.

There were very limited CEMS data available for process heaters operating under turndown conditions (*i.e.*, firing below 50 percent of design capacity). However, two general trends were observed in the CEMS data that were available: (1) Typical exhaust O_2 concentrations increase at lower firing rates; and (2) exhaust NO_X concentrations (corrected to 0-percent excess O_2) increase with increasing O_2 concentration (regardless of firing rates). These data, along with the need to operate the process heater at higher O_2 concentrations during low firing rates to maintain flame stability, suggest that an alternative NO_X emissions limit could, in some instances, be needed to address extended turndown conditions (turndown events lasting a majority of the 30-day averaging time). As such, we considered alternative compliance options to address turndown conditions.

One alternative compliance option considered to address turndown was a mass-based NO_X emissions limit that would be equivalent to the mass of NO_X emitted from a unit meeting the 0.040 (or 0.060) lb/MMBtu limit while firing at 50 percent of capacity, as suggested by commenters. However, for most units for which CEMS data are available, the alternative mass-based emissions limit did not improve the ability of the process heater to meet the emissions limit. We note that most of the process heaters were able to meet the applicable concentration-based emissions limit (40/60 ppmv) or the heating value-based (0.040/0.060 lb/MMBtu) emissions limit

during turndown. Therefore, the issue appears to be limited to a few of the process heaters that must operate at relatively high excess O_2 concentrations during turndown conditions. For these units, the alternative mass-based emissions limit that we were considering rarely, if ever, provided a means for these units to comply with the performance standard.

We understand that technology providers recommend operating process heaters that are turned down at higher excess O_2 concentrations to improve flame stability and ensure safe operation of the process heater; however, based on the information provided by the technology providers, there is still an optimal excess O_2 concentration at which flame stability is achieved while minimizing NO_X formation. That is, even when a process heater is operating at less than 50-percent design capacity, excess O_2 concentrations should still be controlled to minimize NO_X formation within the safe operating constraints to maintain flame stability. We do not have specific data on process heaters that are near, but below, the concentration emissions limits when firing above 50-percent capacity, but cannot meet the concentration limit when firing below 50-percent capacity, so we have no data that show that process heaters operating at less than 50-percent design capacity and controlling excess O_2 concentrations cannot meet the emissions limits. However, we acknowledge that the correlations with firing rates and O_2 and/or NO_X concentrations and the need for higher O_2 concentrations to maintain flame stability generally support the commenter's argument that a few marginally compliant process heaters will have difficulty meeting the basic emissions limit when the unit is turned down. As such, we acknowledge that there may be periods of turndown in which a process heater is operating as recommended, but may be unable to meet the concentration or heating value-based emissions limits in the final rule, especially when the unit is operated at turndown for extended periods (*e.g.*, for 20 days or more compared to the 30-day averaging time). As the need for an alternative limit appears to be limited to a few process heaters and the optimal O_2 concentration is expected to vary, based on fuel gas composition, we determined that a site-specific emissions limit was the best approach to account for these extended turndown conditions. As such, the final rule provides owners and operators that have a process heater operating in turndown for an extended period of time the option of developing a site-specific emissions limit that would apply to those operating conditions and requesting approval from the Administrator to use that limit.

For process heaters between 40 and 100 MMBtu/hr capacity that do not install a NO_X CEMS, turndown is also expected to be an issue with respect to achieving the O_2 operating limit. As described above, higher O_2 concentrations are generally needed to maintain flame stability at low firing rates. To address potential turndown compliance issues with the O_2 operating limit, we have provided an allowance for process heater owners or operators to develop an O_2 operating curve to provide different O_2 operating limits based on the firing rate of the process heater. If a single O_2 operating limit is established, it must be determined when the process heater is being fired at 70 percent or more of capacity (*i.e.*, far from turndown conditions). For process heaters that routinely operate at less than 50 percent of design capacity and require additional O_2 to maintain flame stability, a separate O_2 operating limit should be established for turndown by conducting a second performance test while the unit is operating at less than 50 percent of capacity. Additional performance tests can be conducted to develop O_2 operating limits for additional operating ranges.

Comment: Several commenters requested that the EPA revise the emissions limits for co-fired process heaters or remove the limits for co-fired process heaters from this rulemaking and address them at a later date due to lack of sufficient data to set an achievable emissions limit. One commenter provided a white paper to support higher emissions limits. Commenters also asserted that the averaging time for the weighted average emission rate should be extended to 365 days. One commenter noted that the notation "$E_{NOx,hour}$" in Equation 3 was confusing since the purpose of the equation was to determine the daily emission rate.

Response: The final June 2008 rule included only one emissions limit for all co-fired process heaters, and Industry Petitioners asserted that differences in the configuration and operation of different types of process heaters warranted different emissions limits. The proposed amendments introduced two specific emissions limits for co-fired process heaters, one based on vendor guarantees for the burners and one based on an average NO_X concentration for a combination of fuel gas and fuel oil. We note that, for purposes of this rule, a co-fired process heater is defined as a process heater that employs burners that are designed to be supplied by both gaseous and liquid fuels. In other words, co-fired process heaters are designed to routinely fire both oil and gas in the same burner. These do not include burners that are designed to burn gas, but have supplemental oil firing capability that is not routinely used (*i.e.*, emergency oil back-up).

To respond to the comments requesting higher emissions limits for co-fired process heaters, we reviewed the white paper provided by one commenter (submitted as an attachment to Docket Item No. EPA–HQ–OAR–2007–0011–0308), as well as additional burner emissions test data provided by another commenter[5] (conducted under well-controlled conditions using best available ultra-low NO_X burner technologies at the manufacturer's testing facility). This information indicates that, for co-fired natural draft process heaters, a daily average emissions limit calculated based on a limit of 0.06 lb/MMBtu for the gas portion of the firing and 0.35 lb/MMBtu for the oil portion of the firing is achievable. Similarly, the information indicates that, for co-fired forced draft process heaters, a daily average emissions limit calculated based on a limit of 0.11 lb/MMBtu for the gas portion of the firing and 0.40 lb/MMBtu for the oil portion of the firing is achievable. As noted above, these values are based on burner performance tests, which are considered a better source of information than the vendor guarantees that were relied upon to develop the proposed emissions limit. Therefore, we are revising the NO_X emissions limits for co-fired process heaters to those described above. We note that we have revised the concentration-based NO_X emissions limits to be on a 30-day average basis (same as the limits for gas-fired process heaters). We have also revised the nomenclature of the daily average emissions limit in Equations 3 and 4 (proposed Equation 3) to be clear that we intend the limit to be determined on a daily basis rather than on an hourly basis.

We also note that the burner performance tests were conducted in a controlled environment at the burner manufacturer's full-scale facilities. While it is incumbent on the owner or operator of an affected process heater to control certain operating parameters, such as excess O_2 concentrations, to the

[5] The commenter providing this data asserted that it is CBI. We will follow our CBI regulations in 40 CFR part 2 in handling this data. The data has been placed in the docket, but is not publicly available.

extent possible, we recognize that the performance limits in the final amendments are based on limited data, none of which are direct test data for a co-fired process heater operated at a petroleum refinery. We conclude that the low-NO_X burner technologies exist, are demonstrated and are cost effective for co-fired process heaters and they are, therefore, BSER for co-fired process heaters. However, as the performance limits are based on limited operational data, we also conclude that it is reasonable to provide an alternative, site-specific limit in the event that factors outside the influence of the burner design and operation (such as nitrogen content in the fuel oil) suggests the emission limits in the final rule are inappropriate for a specific application. Consequently, co-fired process heaters that cannot meet the limits specified above, can request approval for a site-specific emissions limit, as allowed above, for process heaters that operate for extended periods under turndown.

B. Flares

Comment: Several commenters asserted that routine connections to a flare should not be considered modifications of the flare because they do not change the maximum physical capacity of the flare and do not generally increase emissions. One commenter asserted that the 40 CFR part 60, subpart A General Provisions in 40 CFR 60.14 can and should apply to flares, so a special modification provision for flares in 40 CFR part 60, subpart Ja is unnecessary. Commenters noted that some connections to the flare have the primary purpose of reducing emissions, which has been excluded under 40 CFR 60.14(e)(5), a paragraph that is not limited to pollutants "to which the standard is applicable." One commenter noted that a single project may remove some connections and add others such that the net emissions could actually be reduced. Another commenter asserted that an increase in flow should not be considered a modification because flow is not a regulated pollutant.

Instead, commenters asserted that the modification provision for a flare should focus on physical and operational changes that increase emissions from the flare. One commenter suggested that the EPA should focus the flare modification provision on connections that provide a primary/routine flow from a process unit to the flare. Other commenters suggested that the flare modification provision should be focused on VOC and SO_2 emissions and should only include connections that result in a net increase of those pollutants emitted "during normal operations" and connections that cause an increase in the total volume of gas containing VOC or sulfur compounds under standard conditions that could reach the flare.

Response: The agency made a conscious decision to promulgate a separate provision for a flare modification in 40 CFR part 60, subpart Ja (see 40 CFR 60.14(f)) because flares are operated differently from other refinery process units, making it difficult to apply the modification provision in the General Provisions (40 CFR 60.14) to them. The physical capacity of a flare is based on the amount of gas potentially discharged to a flare as a result of emergency relief. Refiners frequently make connections to existing flares that result in emissions increases at the flares, but may never approach the physical capacity of the flare system. Contrary to commenters' assertions, the flare modification provision in 40 CFR 60.100a(c) does meet the statutory definition of "modification" in CAA section 111(a)(4), which is "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." It is axiomatic that the connections to the flare described in 40 CFR 60.100a(c) qualify as physical or operational changes to the flare. Additionally, we explained in the proposed rule how these connections also resulted in emissions increases from the flare (see 73 FR 78529). Thus, these types of new connections of refinery process units (including ancillary equipment) and fuel gas systems to the flare qualify as a "modification" of the flare and trigger subpart Ja applicability for the flare.

Those connections we identified that do not increase emissions from the flare were specifically excluded from triggering 40 CFR part 60, subpart Ja applicability under this same provision (see 40 CFR 60.100a(c)(1)). Specifically, we proposed on December 22, 2008, that the following types of connections to a flare would not be considered a modification of the flare: (1) Connections made to install monitoring systems to the flares; (2) connections made to install a flare gas recovery system; (3) connections made to replace or upgrade existing pressure relief or safety valves, provided the new pressure relief or safety valve has a set point opening pressure no lower and an internal diameter no greater than the existing equipment being replaced or upgraded; and (4) replacing piping or moving an existing connection from a refinery process unit to a new location in the same flare, provided the new pipe diameter is less than or equal to the diameter of the pipe/connection being replaced/moved. While we agree that there may be other connections to a flare that would not result in an emissions increase from the flare (see response to the next comment for specific details), we disagree with the commenters that the flare modification provision should be further limited beyond what is already provided in the provision.

We disagree with commenters that we must consider the "net" emissions from the process unit and the flare when determining whether a flare is modified. The affected facility is the flare and does not include the process units that are tied into the flare header system. *See Asarco* v. *EPA*, 578 F.2d 319, 325 (D.C. Cir. 1978) (holding that emission increases had to be determined based on emissions from the affected facility). We also disagree that a modification determination should be limited to emissions increases of VOC or SO_2. Flares are known to emit VOC, SO_2, carbon monoxide (CO), PM and NO_X, as well as other air pollutants, all of which are relevant when determining whether a flare has been modified. See CAA section 111(a)(4). That is, we consider the standards for flares to be emission standards for VOC, SO_2, CO, PM and NO_X. See, generally, 73 FR 35838, 35842, 35854–35856 (June 24, 2008); 73 FR 78522, 78533 (December 22, 2008), as well as Table 4 of this preamble. Using the flare to control VOC emissions at other refinery process units will increase CO, PM and NO_X emissions from the flare and are, therefore, considered modifications of the flare, even if there is a net reduction in VOC emissions at the refinery.

In evaluating whether a flare has been modified, we consider increases in flow to the flare to be directly indicative of increased emissions from the flare. While we agree that "flow" is not a pollutant, we evaluated flow limits as a means to reduce SO_2, VOC, CO, NO_X and other emissions from the flare. The emissions from the flare are very difficult, if not impossible, to measure accurately, but flow to the flare can be measured, and the flow to the flare generates SO_2, VOC, CO, PM, NO_X and other emissions. Therefore, a physical or operational change to a flare that causes an increase of flow to the flare will increase emissions of at least one of these pollutants and is considered a modification of the flare.

Comment: Many commenters responded to the EPA's request for comment on types of connections that

do not result in an increase in emissions from a flare. The commenters suggested numerous specific connections that should not be considered modifications, including:

(1) Connections made to upgrade or enhance (not just to install) a flare gas recovery system;

(2) Connections made for flare gas sulfur removal;

(3) Connections made to install back-up equipment:

(4) Flare interconnects;

(5) All emergency pressure relief valve connections from existing equipment;

(6) Connections of monitoring system purge gases and analyzer exhausts or closed vent sampling systems;

(7) Purge and clearing vapors, block and bleeder vents and other uncombusted vapors where the flare is the control device;

(8) Connections made to comply with other federal, state or local rules where the flare is the control device;

(9) Connections of "unregulated gases" such as hydrogen, nitrogen, ammonia, other non-hydrocarbon gases or natural gas or any connection that is not fuel gas;

(10) New connections upstream of an existing flare gas recovery system, provided the new connections do not compromise or exceed the flare gas recovery system's capacity;

(11) Any new, moved or replaced piping or pressure relief valve connections that do not result in a net increase in emissions from the flare, regardless of piping or pressure relief valve size;

(12) Vapors from tanks used to store sweet or treated products;

(13) Temporary connections for purging existing equipment, as these are essentially "existing" connections; and

(14) Connections of safety instrumentation systems (SIS) described under Occupational Safety and Health Administration (OSHA) process safety standards at 29 CFR 1910.119, the EPA's risk management program at 49 CFR 68 and/or American National Standards Institute (ANSI)/International Society of Automation (ISA)-84.00.01–2004.

Response: We carefully reviewed the commenters' suggested changes to the flare modification provision to determine whether there are additional connections that should not be considered modifications to the flare. We agree that the first four connections in the commenters' list should not be considered modifications of a flare. Projects to upgrade or enhance components of a flare gas recovery system (*e.g.*, addition of compressors or recycle lines) will improve the operation of the flare gas recovery system, and connections to these additional components will not result in increased emissions. Connections made for removal of sulfur from flare gas (Item 2 above) will generally result in a slight decrease in volumetric flow and a large decrease in emissions of SO_2. Connections made to install back-up or redundant equipment (Item 3 above), such as a back-up compressor, will result in fewer released emissions if there is a malfunction in the main equipment.

The request to exclude flare interconnections (Item 4 above) is a complicated issue because interconnecting two separate flares alters what we consider to be the affected facility. The definition of "flare" specifically includes the flare gas header system as part of the flare. Prior to interconnecting the flares, presumably each flare header system is independent, and there would be two separate "flares," each of which could potentially be an affected facility subject to 40 CFR part 60, subpart Ja. However, because the flare includes the flare header system, we consider that an interconnected flare system is a single affected facility, and we have amended the definition of "flare" for clarity. We agree that interconnections between flares will not alter the cumulative amount of gas being flared (*i.e.*, interconnecting two flares does not result in an emissions increase relative to the two single flares prior to interconnection). We also see cases where the emissions from a single flare tip will likely be reduced due to the flare interconnect. For example, when a large release event occurs, this gas will now flow to both of the interconnected flares rather than a single flare. The maximum emission rate for the original single flare actually decreases, while the combined emissions from both flares is the same quantity as prior to the interconnection. Considering this, we agree that the interconnection of two flares does not necessarily result in a modification of the flare and we have specifically excluded flare interconnections from the modification provisions.

However, we also clarify in this response that when a flare that is subject to 40 CFR part 60, subpart Ja is interconnected with a flare that is not subject to subpart Ja, then the resulting interconnected flare is subject to subpart Ja. That is, the only case in which an interconnection between two (or more) flares results in a combined, interconnected flare that is not subject to subpart Ja is when none of the original individual flares were subject to subpart Ja. Additionally, we note that if a new connection is made to the interconnected flare, then the flare (including each individual flare tip within the interconnected flare header system) is modified and becomes an affected facility subject to subpart Ja.

While we agree that connections that do not increase the emissions from the flare should not trigger a modification, we disagree with the commenter that their other suggested connections do not increase the flare's emissions at the time gases are discharged via the new connection. Each of the commenters' suggestions is discussed in the following paragraphs.

We previously proposed an exemption for emergency pressure relief valve connections from existing equipment (Item 5 above) if they replace or upgrade existing equipment and do not increase the instantaneous release rate to the flare (*i.e.*, the new pressure relief valve has a pressure set point and diameter no greater than the equipment being replaced). As stated previously in this preamble, we are finalizing that amendment, as proposed. However, new connections, even if they are made to "existing equipment," will result in an increase in flow to the flare during periods of process upset that cause the pressure relief valve to open.

Connections of monitoring system purge gases and analyzer exhausts or closed vent sampling systems (Item 6 above) will increase the emissions from the flare. Similarly, connections of purge and clearing vapors and block and bleeder vents (Item 7 above), also trigger a modification of the flare because the increase of gas flow to the flare will increase the emissions from the flare.

We recognize that connections to a flare may be made to comply with other federal, state or local rules where the flare is an emissions control device (Item 8 above). In fact, nearly all flares could be considered "control devices." We agree that using a flare as an emissions control device is preferable to venting the process unit to the atmosphere. However, while using the flare as an emissions control device does decrease emissions from the process unit being controlled, the increase of gas flow to the flare will increase the emissions from the flare. Therefore, a connection from a process unit to a flare for use as an emissions control device results in a modification of that flare.

Comments suggesting that connections of "unregulated gases" such as hydrogen, nitrogen, ammonia, other non-hydrocarbon gases or natural gas or connections that are not "fuel gas," should not be considered a

modification of the flare (Item 9 above) are in conflict with the statutory definition of "modification." Each of the streams mentioned by the commenter, when directed to a flare, will increase emissions of at least one pollutant (either PM, CO or NO_X) from the flare (all of which the standard is intended to reduce). That is, we reiterate that we consider the standards for flares to be emission standards for VOC, SO_2, CO, PM and NO_X. As such, we do not agree that the types of gas streams suggested by the commenters should be exempt from the modification determination.

New connections upstream of an existing flare gas recovery system (Item 10 above) will increase the likelihood of an event that would cause an exceedance of the flare gas recovery system's capacity (even if the new connections "do not exceed the flare gas recovery system's capacity" under normal conditions), and the amount of gases sent to the flare would increase as a result of such an event, thereby increasing the emissions from the flare.

We reiterate that we proposed an exemption for any moved or replaced piping or pressure relief valve connections of the same size. However, we disagree with the commenter's suggestion that any "new, moved, or replaced piping or pressure relief valve connections that do not result in a net increase in emissions from the flare regardless of piping or pressure relief valve size" should be exempted (Item 11 above). The premise of the suggested amendment is that new or larger connections somehow will not increase emissions from the flare. We have discussed new connections previously, so we will concentrate on the "regardless of piping or pressure relief valve size" comment in this paragraph. First, the size of the pressure relief valve or piping does correlate to the discharge rate to the flare, with larger pressure relief valves or larger diameter piping allowing higher discharge rates to the flare at a given pressure. In fact, larger pressure relief valves and larger diameter pipes are specifically designed to allow higher flow rates to the flare. Second, higher flow rates will lead to higher emission rates. For a pressure relief event that occurs for several hours, the flow rate to the flare during the first hour of relief using the larger pressure relief valve or larger diameter piping will be larger than the flow rate experienced using the smaller pressure relief valve or smaller diameter piping and will result in higher emissions from the flare. Therefore, we reject the notion that larger diameter pipes and larger pressure relief valves do not increase the emissions rate from the flare during a release event. We are finalizing the proposed exemptions for moved or replaced piping or pressure relief valves with the size and design restrictions for the new piping or pressure relief valves as proposed on December 22, 2008.

Commenters suggested that connections of vapors from tanks used to store sweet or treated products (Item 12 above) should not be modifications because those gas streams have less than 162 ppmv H_2S. We reiterate that SO_2 is not the only pollutant emitted from flares and that the additional flow of sweet gases will increase the emissions of at least one pollutant from the flare, so we are not exempting these types of connections to the flare from the 40 CFR part 60, subpart Ja flare modification provision. However, we have amended the sulfur monitoring requirements for flares to exempt vapors from tanks used to store sweet or treated products from the flare sulfur monitoring requirements. This monitoring exemption is justified because it is not needed for the purposes of a root cause analysis or other compliance purpose. For these sweet vapors, the flow rate root cause analysis threshold will be exceeded well before the SO_2 root cause analysis threshold.

We carefully considered temporary connections for purging existing equipment (Item 13 above), but we failed to see how these temporary connections are essentially "existing connections." According to the commenters, "maintenance gases have been routed in some form or other to the flare for years, and the temporary tie-in to accomplish that is not a change and is not an increase in emissions when viewed from a before and after perspective." If the connections already exist, then opening an existing valve to allow for this type of purging would not trigger a flare modification. If the connection is being relocated and the piping used is the same diameter as the pre-existing connection, then this scenario is adequately covered by the proposed exclusion for relocated connections. However, if a new connection is made specifically to purge an existing piece of equipment, this purge gas unequivocally represents additional gas flow sent to the flare that did not exist and could not exist prior to the connection being made. Again, we consider that the increase in gas flow to the flare will result in an increase in emissions of at least one pollutant from the flare. As such, no exemption is provided for new connections to existing equipment, regardless if these connections are temporary or permanent. We also find that these types of flows should be expressly considered in the flare management plan and that flaring from these "temporary" connections should be minimized to the extent practicable.

The impact of connections of SIS described under OSHA process safety standards at 29 CFR 1910.119, the EPA's risk management program at 49 CFR 68 and ANSI/ISA–84.00.01–2004 (Item 14 above) should be evaluated on a case-by-case basis to determine whether these connections result in a flare modification. We expect that, if these connections are made for flare monitoring purposes, these connections are already excluded in the exemption for flare monitoring systems. If the "SIS" are process unit analyzers and the new connections are being made to connect the analyzer exhaust to the flare, these connections would be considered a modification, as previously discussed. The commenter may also be referring to new connections for additional pressure relief valves identified in the safety reviews required by the cited rules, which we would consider to be a modification of the flare.

Following all of the above review and analysis, we are finalizing three of the connections, as proposed, adding three of the connections requested by commenters and revising one of the proposed connections as requested by commenters in 40 CFR 60.100a(c)(1). Thus, the following seven types of connections are not considered a modification of the flare:

(1) Connections made to install monitoring systems to the flare.

(2) Connections made to install a flare gas recovery system or connections made to upgrade or enhance components of a flare gas recovery system (*e.g.*, addition of compressors or recycle lines).

(3) Connections made to replace or upgrade existing pressure relief or safety valves, provided the new pressure relief or safety valve has a set point opening pressure no lower and an internal diameter no greater than the existing equipment being replaced or upgraded.

(4) Connections that interconnect two or more flares.

(5) Connections made for flare gas sulfur removal.

(6) Connections made to install back-up (redundant) equipment associated with the flare (such as a back-up compressor) that does not increase the capacity of the flare.

(7) Replacing piping or moving an existing connection from a refinery process unit to a new location in the same flare, provided the new pipe diameter is less than or equal to the

diameter of the pipe/connection being replaced/moved.

Comment: Several commenters suggested that *de minimis* emission increases and net emission decreases resulting from new connections to a flare made to control and combust fugitive emissions such as leaks from compressor seals, valves or pumps, should not be considered modifications of a flare. One commenter suggested allowing site-specific exemptions for connections that do not increase emissions or that result in a *de minimis* emissions increase. However, another commenter objected to setting a *de minimis* emissions increase to determine whether a change to a flare is a modification and stated that allowing a *de minimis* approach would cause confusion over the applicability of 40 CFR part 60, subpart Ja because flare emissions are difficult to estimate.

Response: In the preamble to our proposed amendments, the EPA specifically requested comment on using the *de minimis* exception in the flare modification provision. 73 FR 78522. 78529. Industry Petitioners had suggested some type of *de minimis* emissions increase should be allowed without triggering 40 CFR part 60, subpart Ja applicability. *Id.* The EPA acknowledged that these exceptions are "permissible but not required" under the modification provision in the CAA. *Id.* The EPA also stated: "We request comments on a *de minimis* approach and on specific changes that may occur to flares that will result in *de minimis* increases in emissions. We also request comments on the type, number, and amount of emissions that would be considered *de minimis.*" *Id.*

Industry Petitioners continue to recommend that any emissions increases resulting from "routine connections" to the flare system "will be *de minimis*" and should not trigger 40 CFR part 60, subpart Ja applicability at the flare, but they have not provided the comments or data requested in the proposal preamble that the EPA could consider to evaluate the impacts of such an approach. Docket Item No. EPA–HQ–OAR–2007–0011–0311 (second attachment), pg 20. Industry Petitioners again suggest that the EPA exercise its authority and "authorize exceptions from otherwise clear statutory mandates" by promulgating *de minimis* exemptions for the flare modification provision. *Id.; Alabama Power Co.* v. *Costle,* 636 F.2d 323, 360 (D.C. Cir. 1979). As explained in *Alabama Power,* the *de minimis* exception allows agency flexibility in interpreting a statute to prevent "pointless expenditures of effort." *Id.* However, as Industry Petitioners recognize, nothing mandates that the EPA use its *de minimis* authority in any given instance, and courts especially recognize the significant deference due an agency's use of a *de minimis* exception. *Id.* at 400; *Shays* v. *Federal Election Com'n,* 414 F.3d 76, 113 (D.C. Cir. 2005); *Environmental Defense Fund, Inc.* v. *EPA,* 82 F.3d 451, 466 (D.C. Cir. 1996); *Ass'n of Admin. Law Judges* v. *Fed. Labor Relations Auth.,* 397 F.3d 957, 961 (D.C. Cir. 2005).

In exercising that discretion, the EPA must consider the cautionary advice it received from the *Alabama* Court regarding its use of the *de minimis* exception:."EPA must take into account in any action * * * that this exemption authority is narrow in reach and tightly bounded by the need to show that the situation is genuinely *de minimis.*" *Id.* at 361. The Court also noted that exemptions from "the clear commands of a regulatory statute, though sometimes permitted, are not favored." *Id.* at 358. The EPA must exercise this authority cautiously, and only in those circumstances that truly warrant its application.

The EPA has found no basis for promulgating a *de minimis* exception to the flare modification provision. Despite its assertions, Industry Petitioners have still provided no data to support a finding that the emissions increases resulting from the alleged "routine connections" to a flare system are truly "trivial or [of] no value." Docket Item No. EPA–HQ–OAR–2007–0011–0311 (second attachment), pg 20. Without the requested information showing that "the situation is genuinely *de minimis,*" *Alabama Power,* 636 F.2d at 361 and, therefore, warrants this kind of exception, we believe such an exemption would be inappropriate.

Additionally, Industry Petitioners' example that "venting a new small storage tank to a flare system * * * easily would cost a typical refinery tens of millions of dollars" since "the *entire* flare system" (emphasis in original) would be subject to subpart Ja is unavailing for its argument that the EPA should promulgate a *de minimis* exception for the flare modification provision. Docket Item No. EPA–HQ–OAR–2007–0011–0311 (second attachment), pg 21. As the District of Columbia Circuit specifically states in *Shays,* authority for promulgating a *de minimis* exception "does *not* extend to a situation where the regulatory function does provide benefits, in the sense of furthering regulatory objectives, *but the agency concludes the acknowledged benefits are exceeded by the costs.*" *Shays,* 414 F.3d 76, 114 (emphasis added). By focusing solely on cost, Industry Petitioners are effectively asking the agency to engage in the type of cost-benefit analysis prohibited by the *Shays* Court. Such cost analyses are improper in these types of decisions. Industry Petitioners generally focus their discussion on VOC emissions and effectively admit that connecting the small storage tank to the flare system increases emissions from the flare (*e.g.,* "uncontrolled tank emissions would be *essentially* eliminated by combustion in a flare" (Docket Item No. EPA–HQ–OAR–2007–0011–0311 (second attachment), pg 21, emphasis added)). Furthermore, they disregard additional emissions of NO_X and CO resulting from the combustion of these gases at the flare. Industry Petitioners also provide no data quantifying these emissions increases and, therefore, cannot demonstrate that they are "trivial or [of] no value" or, in other words, that the emissions increases are, in fact, *de minimis.* As releases to the flare are often event driven, one can envision situations where the release from even a small storage tank could be significant. On the other hand, the EPA sees a substantial environmental benefit in requiring controls that will reduce the cumulative emissions from a flare that becomes subject to 40 CFR part 60, subpart Ja because of any of these alleged "routine connections." Thus, given the nature of releases to the flare, we determined that a *de minimis* exemption from the modification provisions for flares is unworkable and unwarranted.

Comment: One commenter stated that exempting flares[6] from the H_2S concentration limits during startup, shutdown and malfunction (SSM) events is illegal because the CAA requires continuous compliance with standards of performance promulgated under CAA section 111. See CAA sections 111(a)(1), 302(k). For support, the commenter cited *Sierra Club* v. *EPA,* 551 F.3d 1019 (DC Cir. 2008), in which the Court stated: "When sections 112 and 302(k) are read together, then, Congress has required that there must be continuous section 112-compliant standards." The commenter noted that the Court found that the exemption from compliance with CAA section 112 standards during SSM events violates

[6] The comments submitted referenced "fuel gas combustion devices" as the affected source when describing the exemption during SSM events. However, the exemption only applies to flares. See 40 CFR 60.103a(h). The discussion in this preamble is, therefore, focused on flares as distinguished from other types of fuel gas combustion devices that are required to comply at all times with the H_2S concentration limits in 40 CFR 60.102a(g)(1).

the CAA because the general duty to minimize emissions during SSM events is not a CAA section 112-compliant standard. The commenter asserted that the CAA also requires that a section 111-compliant standard that reflects BSER[7] be in effect at all times for flares.

The commenter further asserted that work practice standards for flares are not CAA section 111-compliant standards because this is not one of those "limited instances" in which CAA section 111(h) authorizes such standards. The commenter stated that the EPA must show that a standard of performance for flares is "not feasible to prescribe or enforce" because "(A) a pollutant * * * cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any federal, state or local law or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations." See CAA section 111(h)(2). The commenter stated that neither of these exemptions appear to apply and the EPA cannot claim that it is infeasible to promulgate a standard of performance for flares,[8] so the EPA cannot set a work practice standard for flares. Thus, the commenter asserted that a CAA section 111-compliant standard does not continuously apply to flares since both the exemption from the H_2S concentration limits during SSM events and the flare work practice standards are not lawful under the CAA.

Another commenter disagreed and provided several reasons why they believe the EPA may lawfully exempt flares from the H_2S concentration limits during SSM events. First, the commenter noted that 40 CFR part 60, subpart Ja was promulgated as part of the mandatory periodic review of 40 CFR part 60, subpart J required by CAA section 111(b)(1)(B). The commenter noted that subpart J exempts a flare from the H_2S concentration limits when combusting certain gases generated during SSM events (see 40 CFR 60.104(a)(1), 60.101(e)) and stated that the record contains "ample evidence" to support maintaining that provision in subpart Ja. The commenter asserted that including these same provisions in subpart Ja is "an appropriate exercise of EPA's authority to 'not review' this aspect of the existing standard in light of the efficacy of the existing standard." See CAA section 111(b)(1)(B).

Second, the commenter noted that the *Sierra Club* decision was largely grounded in the Court's determination that Congress amended CAA section 112 out of concern "about the slow pace of EPA's regulation of HAPs," eliminating much of the EPA's discretion and requiring sources to "meet the strictest standards" without variance "based on different time periods." The commenter further explained that the Court pointed to CAA section 112(d)(1) regarding the EPA's authority to "distinguish among classes, types, and sizes of sources" when promulgating CAA section 112 standards as further evidence for constraining the EPA's ability to adopt different standards applicable during SSM events. In contrast, the commenter asserted that "Congress has expressed no such concern about EPA's efforts to implement section 111" despite revisions to CAA section 111 in 1977 and 1990. Therefore, the commenter asserted, Congress has "effectively ratified EPA's longstanding approach to SSM under the NSPS program," which includes the exemption for flares from the H_2S concentration limits during SSM events.

The commenter also asserted that, regardless of the above and despite the similar nature of the provisions in CAA sections 111 and 112, the EPA has the discretion to implement them differently "under the markedly differently context of the NSPS program v. the MACT program." See *Environmental Defense* v. *Duke Energy Corp.*, 549 U.S. 561, 575–576 (2007). For example, the commenter asserted that the word "continuous" as used in the NSPS program could be interpreted and applied differently, as acknowledged by the Court in *National Lime Ass'n* v. *EPA*, 627 F.2d 416, 434 (DC Cir. 1980) (deferring to agency regarding the effect of "the perplexing implications of Congress' new requirement of systems of continuous emission reduction" on the agency's longstanding "regulations permitting flexibility to account for startups, shutdowns, and malfunctions"). The commenter urged the EPA to exercise this discretion and "reassert the many practical, technical and economic factors" that justify promulgating separate standards for SSM events in the NSPS program.

Third, the commenter asserted that requiring flares to meet the H_2S concentration limits during SSM events does not represent BSER for this time period. According to the commenter, "startup and shutdown gases are intermittent streams that cannot be cost effectively treated for sulfur removal because of their infrequent occurrence, their scattered points of generation and their variability." Therefore, for all of the above reasons, the commenter asserted that exempting a flare from the H_2S concentration limits when combusting certain gases generated during SSM events is lawful under CAA section 111.

Alternatively, the commenter stated that if a standard must apply during SSM events, the flare work practice standards are appropriate in lieu of the H_2S concentration limit.

Response: Regardless of whether or how the *Sierra Club* decision under CAA section 112 applies to NSPS promulgated under CAA section 111, we are promulgating final amendments for flares that include a suite of standards that apply at all times and are aimed at reducing SO_2 emissions from flares. As described previously, this suite of standards requires refineries to: (1) Develop and implement a flare management plan; (2) conduct root cause analysis and take corrective action when waste gas sent to the flare exceeds a flow rate of 500,000 scf above the baseline; (3) conduct root cause analysis and take corrective action when SO_2 emissions exceed 500 lb in a 24-hour period; and (4) optimize management of the fuel gas by limiting the short-term concentration of H_2S to 162 ppmv during normal operating conditions. Additionally, refineries must install and operate monitors for measuring sulfur and flow at the inlet of all of their flares. Together, these requirements provide CAA section 111-compliant standards that collectively cover all operating conditions of the flare.

As the commenter notes, CAA section 111(h)(1) allows the EPA to promulgate a design, equipment, work practice or operational standard or "combination thereof," when "it is not feasible to prescribe or enforce a standard of performance" which reflects BSER for the particular affected source. CAA section 111(h)(2) defines the phrase

[7] The commenter asserted, without providing support, that it is not BSER to exempt flares from the H_2S concentration limits during startup and shutdown events. The commenter also stated that the EPA, at a minimum, must demonstrate how the exemption from the H_2S concentration limits during SSM events does, in fact, represent BSER, but the commenter stated that the EPA has failed to make this demonstration.

[8] The commenter cited the EPA's rationale for proposing work practice standards for flaring in which we state: "It is not feasible to prescribe or enforce a standard of performance for these sources because either the pollution prevention measures eliminate the emission source, so that there are no emissions to capture and convey, or the emissions are so transient, and in some cases, occur so randomly, that the application of a measurement methodology to these sources is not technically and economically practical." 72 FR 27178, 27194–27195 (May 14, 2007). In response, the commenter stated: "[T]he plain language of the Act recognizes that standards of performance leading to the 'capture' of emissions are not infeasible [citation omitted], and EPA has proposed to apply measurement methodologies to flares in spite of the transience of their emissions."

"not feasible to prescribe or enforce a standard of performance" as "any situation in which the Administrator determines that * * * a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or * * * the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations."

We have determined that flares meet the criteria set forth in CAA section 111(h)(2)(A) because emissions from a flare do not occur "through a conveyance designed and constructed to emit or capture such pollutant." Gases are conveyed to the flare for destruction, and combustion products such as SO_2 are not created until combustion occurs, which happens in the flame that burns outside of the flare tip. In other words, the SO_2, NO_X, PM, CO, VOC and other pollutants generated from burning the gases are only created once the gases pass through the flare and come into contact with the flame burning on the outside of the flare. The flare itself is not a "conveyance" that is "emitting" or "capturing" these pollutants; instead, it is a structure designed to combust the gases in the open air. Thus, setting a standard of performance for SO_2 (and other pollutants) is not "feasible," allowing the EPA to instead promulgate standards under CAA section 111(h), which will collectively limit emissions from the flare.

The EPA previously promulgated a standard of performance for SO_2 emissions for fuel gas combustion devices which also applied to flares. 39 FR 9308, 9315 (March 8, 1974). The standard is expressed as an H_2S concentration limit because it was developed as an alternative to measuring the SO_2 concentration in the stack gases exiting fuel gas combustion devices other than flares (*i.e.*, boilers and process heaters). That approach is appropriate for fuel gas combustion devices other than flares because measuring the H_2S in the fuel gas combusted in those devices is directly indicative of the SO_2 emitted from the exhaust stacks of those other devices. As explained in section III of this preamble, we are, for the first time, designating flares as their own affected facility. As such, in finalizing these amendments for flares, we considered whether we could also apply a standard of performance for SO_2 emissions, expressed as an H_2S concentration limit or a total sulfur limit at the inlet to the flare. However, as explained above, flares are substantially different from other fuel gas combustion devices so that this approach is not workable for flares. For example, SO_2 emissions from a flare are dependent on many factors, including the flow rates of all gases sent to the flare, the total sulfur content of all gases sent to the flare and the combustion efficiency at the flare. Each of these factors is also dependent on many variables. For example, combustion efficiency at the flare is dependent upon the flammability of the gases entering the flare, the turbulence at the flare,[9] the wind speed and wind direction and the presence of other pollutants in the gases that can react with the sulfur to form sulfur-containing pollutants other than SO_2. Since so many factors affect the potential formation of SO_2 emissions outside the flare tip, we realized that we could not properly derive an H_2S concentration limit or a total sulfur limit at the flare inlet that would directly correlate with those SO_2 emissions. Thus, we determined that we cannot set a standard of performance for SO_2 emissions at the flare.

However, we still recognize that reducing the amount of sulfur that is sent to a flare will reduce the SO_2 emissions at the flare. Even with the uncertainty described above, we understand the importance of refineries managing the fuel gas sent to their flares in a way that minimizes the sulfur content so as to ultimately minimize the SO_2 emissions. Rather than eliminate the H_2S concentration limit altogether, we are instead requiring under CAA section 111(h) that refineries limit the short-term concentration of H_2S to 162 ppmv in the fuel gas sent to flares during normal operating conditions. Refineries rely on various methods for optimizing the management of fuel gas, including the use of amine treatment and flare gas recovery systems. Amine treatment removes the H_2S from the flare gas that generates the pollutants before the gas is sent to the flare. Flare gas recovery systems remove the flare gas altogether and instead treat this gas in a fuel gas treatment system to be used elsewhere as fuel gas in the refinery. Requiring refineries to meet this concentration limit at the flare ensures that the fuel gas has been adequately treated and managed such that it can be used as fuel gas in the fuel gas system elsewhere in the refinery. We are not requiring refineries to meet this limit during other periods of operation because flare gas recovery systems that capture gases prior to amine treatment can be quickly overwhelmed and fail to properly function during high fuel gas flows. Thus, requiring that flares meet this H_2S concentration limit during periods when high fuel gas flows would likely overwhelm these flare gas recovery systems would not fully address the circumstances refineries face in managing these high flow periods. Designing flare gas recovery systems to capture the full range of gas flows to the flare would not only require the ability to predict the full range of gas flows in the flare headers, but also would require refiners to install recovery compressors in a staged fashion such that all events causing high gas flows could be captured and managed, neither of which are practical. Therefore, promulgating flare requirements that include the H_2S fuel gas concentration limit during normal operating conditions, coupled with requirements for refineries to develop and implement a flare management plan and conduct root cause analyses and take corrective action when waste gas sent to the flare exceeds a flow rate of 500,000 scf above the baseline or 500 lb of SO_2 in a 24-hour period, recognizes these unique circumstances while still requiring the refinery to take all reasonable measures for reducing or eliminating the flow and sulfur content of gases being sent to the flares.

We are aware that numeric SO_2 emission limits for flares have been established under state law and in Federal Implementation Plan (FIP) regulatory requirements. Those source-specific circumstances differ markedly from this nationally applicable rulemaking, necessitating different decisions in two very different circumstances. For example, the EPA's SO_2 FIP for the Billings/Laurel, Montana area includes a SO_2 emission limit of 150 lb of SO_2 per 3 hours for four sources that apply to the flares at all times. See 40 CFR 52.1392(d)(2)(i), (e)(2)(i), (f)(2)(i) and (g)(2)(i). These source-specific limits were appropriately based on dispersion modeling in the Billings/Laurel area to determine what was needed to meet national ambient air quality standards (NAAQS) for SO_2 in the Billings/Laurel area. In contrast, the nationally applicable standards and requirements we are promulgating in this rule must represent the BSER achievable for an entire industry sector scattered across the entire country. This requires that we consider costs and other non-air quality factors that affect all petroleum refineries nationwide in making that decision and not just as applied to a

[9] Turbulence is needed to insure good mixing at the flare, but is affected by whether the flare is assisted with air or steam or non-assisted.

particular group of sources in a particular location.

Additionally, those four sources subject to the Billings/Laurel FIP demonstrate compliance with the 150 lb SO_2/3-hour emission limit by measuring the total sulfur concentration and volumetric flow rate of the gas stream at the inlet to the flare. See 40 CFR 52.1392(d)(2)(ii), (e)(2)(ii), (f)(2)(ii), (g)(2)(ii) and (h). Since the FIP must include emissions limits that insure attainment and maintenance of the NAAQS in the Billings/Laurel area, it was appropriate, in setting the standards for the Billings/Laurel FIP, to conservatively assume that 100 percent of the sulfur in the gases discharged to the flare is converted to SO_2, and based on this conversion, set the numeric limit as a value that is not to be exceeded. However, that same assumption is not appropriate when setting national standards for flares. Instead, we must consider the many factors affecting the formation of SO_2 at the flare tip and how these factors affect how much of the sulfur in the gases sent into the flare actually converts to SO_2. Therefore, although setting such source-specific limits was appropriate to satisfy what the modeling showed was necessary to meet the SO_2 NAAQS in the Billings/Laurel area, a different analysis and standard is appropriate for a national rulemaking.

Therefore, for the reasons discussed above, the EPA is finalizing this collective set of CAA section 111(h)-compliant standards for flares, based on our interpretation of CAA section 111(h) as it applies to flares.

Comment: Numerous commenters asserted that the long-term 60 ppmv H_2S fuel gas concentration limit is not cost effective for flares and, therefore, not BSER for flares. The commenters noted that the EPA did not include costs for compressors, additional amine units and sulfur recovery units, and one commenter stated that the EPA did not consider the range of costs that are incurred by individual refineries. Commenters also asserted that the EPA overstated emission reductions by using 162 ppmv H_2S as a baseline because many refinery streams currently sent to the flare contain H_2S concentrations below 162 ppmv, so 162 ppmv H_2S does not reflect long-term performance. Commenters noted that the British thermal units (Btu) content of flare gas is highly variable and generally lower than that used by the EPA, so the EPA's analysis overestimated the value of the recovered flare gas. One commenter noted that the EPA should have considered consent decree requirements in the baseline SO_2 emissions estimates.

One commenter stated that the long-term 60 ppmv H_2S fuel gas concentration limit could preclude some refineries from processing high-sulfur crude oils, thereby limiting refining production capacity. Another commenter noted that many flares will receive both fuel gas and process upset gas, so it would be impossible to determine if an exceedance is caused by the regulated fuel gas or by the exempt gas. The commenter recommended that the EPA apply the long-term 60 ppmv H_2S fuel gas concentration limit only to fuel gas combusted in process heaters, boilers and similar fuel gas combustion devices, and not to flares, or that the EPA allow Alternative Monitoring Plans to demonstrate compliance with the emissions limits for non-exempt gas streams upstream of the flare header.

Response: We acknowledge that, at proposal, we determined that a long-term 60 ppmv H_2S fuel gas concentration limit was cost effective primarily for process heaters, boilers and other fuel gas combustion devices that are fed by the refinery's fuel gas system. Based on the typical configuration at a refinery, adding one new fuel gas combustion device to the fuel gas system would essentially require the owner or operator to limit the long-term concentration of H_2S in the entire fuel gas system to 60 ppmv, so emission reductions would result from all fuel gas combustion devices tied to that fuel gas system. Upon review of the BSER analysis conducted at proposal for fuel gas combustion devices, we now realize that the analysis is not applicable to flares (See Docket Item No. EPA–HQ–OAR–2007–0011–0289).

Moreover, since we are regulating flares separately from other fuel gas combustion devices in this final rule, we should separately consider whether a long-term H_2S concentration limit is appropriate for fuel gas sent to flares.

In developing the suite of CAA section 111(h) standards for flares, we considered whether refineries should be required to optimize management of their fuel gas by limiting the long-term H_2S concentration to 60 ppmv in addition to the short-term H_2S concentration of 162 ppmv during normal operating conditions. We determined that, for refineries to demonstrate that their fuel gas complies with a long-term H_2S concentration of 60 ppmv, refineries would have to install a flare gas recovery system (which was not needed for other fuel gas combustion devices) and then upgrade the fuel gas desulfurization system. Alternatively, refineries would have to treat the recovered fuel gas to limit the long-term concentration of H_2S to 60 ppmv with new amine treatment units on each flare.

While some of the costs provided by the commenters did not include the value of the recovered gas and appeared, at times, to include equipment not necessarily required by the regulation, we generally agree with the commenters, based on our own cost estimates, that optimizing management of the fuel gas system to limit the long-term concentration of H_2S to 60 ppmv is not cost effective for flares (see Table 4 below). We note that the costs provided by the commenters and the costs and emissions reductions in our analysis are the incremental costs and emissions reductions of going from the short-term 162 ppmv H_2S concentration to a combined short-term 162 ppmv H_2S concentration and long-term 60 ppmv H_2S concentration. While we are aware that some consent decrees require refineries to limit the concentration of H_2S in the fuel gas to levels lower than the short-term 162 ppmv H_2S concentration, our baseline when evaluating the impacts of a national standard (in this case, 40 CFR part 60, subpart Ja) is the national set of requirements to which an affected flare would be subject in the absence of subpart Ja (*i.e.*, the short-term 162 ppmv H_2S concentration limit in 40 CFR part 60, subpart J).

TABLE 4—NATIONAL FIFTH YEAR IMPACTS OF MEETING A LONG-TERM 60 PPMV H_2S CONCENTRATION FOR FLARES SUBJECT TO 40 CFR PART 60, SUBPART JA

	Capital cost ($1,000)	Total annual cost ($1,000/yr) [a]	Emission reduction (tons SO_2/yr) [b]	Emission reduction (tons NO_X/yr) [b]	Emission reduction (tons VOC/yr) [b]	Cost effectiveness ($/ton)
New	80,000	15,000	6	34	130	84,000

TABLE 4—NATIONAL FIFTH YEAR IMPACTS OF MEETING A LONG-TERM 60 PPMV H_2S CONCENTRATION FOR FLARES SUBJECT TO 40 CFR PART 60, SUBPART JA—Continued

	Capital cost ($1,000)	Total annual cost ($1,000/yr) [a]	Emission reduction (tons SO_2/yr) [b]	Emission reduction (tons NO_X/yr) [b]	Emission reduction (tons VOC/yr) [b]	Cost effectiveness ($/ton)
Modified/Reconstructed	860,000	160,000	53	310	1,200	100,000

[a] Because of the heat content of recovered gas, each scf of recovered gas is assumed to offset one scf of natural gas; a value of $5/10,000 scf of natural gas was used to estimate recovery credit.

[b] These emission reductions are based on flares already meeting the short-term 162 ppmv H_2S fuel gas concentration limit in 40 CFR part 60, subpart J (*i.e.*, these are the incremental emission reductions achieved from a baseline of optimizing management of the fuel gas system to limit the short-term H_2S concentration in the fuel gas to 162 ppmv to the originally proposed combined short-term 162 ppmv H_2S concentration and long-term 60 ppmv H_2S concentration in the fuel gas).

Comment: Several commenters addressed the EPA's request for comment on "the equivalency of the subpart Ja requirements as proposed to be amended today and the SCAQMD Rule 1118" and "whether EPA could deem a facility in compliance with subpart Ja as proposed to be amended today if that facility was found to be in compliance with SCAQMD Rule 1118, or other equivalent State or local rules" (73 FR 78532, December 22, 2008). One commenter disagreed with the EPA's position, alleging that "EPA's suggestion that it can waive compliance with the NSPS in this manner is contrary to the Clean Air Act." The commenter stated that the EPA's suggestion "that existing state and local requirements render the federal requirements irrelevant only confirms that EPA's proposed flaring requirements do not reflect the *best* technological system of continuous emission reduction." 42 U.S.C. 7411(h)(1) (emphasis added). The commenter also stated that the CAA already provides a mechanism for implementation of alternative work practice standards in narrowly defined circumstances (42 U.S.C. 7411(h)(3)); an owner or operator may demonstrate to the Administrator that an alternative means of emissions limitation is equivalent to the federal standard on a case-by-case basis. Therefore, the commenter asserted, the CAA clearly states that "EPA's authority to waive federal work practice standards is case specific." Finally, the commenter stated that the EPA did not explain how emissions reductions achieved through compliance with SCAQMD Rule 1118 are equivalent to 40 CFR part 60, subpart Ja. Further, the commenter asserted that the EPA neither identified other state or local rules that could be considered equivalent to subpart Ja, nor explained how the EPA would determine that a specific state or local rule is equivalent to subpart Ja. Therefore, the commenter asserted, it is impossible to fully assess the merit of the EPA's idea and provide meaningful comments.

Another commenter stated that "most stringent" is not one of the criteria that must be applied under the law to determine BSER. Therefore, the commenter asserted, it is not appropriate to argue that the EPA did not properly determine BSER simply because there exist state or local rules that are more stringent than federal requirements. The commenter also asserted that the EPA has full authority to establish alternative regulatory standards that are determined to be as stringent as or more stringent than BSER, and CAA section 111(h)(3) generally applies after the EPA has completed a national rulemaking and an owner or operator requests approval for a site-specific alternative at a later date. The commenter asserted that it is logical that, if an alternative method is identified during the rulemaking process, "the law would allow EPA to establish a site-specific alternative [in the rule itself] (especially, as under [CAA section 111], where the alternative would have to be determined through notice and comment rulemaking)."

Other commenters recommended that refineries complying with SCAQMD Rule 1118 be deemed in compliance with 40 CFR part 60, subparts J and Ja. According to one commenter, SCAQMD Rule 1118 is "in all respects equivalent to or more stringent than the corresponding requirements" of subparts J and Ja. Commenters also recommended that refineries should be able to consider compliance with BAAQMD Regulation 12, Rule 11 and Regulation 12, Rule 12 as compliance with the appropriate provisions of subpart Ja. One commenter provided a table comparing each of the six proposed flare management plan requirements in 40 CFR 60.103a(a) to the SCAQMD and BAAQMD regulations. The table identified sections of BAAQMD Regulation 12, Rule 11 and Regulation 12, Rule 12 that are equivalent to the six subpart Ja flare management plan requirements. The commenter also noted that SCAQMD Rule 1118 is only equivalent to five of the proposed requirements; it does not require an owner or operator to identify procedures to reduce flaring in cases of fuel gas imbalance (although another commenter noted that SCAQMD Rule 1118 requires minimization of all flaring, including fuel gas imbalance). While most commenters focused on the equivalence of the flare management plan requirements of the SCAQMD and BAAQMD rules and the flare management plan requirements of subpart Ja, one commenter requested that the periodic sampling of BAAQMD Regulation 12, Rule 11 be considered equivalent to the continuous sulfur monitoring requirements of subpart Ja for emergency flares.

Response: First, we note that there seems to be some misunderstanding regarding how a determination that SCAQMD Rule 1118 or BAAQMD Regulation 12, Rule 11 and Regulation 12, Rule 12 are equivalent to 40 CFR part 60, subpart Ja would actually be implemented in subpart Ja. The EPA will not "waive" the obligation to comply with subpart Ja if the source is complying with SCAQMD Rule 1118 or BAAQMD Regulation 12, Rule 11 and Regulation 12, Rule 12. In other words, the EPA will not allow the owner or operator to "choose" to comply with SCAQMD Rule 1118 or BAAQMD Regulation 12, Rule 11 and Regulation 12, Rule 12 instead of subpart Ja. Rather, the source must always demonstrate compliance with subpart Ja. If SCAQMD Rule 1118 or BAAQMD Regulation 12, Rule 11 and Regulation 12, Rule 12 are determined to be equivalent to subpart Ja, then these requirements would be provided as an alternative within subpart Ja for the source to demonstrate that it is meeting the requirements of subpart Ja.

To assess the comments, we reviewed SCAQMD Rule 1118, BAAQMD Regulation 12, Rule 11, and BAAQMD Regulation 12, Rule 12 and compared

these rules to the 40 CFR part 60, subpart Ja requirements we are finalizing here. We have included documentation of this review in Docket ID No. EPA–HQ–OAR–2007–0011 that shows the sections of each of those rules that we consider are equivalent to the subpart Ja requirements. We determined that SCAQMD Rule 1118 and BAAQMD Regulation 12, Rule 11 and Regulation 12, Rule 12 will result in equivalent to or greater than the emissions reductions resulting from the subpart Ja flare management plan requirements. As a result of our analysis, we have amended subpart Ja, as described in the following paragraphs.

We determined that SCAQMD Rule 1118 is equivalent to the flare requirements and monitoring, recordkeeping and reporting provisions for determining compliance with the flare requirements in 40 CFR part 60, subpart Ja. We also determined that the combined provisions of BAAQMD Regulation 12, Rule 11 and BAAQMD Regulation 12, Rule 12 are equivalent to the flare requirements and monitoring, recordkeeping and reporting provisions for determining compliance with the flare requirements in subpart Ja. Therefore, we have added specific compliance options for flares that are located in the SCAQMD and are in compliance with SCAQMD Rule 1118, as well as for flares that are located in the BAAQMD and are in compliance with both BAAQMD Regulation 12, Rule 11 and BAAQMD Regulation 12, Rule 12. Flares that are in compliance with these alternative compliance options are in compliance with the flare standards in subpart Ja. Specifically, 40 CFR 60.103a(g) specifies that flares that are located in the SCAQMD may elect to comply with SCAQMD Rule 1118 and flares that are located in the BAAQMD may elect to comply with both BAAQMD Regulation 12, Rule 11 and BAAQMD Regulation 12, Rule 12 to comply with the flare management plan requirements of 40 CFR 60.103a(a) and (b) and the root cause analysis and corrective action analysis requirements of 40 CFR 60.103a(c) through (e). In addition, 40 CFR 60.107a(h) indicates that flares that are located in the SCAQMD may elect to comply with the monitoring requirements of SCAQMD Rule 1118 and flares that are located in the BAAQMD may elect to comply with the combined monitoring requirements of both BAAQMD Regulation 12, Rule 11 and BAAQMD Regulation 12, Rule 12 to comply with the monitoring requirements of 40 CFR 60.107a(e) and (f). The owner or operator must notify the Administrator, as specified in 40 CFR 60.103a(g), that the flare is in compliance with SCAQMD Rule 1118 or both BAAQMD Regulation 12, Rule 11 and BAAQMD Regulation 12, Rule 12. The owner or operator must also submit a copy of the existing flare management plan (if applicable), as specified in 40 CFR 60.103a(g).

We note that, as pointed out by commenters, an owner or operator maintains the ability under CAA section 111(h)(3) to submit a request to establish, on a case-by-case basis, that "an alternative means of emission limitation will achieve a reduction in emissions * * * at least equivalent to the reduction in emissions" achieved under the flare standards of 40 CFR part 60, subpart Ja. Pursuant to CAA section 111(h)(3), we also included specific provisions within 40 CFR 60.103a for owners or operators to submit a request for "an alternative means of emission limitation" that will achieve a reduction in emissions at least equivalent to the reduction in emissions achieved under the final standards in subpart Ja.

Comment: Commenters suggested that the requirement to minimize discharges to the flare in 40 CFR 60.103a(a)(1) should specifically address routine discharges, and the EPA should limit the minimization requirements to actions that: (1) Are "consistent with good engineering practices" and (2) consider costs and other health and environmental impacts, as required by section 111 of the CAA.

Response: We agree that the language in proposed 40 CFR 60.103a(a)(1) appears to require an assessment of flare minimization irrespective of cost or other relevant considerations, as contained in CAA section 111, which was not our intent. We are clarifying, through this response, that cost, safety and emissions reductions may be considered when evaluating what actions should be taken to minimize discharges to a flare, but we disagree that the flare minimization assessment should be limited to "routine discharges." We have revised the flare management plan requirements in 40 CFR 60.103a(a) to more fully describe the types of information that must be evaluated and included in the plan.

As noted in the summary of this rule (section III.C of this preamble), we are finalizing our proposed withdrawal of the 250,000 scfd 30-day rolling average flow limit for flares. This limitation does not adequately account for site-specific factors regarding flare gas Btu content, ability to offset natural gas purchase and other considerations. We find that these factors need to be addressed in a site-specific basis and are more appropriately addressed through the flare management plan. In the absence of the specific flow limitation, we have included additional requirements in the flare management plan to prompt a thorough review of the flare system so that, as an example, flare gas recovery systems are installed and used where these systems are warranted. We have also revised the flare minimization requirements to require the flare management plans to be submitted to the Administrator (40 CFR 60.103a(b)).

As part of the development of the flare management plan, refinery owners and operators can provide rationale and supporting evidence regarding the flare reduction options considered, the costs of each option, the quantity of flare gas that would be recovered or prevented by the option, the Btu content of the flare gas and the ability or inability of the reduction option to offset natural gas purchases. The plan will also include the rationale for the selected reduction option, including consideration of safety concerns. The owner or operator must comply with the plan, as submitted to the Administrator. Major revisions to the plan, such as the addition of an alternative baseline (see next comment for further detail on baselines), must also be submitted to the Administrator.

In summary, although we did not incorporate the commenter's suggested language for limiting the scope of the minimization requirements to actions that are "consistent with good engineering practices" and that "consider costs and other health and environmental impacts," we acknowledge that these are valid considerations in the selection of the minimization alternatives available for a given affected flare. We find that the process of developing and submitting the flare management plan will ensure that these factors are considered consistent with CAA section 111 and that the requirement to minimize discharges to the flare is implemented consistently across all affected sources.

Comment: Commenters asserted that the flare flow root cause analysis threshold of 500,000 scf in any 24-hour period is arbitrary and cannot be fairly applied to all flares at all refineries. One commenter cited an ultracracker flare that routinely cycles from 5 million to 25 million scfd as an example of a flare for which the threshold of 500,000 scf in any 24-hour period would result in constant and meaningless root cause analyses. The commenters suggested removing the numerical threshold and limiting root cause analysis to upsets and malfunctions as initially promulgated in June 2008 (because root cause analysis is generally only effective

for reducing non-routine flows) or using a site- or flare-specific threshold instead. Even if the numerical threshold is revised, the commenters suggested that a number of streams be excluded from the calculation of flow, such as hydrogen and nitrogen, purge and sweep gas, natural gas added to increase the Btu content of the flare gas and gases regulated by other rules to avoid performing multiple root cause analyses for routine events. One commenter suggested that owners or operators should be able to use one root cause analysis report for an event that occurs routinely (as allowed in the consent decrees).

Response: We proposed the flare flow root cause analysis threshold of 500,000 scf in any 24-hour period because we projected that flare gas recovery would be a cost effective emission reduction technique for flares with fuel gas flows that routinely exceed 500,000 scfd, although we acknowledge that the threshold at which flare gas recovery becomes cost effective is strongly (inversely) correlated to the average Btu content of the flare gas (*i.e.,* a relatively small reduction in the Btu content of the gas makes the recovery system significantly less cost effective). Although we did not specifically exclude sweep or purge gas from the flow, we expected that the flow rates of sweep or purge gas (*i.e.,* gases needed to ensure the readiness of the flare and the safety of the flare gas system) would be negligible when compared to the root cause analysis threshold of 500,000 scf in any 24-hour period. In fact, in our original analysis of the appropriate flow rate root cause analysis threshold (Docket Item No. EPA–HQ–OAR–2007–0011–0246), we essentially assumed that the sweep and purge gas flow rates were zero, and we estimated costs and emissions reductions of the 500,000 scf in any 24-hour period threshold, based on recovering that amount of gas or eliminating recurring events of that size (rather than 500,000 scf minus the sweep or purge gas flow).

However, while we do not believe that 5 million scfd [10] is a reasonable base flow for a flare, we do acknowledge that the size of the flare, as well as the flare header system, will greatly impact the required flow needed to maintain the readiness of the flare. Although we can derive suitable flare flow thresholds for average conditions, these thresholds are not necessarily reasonable when applied to all flows, and we did not intend for on-going root cause analyses to be conducted on account of sweep or purge gas.

Therefore, rather than specifying a one-size-fits-all threshold, the final rule requires facilities to develop their own base flare flow rates as part of their flare management plan. A flow-based root cause analysis is triggered if flows measured by the flow monitor exceed 500,000 scf greater than the base flare flow rate in any 24-hour period. Evaluating the flow rate threshold above a baseline better reflects our original analysis of the impacts of flow-based root cause analyses when the sweep or purge gas flow rates are not negligible. We also note that 40 CFR 60.103a(d) allows a single root cause analysis to be conducted for any single continuous discharge that causes the flare to exceed either the root cause analysis threshold for SO_2 or flow for two or more consecutive 24-hour periods.

The final rule does not limit root cause analyses to upsets and malfunctions of refinery process units and ancillary equipment connected to the flare, nor does it explicitly allow owners or operators to use one root cause analysis report for an event that occurs routinely. When we decided to eliminate the numerical limit on flare flow rate, we specifically increased the scope of the flare flow root cause analysis to cover more than just upsets and malfunctions. We also decided not to explicitly allow owners or operators to use one root cause analysis report for an event that occurs routinely as a means to discourage routine flaring of recoverable gas. However, we recognize that there may be recurring discharges to the flare that are not recoverable for various reasons. Therefore, the final rule does allow for several base cases, which could include recurring maintenance; this provision will avoid multiple root cause analyses for a recurring event. As described above, the flare management plan (as well as significant revisions to the plan to include alternative baselines) must be submitted to the Administrator. The Administrator or delegated authority (*e.g.,* the state) may review the plan, although formal approval of the plan is not required. Not specifying a formal approval process is intended to minimize the burden associated with reviewing flare management plans. Rather, the rule specifies elements of the plan that need to be addressed in order for the plan to be considered adequate and provides an opportunity for a delegated authority to find the plan not adequate if they choose to do so.

We expect that a final flare management plan in compliance with 40 CFR part 60, subpart Ja will possess the following characteristics: (1) Completeness (all gas streams are considered, all required elements are included and all appropriate flare reduction measures are evaluated); (2) accuracy (the emission reductions and cost estimates for the different options are accurate); and (3) reasonableness (the selection of reduction options is correct and the baseline flow value is reasonable). If the Administrator identifies deficiencies in the plan (*e.g.,* the plan does not contain all the required elements, alternative flare reduction options were not evaluated or selected when reasonable, the baseline or alternative baseline flow rates are considered unreasonable), the Administrator will notify the owner or operator of the apparent deficiencies. The owner or operator must either revise the plan to address the deficiencies or provide additional information to document the reasonableness of the plan.

Comment: Commenters requested alternative monitoring options or an exemption from continuous flow monitoring for: (1) Flares designed to handle less than 500,000 scfd of gas; (2) pilot gas; (3) flares with flare gas recovery systems; (4) emergency flares; and (5) secondary flares. The commenters asserted that flow meters are costly and engineering calculations, which are currently used, are sufficient to evaluate when the flow to a flare exceeds 500,000 scf in any 24-hour period. One commenter stated that, for flares with flare gas recovery systems, the pressure drop across the flare seal drum can be used to calculate flow rate.

Response: In the final rule, flow monitoring is used to determine whether a root cause analysis is required rather than to ensure compliance with a specific flow limit. We have reviewed the commenters' suggestions and agree that, in certain specific cases, monitoring is not necessary and should not be required. However, as a general rule, we believe flow monitors are needed, not only to provide a verifiable measure of exceedances of the flow root cause analysis threshold, but also exceedances of the root cause analysis threshold of 500 lb SO_2 in any 24-hour period. In addition, when we evaluated local rules,

[10] Regarding commenter's cited ultracracker flare example, it is difficult to believe that sweep gas alone accounts for 5 million scfd of flare gas flow. Additionally, a compositional analysis of the base flare gas from the normal flow, based on data provided from a DIAL study of this refinery, suggests that the base flare gas is of sufficient quality to recover. It also appears, based on the data provided by the commenter, that the hydrogen stream recycle compressor was off-line approximately half the year. For such huge gas flows, considering the cost of purchasing or producing additional hydrogen and the emissions associated with that process, it is reasonable to expect that the facility would have a back-up compressor if the primary compressor is unreliable.

such as the initial BAAQMD rule for flare monitoring, we saw that the measured flare flow rates were several times greater than previously projected by the facilities.

Consequently, we find great value in the flow monitoring requirements for flares. These monitoring requirements will greatly improve the accuracy of emissions estimates from these flares. The resulting improved accuracy of flare emissions estimates will also lead to better decision-making as we conduct future reviews of rules applicable to petroleum refineries. We did consider each of the commenters' suggested exemptions in light of this fact; our specific considerations follow.

We did not specifically consider that some flares would not be capable of exceeding the flow root cause analysis threshold (*i.e.*, designed to handle less than 500,000 scfd of gas). However, these small flares could still exceed the root cause analysis threshold of 500 lb SO_2 in any 24-hour period. As such, we did not provide an exemption from the monitoring requirements for these small flares.

We agree that the monitoring of pilot gas flow is not needed. In the final rule, a root cause analysis is required if the gas flow to the flare exceeds 500,000 scf above the baseline in any 24-hour period. The flow of pilot gas is considered to be part of the baseline flow and is assumed to be constant. As such, monitoring of pilot gas would not be necessary to determine whether a flare has exceeded 500,000 scf above the baseline in any 24-hour period. In practice, the actual baseline flow set for the flare may or may not expressly include the pilot gas flow rate. Generally, the configuration of the flare header is such that the flare flow monitor would not measure pilot gas flow. In this case, the baseline flow determined for the flare would not expressly include the pilot gas flow rate. If the flare flow monitor is configured in such a way that it does measure pilot gas, then pilot gas would be considered part of the baseline conditions for that flare.

We agree with commenters that flares with flare gas recovery systems do have unique conditions and these warrant alternative monitoring options. Additionally, we recognize that the monitoring requirements may be burdensome for flares that are truly "emergency only" (*i.e.*, flares that flare gas rarely, if at all, during a typical year) or for secondary flares in a cascaded flare system. These flares are expected to have a water seal that prevents flare use during normal operations and ensures that the pressure upstream of the water seal (expressed in inches of water) does not exceed the water seal height during normal operations (hereafter referred to as "properly maintain a water seal"). We find that, for these select types of flares, water seal monitoring as an alternative to the flow (and sulfur) monitoring provisions is appropriate.

For flares with a flare gas recovery system and other emergency or secondary flares that properly maintain a water seal, the final rule states that an owner or operator may elect to monitor the pressure in the gas header just before the water seal and monitor the water seal liquid height to verify that the flare header pressure is less than the water seal, which is an indication that no flow of gas occurs. If the flare header pressure exceeds the water seal liquid level, a root cause analysis is triggered unless the pressure exceedance is attributable to staging of compressors. This alternative reduces the costs associated with installing sulfur and flow monitoring systems for flares that rarely receive fuel gas. Engineering calculations can be used to estimate the emissions during the event, but not for determining whether or not a root cause analysis is required.

To ensure that this option is only used for flares that are truly emergency flares and not for flares that are used for routine discharges, the final rule contains a limit on the number of pressure exceedances requiring root cause analyses that can occur in one year. Following the fifth reportable pressure exceedance in any consecutive 365 days, the owner or operator must comply with the sulfur and flow monitoring requirements of 40 CFR 60.107a(e) and (f). Based on a review of available flaring data, we expect that gas may be sent to an emergency flare three to four times per year, on average. Consistent with this information, we are providing in these final amendments that an "emergency flare" may receive up to four releases to the flare in any consecutive 365-day period to account for year-to-year variability. However, a flare receiving more than four discharges in a consecutive 365-day period can no longer be considered an "emergency flare" and must install the required sulfur and flow monitors.

Comment: Commenters requested an exemption from continuous sulfur monitoring or alternative monitoring options for flares handling only gases inherently low in sulfur content, emergency flares, flares with properly designed flare gas recovery systems and secondary flares. For flares handling gases low in sulfur, the commenters noted that continuous monitoring is unnecessary and certain fuel gas streams are already exempted from monitoring if they are combusted in a fuel gas combustion device. For flares that handle only gases exempt from the H_2S concentration requirements and flares with properly designed flare gas recovery systems, commenters stated that engineering calculations are sufficient to determine if the SO_2 root cause analysis threshold of 500 lb in any 24-hour period is exceeded. One commenter requested that the EPA allow owners or operators to submit and use an alternative monitoring plan to demonstrate that the flare gas recovery system is operating within its capacity and to calculate SO_2 emissions from engineering calculations and flare gas sampling. For secondary flares, one commenter noted that the continuous sulfur monitor on the primary flare could be used to determine the sulfur content of the gas being flared from the secondary flare.

One commenter requested that the EPA allow the use of engineering calculations to determine the sulfur-to-H_2S ratio because sampling can be difficult for emergency flares. One commenter noted that the EPA should allow the use of an existing continuous monitoring system if the gas sent to the flare is already monitored elsewhere. As examples, the commenter cited fuel gas and pilot gas already monitored within the fuel gas system.

For flares that rarely see flow, commenters particularly cited difficulties with performance tests. Commenters noted that, to meet the sulfur monitor performance test requirements, an owner or operator may have to intentionally flare gas that may not meet the H_2S concentration limits. One commenter also stated that performing the required relative accuracy test audit (RATA) could cause the flare to exceed the root cause analysis threshold. The commenter recommended revising the performance test requirements for flares with flare gas recovery to require only a cylinder gas audit.

Response: We have amended the final rule so that gases that are exempt from H_2S monitoring due to low sulfur content are also exempt from sulfur monitoring requirements for flares. For low-sulfur gases, the flare root cause analysis will always be triggered by an exceedance of the flow rate threshold well before the SO_2 threshold is exceeded, so no sulfur monitoring is required. However, this exemption can only be used for flares that are configured to receive only fuel gas streams that are inherently low in sulfur content, as described in 40 CFR

60.107a(a)(3), such as flares used for pressure relief of propane or butane product spheres (fuel gas streams meeting commercial grade product specifications for sulfur content of 30 ppmv or less) or flares used to combust fuel gas streams produced in process units that are intolerant to sulfur contamination (*e.g.*, hydrogen plant, catalytic reforming unit, isomerization unit or hydrogen fluoride alkylation unit). We already clarified that flare pilot gas is not required to be monitored. Also, 40 CFR part 60, subpart Ja already allows for H_2S monitoring at a central location, such as the fuel mix drum, for all fuel gas combustion devices (and we are finalizing amendments to ensure it is clear that H_2S monitoring at a central location is allowed for flares as well). Thus, we agree that if a flare only burns natural gas, fuel gas monitored elsewhere or fuel gas streams that are inherently low in sulfur content (as defined in 40 CFR 60.107a(a)(3)), then no H_2S monitor is needed.

The remaining issue is whether or not sulfur monitoring is necessary for "emergency only" flares. (An emergency flare is defined as a flare that combusts gas exclusively released as a result of malfunctions (and not startup, shutdown, routine operations or any other cause) on four or fewer occasions in a rolling 365-day period. For purposes of the rule, a flare cannot be categorized as an *emergency flare* unless it maintains a water seal.) We acknowledge that there are difficulties and costs with installing monitors on flares that rarely operate. However, we are concerned about how the owner or operator will detect emissions above 500 lb SO_2 in any 24-hour period during an upset or malfunction of a refinery process unit or ancillary equipment connected to the flare. Commenters appear to have conflicting opinions regarding the ability to sample the flare gas to determine the sulfur content (or total sulfur-to-H_2S ratio) during a flaring event. If samples could be taken during the flaring events, then that would be a potential option. However, during a process upset or malfunction, focus should be on alleviating the problem rather than taking a special sample. Also, given the duration of some of these events, it appears unlikely that representative samples can be manually collected.

Taking the difficulties discussed above into account, we have developed an alternative monitoring option for emergency flares. As noted in the previous response, emergency flares are expected to properly maintain a water seal. We provide pressure and water seal liquid level monitoring, as previously described as an alternative to the sulfur and flow monitors. As described in more detail above, any fuel gas pressure exceeding the water seal liquid level triggers a root cause analysis and there is a limit to the number of exceedances in one year. Under this option, a root cause analysis is triggered, based on the monitored pressure and water seal height, so accurate measurements of flow rate and sulfur concentrations are less critical than for flares that must evaluate these parameters to determine if a root cause analysis is needed. Consequently, for these flares, engineering calculations can be used to estimate the reported emissions during the flaring event, but the root cause analysis must be performed regardless of the magnitude of these engineering estimates. Using this alternative monitoring option, emergency flares are not required to install continuous sulfur monitoring systems. Flares that do not meet the conditions of an emergency flare are required to install continuous sulfur monitoring systems and cannot elect this alternative monitoring option.

We also agree that flaring solely for the purpose of a RATA or other performance test is not desirable. The "cylinder gas audit" procedures requested by the commenter are described as alternative relative accuracy procedures in section 16.0 of Performance Specification 2 (referenced from Performance Specification 5). We reviewed the alternative relative accuracy procedures and considered how they may apply to flares, and we have determined that the alternative relative accuracy procedures are appropriate for flares. We expect that, for most affected flares, the variability in flow (including no flow conditions) and sulfur content of the gases discharged to the flare create significant barriers to the normally required relative accuracy assessments, particularly if those assessments need to be made over a range of sulfur concentrations potentially seen by the monitor. Therefore, we are amending 40 CFR 60.107a(e)(1)(ii) and 40 CFR 60.107a(e)(2)(ii) to specify that the owner or operator of a flare may elect to use the alternative relative accuracy procedures in section 16.0 of Performance Specification 2 of Appendix B to part 60. As required by 40 CFR 60.108a(b), the owner or operator shall notify the Administrator of their intent to use the alternative relative accuracy procedures.

Comment: One commenter requested that the EPA clarify whether the additionally proposed sulfur monitoring options for flares are for total reduced sulfur or total sulfur. The commenter noted that measuring total sulfur is the simplest and most inclusive measurement of SO_2 emissions and it is the method included in SCAQMD Rule 1118. The commenter also requested that methods for measuring total sulfur in gaseous fuels be included as acceptable options to perform the relative accuracy evaluations of the CEMS.

One commenter requested that provisions be made in 40 CFR 60.107a(e)(2) to develop a total sulfur-to-H_2S (or total reduced sulfur-to-H_2S) ratio so that the total sulfur monitor can be used for both the root cause analysis requirements and for compliance with the requirement to limit short-term H_2S concentration in fuel gas sent to a flare to 162 ppmv without the need for a duplicative continuous H_2S monitor. Another commenter supported the addition of alternative monitoring methods for the sulfur content of flare gas, but noted that since the composition of flare gas is highly variable, the alternative methods must meet continuous monitoring requirements.

Response: We have clarified and consolidated the monitoring requirements to allow total reduced sulfur monitoring for flares. For the purposes of evaluating the SO_2 root cause analysis threshold, total sulfur monitoring provides the most accurate assessment. However, in most cases, the vast majority of sulfur contained in gases discharged to the flare is expected to be in the form of total reduced sulfur compounds, which include carbon disulfide, carbonyl sulfide and H_2S. Our test method for measuring total reduced sulfur includes the use of EPA Method 15A as a reference method, and because EPA Method 15A measures total sulfur, the total reduced sulfur monitoring requirement is equivalent to a total sulfur monitoring method.

As discussed previously, we are relying on the suite of flare requirements we are promulgating to limit SO_2 emissions at the flare. These include optimizing management of the fuel gas by limiting the short-term concentration of H_2S to 162 ppmv during normal operating conditions. We expected most refineries would already have the H_2S monitor and did not consider the use of a total sulfur monitor for use in complying with the short-term 162 ppmv H_2S concentration in the fuel gas. As the H_2S concentration will always be less than the total reduced sulfur concentration, it is acceptable to use the total reduced sulfur monitor to verify that the fuel gas

does not exceed the short-term H_2S concentration of 162 ppmv. Therefore, we have provided for the use of total reduced sulfur monitors, provided the monitor can also meet the 300 ppmv span requirement.

However, we have not provided a correction factor to scale down the total reduced sulfur concentration to H_2S. The owner or operator using this method must essentially be able to demonstrate they can achieve a 162 ppmv total reduced sulfur concentration in the fuel gas. The concentration ratio was provided for the purposes of the root cause analysis because of the costs of adding a total sulfur monitoring system when a dual range H_2S monitor was already in-place, as well as the expected accuracy needed for the system to assess the SO_2 root cause analysis threshold. As few cases would exist where the flaring event would be right at the SO_2 root cause analysis threshold of 500 lb in any 24-hour period, inaccuracies associated with the average total sulfur-to-H_2S ratio were not expected to be significant.

On the other hand, the short-term 162 ppmv H_2S concentration in the fuel gas must be continuously maintained, and the total sulfur-to-H_2S ratio at these low concentrations is expected to be highly variable, depending on the efficiency of the amine scrubber systems. As the amine scrubber systems, according to previous industry comments, are not effective for reduced sulfur compounds other than H_2S, the non-H_2S reduced sulfur concentration is expected to be fairly constant, with most of the fluctuations in total sulfur content being attributable to fluctuations in H_2S concentrations. Consequently, we have determined that the inaccuracies of the ratio approach are not acceptable for continuously demonstrating that the short-term concentration in the fuel gas does not exceed 162 ppmv H_2S. Therefore, owners or operators of affected flares may use the direct output of a total reduced sulfur monitor to assess compliance with the short-term 162 ppmv H_2S concentration in the fuel gas, or they must install a continuous H_2S monitor.

Comment: One commenter supported the proposed amendment revising the span value for fuel gas H_2S analyzers to match the span requirements in 40 CFR part 60, subpart J, stating this will save time and money. However, the commenter stated that the span value for the flare H_2S monitoring option is too restrictive and suggested that requirements in Appendix F to part 60 provide sufficient quality assurance/quality control (QA/QC) without the need for the rule to specify the span range. The commenter also requested clarification of the sulfur monitor span for flares, suggesting that it should be based on the H_2S concentration limits and that engineering calculations can be used to assess exceedances of the SO_2 root cause analysis threshold of 500 lb in any 24-hour period.

Response: The H_2S span value is at 300 ppmv to verify compliance with the H_2S concentration requirement for the fuel gas; the span of the total sulfur monitor needs to be much greater than that to be able to quantify the sulfur content in streams containing several percent sulfur. For units that use the H_2S analyzers both to assess compliance with the short-term 162 ppmv H_2S concentration requirement for the fuel gas and to assess exceedances of the SO_2 root cause analysis threshold of 500 lb in any 24-hour period, a dual range monitor will be necessary. For the purposes of the SO_2 root cause analysis threshold of 500 lb in any 24-hour period, we intended that the monitor be capable of accurately determining the sulfur concentration for the range of concentrations expected to be seen at the flare. We are particularly interested in quantifying the concentrations of high sulfur-containing streams as these would be the streams most likely to trigger a root-cause analysis at low flows. We proposed that the span for the flare sulfur monitor be selected from a range of 1 to 5 percent. We agree with the commenter that this may be too restrictive, and we have revised the span requirements to be determined, based on the maximum sulfur content of gas that can be discharged to the flare (*e.g.*, roughly 1.1 to 1.3 times the maximum anticipated sulfur concentration), but no less than 5,000 ppmv. A single dual range monitor may be used to comply with the short-term 162 ppmv H_2S concentration requirement for the fuel gas and the SO_2 root cause analysis threshold monitoring requirement provided the applicable span specifications are met. In reviewing the span specifications, we noted that span requirements were inadvertently omitted from the total reduced sulfur compound monitoring alternative. The purpose of these monitors is identical to the H_2S monitoring alternative, and the same span considerations apply for these monitors.

We disagree that the QA/QC procedures in Appendix F to part 60 are sufficient without specifying the span values. Procedure 1 of Appendix F to part 60 defines "span value" as: "The upper limit of a gas concentration measurement range that is specified for affected source categories in the applicable subpart of the regulation." The concentrations used for calibration are based on the span value. Several of the QA/QC procedures in Appendix F are undefined if the span value is not defined in the rule.

Comment: Commenters stated that time is needed to install continuous monitors and to make other necessary changes (such as installing a flare gas recovery system or additional amine treatment) to comply with all the flare requirements (*e.g.*, limiting short-term H_2S concentration to 162 ppmv, long-term 60 ppmv H_2S fuel gas concentration limit, flare management plan, root cause analysis and continuous monitoring), especially considering how quickly a flare may become a modified affected source. While most commenters focused on the amount of time needed to install equipment to comply with the long-term 60 ppmv H_2S fuel gas concentration limit, other commenters asserted that additional time for activities, such as planning and re-piping, would be needed to meet the standards. Commenters requested differing amounts of additional time generally ranging from 3 to 5 years. Commenters noted that the additional time would allow owners and operators to schedule any process unit shutdowns needed to install new equipment or monitors during a turnaround. One commenter recommended that the extra time to begin root cause analyses provided to refiners committing to install flare gas recovery systems should also be provided to refiners committing to expand an existing flare gas recovery system. Commenters also noted that experience implementing SCAQMD Rule 1118 suggests that there will be difficulty obtaining and installing continuous monitors in less than 3 years due to the availability of monitor manufacturers and the need to stage the installation of monitors at refineries with multiple affected flares. One commenter requested that the EPA consider a compliance schedule in 40 CFR part 60, subpart Ja that is consistent with compliance schedules in consent decrees. Commenters objected to phasing out the additional time after the rule has been in place for 5 years.

One commenter requested clarification regarding the trigger date from which the additional time to comply with the flare provisions (*e.g.*, 2 years when installing a flare gas recovery system) begins. The commenter questioned whether the trigger date is when construction starts, at startup or when the stay is removed (or whichever is later). Another commenter agreed that the EPA should

set the compliance time based on the initial startup of the modification. The commenter noted that the EPA should follow the 40 CFR part 60 General Provisions for performance test timing and the 40 CFR part 63 General Provisions for compliance timing.

Response: As we are no longer applying the long-term 60 ppmv H_2S fuel gas concentration limit to flares, the comments related to the amount of time needed to comply with a long-term 60 ppmv H_2S fuel gas concentration limit are moot. We do, however, recognize that a flare modification can occur much more quickly than modifications of traditional process-related emission sources. Therefore, we evaluated the comments regarding the amount of time needed to meet the various requirements for flares while keeping the 40 CFR part 60, subpart Ja flare modification provision in mind. We discuss each requirement and the time for demonstrating compliance with that requirement in the following paragraphs.

We find it appropriate to require modified flares that already have adequate treatment and monitoring equipment in place to achieve a short-term H_2S concentration of 162 ppmv (resulting from compliance with 40 CFR part 60, subpart J) to continue to meet that concentration upon startup of the affected flare or the effective date of this final rule, whichever is later. However, some flares are not affected facilities subject to 40 CFR part 60, subpart J, and others are complying with subpart J requirements as specified in consent decrees or have received alternative monitoring plans by which to demonstrate compliance with the short-term H_2S concentration limit. In these cases, we find it appropriate to allow more time to comply with the short-term H_2S concentration limit and/or the associated monitoring requirements because additional amine treatment and/or monitoring systems will be required to comply with the rule.

Therefore, the final rule requires all modified flares that are newly subject to 40 CFR part 60, subpart Ja (but were not previously subject to 40 CFR part 60, subpart J) to comply with the short-term H_2S concentration limit and applicable monitoring requirements no later than 3 years after the effective date of this final rule or upon startup of the affected flare, whichever is later. Modified flares that have accepted applicability of subpart J under a federal consent decree shall comply with the subpart J requirements as specified in the consent decree but shall comply with the short-term H_2S concentration limit and applicable monitoring requirements no later than 3 years after the effective date of this final rule. Modified flares that are already subject to the 162 ppmv short-term H_2S concentration limit under subpart J must meet the short-term H_2S concentration limit under subpart Ja upon startup of the affected flare or the effective date of this final rule, whichever is later. Finally, modified flares that are already subject to the short-term H_2S concentration limit but that have an approved monitoring alternative under subpart J and do not have the monitoring equipment in-place that is required under subpart Ja shall be given up to 3 years from the effective date of this final rule to install the monitors required by subpart Ja (or to obtain an approved monitoring alternative under subpart Ja).

As we noted in the preamble to the proposed amendments, many of the connections that would trigger applicability to 40 CFR part 60, subpart Ja are critical to the safe and efficient operation of the refinery. These connections can, and often must, be installed quickly. At the same time, nearly all refineries will need time for planning, designing, purchasing and installing (including any necessary re-piping) sulfur and flow monitors that are newly required by subpart Ja. Some refineries will elect to add flare gas recovery and/or sulfur treatment equipment to minimize their emissions as part of the evaluations conducted, as required by the new flare management plan requirements, and time will be needed for planning, designing, purchasing and installing these components as well. Given that many flares will become modified affected sources relatively quickly, owners and operators will be competing with one another for the services and products of a finite number of vendors who provide the necessary monitors and other equipment. Several commenters specifically noted availability of monitors as an issue when complying with SCAQMD Rule 1118. As such, we find that immediate compliance with the requirements for flares, such as the planning, designing, purchasing and installation of (including any necessary re-piping) sulfur and flow monitors, may be difficult for operators to meet, especially in situations where quick connections to the flare are made. A phased compliance schedule allows for the operators to comply with some requirements associated with flares, such as continuing to achieve a short-term H_2S concentration of 162 ppmv, if the flares are already subject to 40 CFR part 60, subpart J and have adequate monitoring in place to comply with this final rule, while allowing time to install treatment and processing equipment and monitoring equipment to comply with the standards where necessary.

A phased compliance schedule will also allow owners and operators to minimize process interruption by coordinating the installation of monitoring equipment with process shutdowns or turnarounds. In addition to providing operating flexibility to the refinery, we are taking into consideration the fact that a process shutdown and subsequent startup can generate significant emissions, even if the refinery is taking care to minimize those emissions. We consider a phased compliance schedule that allows owners and operators to avoid startups and shutdowns that are not necessary to maintain the equipment and process to be environmentally beneficial overall and the best system of emissions reduction for a quickly modified flare. Considering the time needed to complete engineering specifications, order and install the required monitoring equipment, and considering the need to coordinate this installation with process unit shutdown or turnarounds, we determined that completion of these activities within 3 years is consistent with the best system of emissions reductions for quickly modified flares.

We note, however, that this phased compliance schedule for the flare requirements in 40 CFR part 60, subpart Ja is intended for those situations when a flare modification occurs quickly and the owner or operator does not have significant planning opportunities to install the required monitors or implement the selected flare minimization options without significant process interruptions. For a future large project on a schedule that includes time for planning, designing, purchasing and installing equipment and monitors, we expect that the owner and operator will have time to assess whether or not the refinery flares will become affected sources through modification. If a project will result in the modification of a flare, we expect that the owner or operator will then plan how to meet the standards in subpart Ja as part of the project itself, including the installation of the monitoring systems and the development of a flare management plan. Because of the ability to plan ahead, flares that are modified as part of a large project will not have all of the difficulties meeting the subpart Ja flare requirements upon completion of the modification as those flares that are modified quickly. Therefore, we find that compliance with the flare

requirements upon startup of the modified flare is appropriate and consistent with the best system of emissions reduction for large projects resulting in a modification of a flare. Thus, we determined that the appropriate time period for compliance with the flare standards is either: (1) 3 years from the effective date of these amendments or (2) upon startup of the modified flare, whichever is later.[11] In this manner, flares that become subject to subpart Ja quickly, based on a small safety-related connection (or have already become subject to subpart Ja based on a modification prior to the effective date of these amendments), will have up to 3 years from the effective date of these amendments to comply fully with the flare standards, but flares that are modified as the result of a significant project, such as the installation of a new process unit that will be tied into an existing flare, will effectively be required to comply with the flare standards at the startup of the new process unit.

Therefore, for the reasons described above, we are providing flares that become affected facilities subject to 40 CFR part 60, subpart Ja through modification with a phased compliance schedule for the flare standards, as described in this paragraph. The final rule requires owners and operators of modified flares to meet the short-term 162 ppmv H_2S concentration requirement by the effective date of these amendments or upon startup of the affected flare (whichever is later) only if they are already subject to the short-term 162 ppmv H_2S concentration limit in 40 CFR part 60, subpart J. Modified flares that were not affected flares under subpart J prior to being modified facilities under subpart Ja must comply with the short-term 162 ppmv H_2S concentration requirement within 3 years of the effective date of these amendments or upon startup of the modified flare, whichever is later. Owners and operators of modified flares that are have accepted applicability of subpart J under a federal consent decree shall comply with the subpart J requirements as specified in the consent decree, but must meet the short-term 162 ppmv H_2S concentration limit no later than 3 years after the effective date of this final rule. Owners and operators of modified flares that are already subject to subpart J and that have an approved monitoring alternative and are unable to meet the applicable subpart Ja monitoring requirements for the short-term H_2S concentration limit must meet the short-term H_2S concentration requirement upon startup of the affected flare or the effective date of this final rule, whichever is later, but shall be given up to 3 years from the effective date of this final rule to install the monitors required by subpart Ja. In this interim period, owners and operators of these modified flares shall demonstrate compliance with the short-term H_2S concentration limit using the monitoring alternative approved under subpart J.

Additionally, we are requiring owners and operators of modified flares to complete and implement the flare management plan under 40 CFR 60.103a(a) by 3 years from the effective date of these amendments or upon startup of the modified flare, whichever is later. We are requiring owners and operators of modified flares to begin conducting root cause and corrective action analyses under 40 CFR 60.103a(c) and (d) no later than 3 years from the effective date of these amendments or the date of the startup of the modified flare, whichever is later, so that the facility can complete the flare management plan and establish baseline flow rates prior to performing the root cause and corrective action analyses. We are also requiring owners and operators of modified flares to install and begin operating the monitors necessary to demonstrate compliance with these provisions, as required under 40 CFR 60.107a(e) through (g) within 3 years from the effective date of these amendments or by the startup date of the modified flare, whichever is later, when the monitors are not already in place. Compliance with the phased compliance schedule constitutes compliance with the flare standards as of the effective date.

We note that the final rule does not provide a phased compliance schedule for new and reconstructed flares. The final rule requires owners and operators of new and reconstructed flares to meet all the flare requirements, including the short-term 162 ppmv H_2S concentration requirement, upon the effective date of the requirements or upon startup of the affected flare, whichever is later.

C. Other Comments

Comment: Several commenters objected to the change to the definition of "refinery process unit." The commenters objected to the proposed amendments to include coke gasification, loading and wastewater treatment, stating the change makes the term more expansive. The commenters stated that the EPA did not evaluate the impacts or explain the consequences of the revised definition. One commenter stated that product loading is generally considered part of the refinery process unit to which it is associated and that wastewater treatment is a utility. Another commenter suggested that the definition specify SIC 2911 (as in Refinery MACT 1).

Response: The original definition of "refinery process unit" in 40 CFR part 60, subpart J and the definition of "refinery process unit" promulgated in 40 CFR part 60, subpart Ja in June 2008 read as follows: "Refinery process unit means any segment of the petroleum refinery in which a specific processing operation is conducted." Thus, to be considered a refinery process unit, only two criteria are needed: (1) The unit must be located at a petroleum refinery; and (2) the unit must be used to conduct "a specific processing operation." The definition does not directly limit the scope of "processing operations." That is, the definition of refinery process unit does not limit process operations to distillation, re-distillation, cracking or reforming, and it is not limited to only those processes used to produce gasoline, kerosene, fuel oils, etc. In the proposed amendment to this definition, we listed "operations" that we construed as conducting a "specific processing operation" when these operations are located at a petroleum refinery. Consequently, we considered the proposed inclusion of examples of refinery process units to be a clarification of the existing definition rather than an expansion of the original definition.

We reviewed the impact of the proposed revision of this definition on 40 CFR part 60, subpart Ja, as well as its historic use in 40 CFR part 60, subpart J. The term "refinery process unit" is used primarily in the definitions of certain affected facilities, "process gas" and "process upset gas" in subparts J and Ja. The term is also used in the flare provisions in subpart Ja. With respect to the definitional terms, there can be no issue with including the designation of "refinery process unit" within the definitions for specific process units. "Process gas" is not used at all in either rule, although it was revised between proposal and promulgation of subpart J. In response to a comment that the definition of "process gas" "should have included the non-hydrocarbon gases produced by various process units in a refinery," the EPA responded: "The definition has been revised to include all gases produced by process units in a refinery except fuel gas and process upset gas." (See page 127 of *Background*

[11] For the purposes of this subpart, startup of the modified flare occurs when any of the activities in 40 CFR 60.100a(c)(1) or (2) is completed (*e.g.*, when a new connection is made to a flare such that flow from a refinery process unit or ancillary equipment can flow to the flare via that new connection).

Information for New Source Performance Standards, Volume 3, Promulgated Standards (BID Vol. 3), EPA 450/2–74–003 (Feb. 1974), Docket Item No. EPA–HQ–OAR–2007–0011–0082). The definition had actually been revised to include "any gas generated by a petroleum refinery process unit." The response in BID Vol. 3 suggests that the EPA considered "refinery process units" and "process units in a refinery" to have the same meaning, and there is no mention of limiting what is considered to be a "refinery process unit" or a "process units in a refinery."

"Process upset gas" is used only to provide an exemption to the H_2S concentration limit for process upset gas sent to a flare. See 40 CFR 60.104(a)(1), 60.103a(h). Therefore, a narrow definition of "refinery process unit" would only limit those gases sent to a flare that would qualify as "process upset gas." For example, if a coke gasifier is not a refinery process unit, then gases generated during the startup, shutdown or malfunction of a coke gasifier located at the refinery would not be "process upset gas" and would be required to comply with the requirement to limit short-term H_2S concentration in fuel gas to 162 ppmv if sent to a flare. We find that the historical application of the "process upset gas" exclusion has considered a broad definition of what constitutes a "refinery process unit."

For 40 CFR part 60, subpart Ja, the definition of "refinery process unit" also impacts the flare provisions. Based on the proposed revisions of "refinery process unit," it was clearly our intent that a broad definition of "refinery process unit" should apply to the flare requirements. Specifically, we intended that a flare modification occurs when a wide range of equipment at the petroleum refinery is newly connected to the flare. It was also our intent that the flare management plan consider flare minimization methods for this broadly defined range of equipment referred to collectively as "refinery process units."

Based on our review of the impacts of changes to the definition of "refinery process unit," and considering all of the comments received, we maintain that the existing definition of "refinery process unit" is broad and should be broadly interpreted. For consistency between 40 CFR part 60, subparts J and Ja, we have elected to maintain the existing definition and not include an example list of refinery process units within the definition. However, to clarify that a modification to a flare occurs when these types of equipment are connected to the flare, we revised the language in the flaring provisions to refer to "refinery process units, including ancillary equipment." This revision is made to clarify our original intent that coke gasification units, storage tanks, product loading operations and wastewater treatment systems, as well as pressure relief valves, pumps, sampling vents, continuous analyzer vents and other similar equipment are units from which a connection to a flare would trigger a flare modification and generate gas streams that should be considered in the flare management plan. We have included in the final amendments a definition of "ancillary equipment." Specifically, *ancillary equipment* means equipment used in conjunction with or that serve a refinery process unit. *Ancillary equipment* includes, but is not limited to, storage tanks, product loading operations, wastewater treatment systems, steam- or electricity-producing units (including coke gasification units), pressure relief valves, pumps, sampling vents, and continuous analyzer vents.

Sulfur recovery plants are also units from which a connection to a flare would trigger a flare modification and generate gas streams that should be considered in the flare management plan. We recognize that on-site sulfur recovery plants are considered refinery process units, and we proposed amendments to the definitions of "refinery process unit" and "sulfur recovery plant" to clarify that we consider a sulfur recovery plant to be "a segment of the petroleum refinery in which a specific processing operation is conducted." However, the strict definition of "refinery process unit" would only apply to sulfur recovery plants physically located at the refinery. As 40 CFR part 60, subpart Ja also applies to off-site sulfur recovery plants (see 40 CFR 60.100(a) and 40 CFR 60.100a(a)), we found it potentially contradictory to define a sulfur recovery plant located outside the refinery as a "refinery process unit," so we are also not finalizing the proposed amendment to include the term "all refinery process units" in the definition of "sulfur recovery plant." However, while connections to a refinery flare from an off-site sulfur recovery plant are not expected to be common, off-site sulfur recovery plants are subject to subpart Ja. We clarify in this response that we would consider such a connection to a flare to be from a "refinery process unit, including ancillary equipment," such that connecting an off-site sulfur recovery plant that is subject to subpart Ja to a flare at a refinery would cause that flare to be a modified flare subject to subpart Ja.

Further, in reviewing the definition of "sulfur recovery plant," we noticed an inadvertent error that also suggests that the sulfur recovery plant must be located at a petroleum refinery, which is not consistent with the applicability provisions in 40 CFR 60.100(a) and 40 CFR 60.100a(a). Specifically, we inadvertently omitted the word "produced" in this first sentence, so we are amending the definition of "sulfur recovery plant" to clarify that a sulfur recovery plant recovers sulfur from sour gases "produced at the petroleum refinery." Thus, we are amending the definition of "sulfur recovery plant" to correct inadvertent errors and to clarify that off-site sulfur recovery plants are included in the definition of "sulfur recovery plant," as these plants are expressly considered to be affected facilities in 40 CFR part 60, subpart Ja.

Comment: Commenters supported the revised definition of "delayed coking unit," but stated that, since 40 CFR part 60, subpart Ja only sets standards for the coke drums, the definition should just include the coke drums associated with a single fractionator. The commenters stated that the definition should not include the fractionator itself because VOC emissions from the fractionator are covered by NSPS for equipment leaks.

Response: The proposed amendments to the definition of "delayed coking unit" specifically listed the primary components of the delayed coking unit. In particular, based on the operation of the delayed coking unit, we find that the fractionator is an integral part of the delayed coking unit. The fresh feed to the delayed coking unit is generally introduced in the fractionator tower bottoms receiver. This integral use of the fractionator is different than the use of fractionators used for other units defined in 40 CFR part 60, subpart Ja, such as the fluid catalytic cracking unit (FCCU). For the FCCU, fresh feed is introduced in the riser, which is part of the affected facility in subpart Ja. As the feed to the delayed coking unit is to the fractionator, we find that the fractionator is an integral part of the delayed coking unit, so we specifically include it as part of the affected facility. While our proposed amendments covered only the major components of the delayed coking unit, upon our review of the definition based on the comments received, we note that there are several other components of the delayed coking unit that are integral to the operation of the delayed coking unit. Additionally, even though the standards are specific to the coke drum, many of these integral components are

interconnected and necessary for the delayed coking unit to meet the applicable standards. Based on our review of the operation of a delayed coking unit, we also include coke cutting and blowdown recovery equipment in the final definition because this equipment is also integral to the overall cyclical operation of the process unit. The definition of "delayed coking unit" has been amended in the final rule to mean a refinery process unit in which high molecular weight petroleum derivatives are thermally cracked and petroleum coke is produced in a series of closed, batch system reactors. A "delayed coking unit" includes, but is not limited to all of the coke drums associated with a single fractionator; the fractionator, including bottoms receiver and overhead condenser; the coke drum cutting water and quench system, including the jet pump and coker quench water tank; process piping and associated equipment such as pumps, valves and connectors; and the coke drum blowdown recovery compressor system.

Since this definition is more specific than the definition included in the amendments proposed on December 22, 2008, it could affect which delayed coking units are subject to subpart Ja. For example, an owner or operator may have made a change to a delayed coking unit that would not be considered a modification under the December 22, 2008, definition, but that same change could make the delayed coking unit a modified facility subject to subpart Ja using the definition of "delayed coking unit" above. In other words, in changing the definition of "delayed coking unit" in the final rule, some delayed coking units that would not have been affected sources under the proposed requirements might now be covered by the final rule. Under CAA section 111(a)(2), a "new source" is defined from the date of proposal only if there is a standard "which will be applicable to such source;" otherwise, a "new source" is defined based upon the final rule date. In this circumstance, using the proposal date as the new source date for determining applicability for this group of delayed coking units would be inappropriate as such units would not have been on notice that subpart Ja could apply to them. Accordingly, we moved the "new source" date for this group of delayed coking units so that delayed coking units that are only defined as such under the final rule are covered by the final rule only if they commence construction, reconstruction or modification after the promulgation date of these final amendments. The "new source" date for other delayed coking units will depend on the previous definitions and when the activities involving the delayed coking unit occurred. See § 60.100a(b) for determining applicability of subpart Ja for delayed coking units.

Comment: One commenter stated that 40 CFR part 63, subpart LLLLL indicates at 40 CFR 63.8681(e) that 40 CFR part 60, subpart J does not apply for asphalt blowing stills subject to subpart LLLLL, and the commenter requested similar clarification for 40 CFR part 60, subpart Ja by exempting this process in 40 CFR 60.100a.

Response: We reviewed the requirement in 40 CFR part 63, subpart LLLLL. Due to the O_2 content of this process gas, we agree that it is not suitable for recovery as fuel gas and subsequent amine treatment; therefore, it is not BSER for combustion controls used on asphalt blowing stills to meet the H_2S concentration limits (or alternative SO_2 emissions limits). We reviewed 40 CFR 60.100a, but we feel a blanket exemption from 40 CFR part 60, subpart Ja is not necessary. Instead, we have included an exemption within the definition of fuel gas similar to the exemptions included for combustion controls on vapors collected and combusted from wastewater treatment and marine vessel loading operations. Specifically, we amended the definition of fuel gas in 40 CFR 60.101a to clarify that fuel gas does not include vapors that are collected and combusted to control emissions from asphalt processing units (*i.e.*, asphalt blowing stills).

Comment: One commenter recommended that the exclusion from the definition of "fuel gas" be extended to vapors "from marine vessel loading operations or waste management units that are collected and combusted" without any reference to a federal requirement. At a minimum, the commenter stated that marine benzene loading under 40 CFR part 61, subpart BB; the wastewater provisions of 40 CFR part 63, subpart G; remediation efforts regulated under Resource Conservation and Recovery Act (RCRA) corrective action; and RCRA 7003 orders should be added to the exclusion.

Response: We were originally concerned that removing the reference to a federal standard may inadvertently exempt the use of these vapors when used in process heaters or boilers. We determined that it was not BSER to require thermal oxidizers used to comply with the cited federal standards to comply with the H_2S concentration limits due to the typically remote location of the combustion sources (control devices) relative to refinery process units (see technical memorandum entitled *Fuel Gas Treatment of Marine Vessel Loading and Wastewater Treatment Unit Off-gas*, in Docket ID No. EPA–HQ–OAR–2007–0011). However, if these gases are currently routed to a fuel gas system or directly to a process heater or boiler, treatment of the fuel gas to meet the SO_2 emissions limits or the H_2S concentration limits is expected to be economically viable. Additionally, these gases are expected to be only a small portion of the fuel gas combusted in these units, and the refinery has an option to over-treat the primary fuel gas so that gases from the wastewater treatment system or marine vessel loading operation can remain untreated while the fuel gas combustion device itself can comply with the SO_2 emissions limits or the H_2S concentration limits, based on the mixture of fuels used in the device.

In reviewing the rules suggested by the commenter, as well as those we originally listed, we noted that acceptable "control devices" or "combustion units" in these rules include process heaters and boilers. We did not intend to exclude vapors that are collected and routed to a process heater or boiler to be exempt from the definition of fuel gas. In other words, when developing this exclusion, we specifically considered the combustion of these gases via a thermal oxidizer or flare currently located at the marine vessel loading or wastewater treatment location. These remote combustion devices were really the subject of the analysis, but we did not want to exclude these combustion units themselves because other fuel gas is often fed to these units to ensure adequate combustion of the vapors being controlled. It is clear from our rationale and the description of the exemption included in the preamble of the proposed rule that the exemption was intended "to exempt vapors that are collected and combusted in an air pollution control device installed to comply with" specific wastewater or marine vessel loading emissions standards. (72 FR 27180 and also at 27183) Process heaters or boilers would not be "installed" to comply with these provisions, and it was not our intent to exclude vapors sent to these types of combustion units. However, the regulatory text is more ambiguous and appears to exclude any vapors collected and combusted, regardless of where they are combusted. As such, we are amending this exclusion to better represent our original intent.

Additionally, with the added clarity in the regulatory text, it seems appropriate to extend this exclusion to control devices used at these locations regardless of why the emission controls were installed. That is, while we originally considered air pollution control devices that were mandated by the EPA, we see no reason to discriminate against air pollution control devices that were installed voluntarily to reduce the emissions from these sources. Further, we intend to clarify that gases off the sour water system, including the sour water stripper, would likely contain higher amounts of reduced sulfur and would be economically viable to treat. Therefore, we are also clarifying that the exemption does not extend to the sour water system. Therefore, the amended definition of "fuel gas" in both 40 CFR part 60, subparts J and Ja states that fuel gas "does not include vapors that are collected and combusted in a thermal oxidizer or flare installed to control emissions from wastewater treatment units other than those processing sour water, marine tank vessel loading operations, or asphalt processing units (*i.e.*, asphalt blowing stills)."

With respect to remediation efforts conducted under RCRA corrective actions, we are unwilling to grant such an exclusion from the definition of "fuel gas" in 40 CFR part 60, subpart Ja. First, we anticipate that most vapors from remediation efforts would be low in sulfur and, if so, the owner or operator could apply for the alternative monitoring methods provided in the rule. Also, although some remediation efforts may occur in remote locations, many of the remediation efforts are conducted in reasonable proximity to existing process units. Finally, the range of activities included in RCRA remediation efforts is broad, and we have little information regarding the number and types of RCRA remediation activities that are being conducted. The commenter provided no description of such activities, nor did they provide a reasonable rationale as to why the vapors from these activities should be exempted.

V. Summary of Cost, Environmental, Energy and Economic Impacts

A. What are the emission reduction and cost impacts for the final amendments?

The emission reduction and cost impacts presented in this section for flares are revised estimates for the impacts of the final requirements of 40 CFR part 60, subpart Ja for flares, as amended by this action. The table shows the differences in anticipated impacts between these final amendments to subpart Ja and the final June 2008 NSPS requirements of subpart Ja, which were estimated assuming only 40 flares would trigger applicability to the rule. The impacts are presented for 400 affected flares that commence construction, reconstruction or modification that will be required to comply with this final rule. We anticipate that most of the flares would become affected due to the modification provisions for flares set forth in the final June 2008 subpart Ja rule. For this analysis, we assumed that 90 percent of the flares will be modified or reconstructed and 10 percent of the flares will be newly constructed. Further, we estimate that 30 percent of the 400 affected flares, or 120 flares, either would meet the definition of "emergency flare" in subpart Ja or would be equipped with a flare gas recovery system such that robust sulfur and flow monitoring would not be required. Therefore, the values in Table 5 of this preamble include the costs and emissions reductions for 400 flares to comply with the flare management plan and root cause and corrective action analyses requirements and for 280 flares to comply with the sulfur and flow monitoring requirements. The cost and emissions reductions for the affected flares to comply with the short-term H_2S concentration of 162 ppmv in the fuel gas are included in the baseline rather than the incremental impacts because this limit is unchanged from the requirements in 40 CFR part 60, subpart J. For further detail on the methodology of these calculations, see *Documentation of Impact Estimates for Fuel Gas Combustion Device and Flare Regulatory Options for Amendments to the Petroleum Refinery NSPS,* in Docket ID No. EPA–HQ–OAR–2007–0011.

We estimate that the final requirements for flares will reduce emissions of SO_2 by 3,200 tons/yr, NO_X by 1,100 tons/yr and VOC by 3,400 tons/yr from the baseline. The estimated annual cost, including annualized capital costs, is a cost savings of about $79 million (2006 dollars) due to the replacement of some natural gas purchases with recovered flare gas and the retention of intermediate and product streams due to a reduction in the number of malfunctions associated with refinery process units and ancillary equipment connected to the flare. Note that not all refiners will realize a cost savings since we only estimate that refineries with high flare flows will install vapor recovery systems. Although the rule does not specifically require installation of flare gas recovery systems, we project that owners and operators of flares receiving high waste gas flows will conclude, upon installation of monitors, implementation of their flare management plans, and implementation of root causes analyses, that installing flare gas recovery would result in fuel savings by using the recovered flare gas where purchased natural gas is now being used to fire equipment such as boilers and process heaters. The flare management plan requires refiners to conduct a thorough review of the flare system so that flare gas recovery systems are installed and used where these systems are warranted. As part of the development of the flare management plan, refinery owners and operators must provide rationale and supporting evidence regarding the flare waste gas reduction options considered, the quantity of flare gas that would be recovered or prevented by the option, the BTU content of the flare gas and the ability or inability of the reduction option to offset natural gas purchases. In addition, consistent with Executive Order 13563 (Improving Regulation and Regulatory Review, issued on January 18, 2011), for facilities implementing flare gas recovery, we are finalizing provisions that would allow the owner or operator to reduce monitoring costs and the number of root cause analyses, corrective actions, and corresponding recordkeeping and reporting they would need to perform. We estimate that the final requirements for flares will reduce emissions of SO_2 by 3,200 tons/yr, NO_X by 1,100 tons/yr and VOC by 3,400 tons/yr from the baseline. The overall cost effectiveness is a cost savings of about $10,000 per ton of combined pollutants removed. The estimated nationwide 5-year emissions reductions and cost impacts for the final standards are summarized in Table 5 of this preamble.

TABLE 5—NATIONAL EMISSION REDUCTIONS AND COST IMPACTS FOR PETROLEUM REFINERY FLARES SUBJECT TO AMENDED STANDARDS UNDER 40 CFR PART 60, SUBPART JA

[Fifth year after the effective date of these final rule amendments] [a]

Subpart Ja requirements	Total capital cost ($1,000)	Total annual cost without credit ($1,000/yr)	Natural gas offset/product recovery credit ($1,000)	Total annual cost ($1,000/yr)	Annual emission reductions (tons SO_2/yr)	Annual emission reductions (tons NO_X/yr)	Annual emission reductions (tons VOC/yr)	Cost effectiveness ($/ton emissions reduced)
Estimates from June 2008 Final Rule	40,000			(7,000)	80	6	200	(23,000)
Revised Estimates for Amendments	460,000	100,000	(180,000)	(79,000)	3,200	1,100	3,400	(10,000)

[a] All costs in this table are relative to the baseline used for the 2008 final rule.

We also estimate that the final requirements for flares will result in emissions reduction co-benefits of CO_2 equivalents by 1,900,000 metric tonnes per year, predominantly as a result of our estimate of the largest flares employing flare gas recovery and to a lesser extent, as a result of the root cause analyses applicable to all flares.

The cost, environmental and economic impacts for the final amendments to 40 CFR part 60, subpart Ja for process heaters are not expected to be different than those reported for the final June 2008 standards. We expect owners and operators to install the same technology to meet these final amendments that we anticipated they would install to meet the June 2008 final subpart Ja requirements (*i.e.*, ultra-low NO_X burners). We did revise our emission estimates based on the type of process heater, creating separate impacts for forced draft process heaters and natural draft process heaters. Dividing process heaters into separate subcategories, based on the draft type, required us to develop new distributions of baseline emissions for each type of process heater. The baseline emission estimates for natural draft process heaters are slightly lower than those developed for the existing subpart Ja requirements (per affected process heater), but the average emission reduction achieved by ultra-low NO_X burners was adjusted to 80 percent (rather than 75 percent used for generic process heaters). For forced draft process heaters, the baseline (*i.e.*, uncontrolled) emissions rate for forced draft process heaters was revised slightly upward, based on the available emissions data. Due to these differences, the mix of controls needed to meet a 40 ppmv emissions limit was no longer cost effective for forced draft process heaters, but the emission reductions associated with process heaters complying with the 60 ppmv standard were higher than those previously estimated for generic process heaters. Thus, the creation of new subcategories of process heaters with different emissions limits for each subcategory did not impact the control or compliance methods used by the facilities (*i.e.*, BSER in all cases was based on the performance of advanced combustion monitoring controls in conjunction with ultra-low NO_X burners) and did not change the estimated compliance costs. As we do not have adequate data regarding the prevalence of natural draft process heaters versus forced draft process heaters that will become subject to the rule, we used the emission reductions estimated for the two different types of process heaters as a means to bound the range of anticipated NO_X emission reductions to be from 7,100 to 8,600 tons/yr in the fifth year after the effective date of this final rule (see *Revised NO_X Impact Estimates for Process Heaters,* in Docket ID No. EPA–HQ–OAR–2007–0011). We estimated the emission reductions to be 7,500 tons/yr for the June 2008 final standards, which falls well within the anticipated range of emissions reductions for the standards we are finalizing here. Given the uncertainty in the emissions estimates, as well as the uncertainty in the relative number of natural draft process heaters versus forced draft process heaters, we concluded that the impacts previously developed for subpart Ja accurately represent the impacts for process heaters in these final amendments.

We note that, in the preamble to the June 2008 final standards, we estimated costs and emissions reductions for 30 fuel gas combustion devices, but we subsequently determined that those estimates did not fully account for the number of affected flares (which, at the time, were considered a subset of fuel gas combustion devices). Therefore, in the preamble to the December 2008 proposed amendments, we presented revised emission reduction and cost estimates for affected fuel gas combustion devices. As previously explained, we are not finalizing the long-term 60 ppmv H_2S fuel gas concentration limit for flares, as proposed, and we revised our cost estimates accordingly. Because these final amendments consider flares to be a separate affected source, the emission reductions and costs for fuel gas combustion devices are not affected by these final amendments and are not included in this preamble. Rather, the final emission reduction and cost estimates for fuel gas combustion devices are very close to the impacts presented in the June 2008 final rule; the details of the analysis and the final impacts are presented in *Documentation of Impact Estimates for Fuel Gas Combustion Device and Flare Regulatory Options for Amendments to the Petroleum Refinery NSPS,* in Docket ID No. EPA–HQ–OAR–2007–0011.

The final amendments to 40 CFR part 60, subpart J are technical corrections or clarifications to the existing rule and should have no negative emissions impacts.

B. What are the economic impacts?

The total annualized compliance costs are estimated to save about $79 million (2006 dollars) in the fifth year after the effective date of these final amendments. Note that not all refiners will realize a cost savings as only flare systems with high waste gas flows (about 10 percent of all flares) are expected to install vapor recovery systems. Alternatively, if no refineries install flare gas recovery systems, total annualized compliance costs are estimated to be $10.7 million (2006 dollars) in the fifth year after proposal. Regardless of whether any refineries install flare gas recovery systems, we do not anticipate any adverse economic impacts associated with this regulatory action, as no increase in refined petroleum product prices or decrease in refined petroleum product output is expected.

For more information, please refer to the Regulatory Impact Analysis (RIA) that is in the docket for this final rule.

C. What are the benefits?

Emission controls installed to meet the requirements of this rule will generate benefits by reducing emissions of criteria pollutants and their precursors, including SO_2, NO_X and VOC as well as CO_2. SO_2, NO_X and VOC are precursors to $PM_{2.5}$ (particles smaller than 2.5 microns), and NO_X and VOC are precursors to ozone. For this rule, we were only able to quantify the health benefits associated with reduced exposure to $PM_{2.5}$ from emission reductions of SO_2 and NO_X and the climate benefits associated with CO_2 emission reductions. We estimate the monetized benefits of this final regulatory action to be $270 million to $580 million (2006 dollars, 3-percent discount rate) in the fifth year (2017). The benefits at a 7-percent discount rate for health benefits and 3-percent discount rate for climate benefits are $240 million to $530 million (2006 dollars). For small flares only, we estimate the monetized benefits are $170 million to $410 million (3-percent discount rate) and $150 million to $370 million (7-percent discount rate for health benefits and 3-percent discount rate for climate benefits). For large flares only, we estimate the monetized benefits are $93 million to $160 million (3-percent discount rate) and $88 million to $150 million (7-percent discount rate for health benefits and 3-percent discount rate for climate benefits). Using alternate relationships between $PM_{2.5}$ and premature mortality supplied by experts, higher and lower benefits estimates are plausible, but most of the expert-based estimates fall between these two estimates.[12] A summary of the monetized benefits estimates by pollutant for all flares at discount rates of 3 percent and 7 percent is in Table 6 of this preamble. Several benefits categories, including direct exposure to SO_2 and NO_X benefits, ozone benefits, ecosystem benefits and visibility benefits are not included in these monetized benefits. All estimates are in 2006 dollars for the year 2017.

TABLE 6—SUMMARY OF THE MONETIZED $PM_{2.5}$ AND CO_2 BENEFITS FOR AMENDED PETROLEUM REFINERIES STANDARDS

[Millions of 2006 dollars] [a]

Pollutant	Emission reductions (tons per year)	Total monetized benefits (3-percent discount)	Total monetized benefits (7-percent discount)
With Flare Gas Recovery			
$PM_{2.5}$ Benefits[b]:			
SO_2	3,200	$210 to $510	$190 to $460.
NO_X	1,100	$7.1 to $18	$6.4 to $16.
PM Total		$220 to $530	$190 to $480.
CO_2 Benefits[c]	1,900,000[d]	$46	$46.
Total Monetized Benefits:		$260 to $580	$240 to $520.
Without Flare Gas Recovery			
$PM_{2.5}$ Benefits[b]:			
SO_2	2,900	$190 to $450	$170 to $410.
NO_X	56	$0.36 to $0.87	$0.32 to $0.78.
PM Total		$190 to $460	$170 to $410.
CO_2 Benefits[c]	110,000[d]	$2.6	$2.6.
Total Monetized Benefits		$190 to $460	$170 to $410.

[a] All estimates are for the analysis year (2017) and are rounded to two significant figures so numbers may not sum across rows. The total monetized benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of $PM_{2.5}$ precursors, such as NO_X and SO_2, as well as CO_2. It is important to note that the monetized benefits do not include reduced health effects from direct exposure to SO_2 and NO_X, ozone exposure, ecosystem effects or visibility impairment.

[b] PM benefits are shown as a range from Pope, *et al.* (2002) to Laden, *et al.* (2006). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effects estimates by particle type.

[c] The CO_2 emission reductions (shown in metric tonnes) have been reduced to reflect the anticipated emission increases associated with the energy disbenefits. CO_2-related benefits were calculated using the social cost of carbon (SCC), which is discussed further in the RIA. The net present value of reduced CO_2 emissions is calculated differently than other benefits. This table shows monetized climate benefits using the global average SCC estimate at a 3-percent discount rate because the interagency workgroup deemed the SCC at a 3-percent discount rate to be the central value. In the RIA, we also provide the monetized CO_2 benefits using discount rates of 5 percent (average), 2.5 percent (average) and 3 percent (95th percentile).

[d] Metric tonnes

These benefits estimates represent the total monetized human health benefits for populations exposed to less $PM_{2.5}$ in 2017 from controls installed to reduce air pollutants in order to meet this rule. To estimate human health benefits of this rule, the EPA used benefit-per-ton factors to quantify the changes in $PM_{2.5}$-related health impacts and monetized benefits based on changes in SO_2 and NO_X emissions. These benefit-per-ton factors were derived using the general approach and methodology laid out in Fann, Fulcher, and Hubbell (2009).[13] This approach uses a model to convert emissions of $PM_{2.5}$ precursors into changes in ambient $PM_{2.5}$ levels and another model to estimate the changes in human health associated with that change in air quality, which are then divided by the emission reductions to

[12] Roman, *et al.*, 2008. *Expert Judgment Assessment of the Mortality Impact of Changes in Ambient Fine Particulate Matter in the U.S.*, Environ. Sci. Technol., 42, 7, 2268—2274.

[13] Fann, N., C.M. Fulcher, B.J. Hubbell. 2009. *The Influence of Location, Source, and Emission Type in Estimates of the Human Health Benefits of Reducing a Ton of Air Pollution.* Air Qual Atmos Health (2009) 2:169–176.

create the benefit-per-ton estimates. However, for this rule, we use air quality modeling data specific to the petroleum refineries sector.[14] The primary difference between the estimates used in this analysis and the estimates reported in Fann, Fulcher, and Hubbell (2009) is the air quality modeling data utilized. While the air quality data used in Fann, Fulcher, and Hubbell (2009) reflects broad pollutant/source category combinations, such as all non-electric generating unit stationary point sources, the air quality modeling data used in this analysis is sector-specific. In addition, the updated air quality modeling data reflects more recent emissions data (2005 rather than 2001) and has a higher spatial resolution (12 kilometers (km) rather than 36 km grid cells). As a result, the benefit-per-ton estimates presented herein better reflect the geographic areas and populations likely to be affected by this sector. The benefits methodology, such as health endpoints assessed, risk estimates applied and valuation techniques applied did not change. However, these updated estimates still have similar limitations as all national-average benefit-per-ton estimates in that they reflect the geographic distribution of the modeled emissions, which may not exactly match the emission reductions in this rulemaking, and they may not reflect local variability in population density, meteorology, exposure, baseline health incidence rates or other local factors for any specific location.

We apply these national benefit-per-ton estimates calculated for this sector separately for SO_2 and NO_X and multiply them by the corresponding emission reductions. The sector-specific modeling does not provide estimates of the $PM_{2.5}$-related benefits associated with reducing VOC emissions, but these unquantified benefits are generally small compared to other $PM_{2.5}$ precursors. More information regarding the derivation of the benefit-per-ton estimates for the petroleum refining sector is available in the technical support document, which is available in the docket.

These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effects estimates by particle type. The main $PM_{2.5}$ precursors affected by this rule are SO_2 and NO_X. Even though we assume that all fine particles have equivalent health effects, the benefit-per-ton estimates vary between precursors depending on the location and magnitude of their impact on $PM_{2.5}$ levels, which drive population exposure. For example, SO_2 has a lower benefit-per-ton estimate than direct $PM_{2.5}$ because it does not form as much $PM_{2.5}$, thus, the exposure would be lower, and the monetized health benefits would be lower.

It is important to note that the magnitude of the $PM_{2.5}$ benefits is largely driven by the concentration response function for premature mortality. Experts have advised the EPA to consider a variety of assumptions, including estimates based both on empirical (epidemiological) studies and judgments elicited from scientific experts, to characterize the uncertainty in the relationship between $PM_{2.5}$ concentrations and premature mortality. We cite two key empirical studies, one based on the American Cancer Society cohort study[15] and the extended Six Cities cohort study.[16] In the RIA for this final rule, which is available in the docket, we also include benefits estimates derived from the expert judgments and other assumptions.

The EPA strives to use the best available science to support our benefits analyses. We recognize that interpretation of the science regarding air pollution and health is dynamic and evolving. After reviewing the scientific literature, we have determined that the no-threshold model is the most appropriate model for assessing the mortality benefits associated with reducing $PM_{2.5}$ exposure. Consistent with this finding, we have conformed the previous threshold sensitivity analysis to the current state of the PM science by incorporating a new "Lowest Measured Level" (LML) assessment in the RIA accompanying this rule. While an LML assessment provides some insight into the level of uncertainty in the estimated PM mortality benefits, the EPA does not view the LML as a threshold and continues to quantify PM-related mortality impacts using a full range of modeled air quality concentrations.

Most of the estimated PM-related benefits in this rule would accrue to populations exposed to higher levels of $PM_{2.5}$. For this analysis, policy-specific air quality data is not available due to time or resource limitations, thus, we are unable to estimate the percentage of premature mortality associated with this specific rule's emission reductions at each $PM_{2.5}$ level. As a surrogate measure of mortality impacts, we provide the percentage of the population exposed at each $PM_{2.5}$ level using the source apportionment modeling used to calculate the benefit-per-ton estimates for this sector. Using the Pope, *et al.* (2002) study, 77 percent of the population is exposed to annual mean $PM_{2.5}$ levels at or above the LML of 7.5 micrograms per cubic meter ($\mu g/m^3$). Using the Laden, *et al.* (2006) study, 25 percent of the population is exposed above the LML of 10 $\mu g/m^3$. It is important to emphasize that we have high confidence in $PM_{2.5}$-related effects down to the lowest LML of the major cohort studies. This fact is important, because, as we model avoided premature deaths among populations exposed to levels of $PM_{2.5}$, we have lower confidence in levels below the LML for each study.

Every benefit analysis examining the potential effects of a change in environmental protection requirements is limited, to some extent, by data gaps, model capabilities (such as geographic coverage) and uncertainties in the underlying scientific and economic studies used to configure the benefit and cost models. Despite these uncertainties, we believe the benefit analysis for this rule provides a reasonable indication of the expected health benefits of the rulemaking under a set of reasonable assumptions. This analysis does not include the type of detailed uncertainty assessment found in the 2006 $PM_{2.5}$ NAAQS RIA because we lack the necessary air quality input and monitoring data to run the benefits model. In addition, we have not conducted air quality modeling for this rule, and using a benefit-per-ton approach adds another important source of uncertainty to the benefits estimates. The 2006 $PM_{2.5}$ NAAQS benefits analysis[17] provides an indication of the sensitivity of our results to various assumptions.

This rule is expected to reduce CO_2 emissions from the electricity sector. The EPA has assigned a dollar value to reductions in CO_2 emissions using recent estimates of the "social cost of carbon" (SCC). The SCC is an estimate

[14] U.S. Environmental Protection Agency. 2011. *Technical Support Document: Estimating the Benefit per Ton of Reducing $PM_{2.5}$ Precursors from the Petroleum Refineries Sector.* EPA, Research Triangle Park, NC.

[15] Pope, *et al.*, 2002. *Lung Cancer, Cardiopulmonary Mortality, and Long-term Exposure to Fine Particulate Air Pollution.* Journal of the American Medical Association 287:1132–1141.

[16] Laden, *et al.*, 2006. *Reduction in Fine Particulate Air Pollution and Mortality.* American Journal of Respiratory and Critical Care Medicine 173: 667–672.

[17] U.S. Environmental Protection Agency, 2006. *Final Regulatory Impact Analysis: $PM_{2.5}$ NAAQS.* Prepared by Office of Air and Radiation. October. Available on the Internet at *http://www.epa.gov/ttn/ecas/ria.html.*

of the monetized damages associated with an incremental increase in carbon emissions in a given year or the per metric ton benefit estimate relating to decreases in CO_2 emissions. It is intended to include (but is not limited to) changes in net agricultural productivity, human health, property damage from increased flood risk, and the value of ecosystem services due to climate change.

The SCC estimates used in this analysis were developed through an interagency process that included the EPA and other executive branch entities, and that concluded in February 2010. We first used these SCC estimates in the benefits analysis for the final joint EPA/DOT Rulemaking to establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; see the rule's preamble for discussion about application of the SCC (75 FR 25324; May 7, 2010). The SCC Technical Support Document (SCC TSD) provides a complete discussion of the methods used to develop these SCC estimates.[18]

The interagency group selected four SCC values for use in regulatory analyses, which we have applied in this analysis: $5.9, $24.3, $39, and $74.4 per metric ton of CO_2 emissions in 2016, in 2007 dollars. The first three values are based on the average SCC from three integrated assessment models, at discount rates of 5, 3 and 2.5 percent, respectively. Social cost of carbon values at several discount rates are included because the literature shows that the SCC is quite sensitive to assumptions about the discount rate, and because no consensus exists on the appropriate rate to use in an intergenerational context. The fourth value is the 95th percentile of the SCC from all three values at a 3-percent discount rate. It is included to represent higher-than-expected impacts from temperature change further out in the extremes of the SCC distribution. Low probability, high impact events are incorporated into all of the SCC values through explicit consideration of their effects in two of the three values as well as the use of a probability density function for equilibrium climate sensitivity. Treating climate sensitivity probabilistically results in more high temperature outcomes, which in turn leads to higher projections of damages.

Applying the global SCC estimates using a 3-percent discount rate, we estimate the value of the climate related benefits of this rule in 2017 is $49 million (2006$), as shown in Table 6. See the RIA for more detail on the methodology used to calculate these benefits and additional estimates of climate benefits using different discount rates and the 95th percentile of the 3-percent discount rate SCC. Important limitations and uncertainties of the SCC approach are also described in the RIA.

It should be noted that the monetized benefits estimates provided above do not include benefits from several important benefit categories, including direct exposure to SO_2 and NO_X, ozone exposure, ecosystem effects and visibility impairment. Although we do not have sufficient information or modeling available to provide monetized estimates for this rulemaking, we include a qualitative assessment of these unquantified benefits in the RIA for this final rule.

Although this final rule provides refiners with some additional compliance options and removes some requirements, such as the long-term H_2S limit for flares, these are non-monetized benefits of the rule.

For more information on the benefits analysis, please refer to the RIA for this rulemaking, which is available in the docket.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under section 3(f)(1) of Executive Order 12866 (58 FR 51735, October 4, 1993), this action is an "economically significant regulatory action" because it is likely to have an annual effect on the economy of $100 million or more. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and Executive Order 13563 (76 FR 3821, January 21, 2011), and any changes made in response to OMB recommendations have been documented in the docket for this action. In addition, the EPA prepared a RIA of the potential costs and benefits associated with this action.

A summary of the monetized benefits, compliance costs and net benefits for the final rule at discount rates of 3 percent and 7 percent is in Table 7 of this preamble.

TABLE 7—SUMMARY OF THE MONETIZED BENEFITS, COMPLIANCE COSTS AND NET BENEFITS FOR THE FINAL PETROLEUM REFINERIES NSPS IN 2017

[Millions of 2006 dollars][a]

	3-Percent discount rate	7-Percent discount rate
Total Monetized Benefits[b]	$270 to $580	$240 to $530.
Total Compliance Costs[c]	−$79	−$79.
Net Benefits	$340 to $660	$320 to $610.
Non-Monetized Benefits	Health effects from direct exposure to SO_2 and NO_2.	
	Health effects from $PM_{2.5}$ exposure from VOC	
	Ecosystem effects.	
	Visibility impairment.	

[a] All estimates are for the implementation year (2017) and are rounded to two significant figures.

[18] Docket ID EPA–HQ–OAR–2009–0472–114577. *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866. Interagency Working Group on Social Cost of Carbon*, with participation by Council of Economic Advisers, Council on Environmental Quality, Department of Agriculture, Department of Commerce, Department of Energy, Department of Transportation, Environmental Protection Agency, National Economic Council, Office of Energy and Climate Change, Office of Management and Budget, Office of Science and Technology Policy, and Department of Treasury (February 2010). Also available at *http://epa.gov/otaq/climate/regulations.htm*.

[b] The total monetized benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of $PM_{2.5}$ precursors such as NO_X and SO_2, as well as CO_2 benefits. It is important to note that the monetized benefits do not include the reduced health effects from direct exposure to SO_2 and NO_X, ozone exposure, ecosystem effects or visibility impairment. Human health benefits are shown as a range from Pope, *et al.* (2002) to Laden, *et al.* (2006). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effects estimates by particle type. The net present value of reduced CO_2 emissions is calculated differently than other benefits. This table includes monetized climate benefits using the global average social cost of carbon (SCC) estimated at a 3-percent discount rate because the interagency work group deemed the SCC estimate at a 3-percent discount rate to be the central value.

[c] The engineering compliance costs are annualized using a 7-percent discount rate.

To support the determination of BSER for the June 24, 2008, final rule, we considered a number of regulatory options and their costs and benefits. Those results are presented in the RIA for the June 24, 2008, final rulemaking, which is available in the docket. These final rule amendments are in response to comments received on the December 22, 2008, proposed rule amendments. Costs and benefits associated with the amendments in this final rule differ from the June 24, 2008, final rule and the December 22, 2008, proposed rule amendments primarily as a result of correcting the number of flares projected to have to comply with this rule (*i.e.*, 400 affected flares in this rule compared to 40 estimated in the June 24, 2008, final rule and 150 in the December 22, 2008, proposed amendments). In addition, the amendments in this final rule to address comments received for the other fuel gas combustion devices do not affect the projected costs and benefits from the December 22, 2008, proposal, which also did not change from the June 24, 2008, final rule. Therefore, for purposes of developing these final rule amendments, we did not re-evaluate the suite of regulatory options for flares and other fuel gas combustion devices considered to support the June 24, 2008, final rule. However, even with the flare count adjustment, this final rule is consistent with Executive Order 13563 (Improving Regulation and Regulatory Review) because the monetized benefits of this final rule exceed the costs. In addition, for facilities implementing flare gas recovery, we are reducing regulatory burden by finalizing provisions that would allow the owner or operator to reduce monitoring costs and the number of root cause analyses, corrective actions and corresponding recordkeeping and reporting they would need to perform.

For more information on the cost-benefits analysis, please refer to the RIA for this rulemaking, which is available in the docket.

B. Paperwork Reduction Act

The final amendments to the Standards of Performance for Petroleum Refineries (40 CFR part 60, subpart J) do not impose any new information collection burden. The final amendments are clarifications and technical corrections that do not affect the estimated burden of the existing rule. Therefore, we have not revised the ICR for the existing rule. However, OMB has previously approved the information collection requirements contained in the existing rule (40 CFR part 60, subpart J) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, and has assigned OMB control number 2060–0022. The OMB control numbers for the EPA's regulations are listed in 40 CFR part 9.

The OMB has approved the information collection requirements in the amendments to the Standards of Performance for Petroleum Refineries for Which Construction, Reconstruction, or Modification Commenced After May 14, 2007 (40 CFR part 60, subpart Ja) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, and has assigned OMB control number 2060–0602.

The information requirements in these final amendments add new compliance options, provide more time to comply with the requirements for flares, clarify the flare management plan requirements and clarify the flare modification provision. Overall, these changes are expected to reduce the costs associated with testing, monitoring, recording and reporting, so they will not result in any increase in burden for the affected facilities for which the EPA previously estimated the burden. However, the EPA has revised the number of flares expected to become subject to the rule over the first 3 years of the ICR. Therefore, the annual burden was estimated for the additional affected facilities. The total burden for 40 CFR part 60, subpart Ja can be estimated by summing the previously approved annual burden for OMB control number 2060–0602 (5,340 labor-hours per year at a cost of $481,249 per year, annualized capital costs of $2,052,000 per year, and operation and maintenance costs of $1,117,440 per year) and the annual burden for this ICR, as described below.

The annual burden for this information collection averaged over the first 3 years of this ICR is estimated to total 54,572 labor-hours per year at a cost of $4,918,110 per year. The annualized capital costs are estimated at $11,266,000 per year and operation and maintenance costs are estimated at $8,750,000 per year. We note that the capital costs, as well as the operation and maintenance costs, are for the continuous monitors; these costs are also included in the cost impacts presented in section V.A of this preamble. Therefore, the burden costs associated with the continuous monitors presented in the ICR are not additional costs incurred by affected sources subject to final 40 CFR part 60, subpart Ja. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations are listed in 40 CFR part 9. The EPA is amending the table in 40 CFR part 9 of currently approved ICR control numbers for various regulations to list regulatory citations for the information requirements contained in this final rule. This amendment updates the table to list the information collection requirements being promulgated here as amendments to the NSPS for petroleum refineries.

The EPA will continue to present OMB control numbers in a consolidated table format to be codified in 40 CFR part 9 of the agency's regulations and in each CFR volume containing the EPA regulations. The table lists the section numbers with reporting and recordkeeping requirements and the current OMB control numbers. This listing of the OMB control numbers and their subsequent codification in the CFR satisfy the requirements of the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) and OMB's implementing regulations at 5 CFR part 1320.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impact of this final action on small entities, small entity is defined as: (1) A small business whose parent company has no more than 1,500 employees, that is primarily engaged in refining crude petroleum into refined petroleum as defined by NAICS code 32411 (as defined by Small Business Administration size standards); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

While we estimated the natural gas recovery offsets or credit at a national level and believe that larger firms are more likely to offset natural gas purchases, the revenues from natural gas recovery offsets might mask disproportionate impacts on small refiners. To better identify disproportionate impacts, we examined the potential impacts on refiners based on a scenario where no firms adopt flare gas recovery systems and comply with the NSPS through flare monitoring and flare management and root cause analysis actions. The incremental compliance costs imposed on small refineries are not estimated to create significant impacts on a cost-to-sales ratio basis at the firm level. Therefore, no adverse economic impacts are expected for any small or large entity.

After considering the economic impacts of these final amendments on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by these final amendments are small petroleum refineries. We have determined that 31 small refiners, or 55 percent of total refiners, will experience an impact of between less than 0.01 percent up to 0.63 percent of revenues.

D. Unfunded Mandates Reform Act

This rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local and tribal governments, in the aggregate, or the private sector in any one year. The costs of the final amendments would not increase costs associated with the final rule. Thus, this rule is not subject to the requirements of sections 202 or 205 of the UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The final amendments contain no requirements that apply to such governments and impose no obligations upon them.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action does not modify existing responsibilities or create new responsibilities among EPA Regional offices, states or local enforcement agencies. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). The final amendments impose no requirements on tribal governments. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is based solely on technology performance.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. The final amendments would not increase the level of energy consumption required for the final rule and may decrease energy requirements.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards (VCS) in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (*e.g.*, materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by VCS bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable VCS.

This rulemaking involves technical standards. The EPA has decided to use the following VCS for determining the higher heating value of fuel fed to process heaters: ASTM D240–02 (Reapproved 2007), *Standard Test Method for Heat of Combustion of Liquid Hydrocarbon Fuels by Bomb Calorimeter;* ASTM D1826–94 (Reapproved 2003), *Standard Test Method for Calorific (Heating) Value of Gases in Natural Gas Range by Continuous Recording Calorimeter;* ASTM D3588–98 (Reapproved 2003), *Standard Practice for Calculating Heat Value, Compressibility Factor, and Relative Density of Gaseous Fuels;* ASTM D4809–06, *Standard Test Method for Heat of Combustion of Liquid Hydrocarbon Fuels by Bomb Calorimeter (Precision Method);* ASTM D4891–89 (Reapproved 2006), *Standard Test Method for Heating Value of Gases in Natural Gas Range by Stoichiometric Combustion;* ASTM D1945–03 (Reapproved 2010), *Standard Method for Analysis of Natural Gas by Gas Chromatography;* and ASTM D1946–90 (Reapproved 2006), *Standard Method for Analysis of Reformed Gas by Gas Chromatography.*

The EPA has decided to use the following VCS as acceptable alternatives to EPA Methods 2, 2A, 2B, 2C or 2D for conducting relative accuracy evaluations of fuel gas flow monitors: American Society of Mechanical Engineers (ASME) MFC–3M–2004, *Measurement of Fluid Flow in Pipes Using Orifice, Nozzle, and Venturi;* ANSI/ASME MFC–4M–1986 (Reaffirmed 2008), *Measurement of Gas Flow by Turbine Meters;* ASME MFC–6M–1998 (Reaffirmed 2005), *Measurement of Fluid Flow in Pipes Using Vortex Flowmeters;* ASME/ANSI MFC–7M–1987 (Reaffirmed 2006), *Measurement of Gas Flow by Means of Critical Flow Venturi Nozzles;* ASME MFC–11M–2006, *Measurement of Fluid Flow by Means of Coriolis Mass Flowmeters;* ASME MFC–14M–2003, *Measurement of Fluid Flow Using Small Bore Precision Orifice Meters;* and ASME MFC–18M–2001, *Measurement of Fluid Flow Using Variable Area Meters.*

The EPA has also decided to use the following VCS as acceptable alternatives to EPA Methods 2, 2A, 2B, 2C or 2D for conducting relative accuracy evaluations of fuel oil flow monitors: ANSI/ASME MFC–5M–1985 (Reaffirmed 2006), *Measurement of Liquid Flow in Closed Conduits Using Transit-Time Ultrasonic Flowmeters;* ASME/ANSI MFC–9M–1988 (Reaffirmed 2006), *Measurement of Liquid Flow in Closed Conduits by Weighing Method;* ASME MFC–16–2007, *Measurement of Liquid Flow in Closed Conduits with Electromagnetic Flowmeters;* ASME MFC–22–2007, *Measurement of Liquid by Turbine Flowmeters;* and ISO 8316: *Measurement of Liquid Flow in Closed Conduits—Method by Collection of the Liquid in a Volumetric Tank (1987–10–01)—First Edition.*

The EPA has decided to use the following VCS as acceptable alternatives to EPA Method 15A and 16A for conducting relative accuracy evaluations of monitors for reduced sulfur compounds, total sulfur compounds, and H_2S: ANSI/ASME PTC 19.10–1981, *Flue and Exhaust Gas Analyses.* The EPA has decided to use the following VCS as acceptable alternatives to EPA Method 16A for analysis of total sulfur samples: ASTM D4468–85 (Reapproved 2006), *Standard Test Method for Total Sulfur in Gaseous Fuels by Hydrogenolysis and Rateometric Colorimetry;* and ASTM D5504–08, *Standard Test Method for Determination of Sulfur Compounds in Natural Gas and Gaseous Fuels by Gas Chromatography and Chemiluminescence.*

The EPA has decided to use the following VCS as acceptable alternatives to EPA Method 18 for relative accuracy evaluations of gas composition analyzers for gas-fired process heaters: ASTM D1945–03 (Reapproved 2010), *Standard Method for Analysis of Natural Gas by Gas Chromatography;* ASTM D1946–90 (Reapproved 2006), *Standard Method for Analysis of Reformed Gas by Gas Chromatography;* ASTM UOP539–97, *Refinery Gas Analysis by Gas Chromatography;* and ASTM D6420–99 (Reapproved 2004), *Standard Test Method for Determination of Gaseous Organic Compounds by Direct Interface Gas Chromatography-Mass Spectrometry.* However, ASTM D6420–99 is a suitable alternative to EPA Method 18 only where:

(1) The target compound(s) are those listed in Section 1.1 of ASTM D6420–99, and

(2) The target concentration is between 150 parts per billion by volume and 100 ppmv.

For target compound(s) not listed in Section 1.1 of ASTM D6420–99, but potentially detected by mass spectrometry, the regulation specifies that the additional system continuing calibration check after each run, as detailed in Section 10.5.3 of the ASTM method, must be followed, met, documented and submitted with the data report even if there is no moisture condenser used or the compound is not considered water soluble. For target compound(s) not listed in Section 1.1 of ASTM D6420–99 and not amenable to detection by mass spectrometry, ASTM D6420–99 does not apply.

These above-listed VCS are incorporated by reference (see 40 CFR 60.17).

The EPA has also decided to use American Gas Association *Report No. 3: Orifice Metering for Natural Gas and Other Related Hydrocarbon Fluids, Part 1: General Equations and Uncertainty Guidelines* (1990), American Gas Association *Report No. 3: Orifice Metering for Natural Gas and Other Related Hydrocarbon Fluids, Part 2: Specification and Installation Requirements* (2000), American Gas Association *Report No. 11: Measurement of Natural Gas by Coriolis Meter* (2003), American Gas Association *Transmission Measurement Committee Report No. 7, Measurement of Natural Gas by Turbine Meters* (Revised February 2006) and API's *Manual of Petroleum Measurement Standards, Chapter 22—Testing Protocol, Section 2—Differential Pressure Flow Measurement Devices,* First Edition, August 2005, for conducting relative accuracy evaluations of fuel gas flow monitors; Gas Processors Association (GPA) Standard 2261–00, *Analysis for Natural Gas and Similar Gaseous Mixtures by Gas Chromatography* (2000), for relative accuracy evaluations of gas composition analyzers for gas-fired process heaters; and GPA 2172–09, *Calculation of Gross Heating Value, Relative Density, Compressibility and Theoretical Hydrocarbon Liquid Content for Natural Gas Mixtures for Custody Transfer,* for determining the higher heating value of fuel fed to process heaters. These methods are also incorporated by reference (see 40 CFR 60.17).

While the agency has identified five VCS as being potentially applicable to this rule, we have decided not to use these VCS in this rulemaking. The use of these VCS would be impractical because they do not meet the objectives of the standards cited in this rule. See the docket for this rule for the reasons for these determinations.

Under 40 CFR 60.13(i) of the NSPS General Provisions, a source may apply to the EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications or procedures in the final rule and amendments.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States.

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The final amendments are either clarifications or compliance alternatives which will neither increase or decrease environmental protection.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801, *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of Congress and to the Comptroller General of the United States. The EPA will submit a report containing these final rules and other required information to the United States Senate, the United States House of Representatives and the Comptroller General of the United States prior to publication of the final rules in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is a "major rule" as defined by 5 U.S.C. 804(2). This final rule will be effective on November 13, 2012.

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: June 1, 2012.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, title 40, chapter I, of the Code of Federal Regulations is amended as follows:

PART 9—[AMENDED]

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135, *et seq.*, 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251, *et seq.*; 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345(d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857, *et seq.*, 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

■ 2. The table in Section 9.1 is amended by adding an entry in numerical order for 60.103a–60.108a under the heading "Standards of Performance for New Stationary Sources" to read as follows:

§ 9.1 OMB Approvals under the Paperwork Reduction Act.

* * * * *

40 CFR citation	OMB control No.
. . . . .	
Standards of Performance for New Stationary Sources [1]	
. . . . .	
60.103a–60.108a	2060–0602
. . . . .	

[1] The ICRs referenced in this section of the table encompass the applicable general provisions contained in 40 CFR part 60, subpart A, which are not independent information collection requirements.

* * * * *

PART 60—[AMENDED]

■ 3. The authority citation for part 60 continues to read as follows:

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

Subpart A—[AMENDED]

■ 4. Section 60.17 is amended by:
■ a. Revising paragraphs (a)(84), (a)(95), (a)(96), (a)(97), and (a)(98);
■ b. Adding paragraphs (a)(100) through (a)(108);
■ c. Adding paragraph (c)(2);
■ d. Revising paragraph (h)(4) and adding paragraphs (h)(5) through (h)(15);
■ e. Adding paragraphs (m)(2) and (m)(3); and
■ f. Adding paragraphs (p) and (q) to read as follows:

§ 60.17 Incorporations by reference.

* * * * *

(a) * * *

(84) ASTM D6420–99 (Reapproved 2004), Standard Test Method for Determination of Gaseous Organic Compounds by Direct Interface Gas Chromatography-Mass Spectrometry, (Approved October 1, 2004), IBR approved for § 60.107a(d) of subpart Ja and table 2 of subpart JJJJ of this part.

* * * * *

(95) ASTM D3588–98 (Reapproved 2003), Standard Practice for Calculating Heat Value, Compressibility Factor, and Relative Density of Gaseous Fuels, (Approved May 10, 2003), IBR approved for §§ 60.107a(d) and 60.5413(d).

(96) ASTM D4891–89 (Reapproved 2006), Standard Test Method for Heating Value of Gases in Natural Gas Range by Stoichiometric Combustion, (Approved June 1, 2006), IBR approved for §§ 60.107a(d) and 60.5413(d).

(97) ASTM D1945–03 (Reapproved 2010), Standard Method for Analysis of Natural Gas by Gas Chromatography, (Approved January 1, 2010), IBR approved for §§ 60.107a(d) and 60.5413(d).

(98) ASTM D5504–08, Standard Test Method for Determination of Sulfur Compounds in Natural Gas and Gaseous Fuels by Gas Chromatography and Chemiluminescence, (Approved June 15, 2008), IBR approved for §§ 60.107a(e) and 60.5413(d).

* * * * *

(100) ASTM D4468–85 (Reapproved 2006), Standard Test Method for Total Sulfur in Gaseous Fuels by Hydrogenolysis and Rateometric Colorimetry (Approved June 1, 2006), IBR approved for § 60.107a(e).

(101) ASTM D240–02 (Reapproved 2007), Standard Test Method for Heat of Combustion of Liquid Hydrocarbon Fuels by Bomb Calorimeter, (Approved May 1, 2007), IBR approved for § 60.107a(d).

(102) ASTM D1826–94 (Reapproved 2003), Standard Test Method for Calorific (Heating) Value of Gases in Natural Gas Range by Continuous Recording Calorimeter, (Approved May 10, 2003), IBR approved for § 60.107a(d).

(103) ASTM D1946–90 (Reapproved 2006), Standard Method for Analysis of Reformed Gas by Gas Chromatography, (Approved June 1, 2006), IBR approved for § 60.107a(d).

(104) ASTM D4809–06, Standard Test Method for Heat of Combustion of Liquid Hydrocarbon Fuels by Bomb Calorimeter (Precision Method), (Approved December 1, 2006), IBR approved for § 60.107a(d).

(105) ASTM UOP539–97, Refinery Gas Analysis by Gas Chromatography, (Copyright 1997), IBR approved for § 60.107a(d).

(106) ASTM D3699–08, Standard Specification for Kerosine, including Appendix X1, (Approved September 1, 2008), IBR approved for §§ 60.41b of subpart Db and 60.41c of subpart Dc of this part.

(107) ASTM D6751–11b, Standard Specification for Biodiesel Fuel Blend Stock (B100) for Middle Distillate Fuels, including Appendices X1 through X3, (Approved July 15, 2011), IBR approved for §§ 60.41b of subpart Db and 60.41c of subpart Dc of this part.

(108) ASTM D7467–10, Standard Specification for Diesel Fuel Oil, Biodiesel Blend (B6 to B20), including Appendices X1 through X3, (Approved August 1, 2010), IBR approved for §§ 60.41b of subpart Db and 60.41c of subpart Dc of this part.

* * * * *

(c) * * *

(2) American Petroleum Institute (API) Manual of Petroleum Measurement Standards, Chapter 22-Testing Protocol, Section 2-Differential Pressure Flow Measurement Devices, First Edition, August 2005, IBR approved for § 60.107a(d) of subpart Ja of this part.

* * * * *

(h) * * *

(4) ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], (Issued August 31, 1981), IBR approved for § 60.56c(b), § 60.63(f), § 60.106(e), § 60.104a(d), (h), (i), and (j), § 60.105a(d), (f), and (g), § 60.106a(a), § 60.107a(a), (c), and (e), tables 1 and 3 of subpart EEEE, tables 2 and 4 of subpart FFFF, table 2 of subpart JJJJ, §§ 60.4415(a), 60.2145(s), 60.2145(t),

60.2710(s), 60.2710(t), 60.2710(w), 60.2730(q), 60.4900(b), 60.5220(b), tables 1 and 2 to subpart LLLL, tables 2 and 3 to subpart MMMM, §§ 60.5406(c) and 60.5413(b).

(5) ASME MFC–3M–2004, Measurement of Fluid Flow in Pipes Using Orifice, Nozzle, and Venturi, IBR approved for § 60.107a(d) of subpart Ja of this part.

(6) ANSI/ASME MFC–4M–1986 (Reaffirmed 2008), Measurement of Gas Flow by Turbine Meters, IBR approved for § 60.107a(d) of subpart Ja of this part.

(7) ANSI/ASME–MFC–5M–1985 (Reaffirmed 2006), Measurement of Liquid Flow in Closed Conduits Using Transit-Time Ultrasonic Flowmeters, IBR approved for § 60.107a(d) of subpart Ja of this part.

(8) ASME MFC–6M–1998 (Reaffirmed 2005), Measurement of Fluid Flow in Pipes Using Vortex Flowmeters, IBR approved for § 60.107a(d) of subpart Ja of this part.

(9) ASME/ANSI MFC–7M–1987 (Reaffirmed 2006), Measurement of Gas Flow by Means of Critical Flow Venturi Nozzles, IBR approved for § 60.107a(d) of subpart Ja of this part.

(10) ASME/ANSI MFC–9M–1988 (Reaffirmed 2006), Measurement of Liquid Flow in Closed Conduits by Weighing Method, IBR approved for § 60.107a(d) of subpart Ja of this part.

(11) ASME MFC–11M–2006, Measurement of Fluid Flow by Means of Coriolis Mass Flowmeters, IBR approved for § 60.107a(d) of subpart Ja of this part.

(12) ASME MFC–14M–2003, Measurement of Fluid Flow Using Small Bore Precision Orifice Meters, IBR approved for § 60.107a(d) of subpart Ja of this part.

(13) ASME MFC–16–2007, Measurement of Liquid Flow in Closed Conduits with Electromagnetic Flowmeters, IBR approved for § 60.107a(d) of subpart Ja of this part.

(14) ASME MFC–18M–2001, Measurement of Fluid Flow Using Variable Area Meters, IBR approved for § 60.107a(d) of subpart Ja of this part.

(15) ASME MFC–22–2007, Measurement of Liquid by Turbine Flowmeters, IBR approved for § 60.107a(d) of subpart Ja of this part.

* * * * *

(m) * * *

(2) Gas Processors Association Standard 2172–09, Calculation of Gross Heating Value, Relative Density, Compressibility and Theoretical Hydrocarbon Liquid Content for Natural Gas Mixtures for Custody Transfer (2009), IBR approved for § 60.107a(d) of subpart Ja of this part.

(3) Gas Processors Association Standard 2261–00, Analysis for Natural Gas and Similar Gaseous Mixtures by Gas Chromatography (2000), IBR approved for § 60.107a(d) of subpart Ja of this part.

* * * * *

(p) The following American Gas Association material is available for purchase from the following address: ILI Infodisk, 610 Winters Avenue, Paramus, New Jersey 07652:

(1) American Gas Association Report No. 3: Orifice Metering for Natural Gas and Other Related Hydrocarbon Fluids, Part 1: General Equations and Uncertainty Guidelines (1990), IBR approved for § 60.107a(d) of subpart Ja of this part.

(2) American Gas Association Report No. 3: Orifice Metering for Natural Gas and Other Related Hydrocarbon Fluids, Part 2: Specification and Installation Requirements (2000), IBR approved for § 60.107a(d) of subpart Ja of this part.

(3) American Gas Association Report No. 11: Measurement of Natural Gas by Coriolis Meter (2003), IBR approved for § 60.107a(d) of subpart Ja of this part.

(4) American Gas Association Transmission Measurement Committee Report No. 7: Measurement of Gas by Turbine Meters (Revised February 2006), IBR approved for § 60.107a(d) of subpart Ja of this part.

(q) The following material is available for purchase from the International Standards Organization (ISO), 1, ch. de la Voie-Creuse, Case postale 56, CH–1211 Geneva 20, Switzerland, +41 22 749 01 11, *http://www.iso.org/iso/home.htm.*

(1) ISO 8316: Measurement of Liquid Flow in Closed Conduits—Method by Collection of the Liquid in a Volumetric Tank (1987–10–01)—First Edition, IBR approved for § 60.107a(d) of subpart Ja of this part.

(2) [Reserved]

Subpart J—[AMENDED]

■ 5. Section 60.100 is amended by:

■ a. Revising paragraph (b);

■ b. Redesignating paragraph (e) as (f); and

■ c. Adding a new paragraph (e) to read as follows:

§ 60.100 Applicability, designation of affected facility, and reconstruction.

* * * * *

(b) Any fluid catalytic cracking unit catalyst regenerator or fuel gas combustion device under paragraph (a) of this section other than a flare which commences construction, reconstruction or modification after June 11, 1973, and on or before May 14, 2007, or any fuel gas combustion device under paragraph (a) of this section that is also a flare which commences construction, reconstruction or modification after June 11, 1973, and on or before June 24, 2008, or any Claus sulfur recovery plant under paragraph (a) of this section which commences construction, reconstruction or modification after October 4, 1976, and on or before May 14, 2007, is subject to the requirements of this subpart except as provided under paragraphs (c) through (e) of this section.

* * * * *

(e) Owners or operators may choose to comply with the applicable provisions of subpart Ja of this part to satisfy the requirements of this subpart for an affected facility.

* * * * *

■ 6. Section 60.101 is amended by revising paragraph (d) to read as follows:

§ 60.101 Definitions.

* * * * *

(d) *Fuel gas* means any gas which is generated at a petroleum refinery and which is combusted. Fuel gas includes natural gas when the natural gas is combined and combusted in any proportion with a gas generated at a refinery. Fuel gas does not include gases generated by catalytic cracking unit catalyst regenerators and fluid coking burners. Fuel gas does not include vapors that are collected and combusted in a thermal oxidizer or flare installed to control emissions from wastewater treatment units or marine tank vessel loading operations.

* * * * *

■ 7. Section 60.106 is amended by revising paragraph (c)(1) to read as follows:

§ 60.106 Test methods and procedures.

* * * * *

(c) * * *

(1) The allowable emission rate (E_s) of PM shall be computed for each run using the following equation:

$E_s = F + A\ (H/R_c)$

Where:

E_s = Emission rate of PM allowed, kg/Mg (lb/ton) of coke burn-off in catalyst regenerator.

F = Emission standard, 1.0 kg/Mg (2.0 lb/ton) of coke burn-off in catalyst regenerator.

A = Allowable incremental rate of PM emissions, 43 g/GJ (0.10 lb/million Btu).

H = Heat input rate from solid or liquid fossil fuel, GJ/hr (million Btu/hr).

R_c = Coke burn-off rate, Mg coke/hr (ton coke/hr).

* * * * *

Subpart Ja—[AMENDED]

■ 7. In § 60.100a, lift the stay on paragraph (c) published December 22, 2008 (73 FR 78552).

■ 8. Section 60.100a is amended by:

■ a. Revising paragraph (a):

■ b. Revising paragraph (b);

■ c. Revising paragraph (c) introductory text and paragraph (c)(1); and

■ d. Revising paragraph (d).

The revisions read as follows:

§ 60.100a Applicability, designation of affected facility, and reconstruction.

(a) The provisions of this subpart apply to the following affected facilities in petroleum refineries: fluid catalytic cracking units (FCCU), fluid coking units (FCU), delayed coking units, fuel gas combustion devices (including process heaters), flares and sulfur recovery plants. The sulfur recovery plant need not be physically located within the boundaries of a petroleum refinery to be an affected facility, provided it processes gases produced within a petroleum refinery.

(b) Except for flares and delayed coking units, the provisions of this subpart apply only to affected facilities under paragraph (a) of this section which commence construction, modification or reconstruction after May 14, 2007. For flares, the provisions of this subpart apply only to flares which commence construction, modification or reconstruction after June 24, 2008. For the purposes of this subpart, a modification to a flare commences when a project that includes any of the activities in paragraphs (c)(1) or (2) of this section is commenced. For delayed coking units, the provisions of this subpart apply to delayed coking units that commence construction, reconstruction or modification on the earliest of the following dates:

(1) May 14, 2007, for such activities that involve a "delayed coking unit" defined as follows: one or more refinery process units in which high molecular weight petroleum derivatives are thermally cracked and petroleum coke is produced in a series of closed, batch system reactors;

(2) December 22, 2008, for such activities that involve a "delayed coking unit" defined as follows: a refinery process unit in which high molecular weight petroleum derivatives are thermally cracked and petroleum coke is produced in a series of closed, batch system reactors. A delayed coking unit consists of the coke drums and associated fractionator;

(3) September 12, 2012, for such activities that involve a "delayed coking unit" as defined in § 60.101a.

(c) For all affected facilities other than flares, the provisions in § 60.14 regarding modification apply. As provided in § 60.14(f), the special provisions set forth under this subpart shall supersede the provisions in § 60.14 with respect to flares. For the purposes of this subpart, a modification to a flare occurs as provided in paragraphs (c)(1) or (2) of this section.

(1) Any new piping from a refinery process unit, including ancillary equipment, or a fuel gas system is physically connected to the flare (*e.g.*, for direct emergency relief or some form of continuous or intermittent venting). However, the connections described in paragraphs (c)(1)(i) through (vii) of this section are not considered modifications of a flare.

(i) Connections made to install monitoring systems to the flare.

(ii) Connections made to install a flare gas recovery system or connections made to upgrade or enhance components of a flare gas recovery system (*e.g.*, addition of compressors or recycle lines).

(iii) Connections made to replace or upgrade existing pressure relief or safety valves, provided the new pressure relief or safety valve has a set point opening pressure no lower and an internal diameter no greater than the existing equipment being replaced or upgraded.

(iv) Connections made for flare gas sulfur removal.

(v) Connections made to install back-up (redundant) equipment associated with the flare (such as a back-up compressor) that does not increase the capacity of the flare.

(vi) Replacing piping or moving an existing connection from a refinery process unit to a new location in the same flare, provided the new pipe diameter is less than or equal to the diameter of the pipe/connection being replaced/moved.

(vii) Connections that interconnect two or more flares.

* * * * *

(d) For purposes of this subpart, under § 60.15, the "fixed capital cost of the new components" includes the fixed capital cost of all depreciable components which are or will be replaced pursuant to all continuous programs of component replacement which are commenced within any 2-year period following the relevant applicability date specified in paragraph (b) of this section.

■ 9. In § 60.101a, lift the stay on the definition of "flare" published December 22, 2008 (73 FR 78552).

■ 10. Section 60.101a is amended by:

■ a. Revising the introductory text;

■ b. Adding, in alphabetical order, definitions of "Air preheat," "Ancillary equipment," "Cascaded flare system," "Co-fired process heater," "Corrective action," "Corrective action analysis," "Emergency flare," "Flare gas header system," "Flare gas recovery system," "Forced draft process heater," "Natural draft process heater," "Non-emergency flare," "Primary flare," "Purge gas," "Root cause analysis," "Secondary flare," and "Sweep gas"; and

■ c. Revising the definitions of "Delayed coking unit," "Flare," "Flexicoking unit," "Fluid coking unit," "Fuel gas," "Fuel gas combustion device," "Petroleum refinery," "Process upset gas" and "Sulfur recovery plant"

The revisions and additions read as follows:

§ 60.101a Definitions.

Terms used in this subpart are defined in the Clean Air Act (CAA), in § 60.2 and in this section.

Air preheat means a device used to heat the air supplied to a process heater generally by use of a heat exchanger to recover the sensible heat of exhaust gas from the process heater.

Ancillary equipment means equipment used in conjunction with or that serve a refinery process unit. *Ancillary equipment* includes, but is not limited to, storage tanks, product loading operations, wastewater treatment systems, steam- or electricity-producing units (including coke gasification units), pressure relief valves, pumps, sampling vents and continuous analyzer vents.

Cascaded flare system means a series of flares connected to one flare gas header system arranged with increasing pressure set points so that discharges will be initially directed to the first flare in the series (*i.e.*, the primary flare). If the discharge pressure exceeds a set point at which the flow to the primary flare would exceed the primary flare's capacity, flow will be diverted to the second flare in the series. Similarly, flow would be diverted to a third (or fourth) flare if the pressure in the flare gas header system exceeds a threshold where the flow to the first two (or three) flares would exceed their capacities.

Co-fired process heater means a process heater that employs burners that are designed to be supplied by both gaseous and liquid fuels on a routine basis. Process heaters that have gas burners with emergency oil back-up burners are not considered co-fired process heaters.

* * * * *

Corrective action means the design, operation and maintenance changes that one takes consistent with good

engineering practice to reduce or eliminate the likelihood of the recurrence of the primary cause and any other contributing cause(s) of an event identified by a root cause analysis as having resulted in a discharge of gases to an affected flare in excess of specified thresholds.

Corrective action analysis means a description of all reasonable interim and long-term measures, if any, that are available, and an explanation of why the selected corrective action(s) is/are the best alternative(s), including, but not limited to, considerations of cost effectiveness, technical feasibility, safety and secondary impacts.

Delayed coking unit means a refinery process unit in which high molecular weight petroleum derivatives are thermally cracked and petroleum coke is produced in a series of closed, batch system reactors. A *delayed coking unit* includes, but is not limited to, all of the coke drums associated with a single fractionator; the fractionator, including the bottoms receiver and the overhead condenser; the coke drum cutting water and quench system, including the jet pump and coker quench water tank; process piping and associated equipment such as pumps, valves and connectors; and the coke drum blowdown recovery compressor system.

Emergency flare means a flare that combusts gas exclusively released as a result of malfunctions (and not startup, shutdown, routine operations or any other cause) on four or fewer occasions in a rolling 365-day period. For purposes of this rule, a flare cannot be categorized as an *emergency flare* unless it maintains a water seal.

Flare means a combustion device that uses an uncontrolled volume of air to burn gases. The *flare* includes the foundation, flare tip, structural support, burner, igniter, flare controls, including air injection or steam injection systems, flame arrestors and the flare gas header system. In the case of an interconnected flare gas header system, the *flare* includes each individual flare serviced by the interconnected flare gas header system and the interconnected flare gas header system.

Flare gas header system means all piping and knockout pots, including those in a subheader system, used to collect and transport gas to a flare either from a process unit or a pressure relief valve from the fuel gas system, regardless of whether or not a flare gas recovery system draws gas from the *flare gas header system*. The *flare gas header system* includes piping inside the battery limit of a process unit if the purpose of the piping is to transport gas to a flare or knockout pot that is part of the flare.

Flare gas recovery system means a system of one or more compressors, piping and the associated water seal, rupture disk or similar device used to divert gas from the flare and direct the gas to the fuel gas system or to a fuel gas combustion device.

Flexicoking unit means a refinery process unit in which high molecular weight petroleum derivatives are thermally cracked and petroleum coke is continuously produced and then gasified to produce a synthetic fuel gas.

* * * * *

Fluid coking unit means a refinery process unit in which high molecular weight petroleum derivatives are thermally cracked and petroleum coke is continuously produced in a fluidized bed system. The *fluid coking unit* includes the coking reactor, the coking burner, and equipment for controlling air pollutant emissions and for heat recovery on the fluid coking burner exhaust vent.

Forced draft process heater means a process heater in which the combustion air is supplied under positive pressure produced by a fan at any location in the inlet air line prior to the point where the combustion air enters the process heater or air preheat. For the purposes of this subpart, a process heater that uses fans at both the inlet air side and the exhaust air side (*i.e.*, balanced draft system) is considered to be a *forced draft process heater*.

Fuel gas means any gas which is generated at a petroleum refinery and which is combusted. *Fuel gas* includes natural gas when the natural gas is combined and combusted in any proportion with a gas generated at a refinery. *Fuel gas* does not include gases generated by catalytic cracking unit catalyst regenerators, coke calciners (used to make premium grade coke) and fluid coking burners, but does include gases from flexicoking unit gasifiers and other gasifiers. *Fuel gas* does not include vapors that are collected and combusted in a thermal oxidizer or flare installed to control emissions from wastewater treatment units other than those processing sour water, marine tank vessel loading operations or asphalt processing units (*i.e.*, asphalt blowing stills).

Fuel gas combustion device means any equipment, such as process heaters and boilers, used to combust fuel gas. For the purposes of this subpart, *fuel gas combustion device* does not include flares or facilities in which gases are combusted to produce sulfur or sulfuric acid.

* * * * *

Natural draft process heater means any process heater in which the combustion air is supplied under ambient or negative pressure without the use of an inlet air (forced draft) fan. For the purposes of this subpart, a *natural draft process heater* is any process heater that is not a forced draft process heater, including induced draft systems.

Non-emergency flare means any flare that is not an emergency flare as defined in this subpart.

* * * * *

Petroleum refinery means any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, asphalt (bitumen) or other products through distillation of petroleum or through redistillation, cracking or reforming of unfinished petroleum derivatives. A facility that produces only oil shale or tar sands-derived crude oil for further processing at a petroleum refinery using only solvent extraction and/or distillation to recover diluent is not a *petroleum refinery*.

Primary flare means the first flare in a cascaded flare system.

* * * * *

Process upset gas means any gas generated by a petroleum refinery process unit or by ancillary equipment as a result of startup, shutdown, upset or malfunction.

Purge gas means gas introduced between a flare's water seal and a flare's tip to prevent oxygen infiltration (backflow) into the flare tip. For flares with no water seals, the function of *purge gas* is performed by sweep gas (*i.e.*, flares without water seals do not use *purge gas*).

* * * * *

Root cause analysis means an assessment conducted through a process of investigation to determine the primary cause, and any other contributing cause(s), of a discharge of gases in excess of specified thresholds.

Secondary flare means a flare in a cascaded flare system that provides additional flare capacity and pressure relief to a flare gas system when the flare gas flow exceeds the capacity of the primary flare. For purposes of this subpart, a *secondary flare* is characterized by infrequent use and must maintain a water seal.

* * * * *

Sulfur recovery plant means all process units which recover sulfur from H_2S and/or SO_2 from a common source of sour gas produced at a petroleum

refinery. The *sulfur recovery plant* also includes sulfur pits used to store the recovered sulfur product, but it does not include secondary sulfur storage vessels or loading facilities downstream of the sulfur pits. For example, a Claus sulfur recovery plant includes: Reactor furnace and waste heat boiler, catalytic reactors, sulfur pits and, if present, oxidation or reduction control systems or incinerator, thermal oxidizer or similar combustion device. Multiple sulfur recovery units are a single affected facility only when the units share the same source of sour gas. *Sulfur recovery plants* that receive source gas from completely segregated sour gas treatment systems are separate affected facilities.

Sweep gas means the gas introduced in a flare gas header system to maintain a constant flow of gas to prevent oxygen buildup in the flare header. For flares with no water seals, *sweep gas* also performs the function of preventing oxygen infiltration (backflow) into the flare tip.

■ 11. In § 60.102a, lift the stay on paragraph (g) published December 22, 2008 (73 FR 78552).

■ 12. Section 60.102a is amended by:

■ a. Revising paragraph (a);

■ b. Revising paragraph (f)(1)(ii);

■ c. Revising paragraph (g);

■ d. Removing and reserving paragraph (h); and

■ e. Revising paragraph (i).

The revisions read as follows:

§ 60.102a Emissions limitations.

(a) Each owner or operator that is subject to the requirements of this subpart shall comply with the emissions limitations in paragraphs (b) through (i) of this section on and after the date on which the initial performance test, required by § 60.8, is completed, but not later than 60 days after achieving the maximum production rate at which the affected facility will be operated or 180 days after initial startup, whichever comes first.

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(f) * * *

(1) * * *

(ii) For a sulfur recovery plant with a reduction control system not followed by incineration, the owner or operator shall not discharge or cause the discharge of any gases into the atmosphere in excess of 300 ppmv of reduced sulfur compounds and 10 ppmv of H_2S, each calculated as ppmv SO_2 (dry basis) at 0-percent excess air; or

* * * * *

(g) Each owner or operator of an affected fuel gas combustion device shall comply with the emissions limits in paragraphs (g)(1) and (2) of this section.

(1) Except as provided in (g)(1)(iii) of this section, for each fuel gas combustion device, the owner or operator shall comply with either the emission limit in paragraph (g)(1)(i) of this section or the fuel gas concentration limit in paragraph (g)(1)(ii) of this section.

(i) The owner or operator shall not discharge or cause the discharge of any gases into the atmosphere that contain SO_2 in excess of 20 ppmv (dry basis, corrected to 0-percent excess air) determined hourly on a 3-hour rolling average basis and SO_2 in excess of 8 ppmv (dry basis, corrected to 0-percent excess air), determined daily on a 365 successive calendar day rolling average basis; or

(ii) The owner or operator shall not burn in any fuel gas combustion device any fuel gas that contains H_2S in excess of 162 ppmv determined hourly on a 3-hour rolling average basis and H_2S in excess of 60 ppmv determined daily on a 365 successive calendar day rolling average basis.

(iii) The combustion in a portable generator of fuel gas released as a result of tank degassing and/or cleaning is exempt from the emissions limits in paragraphs (g)(1)(i) and (ii) of this section.

(2) For each process heater with a rated capacity of greater than 40 million British thermal units per hour (MMBtu/hr) on a higher heating value basis, the owner or operator shall not discharge to the atmosphere any emissions of NO_X in excess of the applicable limits in paragraphs (g)(2)(i) through (iv) of this section.

(i) For each natural draft process heater, comply with the limit in either paragraph (g)(2)(i)(A) or (B) of this section. The owner or operator may comply with either limit at any time, provided that the appropriate parameters for each alternative are monitored as specified in § 60.107a; if fuel gas composition is not monitored as specified in § 60.107a(d), the owner or operator must comply with the concentration limits in paragraph (g)(2)(i)(A) of this section.

(A) 40 ppmv (dry basis, corrected to 0-percent excess air) determined daily on a 30-day rolling average basis; or

(B) 0.040 pounds per million British thermal units (lb/MMBtu) higher heating value basis determined daily on a 30-day rolling average basis.

(ii) For each forced draft process heater, comply with the limit in either paragraph (g)(2)(ii)(A) or (B) of this section. The owner or operator may comply with either limit at any time, provided that the appropriate parameters for each alternative are monitored as specified in § 60.107a; if fuel gas composition is not monitored as specified in § 60.107a(d), the owner or operator must comply with the concentration limits in paragraph (g)(2)(ii)(A) of this section.

(A) 60 ppmv (dry basis, corrected to 0-percent excess air) determined daily on a 30-day rolling average basis; or

(B) 0.060 lb/MMBtu higher heating value basis determined daily on a 30-day rolling average basis.

(iii) For each co-fired natural draft process heater, comply with the limit in either paragraph (g)(2)(iii)(A) or (B) of this section. The owner or operator must choose one of the emissions limits with which to comply at all times:

(A) 150 ppmv (dry basis, corrected to 0-percent excess air) determined daily on a 30 successive operating day rolling average basis; or

(B) The daily average emissions limit calculated using Equation 3 of this section:

$$ER_{NOx} = \frac{0.06\,Q_{gas}\,HHV_{gas} + 0.35\,Q_{oil}\,HHV_{oil}}{Q_{gas}\,HHV_{gas} + Q_{oil}\,HHV_{oil}} \qquad \text{(Eq. 3)}$$

Where:

ER_{NOx} = Daily allowable average emission rate of NO_X, lb/MMBtu (higher heating value basis);

Q_{gas} = Daily average volumetric flow rate of fuel gas, standard cubic feet per day (scf/day);

Q_{oil} = Daily average volumetric flow rate of fuel oil, scf/day;

HHV_{gas} = Daily average higher heating value of gas fired to the process heater, MMBtu/scf; and

HHV_{oil} = Daily average higher heating value of fuel oil fired to the process heater, MMBtu/scf.

(iv) For each co-fired forced draft process heater, comply with the limit in either paragraph (g)(2)(iv)(A) or (B) of this section. The owner or operator must choose one of the emissions limits with which to comply at all times:

(A) 150 ppmv (dry basis, corrected to 0-percent excess air) determined daily on a 30 successive operating day rolling average basis; or

(B) The daily average emissions limit calculated using Equation 4 of this section:

$$ER_{NOx} = \frac{0.11 Q_{gas} HHV_{gas} + 0.40 Q_{oil} HHV_{oil}}{Q_{gas} HHV_{gas} + Q_{oil} HHV_{oil}} \quad \text{(Eq. 4)}$$

Where:

ER_{NOx} = Daily allowable average emission rate of NO_X, lb/MMBtu (higher heating value basis);

Q_{gas} = Daily average volumetric flow rate of fuel gas, scf/day;

Q_{oil} = Daily average volumetric flow rate of fuel oil, scf/day;

HHV_{gas} = Daily average higher heating value of gas fired to the process heater, MMBtu/scf; and

HHV_{oil} = Daily average higher heating value of fuel oil fired to the process heater, MMBtu/scf.

(h) [Reserved]

(i) For a process heater that meets any of the criteria of paragraphs (i)(1)(i) through (iv) of this section, an owner or operator may request approval from the Administrator for a NO_X emissions limit which shall apply specifically to that affected facility. The request shall include information as described in paragraph (i)(2) of this section. The request shall be submitted and followed as described in paragraph (i)(3) of this section.

(1) A process heater that meets one of the criteria in paragraphs (i)(1)(i) through (iv) of this section may apply for a site-specific NO_X emissions limit:

(i) A modified or reconstructed process heater that lacks sufficient space to accommodate installation and proper operation of combustion modification-based technology (*e.g.*, ultra-low NO_X burners); or

(ii) A modified or reconstructed process heater that has downwardly firing induced draft burners; or

(iii) A co-fired process heater; or

(iv) A process heater operating at reduced firing conditions for an extended period of time (*i.e.*, operating in turndown mode). The site-specific NO_X emissions limit will only apply for those operating conditions.

(2) The request shall include sufficient and appropriate data, as determined by the Administrator, to allow the Administrator to confirm that the process heater is unable to comply with the applicable NO_X emissions limit in paragraph (g)(2) of this section. At a minimum, the request shall contain the information described in paragraphs (i)(2)(i) through (iv) of this section.

(i) The design and dimensions of the process heater, evaluation of available combustion modification-based technology, description of fuel gas and, if applicable, fuel oil characteristics, information regarding the combustion conditions (temperature, oxygen content, firing rates) and other information needed to demonstrate that the process heater meets one of the four classes of process heaters listed in paragraph (i)(1) of this section.

(ii) An explanation of how the data in paragraph (i)(2)(i) demonstrate that ultra-low NO_X burners, flue gas recirculation, control of excess air or other combustion modification-based technology (including combinations of these combustion modification-based technologies) cannot be used to meet the applicable emissions limit in paragraph (g)(2) of this section.

(iii) Results of a performance test conducted under representative conditions using the applicable methods specified in § 60.104a(i) to demonstrate the performance of the technology the owner or operator will use to minimize NO_X emissions.

(iv) The means by which the owner or operator will document continuous compliance with the site-specific emissions limit.

(3) The request shall be submitted and followed as described in paragraphs (i)(3)(i) through (iii) of this section.

(i) The owner or operator of a process heater that meets one of the criteria in paragraphs (i)(1)(i) through (iv) of this section may request approval from the Administrator within 180 days after initial startup of the process heater for a NO_X emissions limit which shall apply specifically to that affected facility.

(ii) The request must be submitted to the Administrator for approval. The owner or operator must comply with the request as submitted until it is approved.

(iii) The request shall also be submitted to the following address: U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, U.S. EPA Mailroom (E143–01), Attention: Refinery Sector Lead, 109 T.W. Alexander Drive, Research Triangle Park, NC 27711. Electronic copies in lieu of hard copies may also be submitted to *refinerynsps@epa.gov*.

(4) The approval process for a request for a facility-specific NO_X emissions limit is described in paragraphs (i)(4)(i) through (iii) of this section.

(i) Approval by the Administrator of a facility-specific NO_X emissions limit request will be based on the completeness, accuracy and reasonableness of the request. Factors that the EPA will consider in reviewing the request for approval include, but are not limited to, the following:

(A) A demonstration that the process heater meets one of the four classes of process heaters outlined in paragraphs (i)(1) of this section;

(B) A description of the low-NO_X burner designs and other combustion modifications considered for reducing NO_X emissions;

(C) The combustion modification option selected; and

(D) The operating conditions (firing rate, heater box temperature and excess oxygen concentration) at which the NO_X emission level was established.

(ii) If the request is approved by the Administrator, a facility-specific NO_X emissions limit will be established at the NO_X emission level demonstrated in the approved request.

(iii) If the Administrator finds any deficiencies in the request, the request must be revised to address the deficiencies and be re-submitted for approval.

■ 13. Section 60.103a is revised to read as follows:

§ 60.103a Design, equipment, work practice or operational standards.

(a) Except as provided in paragraph (g) of this section, each owner or operator that operates a flare that is subject to this subpart shall develop and implement a written flare management plan no later than the date specified in paragraph (b) of this section. The flare management plan must include the information described in paragraphs (a)(1) through (7) of this section.

(1) A listing of all refinery process units, ancillary equipment, and fuel gas systems connected to the flare for each affected flare.

(2) An assessment of whether discharges to affected flares from these process units, ancillary equipment and fuel gas systems can be minimized. The flare minimization assessment must (at a minimum) consider the items in paragraphs (a)(2)(i) through (iv) of this section. The assessment must provide clear rationale in terms of costs (capital and annual operating), natural gas offset credits (if applicable), technical feasibility, secondary environmental impacts and safety considerations for the selected minimization alternative(s) or a statement, with justifications, that flow reduction could not be achieved. Based upon the assessment, each owner or operator of an affected flare shall identify the minimization alternatives that it has implemented by the due date of the flare management plan and shall include a schedule for the prompt implementation of any selected measures that cannot reasonably be completed as of that date.

(i) Elimination of process gas discharge to the flare through process operating changes or gas recovery at the source.

(ii) Reduction of the volume of process gas to the flare through process operating changes.

(iii) Installation of a flare gas recovery system or, for facilities that are fuel gas rich, a flare gas recovery system and a co-generation unit or combined heat and power unit.

(iv) Minimization of sweep gas flow rates and, for flares with water seals, purge gas flow rates.

(3) A description of each affected flare containing the information in paragraphs (a)(3)(i) through (vii) of this section.

(i) A general description of the flare, including the information in paragraphs (a)(3)(i)(A) through (G) of this section.

(A) Whether it is a ground flare or elevated (including height).

(B) The type of assist system (*e.g.*, air, steam, pressure, non-assisted).

(C) Whether it is simple or complex flare tip (*e.g.*, staged, sequential).

(D) Whether the flare is part of a cascaded flare system (and if so, whether the flare is primary or secondary).

(E) Whether the flare serves as a backup to another flare.

(F) Whether the flare is an emergency flare or a non-emergency flare.

(G) Whether the flare is equipped with a flare gas recovery system.

(ii) Description and simple process flow diagram showing the interconnection of the following components of the flare: flare tip (date installed, manufacturer, nominal and effective tip diameter, tip drawing); knockout or surge drum(s) or pot(s) (including dimensions and design capacities); flare header(s) and subheader(s); assist system; and ignition system.

(iii) Flare design parameters, including the maximum vent gas flow rate; minimum sweep gas flow rate; minimum purge gas flow rate (if any); maximum supplemental gas flow rate; maximum pilot gas flow rate; and, if the flare is steam-assisted, minimum total steam rate.

(iv) Description and simple process flow diagram showing all gas lines (including flare, purge (if applicable), sweep, supplemental and pilot gas) that are associated with the flare. For purge, sweep, supplemental and pilot gas, identify the type of gas used. Designate which lines are exempt from sulfur, H_2S or flow monitoring and why (*e.g.*, natural gas, inherently low sulfur, pilot gas). Designate which lines are monitored and identify on the process flow diagram the location and type of each monitor.

(v) For each flow rate, H_2S, sulfur content, pressure or water seal monitor identified in paragraph (a)(3)(iv) of this section, provide a detailed description of the manufacturer's specifications, including, but not limited to, make, model, type, range, precision, accuracy, calibration, maintenance and quality assurance procedures.

(vi) For emergency flares, secondary flares and flares equipped with a flare gas recovery system designed, sized and operated to capture all flows except those resulting from startup, shutdown or malfunction:

(A) Description of the water seal, including the operating range for the liquid level.

(B) Designation of the monitoring option elected (flow and sulfur monitoring or pressure and water seal liquid level monitoring).

(vii) For flares equipped with a flare gas recovery system:

(A) A description of the flare gas recovery system, including number of compressors and capacity of each compressor.

(B) A description of the monitoring parameters used to quantify the amount of flare gas recovered.

(C) For systems with staged compressors, the maximum time period required to begin gas recovery with the secondary compressor(s), the monitoring parameters and procedures used to minimize the duration of releases during compressor staging and a justification for why the maximum time period cannot be further reduced.

(4) An evaluation of the baseline flow to the flare. The baseline flow to the flare must be determined after implementing the minimization assessment in paragraph (a)(2) of this section. Baseline flows do not include pilot gas flow or purge gas flow (*i.e.*, gas introduced after the flare's water seal) provided these gas flows remain reasonably constant (*i.e.*, separate flow monitors for these streams are not required). Separate baseline flow rates may be established for different operating conditions provided that the management plan includes:

(i) A primary baseline flow rate that will be used as the default baseline for all conditions except those specifically delineated in the plan;

(ii) A description of each special condition for which an alternate baseline is established, including the rationale for each alternate baseline, the daily flow for each alternate baseline and the expected duration of the special conditions for each alternate baseline; and

(iii) Procedures to minimize discharges to the affected flare during each special condition described in paragraph (a)(4)(ii) of this section, unless procedures are already developed for these cases under paragraph (a)(5) through (7) of this section, as applicable.

(5) Procedures to minimize or eliminate discharges to the flare during the planned startup and shutdown of the refinery process units and ancillary equipment that are connected to the affected flare, together with a schedule for the prompt implementation of any procedures that cannot reasonably be implemented as of the date of the submission of the flare management plan.

(6) Procedures to reduce flaring in cases of fuel gas imbalance (*i.e.*, excess fuel gas for the refinery's energy needs), together with a schedule for the prompt implementation of any procedures that cannot reasonably be implemented as of the date of the submission of the flare management plan.

(7) For flares equipped with flare gas recovery systems, procedures to minimize the frequency and duration of outages of the flare gas recovery system and procedures to minimize the volume of gas flared during such outages, together with a schedule for the prompt implementation of any procedures that cannot reasonably be implemented as of the date of the submission of the flare management plan.

(b) Except as provided in paragraph (g) of this section, each owner or

operator required to develop and implement a written flare management plan as described in paragraph (a) of this section must submit the plan to the Administrator as described in paragraphs (b)(1) through (3) of this section.

(1) The owner or operator of a newly constructed or reconstructed flare must develop and implement the flare management plan by no later than the date that the flare becomes an affected facility subject to this subpart, except for the selected minimization alternatives in paragraph (a)(2) and/or the procedures in paragraphs (a)(5) though (a)(7) of this section that cannot reasonably be implemented by that date, which the owner or operator must implement in accordance with the schedule in the flare management plan. The owner or operator of a modified flare must develop and implement the flare management plan by no later than November 11, 2015 or upon startup of the modified flare, whichever is later.

(2) The owner or operator must comply with the plan as submitted by the date specified in paragraph (b)(1) of this section. The plan should be updated periodically to account for changes in the operation of the flare, such as new connections to the flare or the installation of a flare gas recovery system, but the plan need be re-submitted to the Administrator only if the owner or operator adds an alternative baseline flow rate, revises an existing baseline as described in paragraph (a)(4) of this section, installs a flare gas recovery system or is required to change flare designations and monitoring methods as described in § 60.107a(g). The owner or operator must comply with the updated plan as submitted.

(3) All versions of the plan submitted to the Administrator shall also be submitted to the following address: U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, U.S. EPA Mailroom (E143–01), Attention: Refinery Sector Lead, 109 T.W. Alexander Drive, Research Triangle Park, NC 27711. Electronic copies in lieu of hard copies may also be submitted to *refinerynsps@epa.gov*.

(c) Except as provided in paragraphs (f) and (g) of this section, each owner or operator that operates a fuel gas combustion device, flare or sulfur recovery plant subject to this subpart shall conduct a root cause analysis and a corrective action analysis for each of the conditions specified in paragraphs (c)(1) through (3) of this section.

(1) For a flare:

(i) Any time the SO_2 emissions exceed 227 kilograms (kg) (500 lb) in any 24-hour period; or

(ii) Any discharge to the flare in excess of 14,160 standard cubic meters (m^3) (500,000 standard cubic feet (scf)) above the baseline, determined in paragraph (a)(4) of this section, in any 24-hour period; or

(iii) If the monitoring alternative in § 60.107a(g) is elected, any period when the flare gas line pressure exceeds the water seal liquid depth, except for periods attributable to compressor staging that do not exceed the staging time specified in paragraph (a)(3)(vii)(C) of this section.

(2) For a fuel gas combustion device, each exceedance of an applicable short-term emissions limit in § 60.102a(g)(1) if the SO_2 discharge to the atmosphere is 227 kg (500 lb) greater than the amount that would have been emitted if the emissions limits had been met during one or more consecutive periods of excess emissions or any 24-hour period, whichever is shorter.

(3) For a sulfur recovery plant, each time the SO_2 emissions are more than 227 kg (500 lb) greater than the amount that would have been emitted if the SO_2 or reduced sulfur concentration was equal to the applicable emissions limit in § 60.102a(f)(1) or (2) during one or more consecutive periods of excess emissions or any 24-hour period, whichever is shorter.

(d) Except as provided in paragraphs (f) and (g) of this section, a root cause analysis and corrective action analysis must be completed as soon as possible, but no later than 45 days after a discharge meeting one of the conditions specified in paragraphs (c)(1) through (3) of this section. Special circumstances affecting the number of root cause analyses and/or corrective action analyses are provided in paragraphs (d)(1) through (5) of this section.

(1) If a single continuous discharge meets any of the conditions specified in paragraphs (c)(1) through (3) of this section for 2 or more consecutive 24-hour periods, a single root cause analysis and corrective action analysis may be conducted.

(2) If a single discharge from a flare triggers a root cause analysis based on more than one of the conditions specified in paragraphs (c)(1)(i) through (iii) of this section, a single root cause analysis and corrective action analysis may be conducted.

(3) If the discharge from a flare is the result of a planned startup or shutdown of a refinery process unit or ancillary equipment connected to the affected flare and the procedures in paragraph (a)(5) of this section were followed, a root cause analysis and corrective action analysis is not required; however, the discharge must be recorded as described in § 60.108a(c)(6) and reported as described in § 60.108a(d)(5).

(4) If both the primary and secondary flare in a cascaded flare system meet any of the conditions specified in paragraphs (c)(1)(i) through (iii) of this section in the same 24-hour period, a single root cause analysis and corrective action analysis may be conducted.

(5) Except as provided in paragraph (d)(4) of this section, if discharges occur that meet any of the conditions specified in paragraphs (c)(1) through (3) of this section for more than one affected facility in the same 24-hour period, initial root cause analyses shall be conducted for each affected facility. If the initial root cause analyses indicate that the discharges have the same root cause(s), the initial root cause analyses can be recorded as a single root cause analysis and a single corrective action analysis may be conducted.

(e) Except as provided in paragraphs (f) and (g) of this section, each owner or operator of a fuel gas combustion device, flare or sulfur recovery plant subject to this subpart shall implement the corrective action(s) identified in the corrective action analysis conducted pursuant to paragraph (d) of this section in accordance with the applicable requirements in paragraphs (e)(1) through (3) of this section.

(1) All corrective action(s) must be implemented within 45 days of the discharge for which the root cause and corrective action analyses were required or as soon thereafter as practicable. If an owner or operator concludes that corrective action should not be conducted, the owner or operator shall record and explain the basis for that conclusion no later than 45 days following the discharge as specified in § 60.108a(c)(6)(ix).

(2) For corrective actions that cannot be fully implemented within 45 days following the discharge for which the root cause and corrective action analyses were required, the owner or operator shall develop an implementation schedule to complete the corrective action(s) as soon as practicable.

(3) No later than 45 days following the discharge for which a root cause and corrective action analyses were required, the owner or operator shall record the corrective action(s) completed to date, and, for action(s) not already completed, a schedule for implementation, including proposed commencement and completion dates as specified in § 60.108a(c)(6)(x).

(f) Modified flares shall comply with the requirements of paragraphs (c) through (e) of this section by November 11, 2015 or at startup of the modified flare, whichever is later. Modified flares that were not affected facilities subject to subpart J of this part prior to becoming affected facilities under § 60.100a shall comply with the requirements of paragraph (h) of this section and the requirements of § 60.107a(a)(2) by November 11, 2015 or at startup of the modified flare, whichever is later. Modified flares that were affected facilities subject to subpart J of this part prior to becoming affected facilities under § 60.100a shall comply with the requirements of paragraph (h) of this section and the requirements of § 60.107a(a)(2) by November 13, 2012 or at startup of the modified flare, whichever is later, except that modified flares that have accepted applicability of subpart J under a federal consent decree shall comply with the subpart J requirements as specified in the consent decree, but shall comply with the requirements of paragraph (h) of this section and the requirements of § 60.107a(a)(2) by no later than November 11, 2015.

(g) An affected flare subject to this subpart located in the Bay Area Air Quality Management District (BAAQMD) may elect to comply with both BAAQMD Regulation 12, Rule 11 and BAAQMD Regulation 12, Rule 12 as an alternative to complying with the requirements of paragraphs (a) through (e) of this section. An affected flare subject to this subpart located in the South Coast Air Quality Management District (SCAQMD) may elect to comply with SCAQMD Rule 1118 as an alternative to complying with the requirements of paragraphs (a) through (e) of this section. The owner or operator of an affected flare must notify the Administrator that the flare is in compliance with BAAQMD Regulation 12, Rule 11 and BAAQMD Regulation 12, Rule 12 or SCAQMD Rule 1118. The owner or operator of an affected flare shall also submit the existing flare management plan to the following address: U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, U.S. EPA Mailroom (E143–01), Attention: Refinery Sector Lead, 109 T.W. Alexander Drive, Research Triangle Park, NC 27711. Electronic copies in lieu of hard copies may also be submitted to *refinerynsps@epa.gov*.

(h) Each owner or operator shall not burn in any affected flare any fuel gas that contains H_2S in excess of 162 ppmv determined hourly on a 3-hour rolling average basis. The combustion in a flare of process upset gases or fuel gas that is released to the flare as a result of relief valve leakage or other emergency malfunctions is exempt from this limit.

(i) Each owner or operator of a delayed coking unit shall depressure each coke drum to 5 lb per square inch gauge (psig) or less prior to discharging the coke drum steam exhaust to the atmosphere. Until the coke drum pressure reaches 5 psig, the coke drum steam exhaust must be managed in an enclosed blowdown system and the uncondensed vapor must either be recovered (*e.g.*, sent to the delayed coking unit fractionators) or vented to the fuel gas system, a fuel gas combustion device or a flare.

(j) *Alternative means of emission limitation.* (1) Each owner or operator subject to the provisions of this section may apply to the Administrator for a determination of equivalence for any means of emission limitation that achieves a reduction in emissions of a specified pollutant at least equivalent to the reduction in emissions of that pollutant achieved by the controls required in this section.

(2) Determination of equivalence to the design, equipment, work practice or operational requirements of this section will be evaluated by the following guidelines:

(i) Each owner or operator applying for a determination of equivalence shall be responsible for collecting and verifying test data to demonstrate the equivalence of the alternative means of emission limitation.

(ii) For each affected facility for which a determination of equivalence is requested, the emission reduction achieved by the design, equipment, work practice or operational requirements shall be demonstrated.

(iii) For each affected facility for which a determination of equivalence is requested, the emission reduction achieved by the alternative means of emission limitation shall be demonstrated.

(iv) Each owner or operator applying for a determination of equivalence to a work practice standard shall commit in writing to work practice(s) that provide for emission reductions equal to or greater than the emission reductions achieved by the required work practice.

(v) The Administrator will compare the demonstrated emission reduction for the alternative means of emission limitation to the demonstrated emission reduction for the design, equipment, work practice or operational requirements and, if applicable, will consider the commitment in paragraph (j)(2)(iv) of this section.

(vi) The Administrator may condition the approval of the alternative means of emission limitation on requirements that may be necessary to ensure operation and maintenance to achieve the same emissions reduction as the design, equipment, work practice or operational requirements.

(3) An owner or operator may offer a unique approach to demonstrate the equivalence of any equivalent means of emission limitation.

(4) Approval of the application for equivalence to the design, equipment, work practice or operational requirements of this section will be evaluated by the following guidelines:

(i) After a request for determination of equivalence is received, the Administrator will publish a notice in the **Federal Register** and provide the opportunity for public hearing if the Administrator judges that the request may be approved.

(ii) After notice and opportunity for public hearing, the Administrator will determine the equivalence of a means of emission limitation and will publish the determination in the **Federal Register**.

(iii) Any equivalent means of emission limitations approved under this section shall constitute a required work practice, equipment, design or operational standard within the meaning of section 111(h)(1) of the CAA.

(5) Manufacturers of equipment used to control emissions may apply to the Administrator for determination of equivalence for any alternative means of emission limitation that achieves a reduction in emissions achieved by the equipment, design and operational requirements of this section. The Administrator will make an equivalence determination according to the provisions of paragraphs (j)(2) through (4) of this section.

■ 14. Section 60.104a is amended by:
■ a. Revising paragraph (a);
■ b. Revising paragraphs (d)(4)(ii), (d)(4)(iii), (d)(4)(v) and (d)(8);
■ c. Revising paragraph (f)(3);
■ d. Revising paragraph (h)(5)(iv);
■ e. Revising paragraph (i) introductory text;
■ f. Adding paragraphs (i)(6) through (i)(8);
■ g. Revising paragraph (j) introductory text and paragraph (j)(4) introductory text; and
■ h. Revising paragraph (j)(4)(iv) to read as follows:

§ 60.104a Performance tests.

(a) The owner or operator shall conduct a performance test for each FCCU, FCU, sulfur recovery plant, flare and fuel gas combustion device to

demonstrate initial compliance with each applicable emissions limit in § 60.102a according to the requirements of § 60.8. The notification requirements of § 60.8(d) apply to the initial performance test and to subsequent performance tests required by paragraph (b) of this section (or as required by the Administrator), but does not apply to performance tests conducted for the purpose of obtaining supplemental data because of continuous monitoring system breakdowns, repairs, calibration checks and zero and span adjustments.

* * * * *

(d) * * *

(4) * * *

(ii) The emissions rate of PM (E_{PM}) is computed for each run using Equation 5 of this section:

$$E = \frac{c_s Q_{sd}}{K R_c} \qquad \text{(Eq. 5)}$$

Where:

E = Emission rate of PM, g/kg (lb/1,000 lb) of coke burn-off;

c_s = Concentration of total PM, grams per dry standard cubic meter (g/dscm) (gr/dscf);

Q_{sd} = Volumetric flow rate of effluent gas, dry standard cubic meters per hour (dry standard cubic feet per hour);

R_c = Coke burn-off rate, kilograms per hour (kg/hr) [lb per hour (lb/hr)] coke; and

K = Conversion factor, 1.0 grams per gram (7,000 grains per lb).

(iii) The coke burn-off rate (R_c) is computed for each run using Equation 6 of this section:

$$R_c = K_1 Q_r (\%CO_2 + \%CO) + K_2 Q_a - K_3 Q_r \left(\%CO/_2 + \%CO_2 + \%O_2\right) + K_3 Q_{oxy} (\%O_{oxy})$$

(Eq. 6)

Where:

R_c = Coke burn-off rate, kg/hr (lb/hr);

Q_r = Volumetric flow rate of exhaust gas from FCCU regenerator or fluid coking burner before any emissions control or energy recovery system that burns auxiliary fuel, dry standard cubic meters per minute (dscm/min) [dry standard cubic feet per minute (dscf/min)];

Q_a = Volumetric flow rate of air to FCCU regenerator or fluid coking burner, as determined from the unit's control room instrumentation, dscm/min (dscf/min);

Q_{oxy} = Volumetric flow rate of O_2 enriched air to FCCU regenerator or fluid coking unit, as determined from the unit's control room instrumentation, dscm/min (dscf/min);

$\%CO_2$ = Carbon dioxide (CO_2) concentration in FCCU regenerator or fluid coking burner exhaust, percent by volume (dry basis);

%CO = CO concentration in FCCU regenerator or fluid coking burner exhaust, percent by volume (dry basis);

$\%O_2$ = O_2 concentration in FCCU regenerator or fluid coking burner exhaust, percent by volume (dry basis);

$\%O_{oxy}$ = O_2 concentration in O_2 enriched air stream inlet to the FCCU regenerator or fluid coking burner, percent by volume (dry basis);

K_1 = Material balance and conversion factor, 0.2982 (kg-min)/(hr-dscm-%) [0.0186 (lb-min)/(hr-dscf-%)];

K_2 = Material balance and conversion factor, 2.088 (kg-min)/(hr-dscm) [0.1303 (lb-min)/(hr-dscf)]; and

K_3 = Material balance and conversion factor, 0.0994 (kg-min)/(hr-dscm-%) [0.00624 (lb-min)/(hr-dscf-%)].

* * * * *

(v) For subsequent calculations of coke burn-off rates or exhaust gas flow rates, the volumetric flow rate of Q_r is calculated using average exhaust gas concentrations as measured by the monitors required in § 60.105a(b)(2), if applicable, using Equation 7 of this section:

$$Q_r = \frac{79 \times Q_a + (100 - \%Oxy) \times Q_{oxy}}{100 - \%CO_2 - \%CO - \%O_2} \qquad \text{(Eq. 7)}$$

Where:

Q_r = Volumetric flow rate of exhaust gas from FCCU regenerator or fluid coking burner before any emission control or energy recovery system that burns auxiliary fuel, dscm/min (dscf/min);

Q_a = Volumetric flow rate of air to FCCU regenerator or fluid coking burner, as determined from the unit's control room instrumentation, dscm/min (dscf/min);

Q_{oxy} = Volumetric flow rate of O_2 enriched air to FCCU regenerator or fluid coking unit, as determined from the unit's control room instrumentation, dscm/min (dscf/min);

$\%CO_2$ = Carbon dioxide concentration in FCCU regenerator or fluid coking burner exhaust, percent by volume (dry basis);

%CO = CO concentration FCCU regenerator or fluid coking burner exhaust, percent by volume (dry basis). When no auxiliary fuel is burned and a continuous CO monitor is not required in accordance with § 60.105a(h)(3), assume %CO to be zero;

$\%O_2$ = O_2 concentration in FCCU regenerator or fluid coking burner exhaust, percent by volume (dry basis); and

$\%O_{oxy}$ = O_2 concentration in O_2 enriched air stream inlet to the FCCU regenerator or fluid coking burner, percent by volume (dry basis).

* * * * *

(8) The owner or operator shall adjust PM, NO_X, SO_2 and CO pollutant concentrations to 0-percent excess air or 0-percent O_2 using Equation 8 of this section:

$$C_{adj} = C_{meas}\left[20.9_c \Big/ (20.9 - \%O_2)\right] \qquad \text{(Eq. 8)}$$

Where:

C_{adj} = pollutant concentration adjusted to 0-percent excess air or O_2, parts per million (ppm) or g/dscm;

C_{meas} = pollutant concentration measured on a dry basis, ppm or g/dscm;

20.9_c = 20.9 percent O_2 – 0.0 percent O_2 (defined O_2 correction basis), percent;

20.9 = O_2 concentration in air, percent; and

$\%O_2$ = O_2 concentration measured on a dry basis, percent.

* * * * *

(f) * * *

(3) Compute the site-specific limit using Equation 9 of this section:

$$Opacity\ \ Limit = Opacity_{st}\ x\left(\frac{1\text{ lb} / 1{,}000\text{ lb coke burn}}{PMEmR_{st}}\right) \qquad \text{(Eq. 9)}$$

Where:

Opacity limit = Maximum permissible 3-hour average opacity, percent, or 10 percent, whichever is greater;

$Opacity_{st}$ = Hourly average opacity measured during the source test, percent; and

$PMEmR_{st}$ = PM emission rate measured during the source test, lb/1,000 lb coke burn.

* * * * *

(h) * * *

(5) * * *

(iv) The owner or operator shall use Equation 8 of this section to adjust pollutant concentrations to 0-percent O_2 or 0- percent excess air.

(i) The owner or operator shall determine compliance with the SO_2 and NO_X emissions limits in § 60.102a(g) for a fuel gas combustion device according to the following test methods and procedures:

* * * * *

(6) For process heaters with a rated heat capacity between 40 and 100 MMBtu/hr that elect to demonstrate continuous compliance with a maximum excess oxygen limit as provided in § 60.107a(c)(6) or (d)(8), the owner or operator shall establish the O_2 operating limit or O_2 operating curve based on the performance test results according to the requirements in paragraph (i)(6)(i) or (ii) of this section, respectively.

(i) If a single O_2 operating limit will be used:

(A) Conduct the performance test following the methods provided in paragraphs (i)(1), (2), (3) and (5) of this section when the process heater is firing at no less than 70 percent of the rated heat capacity. For co-fired process heaters, conduct at least one of the test runs while the process heater is being supplied by both fuel gas and fuel oil and conduct at least one of the test runs while the process heater is being supplied solely by fuel gas.

(B) Each test will consist of three test runs. Calculate the NO_X concentration for the performance test as the average of the NO_X concentrations from each of the three test runs. If the NO_X concentration for the performance test is less than or equal to the numerical value of the applicable NO_X emissions limit (regardless of averaging time), then the test is considered to be a valid test.

(C) Determine the average O_2 concentration for each test run of a valid test.

(D) Calculate the O_2 operating limit as the average O_2 concentration of the three test runs from a valid test.

(ii) If an O_2 operating curve will be used:

(A) Conduct a performance test following the methods provided in paragraphs (i)(1), (2), (3) and (5) of this section at a representative condition for each operating range for which different O_2 operating limits will be established. Different operating conditions may be defined as different firing rates (*e.g.*, above 50 percent of rated heat capacity and at or below 50 percent of rated heat capacity) and/or, for co-fired process heaters, different fuel mixtures (*e.g.*, primarily gas fired, primarily oil fired, and equally co-fired, *i.e.*, approximately 50 percent of the input heating value is from fuel gas and approximately 50 percent of the input heating value is from fuel oil). Performance tests for different operating ranges may be conducted at different times.

(B) Each test will consist of three test runs. Calculate the NO_X concentration for the performance test as the average of the NO_X concentrations from each of the three test runs. If the NO_X concentration for the performance test is less than or equal to the numerical value of the applicable NO_X emissions limit (regardless of averaging time), then the test is considered to be a valid test.

(C) If an operating curve is developed for different firing rates, conduct at least one test when the process heater is firing at no less than 70 percent of the rated heat capacity and at least one test under turndown conditions (*i.e.*, when the process heater is firing at 50 percent or less of the rated heat capacity). If O_2 operating limits are developed for co-fired process heaters based only on overall firing rates (and not by fuel mixtures), conduct at least one of the test runs for each test while the process heater is being supplied by both fuel gas and fuel oil and conduct at least one of the test runs while the process heater is being supplied solely by fuel gas.

(D) Determine the average O_2 concentration for each test run of a valid test.

(E) Calculate the O_2 operating limit for each operating range as the average O_2 concentration of the three test runs from a valid test conducted at the representative conditions for that given operating range.

(F) Identify the firing rates for which the different operating limits apply. If only two operating limits are established based on firing rates, the O_2 operating limits established when the process heater is firing at no less than 70 percent of the rated heat capacity must apply when the process heater is firing above 50 percent of the rated heat capacity and the O_2 operating limits established for turndown conditions must apply when the process heater is firing at 50 percent or less of the rated heat capacity.

(G) Operating limits associated with each interval will be valid for 2 years or until another operating limit is established for that interval based on a more recent performance test specific for that interval, whichever occurs first. Owners and operators must use the operating limits determined for a given interval based on the most recent performance test conducted for that interval.

(7) The owner or operator of a process heater complying with a NO_X limit in terms of lb/MMBtu as provided in § 60.102a(g)(2)(i)(B), (g)(2)(ii)(B), (g)(2)(iii)(B) or (g)(2)(iv)(B) or a process heater with a rated heat capacity between 40 and 100 MMBtu/hr that

elects to demonstrate continuous compliance with a maximum excess O_2 limit, as provided in § 60.107a(c)(6) or (d)(8), shall determine heat input to the process heater in MMBtu/hr during each performance test run by measuring fuel gas flow rate, fuel oil flow rate (as applicable) and heating value content according to the methods provided in § 60.107a(d)(5), (d)(6), and (d)(4) or (d)(7), respectively.

(8) The owner or operator shall use Equation 8 of this section to adjust pollutant concentrations to 0-percent O_2 or 0- percent excess air.

(j) The owner or operator shall determine compliance with the applicable H_2S emissions limit in § 60.102a(g)(1) for a fuel gas combustion device or the concentration requirement in § 60.103a(h) for a flare according to the following test methods and procedures:

* * * * *

(4) EPA Method 11, 15 or 15A of Appendix A–5 to part 60 or EPA Method 16 of Appendix A–6 to part 60 for determining the H_2S concentration for affected facilities using an H_2S monitor as specified in § 60.107a(a)(2). The method ANSI/ASME PTC 19.10–1981 (incorporated by reference—see § 60.17) is an acceptable alternative to EPA Method 15A of Appendix A–5 to part 60. The owner or operator may demonstrate compliance based on the mixture used in the fuel gas combustion device or flare or for each individual fuel gas stream used in the fuel gas combustion device or flare.

* * * * *

(iv) If monitoring is conducted at a single point in a common source of fuel gas as allowed under § 60.107a(a)(2)(iv), only one performance test is required. That is, performance tests are not required when a new affected fuel gas combustion device or flare is added to a common source of fuel gas that previously demonstrated compliance.

■ 15. Section 60.105a is amended by:

■ a. Revising paragraph (b) introductory text, and paragraph (b)(1) introductory text, and paragraphs (b)(1)(ii)(A), (b)(2)(i) and (b)(2)(ii); and

■ b. Revising paragraph (i)(5) to read as follows:

§ 60.105a Monitoring of emissions and operations for fluid catalytic cracking units (FCCU) and fluid coking units (FCU).

* * * * *

(b) *Control device operating parameters.* Each owner or operator of a FCCU or FCU subject to the PM per coke burn-off emissions limit in § 60.102a(b)(1) that uses a control device other than fabric filter or cyclone shall comply with the requirements in paragraphs (b)(1) and (2) of this section.

(1) The owner or operator shall install, operate and maintain continuous parameter monitor systems (CPMS) to measure and record operating parameters for each control device according to the applicable requirements in paragraphs (b)(1)(i) through (v) of this section.

* * * * *

(ii) * * *

(A) As an alternative to pressure drop, the owner or operator of a jet ejector type wet scrubber or other type of wet scrubber equipped with atomizing spray nozzles must conduct a daily check of the air or water pressure to the spray nozzles and record the results of each check.

* * * * *

(2) * * *

(i) The owner or operator shall install, operate and maintain each monitor according to Performance Specifications 3 and 4 of Appendix B to part 60.

(ii) The owner or operator shall conduct performance evaluations of each CO_2, O_2 and CO monitor according to the requirements in § 60.13(c) and Performance Specifications 3 and 4 of Appendix B to part 60. The owner or operator shall use EPA Method 3 of Appendix A–3 to part 60 and EPA Method 10, 10A or 10B of Appendix A–4 to part 60 for conducting the relative accuracy evaluations.

* * * * *

(i) * * *

(5) All rolling 7-day periods during which the average concentration of SO_2 as measured by the SO_2 CEMS under § 60.105a(g) exceeds 50 ppmv, and all rolling 365-day periods during which the average concentration of SO_2 as measured by the SO_2 CEMS exceeds 23 ppmv.

* * * * *

■ 16. In § 60.107a, lift the stay on paragraphs (d) and (e) published December 22, 2008 (73 FR 78552).

■ 17. Section 60.107a is amended by:

■ a. Revising the section heading;

■ b. Revising paragraph (a) introductory text, paragraph (a)(1) introductory text, paragraph (a)(2) introductory text, (a)(2)(i), (a)(2)(iv) and paragraph (a)(3) introductory text;

■ c. Adding paragraphs (a)(2)(v) and (a)(2)(vi);

■ d. Revising paragraph (b) introductory text and paragraphs (b)(1)(i), (b)(1)(v) and (b)(3)(iii);

■ e. Revising paragraph (c) introductory text and paragraphs (c)(1) and (c)(6);

■ f. Redesignating paragraphs (d), (e), and (f) as paragraphs (e), (f) and (i), respectively;

■ g. Adding a new paragraph (d);

■ h. Revising newly redesignated paragraph (e);

■ i. Revising newly redesignated paragraph (f);

■ j. Adding a new paragraph (g);

■ k. Adding a new paragraph (h); and

■ l. Revising newly redesignated paragraph (i).

The revisions and additions read as follows:

§ 60.107a Monitoring of emissions and operations for fuel gas combustion devices and flares.

(a) *Fuel gas combustion devices subject to* SO_2 or H_2S limit and flares subject to H_2S concentration requirements. The owner or operator of a fuel gas combustion device that is subject to § 60.102a(g)(1) and elects to comply with the SO_2 emission limits in § 60.102a(g)(1)(i) shall comply with the requirements in paragraph (a)(1) of this section. The owner or operator of a fuel gas combustion device that is subject to § 60.102a(g)(1) and elects to comply with the H_2S concentration limits in § 60.102a(g)(1)(ii) or a flare that is subject to the H_2S concentration requirement in § 60.103a(h) shall comply with paragraph (a)(2) of this section.

(1) The owner or operator of a fuel gas combustion device that elects to comply with the SO_2 emissions limits in § 60.102a(g)(1)(i) shall install, operate, calibrate and maintain an instrument for continuously monitoring and recording the concentration (dry basis, 0-percent excess air) of SO_2 emissions into the atmosphere. The monitor must include an O_2 monitor for correcting the data for excess air.

* * * * *

(2) The owner or operator of a fuel gas combustion device that elects to comply with the H_2S concentration limits in § 60.102a(g)(1)(ii) or a flare that is subject to the H_2S concentration requirement in § 60.103a(h) shall install, operate, calibrate and maintain an instrument for continuously monitoring and recording the concentration by volume (dry basis) of H_2S in the fuel gases before being burned in any fuel gas combustion device or flare.

(i) The owner or operator shall install, operate and maintain each H_2S monitor according to Performance Specification 7 of Appendix B to part 60. The span value for this instrument is 300 ppmv H_2S.

* * * * *

(iv) Fuel gas combustion devices or flares having a common source of fuel gas may be monitored at only one location, if monitoring at this location accurately represents the concentration

of H_2S in the fuel gas being burned in the respective fuel gas combustion devices or flares.

(v) The owner or operator of a flare subject to § 60.103a(c) through (e) may use the instrument required in paragraph (e)(1) of this section to demonstrate compliance with the H_2S concentration requirement in § 60.103a(h) if the owner or operator complies with the requirements of paragraph (e)(1)(i) through (iv) and if the instrument has a span (or dual span, if necessary) capable of accurately measuring concentrations between 20 and 300 ppmv. If the instrument required in paragraph (e)(1) of this section is used to demonstrate compliance with the H_2S concentration requirement, the concentration directly measured by the instrument must meet the numeric concentration in § 60.103a(h).

(vi) The owner or operator of modified flare that meets all three criteria in paragraphs (a)(2)(vi)(A) through (C) of this section shall comply with the requirements of paragraphs (a)(2)(i) through (v) of this section no later than November 11, 2015. The owner or operator shall comply with the approved alternative monitoring plan or plans pursuant to § 60.13(i) until the flare is in compliance with requirements of paragraphs (a)(2)(i) through (v) of this section.

(A) The flare was an affected facility subject to subpart J of this part prior to becoming an affected facility under § 60.100a.

(B) The owner or operator had an approved alternative monitoring plan or plans pursuant to § 60.13(i) for all fuel gases combusted in the flare.

(C) The flare did not have in place on or before September 12, 2012 an instrument for continuously monitoring and recording the concentration by volume (dry basis) of H_2S in the fuel gases that is capable of complying with the requirements of paragraphs (a)(2)(i) through (v) of this section.

(3) The owner or operator of a fuel gas combustion device or flare is not required to comply with paragraph (a)(1) or (2) of this section for fuel gas streams that are exempt under §§ 60.102a(g)(1)(iii) or 60.103a(h) or, for fuel gas streams combusted in a process heater, other fuel gas combustion device or flare that are inherently low in sulfur content. Fuel gas streams meeting one of the requirements in paragraphs (a)(3)(i) through (iv) of this section will be considered inherently low in sulfur content.

* * * * *

(b) *Exemption from H_2S monitoring requirements for low-sulfur fuel gas streams.* The owner or operator of a fuel gas combustion device or flare may apply for an exemption from the H_2S monitoring requirements in paragraph (a)(2) of this section for a fuel gas stream that is inherently low in sulfur content. A fuel gas stream that is demonstrated to be low-sulfur is exempt from the monitoring requirements of paragraphs (a)(1) and (2) of this section until there are changes in operating conditions or stream composition.

(1) * * *

(i) A description of the fuel gas stream/system to be considered, including submission of a portion of the appropriate piping diagrams indicating the boundaries of the fuel gas stream/system and the affected fuel gas combustion device(s) or flare(s) to be considered;

* * * * *

(v) A description of how the 2 weeks (or seven samples for infrequently operated fuel gas streams/systems) of monitoring results compares to the typical range of H_2S concentration (fuel quality) expected for the fuel gas stream/system going to the affected fuel gas combustion device or flare (*e.g.*, the 2 weeks of daily detector tube results for a frequently operated loading rack included the entire range of products loaded out and, therefore, should be representative of typical operating conditions affecting H_2S content in the fuel gas stream going to the loading rack flare).

* * * * *

(3) * * *

(iii) If the operation change results in a sulfur content that is outside the range of concentrations included in the original application and the owner or operator chooses not to submit new information to support an exemption, the owner or operator must begin H_2S monitoring using daily stain sampling to demonstrate compliance. The owner or operator must begin monitoring according to the requirements in paragraphs (a)(1) or (a)(2) of this section as soon as practicable, but in no case later than 180 days after the operation change. During daily stain tube sampling, a daily sample exceeding 162 ppmv is an exceedance of the 3-hour H_2S concentration limit. The owner or operator of a fuel gas combustion device must also determine a rolling 365-day average using the stain sampling results; an average H_2S concentration of 5 ppmv must be used for days within the rolling 365-day period prior to the operation change.

(c) *Process heaters complying with the NO_X concentration-based limit.* The owner or operator of a process heater subject to the NO_X emissions limit in § 60.102a(g)(2) and electing to comply with the applicable emissions limit in § 60.102a(g)(2)(i)(A), (g)(2)(ii)(A), (g)(2)(iii)(A) or (g)(2)(iv)(A) shall install, operate, calibrate and maintain an instrument for continuously monitoring and recording the concentration (dry basis, 0-percent excess air) of NO_X emissions into the atmosphere according to the requirements in paragraphs (c)(1) through (5) of this section, except as provided in paragraph (c)(6) of this section. The monitor must include an O_2 monitor for correcting the data for excess air.

(1) Except as provided in paragraph (c)(6) of this section, the owner or operator shall install, operate and maintain each NO_X monitor according to Performance Specification 2 of Appendix B to part 60. The span value of this NO_X monitor must be between 2 and 3 times the applicable emissions limit, inclusive.

* * * * *

(6) The owner or operator of a process heater that has a rated heating capacity of less than 100 MMBtu and is equipped with combustion modification-based technology to reduce NO_X emissions (*i.e.*, low-NO_X burners, ultra-low-NO_X burners) may elect to comply with the monitoring requirements in paragraphs (c)(1) through (5) of this section or, alternatively, the owner or operator of such a process heater shall conduct biennial performance tests according to the requirements in § 60.104a(i), establish a maximum excess O_2 operating limit or operating curve according to the requirements in § 60.104a(i)(6) and comply with the O_2 monitoring requirements in paragraphs (c)(3) through (5) of this section to demonstrate compliance. If an O_2 operating curve is used (*i.e.*, if different O_2 operating limits are established for different operating ranges), the owner or operator of the process heater must also monitor fuel gas flow rate, fuel oil flow rate (as applicable) and heating value content according to the methods provided in paragraphs (d)(5), (d)(6), and (d)(4) or (d)(7) of this section, respectively.

(d) *Process heaters complying with the NO_X heating value-based or mass-based limit.* The owner or operator of a process heater subject to the NO_X emissions limit in § 60.102a(g)(2) and electing to comply with the applicable emissions limit in § 60.102a(g)(2)(i)(B) or (g)(2)(ii)(B) shall install, operate, calibrate and maintain an instrument for continuously monitoring and recording the concentration (dry basis, 0-percent excess air) of NO_X emissions into the

atmosphere and shall determine the F factor of the fuel gas stream no less frequently than once per day according to the monitoring requirements in paragraphs (d)(1) through (4) of this section. The owner or operator of a co-fired process heater subject to the NO_X emissions limit in § 60.102a(g)(2) and electing to comply with the heating value-based limit in § 60.102a(g)(2)(iii)(B) or (g)(2)(iv)(B) shall install, operate, calibrate and maintain an instrument for continuously monitoring and recording the concentration (dry basis, 0-percent excess air) of NO_X emissions into the atmosphere according to the monitoring requirements in paragraph (d)(1) of this section; install, operate, calibrate and maintain an instrument for continuously monitoring and recording the flow rate of the fuel gas and fuel oil fed to the process heater according to the monitoring requirements in paragraph (d)(5) and (6) of this section; for fuel gas streams, determine gas composition according to the requirements in paragraph (d)(4) of this section or the higher heating value according to the requirements in paragraph (d)(7) of this section; and for fuel oil streams, determine the heating value according to the monitoring requirements in paragraph (d)(7) of this section.

(1) Except as provided in paragraph (d)(8) of this section, the owner or operator shall install, operate and maintain each NO_X monitor according to the requirements in paragraphs (c)(1) through (5) of this section. The monitor must include an O_2 monitor for correcting the data for excess air.

(2) Except as provided in paragraph (d)(3) of this section, the owner or operator shall sample and analyze each fuel stream fed to the process heater using the methods and equations in section 12.3.2 of EPA Method 19 of Appendix A–7 to part 60 to determine the F factor on a dry basis. If a single fuel gas system provides fuel gas to several process heaters, the F factor may be determined at a single location in the fuel gas system provided it is representative of the fuel gas fed to the affected process heater(s).

(3) As an alternative to the requirements in paragraph (d)(2) of this section, the owner or operator of a gas-fired process heater shall install, operate and maintain a gas composition analyzer and determine the average F factor of the fuel gas using the factors in Table 1 of this subpart and Equation 10 of this section. If a single fuel gas system provides fuel gas to several process heaters, the F factor may be determined at a single location in the fuel gas system provided it is representative of the fuel gas fed to the affected process heater(s).

$$F_d = \frac{1{,}000{,}000 \times \sum \left(X_i \times MEV_i \right)}{\sum \left(X_i \times MHC_i \right)} \qquad \text{(Eq. 10)}$$

Where:

F_d = F factor on dry basis at 0-percent excess air, dscf/MMBtu.

X_i = mole or volume fraction of each component in the fuel gas.

MEV_i = molar exhaust volume, dry standard cubic feet per mole (dscf/mol).

MHC_i = molar heat content, Btu per mole (Btu/mol).

1,000,000 = unit conversion, Btu per MMBtu.

(4) The owner or operator shall conduct performance evaluations of each compositional monitor according to the requirements in Performance Specification 9 of Appendix B to part 60. Any of the following methods shall be used for conducting the relative accuracy evaluations:

(i) EPA Method 18 of Appendix A–6 to part 60;

(ii) ASTM D1945–03 (Reapproved 2010)(incorporated by reference-see § 60.17);

(iii) ASTM D1946–90 (Reapproved 2006)(incorporated by reference-see § 60.17);

(iv) ASTM D6420–99 (Reapproved 2004)(incorporated by reference-see § 60.17);

(v) GPA 2261–00 (incorporated by reference-see § 60.17); or

(vi) ASTM UOP539–97 (incorporated by reference-see § 60.17).

(5) The owner or operator shall install, operate and maintain fuel gas flow monitors according to the manufacturer's recommendations. For volumetric flow meters, temperature and pressure monitors must be installed in conjunction with the flow meter or in a representative location to correct the measured flow to standard conditions (*i.e.*, 68 °F and 1 atmosphere). For mass flow meters, use gas compositions determined according to paragraph (d)(4) of this section to determine the average molecular weight of the fuel gas and convert the mass flow to a volumetric flow at standard conditions (*i.e.*, 68 °F and 1 atmosphere). The owner or operator shall conduct performance evaluations of each fuel gas flow monitor according to the requirements in § 60.13 and Performance Specification 6 of Appendix B to part 60. Any of the following methods shall be used for conducting the relative accuracy evaluations:

(i) EPA Method 2, 2A, 2B, 2C or 2D of Appendix A–2 to part 60;

(ii) ASME MFC–3M–2004 (incorporated by reference-see § 60.17);

(iii) ANSI/ASME MFC–4M–1986 (Reaffirmed 2008) (incorporated by reference-see § 60.17);

(iv) ASME MFC–6M–1998 (Reaffirmed 2005) (incorporated by reference-see § 60.17);

(v) ASME/ANSI MFC–7M–1987 (Reaffirmed 2006) (incorporated by reference-see § 60.17);

(vi) ASME MFC–11M–2006 (incorporated by reference-see § 60.17);

(vii) ASME MFC–14M–2003 (incorporated by reference-see § 60.17);

(viii) ASME MFC–18M–2001 (incorporated by reference-see § 60.17);

(ix) AGA Report No. 3, Part 1 (incorporated by reference-see § 60.17);

(x) AGA Report No. 3, Part 2 (incorporated by reference-see § 60.17);

(xi) AGA Report No. 11 (incorporated by reference-see § 60.17);

(xii) AGA Report No. 7 (incorporated by reference-see § 60.17); and

(xiii) API Manual of Petroleum Measurement Standards, Chapter 22, Section 2 (incorporated by reference-see § 60.17).

(6) The owner or operator shall install, operate and maintain each fuel oil flow monitor according to the manufacturer's recommendations. The owner or operator shall conduct performance evaluations of each fuel oil flow monitor according to the requirements in § 60.13 and Performance Specification 6 of Appendix B to part 60. Any of the following methods shall be used for conducting the relative accuracy evaluations:

(i) Any one of the methods listed in paragraph (d)(5) of this section that are applicable to fuel oil (*i.e.*, "fluids");

(ii) ANSI/ASME–MFC–5M–1985 (Reaffirmed 2006) (incorporated by reference-see § 60.17);

(iii) ASME/ANSI MFC–9M–1988 (Reaffirmed 2006) (incorporated by reference-see § 60.17);

(iv) ASME MFC–16–2007 (incorporated by reference-see § 60.17);

(v) ASME MFC–22–2007 (incorporated by reference-see § 60.17); or

(vi) ISO 8316 (incorporated by reference-see § 60.17).

(7) The owner or operator shall determine the higher heating value of each fuel fed to the process heater using any of the applicable methods included in paragraphs (d)(7)(i) through (ix) of this section. If a common fuel supply system provides fuel gas or fuel oil to several process heaters, the higher heating value of the fuel in each fuel supply system may be determined at a single location in the fuel supply system provided it is representative of the fuel fed to the affected process heater(s). The higher heating value of each fuel fed to the process heater must be determined no less frequently than once per day except as provided in paragraph (d)(7)(x) of this section.

(i) ASTM D240–02 (Reapproved 2007) (incorporated by reference-see § 60.17).

(ii) ASTM D1826–94 (Reapproved 2003) (incorporated by reference-see § 60.17).

(iii) ASTM D1945–03 (Reapproved 2010) (incorporated by reference-see § 60.17).

(iv) ASTM D1946–90 (Reapproved 2006) (incorporated by reference-see § 60.17).

(v) ASTM D3588–98 (Reapproved 2003) (incorporated by reference-see § 60.17).

(vi) ASTM D4809–06 (incorporated by reference-see § 60.17).

(vii) ASTM D4891–89 (Reapproved 2006) (incorporated by reference-see § 60.17).

(viii) GPA 2172–09 (incorporated by reference-see § 60.17).

(ix) Any of the methods specified in section 2.2.7 of Appendix D to part 75.

(x) If the fuel oil supplied to the affected co-fired process heater originates from a single storage tank, the owner or operator may elect to use the storage tank sampling method in section 2.2.4.2 of Appendix D to part 75 instead of daily sampling, except that the most recent value for heating content must be used.

(8) The owner or operator of a process heater that has a rated heating capacity of less than 100 MMBtu and is equipped with combustion modification based technology to reduce NO_X emissions (*i.e.*, low-NO_X burners or ultra-low NO_X burners) may elect to comply with the monitoring requirements in paragraphs (d)(1) through (7) of this section or, alternatively, the owner or operator of such a process heater shall conduct biennial performance tests according to the requirements in § 60.104a(i), establish a maximum excess O_2 operating limit or operating curve according to the requirements in § 60.104a(i)(6) and comply with the O_2 monitoring requirements in paragraphs (c)(3) through (5) of this section to demonstrate compliance. If an O_2 operating curve is used (*i.e.*, if different O_2 operating limits are established for different operating ranges), the owner or operator of the process heater must also monitor fuel gas flow rate, fuel oil flow rate (as applicable) and heating value content according to the methods provided in paragraphs (d)(5), (d)(6), and (d)(4) or (d)(7) of this section, respectively.

(e) *Sulfur monitoring for assessing root cause analysis threshold for affected flares.* Except as described in paragraphs (e)(4) and (h) of this section, the owner or operator of an affected flare subject to § 60.103a(c) through (e) shall determine the total reduced sulfur concentration for each gas line directed to the affected flare in accordance with either paragraph (e)(1), (e)(2) or (e)(3) of this section. Different options may be elected for different gas lines. If a monitoring system is in place that is capable of complying with the requirements related to either paragraph (e)(1), (e)(2) or (e)(3) of this section, the owner or operator of a modified flare must comply with the requirements related to either paragraph (e)(1), (e)(2) or (e)(3) of this section upon startup of the modified flare. If a monitoring system is not in place that is capable of complying with the requirements related to either paragraph (e)(1), (e)(2) or (e)(3) of this section, the owner or operator of a modified flare must comply with the requirements related to either paragraph (e)(1), (e)(2) or (e)(3) of this section no later than November 11, 2015 or upon startup of the modified flare, whichever is later.

(1) *Total reduced sulfur monitoring requirements.* The owner or operator shall install, operate, calibrate and maintain an instrument for continuously monitoring and recording the concentration of total reduced sulfur in gas discharged to the flare.

(i) The owner or operator shall install, operate and maintain each total reduced sulfur monitor according to Performance Specification 5 of Appendix B to part 60. The span value should be determined based on the maximum sulfur content of gas that can be discharged to the flare (*e.g.*, roughly 1.1 to 1.3 times the maximum anticipated sulfur concentration), but may be no less than 5,000 ppmv. A single dual range monitor may be used to comply with the requirements of this paragraph and paragraph (a)(2) of this section provided the applicable span specifications are met.

(ii) The owner or operator shall conduct performance evaluations of each total reduced sulfur monitor according to the requirements in § 60.13(c) and Performance Specification 5 of Appendix B to part 60. For flares that routinely have flow, the owner or operator of each total reduced sulfur monitor shall use EPA Method 15A of Appendix A–5 to part 60 for conducting the relative accuracy evaluations. The method ANSI/ASME PTC 19.10–1981 (incorporated by reference-see § 60.17) is an acceptable alternative to EPA Method 15A of Appendix A–5 to part 60. The alternative relative accuracy procedures described in section 16.0 of Performance Specification 2 of Appendix B to part 60 (cylinder gas audits) may be used for conducting the relative accuracy evaluations. For flares that do not receive routine flow, the alternative relative accuracy procedures described in section 16.0 of Performance Specification 2 of Appendix B to part 60 (cylinder gas audits) may be used for conducting the relative accuracy evaluations, except that it is not necessary to include as much of the sampling probe or sampling line as practical.

(iii) The owner or operator shall comply with the applicable quality assurance procedures in Appendix F to part 60 for each total reduced sulfur monitor.

(2) *H_2S monitoring requirements.* The owner or operator shall install, operate, calibrate, and maintain an instrument for continuously monitoring and recording the concentration of H_2S in gas discharged to the flare according to the requirements in paragraphs (e)(2)(i) through (iii) of this section and shall collect and analyze samples of the gas and calculate total sulfur concentrations as specified in paragraphs (e)(2)(iv) through (ix) of this section.

(i) The owner or operator shall install, operate and maintain each H_2S monitor according to Performance Specification 7 of Appendix B to part 60. The span value should be determined based on the maximum sulfur content of gas that can be discharged to the flare (*e.g.*, roughly 1.1 to 1.3 times the maximum anticipated sulfur concentration), but may be no less than 5,000 ppmv. A single dual range H_2S monitor may be used to comply with the requirements of this paragraph and paragraph (a)(2) of

this section provided the applicable span specifications are met.

(ii) The owner or operator shall conduct performance evaluations of each H_2S monitor according to the requirements in § 60.13(c) and Performance Specification 7 of Appendix B to part 60. For flares that routinely have flow, the owner or operator shall use EPA Method 11, 15 or 15A of Appendix A–5 to part 60 for conducting the relative accuracy evaluations. The method ANSI/ASME PTC 19.10–1981 (incorporated by reference—see § 60.17) is an acceptable alternative to EPA Method 15A of Appendix A–5 to part 60. The alternative relative accuracy procedures described in section 16.0 of Performance Specification 2 of Appendix B to part 60 (cylinder gas audits) may be used for conducting the relative accuracy evaluations. For flares that do not receive routine flow, the alternative relative accuracy procedures described in section 16.0 of Performance Specification 2 of Appendix B to part 60 (cylinder gas audits) may be used for conducting the relative accuracy evaluations, except that it is not necessary to include as much of the sampling probe or sampling line as practical.

(iii) The owner or operator shall comply with the applicable quality assurance procedures in Appendix F to part 60 for each H_2S monitor.

(iv) In the first 10 operating days after the date the flare must begin to comply with § 60.103a(c)(1), the owner or operator shall collect representative daily samples of the gas discharged to the flare. The samples may be grab samples or integrated samples. The owner or operator shall take subsequent representative daily samples at least once per week or as required in paragraph (e)(2)(ix) of this section.

(v) The owner or operator shall analyze each daily sample for total sulfur using either EPA Method 15A of Appendix A–5 to part 60, EPA Method 16A of Appendix A–6 to part 60, ASTM Method D4468–85 (Reapproved 2006) (incorporated by reference—see § 60.17) or ASTM Method D5504–08 (incorporated by reference—see § 60.17).

(vi) The owner or operator shall develop a 10-day average total sulfur-to-H_2S ratio and 95-percent confidence interval as follows:

(A) Calculate the ratio of the total sulfur concentration to the H_2S concentration for each day during which samples are collected.

(B) Determine the 10-day average total sulfur-to-H_2S ratio as the arithmetic average of the daily ratios calculated in paragraph (e)(2)(vi)(A) of this section.

(C) Determine the acceptable range for subsequent weekly samples based on the 95-percent confidence interval for the distribution of daily ratios based on the 10 individual daily ratios using Equation 11 of this section.

$$AR = Ratio_{Avg} \pm 2.262 \times SDev \qquad \text{(Eq. 11)}$$

Where:

AR = Acceptable range of subsequent ratio determinations, unitless.

$Ratio_{Avg}$ = 10-day average total sulfur-to-H_2S concentration ratio, unitless.

2.262 = t-distribution statistic for 95-percent 2-sided confidence interval for 10 samples (9 degrees of freedom).

SDev = Standard deviation of the 10 daily average total sulfur-to-H_2S concentration ratios used to develop the 10-day average total sulfur-to-H_2S concentration ratio, unitless.

(vii) For each day during the period when data are being collected to develop a 10-day average, the owner or operator shall estimate the total sulfur concentration using the measured total sulfur concentration measured for that day.

(viii) For all days other than those during which data are being collected to develop a 10-day average, the owner or operator shall multiply the most recent 10-day average total sulfur-to-H_2S ratio by the daily average H_2S concentrations obtained using the monitor as required by paragraph (e)(2)(i) through (iii) of this section to estimate total sulfur concentrations.

(ix) If the total sulfur-to-H_2S ratio for a subsequent weekly sample is outside the acceptable range for the most recent distribution of daily ratios, the owner or operator shall develop a new 10-day average ratio and acceptable range based on data for the outlying weekly sample plus data collected over the following 9 operating days.

(3) *SO_2 monitoring requirements.* The owner or operator shall install, operate, calibrate and maintain an instrument for continuously monitoring and recording the concentration of SO_2 from a process heater or other fuel gas combustion device that is combusting gas representative of the fuel gas in the flare gas line according to the requirements in paragraph (a)(1) of this section, determine the F factor of the fuel gas at least daily according to the requirements in paragraphs (d)(2) through (4) of this section, determine the higher heating value of the fuel gas at least daily according to the requirements in paragraph (d)(7) of this section and calculate the total sulfur content (as SO_2) in the fuel gas using Equation 12 of this section.

$$TS_{FG} = C_{SO_2} \times F_d \times HHV_{FG} \qquad \text{(Eq. 12)}$$

Where:

TS_{FG} = Total sulfur concentration, as SO_2, in the fuel gas, ppmv.

C_{SO2} = Concentration of SO_2 in the exhaust gas, ppmv (dry basis at 0-percent excess air).

F_d = F factor gas on dry basis at 0-percent excess air, dscf/MMBtu.

HHV_{FG} = Higher heating value of the fuel gas. MMBtu/scf.

(4) *Exemptions from sulfur monitoring requirements.* Flares identified in paragraphs (e)(4)(i) through (iv) of this section are exempt from the requirements in paragraphs (e)(1) through (3) of this section. For each such flare, except as provided in paragraph (e)(4)(iv), engineering calculations shall be used to calculate the SO_2 emissions in the event of a discharge that may trigger a root cause analysis under § 60.103a(c)(1).

(i) Flares that can only receive:

(A) Fuel gas streams that are inherently low in sulfur content as described in paragraph (a)(3)(i) through (iv) of this section; and/or

(B) Fuel gas streams that are inherently low in sulfur content for which the owner or operator has applied for an exemption from the H_2S monitoring requirements as described in paragraph (b) of this section.

(ii) Emergency flares, provided that for each such flare, the owner or operator complies with the monitoring alternative in paragraph (g) of this section.

(iii) Flares equipped with flare gas recovery systems designed, sized and operated to capture all flows except those resulting from startup, shutdown or malfunction, provided that for each such flare, the owner or operator complies with the monitoring alternative in paragraph (g) of this section.

(iv) Secondary flares that receive gas diverted from the primary flare. In the event of a discharge from the secondary flare, the sulfur content measured by the sulfur monitor on the primary flare should be used to calculate SO_2 emissions, regardless of whether or not the monitoring alternative in paragraph (g) of this section is selected for the secondary flare.

(f) *Flow monitoring for flares.* Except as provided in paragraphs (f)(2) and (h) of this section, the owner or operator of an affected flare subject to § 60.103a(c) through (e) shall install, operate, calibrate and maintain, in accordance with the specifications in paragraph (f)(1) of this section, a CPMS to measure and record the flow rate of gas discharged to the flare. If a flow monitor is not already in place, the owner or operator of a modified flare shall comply with the requirements of this paragraph by no later than November 11, 2015 or upon startup of the modified flare, whichever is later.

(1) The owner or operator shall install, calibrate, operate and maintain each flow monitor according to the manufacturer's procedures and specifications and the following requirements.

(i) Locate the monitor in a position that provides a representative measurement of the total gas flow rate.

(ii) Use a flow sensor with a measurement sensitivity of no more than 5 percent of the flow rate or 10 cubic feet per minute, whichever is greater.

(iii) Use a flow monitor that is maintainable online, is able to continuously correct for temperature and pressure and is able to record flow in standard conditions (as defined in § 60.2) over one-minute averages.

(iv) At least quarterly, perform a visual inspection of all components of the monitor for physical and operational integrity and all electrical connections for oxidation and galvanic corrosion if the flow monitor is not equipped with a redundant flow sensor.

(v) Recalibrate the flow monitor in accordance with the manufacturer's procedures and specifications biennially (every two years) or at the frequency specified by the manufacturer.

(2) Emergency flares, secondary flares and flares equipped with flare gas recovery systems designed, sized and operated to capture all flows except those resulting from startup, shutdown or malfunction are not required to install continuous flow monitors; provided, however, that for any such flare, the owner or operator shall comply with the monitoring alternative in paragraph (g) of this section.

(g) *Alternative monitoring for certain flares equipped with water seals.* The owner or operator of an affected flare subject to § 60.103a(c) through (e) that can be classified as either an emergency flare, a secondary flare or a flare equipped with a flare gas recovery system designed, sized and operated to capture all flows except those resulting from startup, shutdown or malfunction may, as an alternative to the sulfur and flow monitoring requirements of paragraphs (e) and (f) of this section, install, operate, calibrate and maintain, in accordance with the requirements in paragraphs (g)(1) through (7) of this section, a CPMS to measure and record the pressure in the flare gas header between the knock-out pot and water seal and to measure and record the water seal liquid level. If the required monitoring systems are not already in place, the owner or operator of a modified flare shall comply with the requirements of this paragraph by no later than November 11, 2015 or upon startup of the modified flare, whichever is later.

(1) Locate the pressure sensor(s) in a position that provides a representative measurement of the pressure and locate the liquid seal level monitor in a position that provides a representative measurement of the water column height.

(2) Minimize or eliminate pulsating pressure, vibration and internal and external corrosion.

(3) Use a pressure sensor and level monitor with a minimum tolerance of 1.27 centimeters of water.

(4) Using a manometer, check pressure sensor calibration quarterly.

(5) Conduct calibration checks any time the pressure sensor exceeds the manufacturer's specified maximum operating pressure range or install a new pressure sensor.

(6) In a cascaded flare system that employs multiple secondary flares, pressure and liquid level monitoring is required only on the first secondary flare in the system (*i.e.*, the secondary flare with the lowest pressure release set point).

(7) This alternative monitoring option may be elected only for flares with four or fewer pressure exceedances required to be reported under § 60.108a(d)(5) ("reportable pressure exceedances") in any 365 consecutive calendar days. Following the fifth reportable pressure exceedance in a 365-day period, the owner or operator must comply with the sulfur and flow monitoring requirements of paragraphs (e) and (f) of this section as soon as practical, but no later than 180 days after the fifth reportable pressure exceedance in a 365-day period.

(h) *Alternative monitoring for flares located in the BAAQMD or SCAQMD.* An affected flare subject to this subpart located in the BAAQMD may elect to comply with the monitoring requirements in both BAAQMD Regulation 12, Rule 11 and BAAQMD Regulation 12, Rule 12 as an alternative to complying with the requirements of paragraphs (e) and (f) of this section. An affected flare subject to this subpart located in the SCAQMD may elect to comply with the monitoring requirements in SCAQMD Rule 1118 as an alternative to complying with the requirements of paragraphs (e) and (f) of this section.

(i) *Excess emissions.* For the purpose of reports required by § 60.7(c), periods of excess emissions for fuel gas combustion devices subject to the emissions limitations in § 60.102a(g) and flares subject to the concentration requirement in § 60.103a(h) are defined as specified in paragraphs (i)(1) through (5) of this section. Determine a rolling 3-hour or a rolling daily average as the arithmetic average of the applicable 1-hour averages (*e.g.*, a rolling 3-hour average is the arithmetic average of three contiguous 1-hour averages). Determine a rolling 30-day or a rolling 365-day average as the arithmetic average of the applicable daily averages (*e.g.*, a rolling 30-day average is the arithmetic average of 30 contiguous daily averages).

(1) *SO_2 or H_2S limits for fuel gas combustion devices.* (i) If the owner or operator of a fuel gas combustion device elects to comply with the SO_2 emission limits in § 60.102a(g)(1)(i), each rolling 3-hour period during which the average concentration of SO_2 as measured by the SO_2 continuous monitoring system required under paragraph (a)(1) of this section exceeds 20 ppmv, and each rolling 365-day period during which the average concentration of SO_2 as measured by the SO_2 continuous monitoring system required under paragraph (a)(1) of this section exceeds 8 ppmv.

(ii) If the owner or operator of a fuel gas combustion device elects to comply with the H_2S concentration limits in § 60.102a(g)(1)(ii), each rolling 3-hour period during which the average concentration of H_2S as measured by the

H_2S continuous monitoring system required under paragraph (a)(2) of this section exceeds 162 ppmv and each rolling 365-day period during which the average concentration as measured by the H_2S continuous monitoring system under paragraph (a)(2) of this section exceeds 60 ppmv.

(iii) If the owner or operator of a fuel gas combustion device becomes subject to the requirements of daily stain tube sampling in paragraph (b)(3)(iii) of this section, each day during which the daily concentration of H_2S exceeds 162 ppmv and each rolling 365-day period during which the average concentration of H_2S exceeds 60 ppmv.

(2) H_2S concentration limits for flares. (i) Each rolling 3-hour period during which the average concentration of H_2S as measured by the H_2S continuous monitoring system required under paragraph (a)(2) of this section exceeds 162 ppmv.

(ii) If the owner or operator of a flare becomes subject to the requirements of daily stain tube sampling in paragraph (b)(3)(iii) of this section, each day during which the daily concentration of H_2S exceeds 162 ppmv.

(3) *Rolling 30-day average NO_X limits for fuel gas combustion devices.* Each rolling 30-day period during which the average concentration of NO_X as measured by the NO_X continuous monitoring system required under paragraph (c) or (d) of this section exceeds:

(i) For a natural draft process heater, 40 ppmv and, if monitored according to § 60.107a(d), 0.040 lb/MMBtu;

(ii) For a forced draft process heater, 60 ppmv and, if monitored according to § 60.107a(d), 0.060 lb/MMBtu; and

(iii) For a co-fired process heater electing to comply with the NO_X limit in § 60.102a(g)(2)(iii)(A) or (g)(2)(iv)(A), 150 ppmv.

(iv) The site-specific limit determined by the Administrator under § 60.102a(i).

(4) *Daily NO_X limits for fuel gas combustion devices.* Each day during which the concentration of NO_X as measured by the NO_X continuous monitoring system required under paragraph (d) of this section exceeds the daily average emissions limit calculated using Equation 3 in § 60.102a(g)(2)(iii)(B) or Equation 4 in § 60.102a(g)(2)(iv)(B).

(5) *Daily O_2 limits for fuel gas combustion devices.* Each day during which the concentration of O_2 as measured by the O_2 continuous monitoring system required under paragraph (c)(6) of this section exceeds the O_2 operating limit or operating curve determined during the most recent biennial performance test.

■ 18. Section 60.108a is amended by:
■ a. Revising paragraph (b);
■ b. Revising paragraph (c)(1);
■ c. Revising paragraph (c)(6) introductory text and paragraphs (c)(6)(ii) through (vi);
■ d. Adding paragraphs (c)(6)(vii), (viii), (ix), (x) and (xi);
■ e. Adding paragraph (c)(7); and
■ f. Revising paragraph (d)(5).

The revisions and additions read as follows:

§ 60.108a Recordkeeping and reporting requirements.

* * * * *

(b) Each owner or operator subject to an emissions limitation in § 60.102a shall notify the Administrator of the specific monitoring provisions of §§ 60.105a, 60.106a and 60.107a with which the owner or operator intends to comply. Each owner or operator of a co-fired process heater subject to an emissions limitation in § 60.102a(g)(2)(iii) or (iv) shall submit to the Administrator documentation showing that the process heater meets the definition of a co-fired process heater in § 60.101a. Notifications required by this paragraph shall be submitted with the notification of initial startup required by § 60.7(a)(3).

(c) * * *

(1) A copy of the flare management plan.

* * * * *

(6) Records of discharges greater than 500 lb SO_2 in any 24-hour period from any affected flare, discharges greater than 500 lb SO_2 in excess of the allowable limits from a fuel gas combustion device or sulfur recovery plant and discharges to an affected flare in excess of 500,000 scf above baseline in any 24-hour period as required by § 60.103a(c). If the monitoring alternative provided in § 60.107a(g) is selected, the owner or operator shall record any instance when the flare gas line pressure exceeds the water seal liquid depth, except for periods attributable to compressor staging that do not exceed the staging time specified in § 60.103a(a)(3)(vii)(C). The following information shall be recorded no later than 45 days following the end of a discharge exceeding the thresholds:

* * * * *

(ii) The date and time the discharge was first identified and the duration of the discharge.

(iii) The measured or calculated cumulative quantity of gas discharged over the discharge duration. If the discharge duration exceeds 24 hours, record the discharge quantity for each 24-hour period. For a flare, record the measured or calculated cumulative quantity of gas discharged to the flare over the discharge duration. If the discharge duration exceeds 24 hours, record the quantity of gas discharged to the flare for each 24-hour period. Engineering calculations are allowed for fuel gas combustion devices, but are not allowed for flares, except for those complying with the alternative monitoring requirements in § 60.107a(g).

(iv) For each discharge greater than 500 lb SO_2 in any 24-hour period from a flare, the measured total sulfur concentration or both the measured H_2S concentration and the estimated total sulfur concentration in the fuel gas at a representative location in the flare inlet.

(v) For each discharge greater than 500 lb SO_2 in excess of the applicable short-term emissions limit in § 60.102a(g)(1) from a fuel gas combustion device, either the measured concentration of H_2S in the fuel gas or the measured concentration of SO_2 in the stream discharged to the atmosphere. Process knowledge can be used to make these estimates for fuel gas combustion devices, but cannot be used to make these estimates for flares, except as provided in § 60.107a(e)(4).

(vi) For each discharge greater than 500 lb SO_2 in excess of the allowable limits from a sulfur recovery plant, either the measured concentration of reduced sulfur or SO_2 discharged to the atmosphere.

(vii) For each discharge greater than 500 lb SO_2 in any 24-hour period from any affected flare or discharge greater than 500 lb SO_2 in excess of the allowable limits from a fuel gas combustion device or sulfur recovery plant, the cumulative quantity of H_2S and SO_2 released into the atmosphere. For releases controlled by flares, assume 99-percent conversion of reduced sulfur or total sulfur to SO_2. For fuel gas combustion devices, assume 99-percent conversion of H_2S to SO_2.

(viii) The steps that the owner or operator took to limit the emissions during the discharge.

(ix) The root cause analysis and corrective action analysis conducted as required in § 60.103a(d), including an identification of the affected facility, the date and duration of the discharge, a statement noting whether the discharge resulted from the same root cause(s) identified in a previous analysis and either a description of the recommended corrective action(s) or an explanation of why corrective action is not necessary under § 60.103a(e).

(x) For any corrective action analysis for which corrective actions are required in § 60.103a(e), a description of the corrective action(s) completed within the first 45 days following the discharge

and, for action(s) not already completed, a schedule for implementation, including proposed commencement and completion dates.

(xi) For each discharge from any affected flare that is the result of a planned startup or shutdown of a refinery process unit or ancillary equipment connected to the affected flare, a statement that a root cause analysis and corrective action analysis are not necessary because the owner or operator followed the flare management plan.

(7) If the owner or operator elects to comply with § 60.107a(e)(2) for a flare, records of the H_2S and total sulfur analyses of each grab or integrated sample, the calculated daily total sulfur-to-H_2S ratios, the calculated 10-day average total sulfur-to-H_2S ratios and the 95-percent confidence intervals for each 10-day average total sulfur-to-H_2S ratio.

(d) * * *

(5) The information described in paragraph (c)(6) of this section for all discharges listed in paragraph (c)(6) of this section. For a flare complying with the monitoring alternative under § 60.107a(g), following the fifth discharge required to be recorded under paragraph (c)(6) of this section and reported under this paragraph, the owner or operator shall include notification that monitoring systems will be installed according to § 60.107a(e) and (f) within 180 days following the fifth discharge.

* * * * *

■ 19. Section 60.109a is amended by revising paragraph (b) introductory text and adding paragraph (b)(4) to read as follows:

§ 60.109a Delegation of authority.

* * * * *

(b) In delegating implementation and enforcement authority of this subpart to a state, local or tribal agency, the approval authorities contained in paragraphs (b)(1) through (4) of this section are retained by the Administrator of the U.S. EPA and are not transferred to the state, local or tribal agency.

* * * * *

(4) Approval of an application for an alternative means of emission limitation under § 60.103a(j) of this subpart.

■ 20. Table 1 to subpart Ja is added to read as follows:

TABLE 1 TO SUBPART JA OF PART 60—MOLAR EXHAUST VOLUMES AND MOLAR HEAT CONTENT OF FUEL GAS CONSTITUENTS

Constituent	MEV[a] dscf/mol	MHC[b] Btu/mol
Methane (CH_4)	7.29	842
Ethane (C_2H_6)	12.96	1,475
Hydrogen (H_2)	1.61	269
Ethene (C_2H_4)	11.34	1,335
Propane (C_3H_8)	18.62	2,100
Propene (C_3H_6)	17.02	1,947
Butane (C_4H_{10})	24.30	2,717
Butene (C_4H_8)	22.69	2,558
Inerts	0.85	0

[a] MEV = molar exhaust volume, dry standard cubic feet per gram-mole (dscf/g-mol) at standard conditions of 68 °F and 1 atmosphere.

[b] MHC = molar heat content (higher heating value basis), Btu per gram-mole (Btu/g-mol).

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Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for the Jemez Mountains Salamander and Proposed Designation of Critical Habitat; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2012–0063; 4500030114]

RIN 1018–AY24

Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for the Jemez Mountains Salamander and Proposed Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the Jemez Mountains salamander as an endangered species under the Endangered Species Act of 1973, as amended (Act); and propose to designate critical habitat for the species. In total, approximately 90,789 acres (36,741 hectares) are being proposed for designation as critical habitat in Los Alamos, Rio Arriba, and Sandoval Counties, New Mexico.

DATES: We will accept comments received or postmarked on or before November 13, 2012. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by October 29, 2012.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov*. In the Search box, enter FWS–R2–ES–2012–0063, which is the docket number for this rulemaking. You may submit a comment by clicking on "Comment Now!".

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R2–ES–2012–0063; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information). The coordinates or plot points or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at *http://www.fws.gov/southwest/es/NewMexico/*, *http://www.regulations.gov* at Docket No. FWS–R2–ES–2012–0063, and at the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional supporting information that we may develop for this critical habitat designation will also be available at the above locations.

FOR FURTHER INFORMATION CONTACT: Wally Murphy, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna NE., Albuquerque, NM 87113; by telephone 505–346–2525; or by facsimile 505–346–2542. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

Executive Summary

Purpose of the Regulatory Action

Under the Act, a species or subspecies may warrant protection through listing if it is an endangered or threatened species throughout all or a significant portion of its range. On September 9, 2010, we published a 12-month finding stating that listing the Jemez Mountains salamander (*Plethodon neomexicanus*) under the Act was warranted, but precluded by other listing priorities (75 FR 54822). In that document we explained that the species currently faces numerous threats of high magnitude, and, therefore, qualifies for listing. This rule reassesses all available information regarding status of and threats to the salamander.

Under the Act, a species may be determined to be an endangered or threatened species based on any of five factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued existence. We have determined that the Jemez Mountains salamander meets the definition of an endangered species due to three of these five factors.

Summary of the Major Provisions of the Regulatory Action in Question

This document consists of: (1) A proposed rule to list the Jemez Mountains salamander (*Plethodon neomexicanus*) as an endangered species; and (2) a proposed rule for designation of critical habitat for the Jemez Mountains salamander.

We will obtain opinions from knowledgeable individuals with scientific expertise to review our technical assumptions, analysis, adherence to regulations, and whether or not we had used the best available information. These peer reviewers will analyze our methods and conclusions and provide additional information, clarifications, and suggestions to improve the final listing and critical habitat rule. As a result, we will make a final determination as to whether the Jemez Mountains salamander is an endangered or threatened species, and designate critical habitat as appropriate, in the final rule. For this rule, we propose to list the Jemez Mountains salamander as an endangered species and propose to designate approximately 90,789 acres (36,741 hectares) of critical habitat in Los Alamos, Rio Arriba, and Sandoval Counties, New Mexico.

SUPPLEMENTARY INFORMATION: This document consists of: (1) A proposed rule to list the Jemez Mountains salamander (salamander) as an endangered species; and (2) a proposed critical habitat designation for the salamander.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from the public, other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and regulations that may be addressing those threats.

(2) Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of this species.

(3) Any information on the biological or ecological requirements of the species, and ongoing conservation measures for the species and its habitat.

(4) Current or planned activities in the geographic areas occupied by the species and possible impacts of these activities on this species.

(5) Any information on impacts to the species resulting from fire management practices, severe wildfire, forest composition and structure conversions,

post-fire rehabilitation, other forest management practices (including salvage logging, building of roads and trails, and recreational use).

(6) The reasons why we should or should not designate habitat as "critical habitat" under section 4 of the Act (16 U.S.C. 1531 *et seq.*) including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(7) Specific information on:

(a) The amount and distribution of Jemez Mountains salamander habitat;

(b) What areas that are currently occupied and contain features essential to the conservation of the species that should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(8) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(9) Information on the projected and reasonably likely impacts of climate change on the Jemez Mountains salamander and proposed critical habitat.

(10) Any foreseeable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(11) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(12) The appropriateness of the methodology used for delineating the proposed critical habitat (including any data that might help further refine these areas).

(13) The likelihood of adverse social reactions to the designation of critical habitat and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(14) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Please note that 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, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made "solely on the basis of the best scientific and commercial data available."

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described 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 your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this 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*. Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

In December 1982, we published a notice of review classifying the salamander as a Category 2 species (47 FR 58454, December 30, 1982). Category 2 status included those taxa for which information in the Service's possession indicated that a proposed listing rule was possibly appropriate, but for which sufficient data on biological vulnerability and threats were not available to support a proposed rule.

On February 21, 1990, we received a petition to list the Jemez Mountains salamander as threatened. Subsequently, we published a substantial 90-day finding, indicating that the petition contained sufficient information to suggest that listing may be warranted (55 FR 38342; September 18, 1990). In the Candidate Notice of Review (CNOR) published on November 21, 1991, we announced the salamander as a Category 1 species with a "declining" status (56 FR 58814). Category 1 status included those species for which the Service had on file substantial information regarding the species' biological vulnerability and threat(s) to support proposals to list them as either an endangered or threatened species. The "declining" status indicated decreasing numbers, increasing threats, or both.

On May 30, 1991, the Service, the U.S. Forest Service (USFS), and the New Mexico Department of Game and Fish (NMDGF) signed a Memorandum of Agreement outlining actions to be taken to protect the salamander and its habitat on the Santa Fe National Forest lands, including the formation of a team of agency biologists to immediately implement the Memorandum of Agreement and to develop a management plan for the species. The management plan was to be incorporated into the Santa Fe National Forest Plan. On April 3, 1992, we published a 12-month finding that listing the salamander was not warranted because of the conservation measures and commitments within the Memorandum of Agreement (57 FR 11459). In the November 15, 1994, CNOR, we included the salamander as a Category 2 species, with a trend status of "improving" (59 FR 58982). A status of "improving" indicated those species known to be increasing in numbers or whose threats to their continued existence were lessening in the wild.

In the CNOR published on February 28, 1996, we announced a revised list of animal and plant taxa that were regarded as candidates for possible addition to the List of Endangered and Threatened Wildlife and Plants (61 FR 7596). The revised candidate list included only former Category 1 species. All former Category 2 species were dropped from the list in order to reduce confusion about the conservation status of those species, and to clarify that the Service no longer regarded them as candidates for listing. Because the Jemez Mountains salamander was a Category 2 species, it was no longer recognized as a candidate species as of the February 28, 1996, CNOR.

In January, 2000, the New Mexico Endemic Salamander Team (NMEST), a group of interagency biologists representing NMDGF, the Service, the U.S. Geological Survey, and the Santa

Fe National Forest, finalized a Cooperative Management Plan for the Jemez Mountains salamander on lands administered by the Santa Fe National Forest (Cooperative Management Plan), and the agencies signed an updated Conservation Agreement that superseded the Memorandum of Agreement. The stated purpose of the Conservation Agreement and the Cooperative Management Plan was to provide for the long-term conservation of salamanders by reducing or removing threats to the species and by proactively managing their habitat (NMEST 2000 Conservation Agreement, p. 1). In a Decision Notice and Finding of No Significant Impact for the Forest Plan Amendment for Managing Special Status Species Habitat, signed on December 8, 2004, the Cooperative Management Plan was incorporated into the Santa Fe National Forest Plan.

On October 15, 2008, we received a petition dated October 9, 2008, from WildEarth Guardians requesting that we list the Jemez Mountains salamander as either an endangered or threatened species under the Act, and designate critical habitat. On August 11, 2009, we published a 90-day finding that the petition presented substantial information that listing the salamander may be warranted and that initiated a status review of the species (74 FR 40132). On December 30, 2009, WildEarth Guardians filed suit against the Service for failure to issue a 12-month finding on the petition (*WildEarth Guardians* v. *Salazar*, No. 09–1212 (D.N.M.)). Under a stipulated settlement agreement, we published a 12-month finding on September 9, 2010, that listing the salamander as either an endangered or threatened species was warranted but precluded by higher priority actions (75 FR 54822). This rule constitutes our proposal to list the Jemez Mountains salamander as an endangered species and our proposal to designate critical habitat.

Proposed Endangered Status for the Jemez Mountains Salamander

Background

Species Information

The salamander is uniformly dark brown above, with occasional fine gold to brassy coloring with stippling dorsally (on the back and sides) and is sooty gray ventrally (underside). The salamander is slender and elongate, and it possesses foot webbing and a reduced fifth toe. This salamander is a member of the family Plethodontidae, is strictly terrestrial, and does not use standing surface water for any life stage. Respiration occurs through the skin, which requires a moist microclimate for gas exchange.

Taxonomy and Species Description

The Jemez Mountains salamander was originally reported as *Spelerpes multiplicatus* (=*Eurycea multiplicata*) in 1913 (Degenhardt *et al.* 1996, p. 27); however, it was described and recognized as a new and distinct species (*Plethodon neomexicanus*) in 1950 (Stebbins and Riemer, pp. 73–80). No subspecies are recognized.

The Jemez Mountains salamander is one of two species of plethodontid salamanders endemic (native and restricted to a particular region) to New Mexico: The Jemez Mountains salamander and the Sacramento Mountains salamander (*Aneides hardii*). Unlike most other North American plethodontid salamanders, these two species are geographically isolated from all other species of *Plethodon* and *Aneides*.

Distribution

The distribution of plethodontid salamanders in North America has been highly influenced by past changes in climate and associated Pleistocene glacial cycles. In the Jemez Mountains, the lack of glacial landforms indicates that alpine glaciers may not have developed here, but evidence from exposed rocky areas (felsenmeers) may reflect near-glacial conditions during the Wisconsin Glacial Episode (Allen 1989, p. 11). Conservatively, the salamander has likely occupied the Jemez Mountains for at least 10,000 years, but this could be as long as 1.2 million years, colonizing the area subsequent to volcanic eruption.

The salamander is restricted to the Jemez Mountains in northern New Mexico, in Los Alamos, Rio Arriba, and Sandoval Counties, around the rim of the collapsed caldera (large volcanic crater), with some occurrences on topographic features (e.g., resurgent domes) on the interior of the caldera. The majority of salamander habitat is located on federally managed lands, including the USFS, the National Park Service (Bandelier National Monument), Valles Caldera National Preserve (VCNP), and Los Alamos National Laboratory, with some habitat located on tribal land and private lands (NMEST 2000, p. 1). The VCNP is located west of Los Alamos, New Mexico, and is part of the National Forest System (owned by the U.S. Department of Agriculture), but run by a nine-member Board of Trustees: the Supervisor of Bandelier National Monument, the Supervisor of the Santa Fe National Forest, and seven other members with distinct areas of experience or activity appointed by the President of the United States (Valles Caldera Trust 2005, pp. 1–11). Prior to Federal ownership in 2000, the VCNP was privately held. The species predominantly occurs at an elevation between 7,200 and 9,500 feet (ft) (2,200 and 2,900 meters (m)) (Degenhardt *et al.* 1996, p. 28), but has been found as low as 6,998 ft (2,133 m) (Ramotnik 1988, p. 78) and as high as 10,990 ft (3,350 m) (Ramotnik 1988, p. 84).

Movements, Home Range, and Dispersal

Ramotnik (1988, pp. 11–12) used implanted radioactive wires in polyethylene tubing to track 9 individual salamanders for durations between 2 days and 6 weeks, monitoring their movements every 1 to 3 days, and two salamanders were tracked every 2 hours throughout a 12-hour period. Ramotnik (1988, p. 27) reported individual distances salamanders moved between consecutive observations ranged from 0 to 108 ft (0 to 13 m) and that 73 percent of recorded movements were less than 3.3 ft (1 m). In 59 of 109 observations, salamanders did not move. When the zero-distance movements were excluded from analysis, the average distance salamanders moved was 7.8 ft (2.4 m), with the greatest movement of 43 ft (13 m) (Ramotnik 1988, p. 28). Ramotnik (1988, p. 32) also estimated the home range of six salamanders with these data and reports the average home range was 86 square feet (ft^2) (8.0 square meters (m^2); males had a larger home range (137 ft^2 (12.7 m^2)) than females (78 ft^2 (7.2 m^2)). The individuals that had larger home ranges (greater than 54 ft^2 (5.0 m^2)) were often found returning to the same cover object; whereas individuals with home ranges less than 54 ft^2 (5 m^2) rarely returned to the same spot (Ramotnik 1988, p. 32). While these data are limited because small sample size, they provide some information on the relatively small movements made by individuals and their relatively small home range.

In another well-studied terrestrial salamander, the red-backed salamander (*Plethodon cinereus*), there is conflicting evidence regarding its dispersal abilities. Some information suggests this salamander exhibits small movements, even across multiple years, consisting primarily of small home ranges and with little movement among cover objects. However, there is other evidence of moderate-distance homing ability, greater movement during colonization events, and an estimated range expansion of 262 ft (80 m) per year over the last 18,000 years (Cabe *et*

al. 2007, p. 54). Cabe *et al.* 2007 (pp. 53–60) measured gene flow of red-backed salamanders across a continuous forested habitat as an indicator of the salamander's dispersal. They suggested that gene flow and dispersal frequency were normally low, indicating that red-backed salamanders generally do not move much, but under certain circumstances, they might disperse farther than normal. These unique conditions occur when the population density of red-backed salamanders is so high in a given area that the habitat is saturated with them, and there is a resultant reduction in breeding success, and other, less densely populated habitat is available (Cabe *et al.* 2007, p. 53). The Jemez mountains salamander is likely similar to other terrestrial salamanders, where dispersal distance and frequency is generally low, but some individuals may make moderate dispersal movements into available habitat.

In the 12-month finding for the Jemez Mountains salamander (75 FR 54822; September 9, 2010), we divided known salamander distributional data into five units (Unit 1-Western; Unit 2-Northern; Unit 3-East-South-Eastern; Unit 4-Southern; and Unit 5-Central), to provide clarity in describing and analyzing the potential threats that may differ across the species' range. However, for this rule, we are no longer using these units as reference, because we did not want to cause confusion with the critical habitat units.

Habitat

The strictly terrestrial Jemez Mountains salamander predominantly inhabits mixed-conifer forest, consisting primarily of Douglas fir (*Pseudotsuga menziesii*), blue spruce (*Picea pungens*), Engelman spruce (*P. engelmannii*), white fir (*Abies concolor*), limber pine (*Pinus flexilis*), Ponderosa pine (*P. ponderosa*), Rocky Mountain maple (*Acer glabrum*), and aspen (*Populus tremuloides*) (Degenhardt *et al.* 1996, p. 28; Reagan 1967, p. 17). The species has occasionally been found in stands of pure Ponderosa pine and in spruce-fir and aspen stands, but these forest types have not been adequately surveyed. Predominant understory includes Rocky Mountain maple (*Acer glabrum*), New Mexico locust (*Robinia neomexicana*), oceanspray (*Holodiscus sp.*), and various shrubby oaks (*Quercus spp.*) (Degenhardt *et al.* 1996, p. 28; Reagan 1967, p. 17). Salamanders are generally found in association with decaying coniferous logs, and in areas with abundant white fir, Ponderosa pine, and Douglas fir as the predominant tree species (Ramotnik 1988, p. 17; Reagan 1967, pp. 16–17). Salamanders use decaying coniferous logs (particularly Douglas fir logs) considerably more often than deciduous logs, likely due to the physical features (e.g., blocky pieces with cracks and spaces) that form as coniferous logs decay (Ramotnik 1988, p. 53). Still, the species may be found beneath some deciduous logs and excessively decayed coniferous logs, because these can provide aboveground habitat and cover (Ramotnik 1988, p. 53).

Biology

The Jemez Mountains salamander is strictly terrestrial, does not possess lungs, and does not use standing surface water for any life stage. Respiration occurs through the skin, which requires a moist microclimate for gas exchange. Substrate moisture through its effect on absorption and loss of water is probably the most important factor in the ecology of this terrestrial salamander, as it is in other strictly terrestrial salamander species (Heatwole and Lim 1961, p. 818). The Jemez Mountains salamander spends much of its life underground and can be found above ground when relative environmental conditions are warm and wet, which is typically from July through September; but occasional salamander observations have been made in May, June, and October. Relatively warm and wet environmental conditions suitable for salamander aboveground activity are likely influenced by snow infiltration and summer monsoon rains. When active above ground, the species is usually found under decaying logs, rocks, bark, moss mats, or inside decaying logs or stumps.

The salamander's subterranean habitat appears to be deep, fractured, subterranean rock in areas with high soil moisture (NMEST 2000, p. 2) where the geologic and moisture constraints likely limit the distribution of the species. Soil pH (acidity or alkalinity) may limit distribution as well. It is unknown whether the species forages or carries on any other activities below ground, although it is presumed that eggs are laid and hatch underground. Salamander prey from aboveground foraging is diverse in size and type, with ants (Hymenoptera, Formicidae), mites (Acari), and beetles (Coleoptera) being most important (most numerous, most voluminous, and most frequent) in the salamander's diet (Cummer 2005, p. 43). Cummer (2005, pp. 45–50) found that specialization on invertebrate species was unlikely, but there was likely a preferential selection of prey categories (ants, mites, and beetles).

The aboveground microhabitat (under or inside cover objects) temperature for 577 Jemez Mountains salamanders ranged from 43 to 63 degrees Fahrenheit (°F) (6.0 to 17.0 degrees Celsius (°C)), with an average of 54.9 °F (12.7 °C) (Williams 1972, p. 18). Significantly more salamanders were observed under logs where temperatures are closest to the average temperature (54.5 °F (12.5 °C)) than inside logs where temperatures deviated the most from the average temperature (55.9 °F (13.3 °C)) (Williams 1972, p. 19).

Sexual maturity is attained at 3 to 4 years in age for females and 3 years for males (Williams 1976, pp. 31, 35). Reproduction in the wild has not been observed; however, based on observed physiological changes, mating is believed to occur above ground between July and August (Williams 1976, pp. 31–36). Based on examination of 57 female salamanders in the wild and 1 clutch of eggs laid in a laboratory setting, Williams (1978, p. 475) concluded that females likely lay 7 or 8 eggs every other year or every third year. Eggs are thought to be laid subterranean the spring after mating occurs (Williams 1978, p. 475). Jemez Mountains salamanders have direct-developing eggs, whereby fully formed salamanders hatch from the eggs. The lifespan of the salamander in the wild is unknown. However, considering the estimated lifespan of other similar terrestrial plethodontid salamanders and the above reproductive information, we believe that the lifespan of this species is likely greater than 10 years.

Status of the Species

A complete overview of the available survey data and protocols for the Jemez Mountains salamander is reported in the 12-month finding for the salamander (75 FR 54822; September 9, 2010). In summary, we have approximately 20 years of salamander survey data that provide detection information at specific survey sites for given points in time. The overall rangewide population size of the Jemez Mountains salamander is unknown because surveys tend to be localized (approximately 200 m by 200 m areas (256 ft by 256 ft), and we cannot meaningfully relate these data to the demographics of the species. Additionally, like most plethodontid salamanders, monitoring population size or trends of the Jemez Mountains salamander is inherently difficult because of the natural variation associated with the species' behavior (Hyde and Simons 2001, p. 624). For example, when the species is underground, they cannot be detected. Therefore, the probability of detecting a

salamander is highly variable and dependent upon the environmental and biological parameters that drive aboveground and belowground activities (Hyde and Simons 2001, p. 624). Given the known bias of detection probabilities and the inconsistent survey effort across years, population trends and population size estimates using existing data cannot be made accurately.

Despite our inability to quantify population size or trends for the salamander, these qualitative data (data that are observable, but not measurable) provide information for potential inferences. Based on these inferences, we believe that the persistence of the salamander may vary across the range of the species. For example, in some localities where the salamander was once considered abundant or common, the salamander is now rarely detected or has not been recently detected at all (New Mexico Heritage Program 2010a and b, spreadsheets). There also appears to be an increase in the number of areas where salamanders were once present, but have not been observed during more recent surveys (New Mexico Heritage Program 2010a and b, spreadsheets). Alternatively, there are two localities on the VCNP where the salamander continues to be relatively abundant, compared to most other recent detections (Redondo Border located in the central portion of the VCNP, and on a slope in the northeast portion of the VCNP). Still, the number of individuals found at these 2 localities is far less than other historical reports including the report in which 659 individuals were captured in a single year in 1970 and 394 of those individuals were captured in a single month (Williams 1976, p. 26). Currently, there is no known location where the number of salamanders observed is similar to that observed in 1970.

Overall, some of the localized survey areas appear to be unchanging (survey results with similar numbers of salamanders through time during the period in which environmental conditions for salamander aboveground activity is warm and wet, which is typically from July through September). However, in other areas, particularly along the western and southern sides of the range, the number of salamanders observed during surveys appears to be decreasing or the number of surveys resulting in no detections at all are increasing (fewer or no salamanders observed for the same survey effort, while environmental conditions for salamander aboveground activity is considered optimal) (New Mexico Heritage Program 2010a and b, spreadsheets). An assessment of population trends using these data would not be accurate, unless we could demonstrate that these limited data are representative of the overall population. We expect that detecting overall trends will be difficult for this species, given data limitations, the cost of comprehensive surveys, and the likelihood of natural, annual, and spatial variations.

In summary, the available data cannot be used to estimate population size or trends in the rangewide abundance of the salamander. Although we lack specific long-term population and trend information, available data and qualitative observations of salamanders suggest that the species is more difficult to find during surveys. Even though we are not able to estimate population trends, the number of surveys resulting in no salamander detections is increasing. Because we have limited data regarding the status of the species or population trends, we specifically request this information.

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The principal threats to the habitat of the Jemez Mountains salamander include historical fire exclusion (the act of preventing fire) and suppression (the act of putting out fire) and severe wildland fires; forest composition and structure conversions; post-fire rehabilitation; forest and fire management; roads, trails, and habitat fragmentation; and recreation.

Fire Exclusion, Suppression, and Severe Wildland Fires

In the Jemez Mountains, over 100 years of fire suppression and fire exclusion (along with livestock grazing and other stressors) have altered forest composition and structure, and increased the threat of wildfire in Ponderosa pine and mixed-conifer forests (Belsky and Blumenthal 1997, p. 318). Fire has been an important process in the Jemez Mountains for at least several thousand years (Allen 1989, p. 69), indicating that the salamander coexisted with historical fire regimes. Frequent, low-intensity surface fires and patchy, small-scale, high-intensity fires in the Jemez Mountains historically maintained salamander habitat. These fires spread widely through grassy understory fuels, or erupted on very small scales. The natural fire intervals prior to the 1900s ranged from 5 to 25 years across the Jemez Mountains (Allen 2001, p. 4). Dry mixed-conifer forests burned on average every 12 years, whereas wet mixed-conifer forests burned on average every 20 years. Historically, patchy surface fires within mixed-conifer forests would have thinned stands and created natural fuel breaks that would limit the extent of fires. Still, in very dry years, there is evidence of historical fires occurring across entire watersheds, but they did not burn with high severity over entire mountain sides (Jemez Mountains Adaptive Planning Workshop Session II Final Notes 2010, p. 7). Aspen stands are evidence of historical patchy crown fires that represent the relatively small-scale, stand-replacing fires that have historically occurred in the Jemez Mountains, which are also associated with significantly dry years (Margolis *et al.* 2007, p. 2236).

These historical fire patterns were interrupted in the late 1800s through the elimination of fine fuels, as a result of livestock overgrazing and historical managed fire suppression. This interruption and exclusion of fire promoted the development of high forest stand densities with heavy accumulations of dead and downed fuel, and growth of ladder fuels (the dense mid-story trees that favor development of crown fires) (Allen 2001, pp. 5–6). In fact, past fire exclusion activities in this area converted historically low- to moderate-severity fire regimes with small, patchy fires to high-severity, large-scale, stand-replacing fires that have the potential to significantly destroy or degrade salamander habitat (USFS 2009a, pp. 8–9). The disruption of the natural cycle of fire and subsequent accumulation of

continuous fuels within the coniferous forests on south- and north-facing slopes has increased the chances of a severe wildfire affecting large areas of salamander habitat within the Jemez Mountains (e.g., see USFS 2009a, 2009b).

In recent years, prescribed fire at VCNP has been limited, with only one burn in 2004 that was described as creating a positive vegetation response (ENTRIX 2009, p. 97). A prescribed fire plan is expected to be developed (ENTRIX 2009, p. 97), because there is concern for severe wildland fires to occur (Parmenter 2009, cited in Service 2010). The planned Scooter Peak prescribed burn between the VCNP and Bandelier National Monument is a fuel-reduction project in occupied salamander habitat, but is small in scale (approximately 960 acres (ac) (390 hectares (ha)) (ENTRIX 2009, p. 2). Although future thinning of secondary growth may partially reduce the risk of severe wildland fires in areas, these efforts are not likely at a sufficient geographical scale to lessen the overall threat to the salamander.

The frequency of large-scale, high-severity, stand-replacing wildland fires has increased in the latter part of the 20th century in the Jemez Mountains. This increase is due to landscape-wide buildup of woody fuels associated with removal of grassy fuels from extreme year-round livestock overgrazing in the late 1800s, and subsequent fire suppression (Allen 1989, pp. 94–97; 2001, pp. 5–6). The majority of wildfires over the past 20 years have exhibited crown fire behavior and burned in the direction of the prevailing south or southwest winds (USFS 2009a, p. 17). The first severe wildland fire in the Jemez Mountains was the La Mesa Fire in 1977, burning 15,400 ac (6,250 ha). Subsequent fires included the Buchanon Fire in 1993 (11,543 ac (4,671 ha)), the Dome Fire in 1996 (16,516 ac (6,684 ha)), the Oso Fire in 1997 (6,508 ac (2,634 ha)), the Cerro Grande Fire in 2000 (42,970 ac (17,390 ha)), and the Lakes Fire Complex (Lakes and BMG Fires) in 2002 (4,026 ac (1,629 ha)) (Cummer 2005, pp. 3–4). Between 1995 and 2010, severe wildland fires have burned about 36 percent of modeled or known salamander habitat on USFS lands (USFS 2009, p. 1). Following the Cerro Grande Fire, the General Accounting Office reported that these conditions are common in much of the western part of the United States turning areas into a "virtual tinderbox" (General Accounting Office 2000, p. 15).

In 2011, the Las Conchas Fire burned 150,590 ac (60,942 ha) in the Jemez Mountains, and, until the 2012 Whitewater Complex Fire in southwestern New Mexico, Las Conchas was New Mexico's largest wildfire to date (USFS 2011a, p. 1). The Las Conchas Fire burned approximately 17,780 ac (7,195 ha) of modeled or known salamander habitat in the east, south, and southeastern part of its range. This demonstrates that the threat of severe wildland fires to salamander habitat remains high, due to tons of dead and down fuel, overcrowded tree conditions leading to poor forest health, and dense thickets of small-diameter trees. There is a 36 percent probability of having at least one large fire of 4,000 ac (over 1,600 ha) every year for the next 20 years in the southwest Jemez Mountains (USFS 2009a, p. 19). Moreover, the probability of exceeding this estimated threshold of 4,000 ac (1,600 ha) burned in the same time period is 65 percent (USFS 2009a, p. 19). As an example of the severe fire risk, the Thompson Ridge-San Antonio area in the western portion of the salamander's range has extensive ladder fuels and surface fuels estimated at over 20 tons per acre, and the understory in areas contains over 800 dense sapling trees per acre within the mixed-conifer and Ponderosa pine stands (USFS 2009a, pp. 24–25). The canyon topography aligns with south winds and steep slopes, making this area highly susceptible to crown fire (USFS 2009a, pp. 24–25). Moreover, we found that the risk of burning is not eliminated following severe wildfires. Some areas that previously burned during the 2000 Cerro Grande Fire burned again during the 2011 Las Conchas Fire.

Increases in soil and microhabitat temperatures, which generally increase with increasing burn severity, can have profound effects on salamander behavior and physiology and can, therefore, influence their ability to persist subsequent to severe wildland fires. Following the Cerro Grande Fire, soil temperatures were recorded under potential salamander cover objects in geographic areas occupied by the salamander (Cummer and Painter 2007, pp. 26–37). Soil temperatures in areas of high-severity burn exceeded the salamander's thermal tolerance (the temperature that causes death) (Spotila 1972, p. 97; Cummer and Painter 2007, pp. 28–31). Because widespread dry conditions are an important factor contributing to the occurrence of severe wildfire, when severe wildfire occurs, most salamanders are likely protected in subterranean habitat and are not killed directly from wildfire. However, even in moderate and high-severity burned areas where fires did not result in the death of salamanders, the microhabitat conditions, such as those resulting from the Cerro Grande Wildfire, would limit the timing and duration that the salamanders could be active above ground (feeding and mating). Moreover, elevated temperatures lead to increases in oxygen consumption, heart rate, and metabolic rate, resulting in decreased body water (the percentage of water in the body) and body mass (Whitford 1968, pp. 247–251). Physiological stress from elevated temperatures may also increase susceptibility to disease and parasites. Effects from temperature increases are discussed in greater detail under Factor E, below.

Severe wildland fires typically increase soil pH, which could affect the salamander. In one study of the Jemez Mountains salamander, soil pH was the single best indicator of relative abundance of salamanders at a site (Ramotnik 1988, pp. 24–25). Sites with salamanders had a soil pH of 6.6 (± 0.08) and sites without salamanders had a soil pH of 6.2 (± 0.06). In another species of a terrestrial plethodontid salamander, the red-backed salamander (*Plethodon cinereus*), soil pH influences and limits its distribution and occurrence as well as its oxygen consumption rates and growth rates (Wyman and Hawksley-Lescault 1987, p. 1823). Similarly, Frisbie and Wyman (1991, p. 1050) found the disruption of sodium balance by acidic conditions in three species of terrestrial salamanders. A low pH substrate can also reduce body sodium, body water levels, and body mass (Frisbie and Wymán 1991, p. 1050). Changes in soil pH following wildfire could impact the salamander, either by making the habitat less suitable, or through physiological stress.

Including the Santa Fe National Forest, the existing risk of wildfire on the VCNP and surrounding areas is uncharacteristically high and is a significant departure from historical conditions over 100 years ago (VCNP 2010, p. 3.1; Allen 1989, pp. ii–346; 2001, pp. 1–10). Several regulatory attempts have been made to address and correct the altered ecological balance of New Mexico's forests resulting from a century of fire suppression, logging, and livestock grazing. Congress enacted the Community Forest Restoration Act to promote healthy watersheds and reduce the threat of large, high-intensity wildfires; insect infestation; and disease in the forests in New Mexico (H.R. 2389, Public Law 106–393). The subsequent Omnibus Public Land Management Act, also called the "Forest Landscape Restoration Act" (Title, IV, Public Law III–II, 2009), established a national program that encourages ecological,

economic, and social sustainability and utilization of forest restoration byproducts to benefit local rural economies and improve forest health. As a result, the Santa Fe National Forest and partners prepared the Southwest Jemez Mountains Landscape Assessment designed to reduce the threat of severe wildland fire in the western and southern part of the salamander's range over the next 10 years (USFS 2009, p. 2).

In 2011, this Collaborative Forest Landscape Restoration project was selected and is eligible for up to $4 million per year to restore approximately 210,000 ac (85,000 ha) of forest in the southwestern Jemez Mountains (USFS 2011b, pp. 1–2), but a lack of matching funds may limit the geographical extent of this project. Moreover, this project will not effectively address the short-term risk of severe wildland fire to the species because treatments are anticipated to be implemented slowly, over a decade or more, and will likely not begin in salamander habitat until at least 2013. Finally, it is unknown whether the proposed treatments will effectively reduce the risk of severe wildfire to the salamander or its habitat without causing additional harm to the species, because measures to minimize impacts will be experimental and have not yet been developed. We believe that this risk of wildfire is one of the most significant threats facing this species, and projects attempting to reduce the threat of wildland fire will need to be implemented over a large part of the landscape before significant risk reduction for the salamander is achieved. For these reasons, we conclude that the overall risk of severe wildland fire will not be significantly reduced or eliminated on USFS lands, National Park Service lands, the VCNP, or surrounding lands in the future.

Since 1977, these severe wildland fires have significantly degraded important features of salamander habitat, including removal of tree canopy and shading, increases of soil temperature, decreases of soil moisture, increased pH, loss or reduction of soil organic matter, reduced soil porosity, and short-term creation of hydrophobic (water-repelling) soils. These and other effects limit the amount of available aboveground habitat, and the timing and duration when salamanders can be active above ground, which negatively impacts salamander behavior (e.g., maintenance of water balance, foraging, and mating) and physiology (e.g., increased dehydration, heart rate and oxygen consumption, and increased energy demands). These negative impacts are greater for hatchlings and juvenile salamanders because, relative to their body mass size, they have a greater skin surface area than larger salamanders, and thus have greater rates of water and gas exchange over their skin surface. Survivorship of hatchlings and juveniles is likely reduced from the effects of extensive stand-replacing wildland fires.

For these reasons, severe wildland fires have led to a reduction in the quality and quantity of the available salamander habitat rangewide, reducing the survivorship and fecundity of the salamander rangewide. The USFS concludes, and we concur, that habitat loss from extensive, stand-replacing wildland fire is a threat to the salamander (USFS 2009c, p. 1), and these effects will likely continue into the future, because areas that have not burned in the past 15 years are still at extremely high risk, and areas that have experienced severe wildfires in the last 15 years have degraded habitat that continues to adversely affect the salamander. We consider the reduction in the quality and quantity of habitat from extensive stand-replacing wildland fire to be a significant threat to the species, because this threat is rangewide and affects salamander behavior, physiology, and reproductive success. Therefore, we believe that severe wildland fire has substantially impacted the salamander and its habitat, and this trend is expected to continue throughout its range in the future, unless and until projects attempting to reduce the threat of wildland fire are effectively implemented over a large part of the landscape in the Jemez Mountains which includes the habitat of the salamander.

Forest Composition and Structure Conversions

Changes in forest composition and structure may exacerbate severe wildland fires and are, therefore, considered a threat to the salamander. In addition, changes in forest composition and structure may threaten the salamander by directly altering soil moisture, soil temperature, soil pH, relative humidity, and air temperature. While it is possible that increased canopy could provide additional shading, and thus lower air and soil temperatures, and reduce soil moisture loss, it is presumed that any minor gains from a slightly more closed canopy would be lost as a result of the increase in demand for water that would be required for evapotranspiration by an increased number of small-diameter trees, which in turn would lead to increased drying of the soil. Limited water leads to drought-stress in trees, and an increase in susceptibility of trees to burning, insect infestations, and disease. This is especially true on south-facing slopes, where less moisture is available or during times of earlier snowmelt. Reduced soil moisture may also influence soil temperature and relative humidity.

Reduced soil moisture disrupts other aboveground activities of salamanders (e.g., foraging and mating), because salamanders must first address moisture needs above all other life functions (Heatwole and Lim 196, p. 818). Additionally, ecological changes resulting from forest composition changes could result in altered prey availability; however, we do not know if such changes would affect the salamander. The type and quantity of vegetation affects soil pH, and thus could also affect the salamander. Overall, the degree of cascading ecological impacts from shifts in forest composition and structure is currently unknown; however, alteration of forest composition and structure contribute to increased risk of forest die-offs from disease and insect infestation throughout the range of the salamander (USFS 2002, pp. 11–13; 2009d, p. 1; 2009a, pp. 8–9; 2010, pp. 1–11; Allen 2001, p. 6). We find that the interrelated contributions from changes in vegetation to large-scale, high-severity wildfire and forest die-offs are of a significant magnitude across the range of the species (e.g., see "Fire Exclusion, Suppression, and Severe Wildland Fires" section, above), and, in addition to continued predicted future changes to forested habitat within the range of the species, are threats to the salamander.

Preliminary data collected from the VCNP indicates that an increase in the amount of tree canopy cover in an area can decrease the amount of snow that is able to reach the ground, and can ultimately decrease the amount of soil moisture and infiltration (Enquist *et al.* 2009, p. 8). On the VCNP, 95 percent of coniferous forests have thick canopy cover with heavy understory fuels (VCNP 2010, pp. 3.3–3.4; USFS 2009a, p. 9). In these areas, snow accumulates in the tree canopy over winter, and in the spring can quickly evaporate without reaching or infiltrating the soil. Relatively recent increases in canopy cover, resulting from changes in forest composition and structure caused by historical management and fire-suppression, could be having significant drying effects on salamander habitat. In summary, existing and ongoing changes in forest composition and structure are interrelated to the threat of severe wildland fire and may also directly

affect habitat suitability by altering soil moisture, soil temperature, soil pH, relative humidity, and air temperature. Therefore, forest composition and structure conversions resulting in increased canopy cover and denser understory pose threats to the salamander now and are likely to continue in the future.

Post-fire Rehabilitation

Post-fire management practices are often needed to restore forest dynamics (Beschta *et al.* 2004, p. 957). In 1971, USFS was given formal authority by Congress for Burn Area Emergency Rehabilitation (BAER) (Robichaud *et al.* 2000, p. 1) and integrated the evaluation of fire severity, funding request procedures, and treatment options. Treatment options implemented by USFS and BAER teams include hillslope treatments (grass seeding, contour-felled logs, mulch, and other methods to reduce surface runoff and keep post-fire soil in place, such as tilling, temporary fencing, erosion control fabric, straw wattles, lopping, and scattering of slash) and channel treatments (straw bale check dams, log check dams, rock dams, and rock cage dams (gabions)) (Robichaud *et al.* 2000, pp. 11–21). Rehabilitation actions following the Cerro Grande fire in salamander habitat included heavy equipment and bulldozer operation, felling trees for safety reasons, mulching with straw and placement of straw bales, cutting and trenching trees (contour felling and securing on slope), hand and aerial seeding, and aerial hydromulch (wet mulch with fertilizer and seed) (USFS 2001, p. 1). Rehabilitation actions following the Las Conchas Fire included road protections (removal of culverts, installation of trash racks and drainage dips); hand and aerial seeding; mulching; and removal of trees at ancestral communities (USFS 2011a, pp. 7–9; USFS 2012, pp. 1–3).

In many cases, rehabilitation actions can have further detrimental impacts on the Jemez Mountains salamander and its habitat beyond what was caused by the fire, but the USFS has made efforts to minimize such impacts (USFS 2012, pp. 1–3). For instance, following the Las Conchas Fire, rehabilitation actions in the Jemez Mountains salamander's habitat that is categorized as "Essential" according to the Jemez Mountains Salamander Management Plan or categorized as an "Occupied Stand" by the USFS were limited to small scales and included: an estimated 4.3 ac (1.7 ha) of habitat being impacted for road protections, 7.5 ac (3.0 ha) were seeded and mulched (for archeological site protection and Nordic ski trail protection), 150 ac (60.7) were disturbed for hazard tree removal (cutting trees that could be dangerous by falling onto a roadway), and 3.25 ac (1.3 ha) of bulldozer line was rehabilitated with slash placement or seeding (USFS 2011a, pp. 7–9; USFS 2012, pp. 1–3).

Some post-fire rehabilitation actions may be beneficial for the salamander. For example, contour felling can slow erosion and, in cases where aboveground rocks are not present or present in low numbers, the felled logs can also provide immediate aboveground cover. Following the Cerro Grande Fire, the BAER Team recommended felling large-diameter Douglas fir logs and cutting four disks off each log (rounds) to provide immediate cover for salamanders before summer rains (Interagency BAER Team 2000, p. 87; USFS 2001, p. 1). Similar recommendations were made after the Las Conchas Fire (BAER Survey Survey Specialist Report, 2011, p. 3). We believe these actions would benefit the salamander immediately post-fire, but these actions have not been implemented and still need to be tested. Still, some post-fire treatments (e.g., grass seeding, heavy equipment operation, bulldozing, tilling, hydromulching, mulching, erosion control fabrics, and removal of aboveground rocks to build rock dams) likely negatively impacted the salamander.

The most common BAER treatment has been grass seeding dropped from aircraft (Robichaud *et al.* 2000, p. 11; Peppin *et al.* 2010, p. 574). Nonnative grasses have typically been seeded because they are fast-growing and have extensive fibrous roots (Robichaud *et al.* 2000, p. 11); however, in more recent years, efforts have been made to use native plant species, but their use is often limited by high cost and inadequate availability (Peppin *et al.* 2010, p. 574). Overall, seeding with grass is relatively inexpensive, and has been reported to rapidly increase water infiltration and stabilize soil (Robichaud *et al.* 2000, p. 11). However, Peppin *et al.* (2010, p. 573) concluded that post-wildfire seeding in western U.S. forests does little to protect soil in the short-term, has equivocal effect on invasion of nonnative species, and can have negative effects on native vegetation recovery. Nevertheless, nonnative grasses from post-fire rehabilitation efforts have created thick mats that are impenetrable to the salamander, because the species has short legs and cannot dig tunnels. The existing spaces in the soil fill with extensive roots, altering the subterranean habitat in a manner that is unusable to the salamander. We are aware of areas that burned with moderate and high severities in the Dome Fire (eastern and southeastern part of its range), where these thick mats of grass resulting from rehabilitation still persist, and salamanders are no longer found there. It is possible that native grasses could have the same effect, because the goal of the rehabilitation effort is to stabilize the soil with quick-growing fibrous roots.

Additionally, grass seed mixtures can also contain fertilizer that is broadcast over large areas of habitat (e.g., hydromulch used in post-fire treatments for the Cerro Grande Fire). Fertilizers can contain nitrate, which is toxic to amphibians at certain levels (Rouse *et al.* 1999, p. 799). Finally, how mulching with straw post-fire affects the salamander remains unknown, but could have significant adverse effects if there is widespread use and the mulch creates an impenetrable layer or alters the microecology in the upper layers of the soil and at the soil's surface. While the effects to salamanders from seeding with nonnative grasses, use of fertilizers, or mulch application have not been specifically studied, these actions, alone or in combination, have likely caused widespread adverse impacts to the salamander. To reduce adverse effects to the salamander resulting from post-fire rehabilitation efforts following the Las Conchas Fire, efforts were made to avoid seeding in most salamander areas (USFS 2011c, p. 9), and avoiding salamander habitat was a specific criterion for grass seeding and mulching actions (USFS 2012, p. 3). Because many common post-fire treatment actions have the potential to have significant, widespread adverse effects, we anticipate habitat alterations from wildfire and post-fire rehabilitation will continue to be a threat to the salamander localities from both past and future treatments.

In summary, some post-fire treatments, such as contour felling of logs and cutting and scattering rounds, may reduce some of the short-term effects of fire to the salamander and its habitat. However, most post-fire treatments negatively impact the salamander and its habitat in the long-term. Small-scale impacts could occur from removing rocks from habitat to build rock dams, and large-scale impacts include grass seeding and associated chemicals, and possibly mulching. We conclude that while the effects of high-severity, stand-replacing wildfire are the most significant threat to the salamander and its habitat, actions taken following wildfires are also a threat to the salamander's habitat,

and are expected to continue in the future.

Fire Use

Fire use includes the combination of wildland fire use (the management of naturally ignited wildland fires to accomplish specific resource management objectives) and prescribed fire (any fire ignited by management actions to meet specific objectives) applications to meet natural resource objectives (USFS 2010b, p. 1). Fire use can benefit the salamander in the long term by reducing the risk of severe wildland fires and by returning the natural fire cycle to the ecosystem. Alternatively, other practices, such as broadcast burning (i.e., conducting prescribed fires over large areas), consume ground litter that helps to create moist conditions and stabilize soil and rocky slopes. Depending on time of year, fire use can also negatively impact the salamander when the species is active above ground (typically from July to September). However, the wet conditions required for salamander aboveground activity are often not conducive to fire. Prescribed fire in the Jemez Mountains is often planned for the fall (when the salamanders are not active above ground), because low wind and increased moisture during this time allow more control, lowering chances of the fire's escape. Because fire historically occurred prior to July (i.e., premonsoon rains), the majority of fires likely preceded the salamander's aboveground activity. Prescribed fires conducted after September, when salamanders typically return to their subterranean retreats, would be similar to a natural fire regime in the spring, with low direct impacts because most salamanders are subterranean at that time. However, it is unknown what the indirect impacts of altering the time of year when fire is present on the landscape have on the salamander and its habitat.

Other activities related to fire use that may have negative impacts to the salamander and its habitat include digging fire lines, targeting the reduction of large decaying logs, and using flares and fire-retardant chemicals in salamander habitat. Some impacts or stressors to the salamander can be avoided through seasonal timing of prescribed burns and modifying objectives (e.g., leaving large-diameter logs and mixed canopy cover) and by modifying fire management techniques (e.g., not using flares or chemicals) in salamander habitat (Cummer 2005, pp. 2–7).

As part of the Southwest Jemez Restoration Project proposal, the Santa Fe National Forest has set specific goals pertaining to salamander habitat, including reduction of the risk of high-intensity wildfire in salamander habitat, and retention of a moisture regime that will sustain high-quality salamander habitat (USFS 2009a, p. 11). The Santa Fe National Forest intends to minimize impacts to salamander habitat and to work towards recovery of the salamander (USFS 2009, p. 4), but specific actions or recommendations to accomplish this goal have not yet been determined. If the salamander's needs are not considered, fire use could make its habitat less suitable (warmer; drier; fewer large, decaying logs), and kill or injure salamanders that are active above ground. Alternatively, the salamander's habitat may benefit if seasonal restrictions and maintaining key habitat features (e.g., large logs and sufficient canopy cover to maintain moist microhabitats) are part of managing fire.

Given the current condition of forest composition and structure, the risks of severe wildland fire on a large geographic scale will take a long-term planning strategy. Fire use is critical to the long-term protection of the salamander's habitat, although some practices are not beneficial to the species and may be a threat to the salamander.

Fire Suppression Activities

Similarly, fire suppression activities may both protect and negatively impact the salamander and its habitat. For example, fire suppression actions that occurred in salamander habitat during the Cerro Grande Fire included hand line construction and bulldozer line construction (digging fire breaks down to bare mineral soil), backfiring (burning off heavy ground cover before the main fire reached that fuel source), and fire retardant drops (USFS 2001, p. 1). Fire suppression actions in modeled salamander habitat on the Santa Fe National Forest following Las Conchas Fire included 1.2 miles (mi) (1.9 kilometers (km)) of bulldozer line, 0.6 mi (0.9 km) of hand line, 1.2 mi (1.9 km) of fire retardant drop, and 1.5 ac (0.6 ha) of areas cleared for three drop points and one Medivac area (USFS 2011d, pp. 1–2). Water dropping from helicopters is another fire suppression technique used in the Jemez Mountains, where water is collected from accessible streams, ponds, or stock tanks. By dropping surface water into terrestrial habitat, there is a significant increased risk of spreading aquatic pathogens into terrestrial habitats (see *C. Disease and Predation*, below).

The impacts of fire retardants and firefighting foams to the salamander are discussed under *E. Other Natural or Manmade Factors Affecting Its Continued Existence*, below. Fire suppression actions, including the use of fire retardants, water dropping, backfiring, and fire line construction, likely impact the salamander's habitat; however, the effects of habitat impacts from fire suppression on the salamander remain unknown, and, based on the information available at this time, we determine that fire suppression actions do not appear to be a threat to the salamander's habitat. These activities improve the chances of quick fire suppression, and thus fires would be relatively smaller in scale and could have fewer impacts than a severe wildland fire. Therefore, we do not find that fire suppression activities are a threat to the salamander's habitat, nor do we expect them to become a threat in the future.

Mechanical Treatment of Hazardous Fuels

Mechanical treatment of hazardous fuels refers to the process of grinding or chipping vegetation (trees and shrubs) to meet forest management objectives. When these treatments are used, resprouting vegetation often grows back in a few years and subsequent treatment is needed. Mechanical treatment is a fuel-reduction technique that may be used alone or in combination with prescribed fire. Mechanical treatment may include the use of heavy equipment or manual equipment to cut vegetation (trees and shrubs) and to scrape slash and other debris into piles for burning or mastication. Mastication equipment uses a cutting head attached to an overhead boom to grind, chip, or crush wood into smaller pieces, and is able to treat vegetation on slopes up to 35 to 45 percent, while generally having little ground impact (soil compaction or disturbance). The debris is left on the ground where it decomposes and provides erosion protection, or it is burned after drying out.

Mechanical treatment of hazardous fuels, such as manual or machine thinning (chipping and mastication), may cause localized disturbances to the forest structure or alter ecological interactions at the soil surface that can impact the salamander and its habitat. For example, removal of overstory tree canopy or ground cover within salamander habitat may cause desiccation of soil or rocky substrates. Also, a layer of masticated material could change microhabitat conditions making it unsuitable for salamanders (e.g., altering fungal communities or physically making it difficult for salamanders to move through).

Additionally, tree-felling or use of heavy equipment has the potential to disturb the substrate, resulting in destabilization of talus and compaction of soil, which may reduce subterranean interstices (spaces) used by salamanders as refuges or movement.

Activities that compact soil, alter ecological interactions at the soil surface, remove excessive canopy cover, or are conducted while salamanders are above-ground active would be detrimental to the salamander and its habitat. A masticator is one type of heavy machinery that can be used for mechanical treatment of fuels that could potentially compact the soil and leave debris altering the soil surface ecology. In one study at a different location, a masticator was operated on existing skid trails (temporary trails used to transport trees, logs, or other forest products) and did not increase soil compaction, because the machinery traveled on existing trails covered with masticated materials (wood chips, etc.), which more evenly distributed the weight of the machinery and reduced soil compaction (Moghaddas and Stephens 2008, p. 3104). However, studies in the Jemez Mountains and effects to soils there have not been conducted.

At this time, we do not have any specific information whether mechanical treatments, including mastication, negatively impact the salamander either through altering above ground habitat or soil compaction. We encourage research on these techniques if they are to be implemented in salamander habitat. If mechanical treatment and hazardous fuels activities are conducted in a manner that minimizes impacts to the salamander and its habitat, while reducing the risk of severe wildland fire, the salamander could ultimately benefit from the reduction in the threat of severe wildland fire and the improvement in the structure and composition of the forest. However, mechanical treatments could also pose a threat to the salamander and its habitat if conducted in a manner that degrades or makes habitat unusable to the salamander. Finally, if salamanders are active above ground, any of these activities could crush salamanders present. We are not aware of any specific large-scale mechanical treatments in salamander habitat; however, mastication is an option for treatments in the Southwest Jemez Restoration Project area. We request information on mechanical treatments that may occur in salamander habitat and how those treatments may affect the salamander and its habitat.

Forest Silvicultural Practices

Many areas of the landscape in the Jemez Mountains have been fragmented by past silvicultural practices (the care and cultivation of forest trees) including commercial (trees greater than 9 inches (in) (23 centimeteres (cm)) in diameter at breast height (dbh)) and precommercial (trees less than 9 in (23 cm) dbh) timber harvesting. Much of the forests of the Jemez Mountains lack large-diameter trees and have become overgrown with small-diameter trees. While salamanders still occupy areas where timber harvesting has occurred, the effects of past silvicultural practices continue to adversely affect the salamander and its habitat through the absence of large-diameter trees that, when they fall and decompose, provide high-quality aboveground habitat, through the contribution of high fuels increasing the risk of large-scale stand-replacing wildfire, and cascading effects on soil moisture and temperature.

From 1935 to 1972, logging (particularly clear-cut logging) was conducted on VCNP (ENTRIX 2009, p. 164). These timber activities resulted in about 50 percent of VCNP being logged, with over 1,000 mi (1,600 km) of 1960s-era logging roads (ENTRIX 2009, p. 164) being built in winding and spiraling patterns around hills (ENTRIX 2009, pp. 59–60). On the VCNP, 95 percent of forest stands contain dense thickets of small-diameter trees, creating a multi-tiered forest structure (VCNP 2010, pp. 3.3–3.4). This multi-tiered forest structure is similar to surrounding areas, and provides ladder fuels that favor the development of crown fires (as opposed to high-intensity, habitat-destroying ground fires) (Allen 2001, pp. 5–6; USFS 2009a, p. 10). Additionally, all forest types on the VCNP contain very few late-stage mature trees greater than 16 in (41 cm) dbh (less than 10 percent of the overall cover) (VCNP 2010, pp. 3.4, 3.6–3.23). The lack of large trees is an artifact of intense logging, mostly from clear-cutting practices in the 1960s (VCNP 2010, p. 3.4). Clear-cutting degrades forest floor microhabitats for salamanders by eliminating shading and leaf litter, increasing soil surface temperature, and reducing moisture (Petranka 1998, p. 16).

In a study comparing four logged sites and five unlogged sites in Jemez Mountains salamander habitat, Ramotnik (1986, p. 8) reports that a total of 47 salamanders were observed at four of the five unlogged sites, while no salamanders were observed on any of the logged sites. We do not know if salamanders actually occupied the logged sites prior to logging, but significant differences in habitat features (soil pH, litter depth, and log size) between the logged and unlogged sites were reported (Ramotnik 1986, p. 8). On the unlogged sites, salamanders were associated with cover objects that were closer together and more decayed, and that had a higher canopy cover, greater moss and lichen cover, and lower surrounding needle cover, compared to cover objects on logged sites (Ramotnik 1986, p. 8). Cover objects on logged sites were less decomposed and accessible by the salamanders, had a shallower surrounding litter depth, and were associated with a more acidic soil than were cover objects on the unlogged sites (Ramotnik 1986, p. 8). Based on the differences between logged and unlogged sites, we believe that logging can destroy or modify the Jemez Mountains salamander's habitat in such a way that it becomes uninhabitable or less suitable for the species.

Consistent with the findings of Ramotnik (1986, p. 8), deMaynadier and Hunter (1995; in Olson *et al.* 2009, p. 6) reviewed 18 studies and found that salamander abundance after timber harvest was 3.5 times greater on control (unlogged) areas than in clear-cut areas. Furthermore, Petranka *et al.* (1993; in Olson *et al.* 2009, p. 6) found that *Plethodon* abundance and richness in mature forest were five times higher than in recent clear-cut areas, and they estimated that it would take as much as 50 to 70 years for clear-cut populations to return to precleareut levels. We do not know the amount of time it might take for Jemez Mountains salamanders to recover from habitat alterations resulting from clear-cut logging, particularly because of concurrent and ongoing factors affecting forest stand conditions (e.g., fire suppression, livestock grazing, changes in vegetation composition and structure).

The majority of Jemez Mountains salamander habitat has been heavily logged, which has resulted in changes in stand structure, including a paucity of large-diameter trees. This lack of large-diameter trees means that there is a limited source for future large, decaying logs that provide high-quality (e.g., relatively cool, high-moisture diurnal retreats) aboveground habitat. Ramotnik (1986, p. 12) reported that logs with salamanders were significantly larger and wetter than those without salamanders, and most salamanders were found in well-decomposed logs. In a similar plethodontid salamander, large logs provide refuge from warmer temperatures and resiliency from impacts that can warm and dry habitat (Kluber *et al.* 2009, p. 31). In summary,

there are less high-quality salamander habitat features and no material for future high-quality salamander habitat features in areas where large-diameter trees have been removed.

On the VCNP, only minor selective logging has occurred since 1972, and it is expected that some thinning of secondary growth forests will continue to occur to prevent severe wildfires. However, no commercial logging is proposed or likely in the foreseeable future (Parmenter 2009b, cited in Service 2010). Although commercial timber harvest on the Santa Fe National Forest has declined appreciably since 1988 (Fink 2008, pp. 9, 19), the effects from historical logging and associated roads will continue to be a threat to the salamander.

The historical clear-cut logging practices in the Jemez Mountains have likely led to significant habitat loss for the salamander. The cutting has contributed to current stand conditions (high fuels), and the forest lacks large-diameter trees for future high-quality aboveground cover objects. We believe that the effects from historical, clear-cut logging are currently affecting the salamander and its habitat, and will continue to do so in the future.

Salvage cutting (logging) removes dead, dying, damaged, or deteriorating trees while the wood is still merchantable (Wegner 1984, p. 421). Sanitation cutting, similar to salvage, removes the same kinds of trees, as well as those susceptible to attack from biotic pests (Wegner 1984, p. 421). Both types of cutting occur in the Jemez Mountains salamander's habitat, and are referred to as "salvage logging." Salvage logging is a common management response to forest disturbance (Lindenmayer *et al.* 2008, p. 4) and, in the salamander's habitat, is most likely to occur after a forest die-off resulting from fire, disease, insects, or drought. The purposes for salvage logging in the Jemez Mountains have included firewood for local use, timber for small and large mills, salvage before decay reduces the economic value of the trees, creation of diverse healthy and productive timber stands, management of stands to minimize insect and disease losses (USFS 1996, p. 4), and recovery of the timber value of fire-killed trees (USFS 2003, p. 1). When conducted in the salamander's habitat, salvage logging can further reduce the quality of the salamander's habitat remaining after the initial disturbance, by removing or reducing the shading afforded by dead standing trees (Moeur and Guthrie 1984, p. 140) and future salamander cover objects (removal of trees precludes their recruitment to the forest floor), and by interfering with habitat recovery (Lindenmayer *et al.* 2008, p. 13).

Recent salvage logging within the range of the Jemez Mountains salamander occurred following the 2002 Lakes and BMG Wildfire. The USFS stated that mitigation measures for the Lakes and BMG Wildfire Timber Salvage Project would further protect the salamander and enhance salamander habitat by immediately providing slash and fallen logs (USFS 2003, pp. 4–5). Mitigation for the salvage logging project included conducting activities during winter to avoid soil compaction (as the ground is more likely to be frozen and hard at that time), and providing for higher snag retention (by leaving all Douglas fir trees (16 percent fire-killed trees) and 10 percent of other large snags) to provide future fallen log habitat (USFS 2003, p. 29). These mitigation measures were developed in consultation with NMEST in an effort to minimize impacts to the Jemez Mountains salamander from salvage logging; however, NMEST recommended that salvage logging be excluded from occupied salamander habitat because it was not clear that, even with the additional mitigations, it would meet the conservation objectives of the Cooperative Management Plan (NMEST 2003, p. 1).

The mitigation measures would likely benefit the salamander in the short term if conducted without salvage logging. It is not known if mitigation measures offset the impacts of salvage logging in salamander habitat; however, Lindenmayer *et al.* (2008, p. 13) reports that salvage logging interferes with natural ecological recovery and may increase the likelihood and intensity of subsequent fires. We believe that removal of trees limits the amount of future cover and allows additional warming and drying of habitat. The potential for large-scale forest die-offs from wildfire, insect outbreak, disease, or drought is high in the Jemez Mountains, which may result in future salvage logging in salamander habitat. We believe that salvage logging in salamander habitat further diminishes habitat quality and may be a determining factor of salamander persistence subsequent to forest die-off.

Some timber harvest activities likely pose no threat to the continued existence of the Jemez Mountains salamander. For example, removal of trees that may pose a safety hazard may have minimal disturbance to surrounding soils or substrates, especially if removal is conducted when the species is not active above ground (i.e., seasonal restrictions). This type of localized impact may affect a few individuals, but it is not likely to affect a population or be considered a threat. Likewise, precommercial thinning (removal of trees less than 9 in (23 cm) dbh or shrub and brush removal (without the use of herbicides) to control vegetation, and without disturbing or compacting large areas of the surrounding soils, likely could be conducted without adverse effects to the salamander or its habitat.

In summary of forest silvicultural practices, impacts from past commercial logging activities continue to have detrimental effects to the salamander and its habitat. These past activities removed large-diameter trees, altered forest canopy structure, created roads, compacted soil, and disturbed other important habitat features. These effects of historical logging include the warming and drying of habitat, and a paucity of large cover objects (decaying logs) that would have contributed to habitat complexity and resiliency. Salvage logging further diminishes salamander habitat subsequent to disturbance. Therefore, we conclude that the salamander continues to face threats from current forest silvicultural practices, including salvage logging. These actions are smaller in scale relative to the range of the species, and we are not aware of any proposals to salvage-log the large area of the Las Conchas burn area. However, the habitat-warming and drying effect of these actions may cause additional detrimental disturbance to habitat in areas burned by severe wildfire. We also conclude that the salamander continues to face threats resulting from the habitat-related effects of historical logging activities because high-quality, high-moisture retreats are presently fewer, and future opportunities for high-quality, high-moisture retreats will be extremely rare. Because all salamander life functions and activities are based on the individual's water balance, limiting opportunities for hydration affects all other aspects of survival and reproduction, greatly contributing to the risk of extinction. This significant threat is occurring now and will continue into the future.

Dams

Following the 2000 Cerro Grande Fire, water retention dams were constructed within potential salamander habitat to minimize soil erosion within burned areas (NMDGF 2001, p. 1; NMEST 2002, pp.1–2; Kutz 2002, p. 1). Because these types of structures were installed to slow erosion subsequent to wildfire, additional dams or flood control features could be constructed within salamander habitat in the future

following severe wildland fires. Some individual salamanders may be killed or injured by this activity; however, the impact to the species and habitat from construction of retention dams would be relatively minor. For this reason, we do not consider the construction of dams to currently be a significant threat to the salamander, nor do we expect dam construction to be a threat to the species in the future.

Mining

Pumice mining activities (e.g., Copar Pumice Company, the Copar South Pit Pumice Mine, and the El Cajete Pumice Mine) have been evaluated for impacts to the salamander (USFS 1995, pp. 1–14; 1996, pp. 1–3). Pumice mines are located within areas of volcanic substrate that are unlikely to support salamanders (USFS 2009c, p. 2). However, associated infrastructure from expansion of the El Cajete Mine, such as access roads and heavy equipment staging areas, may have the potential to be located in potential salamander habitat. Although no decision on authorizing the extension to the El Cajete Mine has been made (USFS 2009. p. 2), these activities would be small in scale and not likely considered a threat to the species, either currently or in the future.

Private (Residential) Development

In our 12-month finding (75 FR 54822; September 9, 2010), we found that residential development was a threat to the salamander, because we visually assessed salamander occurrences on a map and it appeared that private lands contained substantially sized, contiguous areas of salamander habitat, with the potential for future development. However, after conducting a GIS (Geographical Information System) analysis for this rule (see *Criteria Used To Identify Critical Habitat*, below), we found that only 3 percent (2,817 ac (1,140 ha) of the total modeled habitat are private lands, of which 719 ac (291 ha) include the Pajarito Ski area, where the habitat is already developed and unlikely to be suitable for the salamander in the long term (see Recreation, below). The remaining areas of private lands occur as noncontiguous scattered parcels. However, some private lands, as well as areas with salamander habitat on the Santa Fe National Forest, could be developed for private use (USFS 1997, pp. 1–4; USFS 1998, pp. 1–2).

Development can destroy and fragment the salamander's habitat through the construction of homes and associated infrastructure (e.g., roads, driveways, and buildings), making those areas unusable to salamanders and likely resulting in mortalities to salamanders within those areas. Furthermore, as the human population continues to increase in the Jemez Mountains, we believe development will likely continue to directly affect the salamander and its habitat in the future. These activities will likely be in the form of new housing and associated roads and infrastructure. Although we anticipate some loss and degradation of habitat from these activities, salamander habitat on private lands is smaller and more isolated than we thought prior to our GIS analysis. Moreover, we found very few salamander occurrences on private lands. For these reasons, we believe that private residential development has the potential to impact the salamander and its habitat, but does not constitute a significant threat to the species.

Geothermal Development

A large volcanic complex in the Jemez Mountains is the only known high-temperature geothermal resource in New Mexico (Fleischmann 2006, p. 27). Geothermal energy was explored for possible development on the VCNP between 1959 and 1983 (USFS 2007, p. 126). In July 1978, the U.S. Department of Energy, Union Oil Company of California (Unocal), and the Public Service Company of New Mexico began a cooperative geothermal energy project (USFS 2007, p. 126). The demonstration project drilled 20 exploratory wells over the next 4 years. One of the geothermal development locations was south of Redondo Peak on the VCNP, and the canyon in this area was occupied by the salamander (Sabo 1980, pp. 2–4). An Environmental Impact Statement analyzed a variety of alternatives, including placement of transmission towers and lines (U.S. Department of Energy cited in Sabo 1980, pp. 2–5). Nevertheless, the project ended in January 1982, because Unocal's predictions concerning the size of geothermal resources were not met. Out of the 40 wells drilled in the Valles Caldera in the Redondo Creek and Sulphur Springs areas, only a few yielded sufficient resources to be considered production wells (USFS 2007, p. 126). In some cases, these wells were drilled in the salamander's habitat and concrete well pads were built.

Although the geothermal resources are found within the range of the salamander in the Jemez Mountains, extraction of large quantities of hot fluids from these rocks has proven difficult and not commercially viable (USFS 2007, p. 127). As such, we are not aware of any current or future plans to construct large or small-scale geothermal power production projects within salamander habitat. Moreover, in 2006, the mineral rights on the VCNP were condemned, including geothermal resources (VallesCaldera.com 2010, p. 1). For these reasons, geothermal development does not present a current or future threat to the salamander.

Roads, Trails, and Habitat Fragmentation

Construction of roads and trails has historically eliminated or reduced the quality or quantity of salamander habitat, reducing blocks of native vegetation to isolated fragments, and creating a matrix of native habitat islands that have been altered by varying degrees from their natural state. Allen (1989, pp. 46, 54, 163, 216–242, and 302) collected and analyzed changes in road networks (railroads, paved roads, improved roads, dirt roads, and primitive roads) in the Jemez Mountains from 1935 to 1981. Landscape-wide road density increased 11.75 times, from 0.24 mi (0.38 km) of road per square mi (2.6 square km) in 1935, to 2.8 mi (4.5 km) of road per square mi (2.6 square km) in 1981, and in surface area of from 0.13 percent (610 ac; 247 ha) to 1.7 percent (7,739 ac; 3,132 ha) (Allen 1989, pp. 236–240). Allen (1989, p. 240) reports that of 5,246 mi (8,443 km) of roads in the Jemez Mountains in 1981, 74 percent were mapped on USFS lands (2,241 mi; 3,607 km) and private lands (1,646 mi; 2,649 km). These roads generally indicate past logging activity of USFS and private lands (Allen 1989 p. 236).

Ongoing effects of roads and their construction on the VCNP may exceed the effects of the timber harvests for which the roads were constructed (Balmat and Kupfer 2004, p. 46). The majority of roads within the range of the salamander are unpaved, and the compacted soil typically has very low infiltration rates that generate large amounts of surface runoff (Robichaud *et al.* 2010, p. 80). Increasing runoff, decreasing infiltration, and increasing edge effects (open areas along roads) has led to the drying of adjacent areas of salamander habitat.

The construction of roads and trails (motorized vehicle, bicycle, and foot trails) degrades habitat by compacting soil and eliminating interstitial spaces above and below ground. Roads are known to fragment terrestrial salamander habitat and act as partial barriers to movement (deMaynadier and Hunter 2000, p. 56; Marsh *et al.* 2005, p. 2004). Furthermore, roads and trails reduce or eliminate important habitat features (e.g., lowering canopy cover or

drying of soil) and prevent gene flow (Saunders *et al.* 1991, p. 25; Burkey 1995, pp. 527, 528; Frankham *et al.* 2002, p. 310; Noss *et al.* 2006, p. 219). Vehicular and off-highway vehicle (OHV) use of roads and trails can kill or injure salamanders. We consider the establishment of roads and trails to be a threat that will likely continue to impact the salamander and its habitat, increasing the risk of extirpation of some localities.

Road clearing and maintenance activities can also cause localized adverse impacts to the salamander from scraping and widening roads and shoulders or maintaining drainage ditches or replacing culverts. These activities may kill or injure individuals through crushing by heavy equipment. Existing and newly constructed roads or trails fragment habitat, increasing the chances of extirpation of isolated populations, especially when movement between suitable habitat is not possible (Burkey 1995, p. 540; Frankham *et al.* 2002, p. 314). Isolated populations or patches are vulnerable to random events, which could easily destroy part of or an entire isolated population, or decrease a locality to such a low number of individuals that the risk of extirpation from human disturbance, natural catastrophic events, or genetic and demographic problems (e.g., loss of genetic diversity, uneven male to female ratios) would increase greatly (Shaffer 1987, p. 71; Burkey 1995, pp. 527, 528; Frankham *et al.* 2002, pp. 310–324).

Terrestrial salamanders are impacted by edge effects, typically adjacent to roads and areas of timber harvest, because microclimate conditions within forest edges often exhibit higher air and soil temperatures, lower soil moisture, and lower humidity, compared to interior forested areas (Moseley *et al.* 2009, p. 426). Moreover, by creating edge effects, roads can reduce the quality of adjacent habitat by increasing light and wind penetration, exposure to pollutants, and the spread of invasive species (Marsh *et al.* 2005, pp. 2004–2005). Due to the physiological nature of terrestrial salamanders, they are sensitive to these types of microclimate alterations, particularly to changes to temperature and moisture (Moseley *et al.* 2009, p. 426). Generally, more salamanders are observed with increasing distance from some edge types, which is attributed to reduced moisture and microhabitat quality (Moseley *et al.* 2009, p. 426).

On the western part of the species' range, road construction on New Mexico State Highway 126 around the town of Seven Springs occurred in occupied salamander habitat in 2007 and 2008. Measures were implemented by the USFS to reduce the impact of these road construction activities on salamanders, including limiting construction to times when salamanders would not be active above ground (October through June) and felling of approximately 300 trees in the project area to replace large woody debris that was being used by the salamander but removed by the road construction. However, these measures only offered some protection for salamanders and their habitat outside the project footprint. The rerouting and construction of Highway 126 went through the middle of a large salamander population where 24 ac (9.7 ha) of salamander habitat were directly impacted by this project (USFS 2009c, p. 2). This project destroyed and made unusable the 24 ac (9.7 ha). Also, the project fragmented the occupied salamander habitat remaining outside of the 24-ac (9.7-ha) footprint, because the new road has a nearly vertical cut bank and salamanders will not be able to cross it. Continued maintenance of State Highway 126 in the future will likely involve the use of salts for road de-icing, and increase the exposure of adjacent areas to chemicals and pollution from vehicular traffic. Habitat fragmentation of and subsequent edge effects due to this road construction project have reduced the quality and quantity of salamander habitat in this part of its range.

In 2007, the NMEST concluded that impacts from OHVs and motorcycles were variable depending on their location relative to the salamander's habitat. Because the width of a trail is generally smaller than a road, canopy cover typically remains over trails. In some cases (e.g., flat areas without deeply cut erosion), the trails do not likely impede salamander movement. Alternatively, severe erosion caused by heavy trail use by motorcycles or OHVs in some places formed trenches approximately 2 ft wide by 2 to 3 ft deep (0.6 m wide by 0.6 to 0.9 m deep), which would likely prevent salamander movement, fragment local populations, and trap salamanders that fall into the trenches. Therefore, OHVs and motorcycles could severely impact the salamander's habitat.

On November 9, 2005, the USFS issued the Travel Management Rule that requires designation of a system of roads, trails, and areas for motor vehicle use by vehicle class and, if appropriate, by time of year (70 FR 68264). As part of this effort, the USFS inventoried and mapped roads and motorized trails, and is currently completing a Final Environmental Impact Statement to change the usage of some of the current system within the range of the salamander. The Santa Fe National Forest is attempting to minimize the amount of authorized roads or trails in known occupied salamander habitat and will likely prohibit the majority of motorized cross-country travel within the range of the species (USFS 2009c, p. 2; USFS 2010c p. 95). Nevertheless, by closing some areas to OHV use, the magnitude of impacts in areas open to OHV use in salamander habitat will be greater (NMEST 2008, p. 2). We acknowledge that some individual salamanders may be killed or injured by vehicles and OHVs and that OHV use impacts salamander habitat. However, we believe the Santa Fe National Forest is attempting to minimize impacts to the salamander and its habitat. Furthermore, we believe that the revised travel management regulations will reduce the impact of motorized vehicles on the salamander and its habitat by providing a consistent policy that can be applied to all classes of motor vehicles, including OHVs. We consider unmanaged OHV and motorcycle use to be a threat to the salamander, but with the implementation of the forthcoming management of motorized trails on the Santa Fe National Forest, the threat will be greatly reduced.

In summary, the extensive roads that currently exist in the Jemez Mountains have significantly impacted the salamander and its habitat due to the possible death and injury of salamanders; fragmentation and population isolation; habitat loss; habitat modification near road edges; and in some cases, increased exposure to chemicals, salts, and pollution. Roads associated with private development are most likely to be constructed or expanded in the future in the southern and eastern portions of the species' range, because this part of the species' range has the most private land. Also, new roads may also be constructed through Federal lands within the salamander's range, but such construction is unlikely because the Santa Fe National Forest is attempting to reduce roads and road usage in the Jemez Mountains. Roads and trails have significantly fragmented habitat and likely reduced persistence of existing salamander localities. Therefore, we consider roads, trails, and the resulting habitat fragmentation to be a threat to the Jemez Mountains salamander and its habitat now and in the future.

Recreation

The Jemez Mountains are heavily used for recreational activities that impact the species, including camping, hiking, mountain biking, hunting, and

skiing; OHV use is addressed above. Located in the southwestern Jemez Mountains is the Jemez National Recreation Area. The Jemez National Recreation Area comprises 57,650 acres (23,330 ha), and is managed by the U.S. Forest Service for the promotion of fishing, camping, rock climbing, hunting, and hiking. It is estimated that nearly 1.6 million people visit the Jemez National Recreation Area for recreational opportunities each year (Jemez National Recreation Area 2002, p. 2). Despite an existing average road density of approximately 2.5 mi (4.0 km) of road per square mi (2.6 square km) on the Jemez National Recreation Area, off-road use continues to occur, resulting in new roads being created, or decommissioned roads being reopened (Jemez National Recreation Area 2002, pp. 10–11).

Using current population and travel trends, the potential visitation demand on the VCNP is between 250,000 and 400,000 visits per year (Entrix 2009, p. 93). Of this projection, the VCNP is expected to realize 120,000 visitors per year by the year 2020 (Entrix 2009, p. 94). To put this in context, from 2002 to 2007 the VCNP averaged about 7,600 visitors per year (Entrix 2009, p. 13). Bandelier National Monument, which has a smaller proportion of salamander habitat relative to the Santa Fe National Forest or VCNP, attracts an average annual visitation of more than 250,000 people (Entrix 2009, p. 92). Fenton Lake State Park in the western part of the species' range also contains salamander habitat. The park received more than 120,000 visitors on its 70 ac (28 ha) containing hiking trails and a fishing lake (Entrix 2009, p. 92).

Campgrounds and associated parking lots and structures have likely impacted the salamander's habitat through modification of small areas by soil compaction and vegetation removal. Similarly, compaction of soil from hiking or mountain biking trails has modified a relatively small amount of habitat. The majority of these trails likely do not act as barriers to movement nor create edge effects similar to roads, because they are narrow and do not reduce canopy cover. However, similar to OHV trails, deeply eroded mountain bike trails could act as barriers and entrap salamanders.

The Pajarito Ski Area in Los Alamos County was established in 1957 and expanded through 1994. Ski runs were constructed within salamander habitat. A significant amount of high-quality habitat (north-facing mountain slopes with mixed-conifer forests and many salamander observations (New Mexico Heritage Program 2010a and b, spreadsheets) was destroyed with construction of the ski areas, and the runs and roads have fragmented and created a high proportion of edge areas. Nevertheless, surveys conducted in 2001 in two small patches of forested areas between ski runs detected salamanders (Cummer *et al.* 2001, pp. 1, 2). Most areas between runs remain unsurveyed. However, because of the large amount of habitat destroyed, the extremely small patch sizes that remain, and relatively high degree of edge effects and fragmentation, the salamander will likely not persist in these areas in the long term.

Adjacent to the downhill ski runs are cross country ski trails. These trails are on USFS land, but maintained by a private group. In 2001, trail maintenance and construction with a bulldozer was conducted by the group in salamander habitat during salamander aboveground activity period (NMEST 2001, p. 1). Trail maintenance was reported as leveling all existing ski trails with a bulldozer, which involved substantial soil disturbance, cutting into slopes as much as 2 ft (0.6 m), filling other areas in excess of 2 ft (0.6 m), widening trails, and downing some large trees (greater than 10 in (25 cm) dbh), ultimately disturbing approximately 2 to 5 ac (1 to 2 ha) of occupied salamander habitat (Sangre de Christo Audubon Society 2001, pp. 2–3). This type of trail maintenance, while salamanders were active above ground, may have resulted in direct impacts to salamanders, and further fragmented and dried habitat. We do not know if there are future plans to modify or expand the existing ski area.

The Jemez Mountains are currently heavily used for recreational activities, and, as human populations in New Mexico continue to expand, there will likely be an increased demand in the future for recreational opportunities in the Jemez Mountains. Therefore, we conclude that recreational activities are currently a threat to the salamander, and will continue to be a threat in the future.

Livestock Grazing

Historical livestock grazing contributed to changes in the Jemez Mountains ecosystem by removing understory grasses, contributing to altered fire regimes and vegetation composition and structure, and increasing soil erosion. Livestock grazing generally does not occur within salamander habitat, because cattle concentrate outside of forested areas where grass and water are more abundant. We have no information that indicates livestock grazing is a direct or indirect threat to the salamander or its habitat. However, small-scale habitat modification, such as livestock trail establishment or trampling in occupied salamander habitat, is possible. The USFS and VCNP manage livestock to maintain fine grassy fuels, and should not limit low-intensity fires in the future. Although some small-scale habitat modification is possible, livestock are managed to maintain a grassy forest understory. Therefore, we do not consider livestock grazing to be a current threat to the salamander's habitat, nor do we anticipate that it will be in the future.

Summary

In summary of Factor A, the salamander and its habitat experience threats from historical and current fire management practices; severe wildland fire; forest composition and structure conversions; post-fire rehabilitation; forest management (including silvicultural practices); roads, trails, and habitat fragmentation; and recreation. Because these threats warm and dry habitat, they affect all behavioral and physiological functions of the species, and ultimately reduce the survivorship and reproductive success of salamanders across the entire range of the species, greatly impacting the salamander and its habitat. Further, these significant threats are occurring now and are expected to continue in the future. We, therefore, determine that the present or threatened destruction, modification, or curtailment of habitat and range represents a current significant threat to the salamander, and will continue to be so in the future.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Between 1960 and 1999, nearly 1,000 salamanders were collected from the wild for scientific or educational purposes (Painter 1999, p. 1). The majority (738 salamanders) were collected between 1960 and 1979 (Painter 1999, p. 1). Since 1999, very few salamanders have been collected, and all were collected under a valid permit, issued by either NMDGF or USFS. This species is difficult to maintain in captivity, and we know of no salamanders in the pet trade or in captivity for educational or scientific purposes.

In 1967, salamanders were only known from seven localities (Reagan 1967, p. 13). Only one of these localities (the "Type Locality") was described as having an "abundant salamander population" (Reagan 1967, p. 8). The species was originally described using specimens collected from this

population, which is located the southern portion of the species' range (Stebbins and Reimer 1950, pp. 73–80). Many researchers went to this site for collections and studies. Reagan (1967, p. 11) collected 165 salamanders from this locality between 1965 and 1967, whereas Williams collected an additional 67 of 659 salamanders found at this locality in 1970 (1972, p. 11). The information regarding the disposition of the 659 salamanders in this study is unclear, and it is possible more of these individuals were collected. Nonetheless, an unspecified but "large percentage" of the nearly 1,000 collected salamanders was reported from the "Type Locality" (Painter 1999, p.1) and was deposited as museum specimens around the country. Although surveys have been conducted at this locality since the 1990s, no salamanders have been found, suggesting that salamanders in the area may have been extirpated from overcollection. We are not aware of any other localities where the species has been extirpated from overcollection. Nevertheless, it is possible that repeated collections of individuals can lead to extirpation. We believe this is no longer a threat, because collections are stringently regulated through permits issued by NMDGF and the USFS (see Factor D, below). Due to these measures, we do not believe that collection will be a threat in the future.

Survey techniques associated with scientific inquiries and monitoring the salamander can alter salamander habitat by disturbing and drying the areas underneath the objects that provide cover, and by destroying decaying logs as a result of searching inside them. Beginning in 2011, the Service, NMDGF, and other partners are hosting annual training workshops to train surveyors on techniques that will minimize adverse effects to salamanders and their habitat, including replacing cover objects as they were found and leaving part of every log intact; however, impacts will still occur. When surveys are dispersed and there are multiple intervening years, impacts are likely lessened; however, when a location is repeatedly surveyed, habitat quality is diminished. We are aware of a few locations that have received impacts from repeated surveys for demographic studies conducted by NMDGF, but those studies have since concluded (NMDGF 2000, p. 1). We are currently working with the NMDGF, the USFS, and other partners on a survey protocol testing the efficacy of artificial cover objects to further minimize impacts to the salamander and its habitat.

We do not have any recent evidence of threats to the salamander from overutilization for commercial, recreational, scientific, or educational purposes, and we have no reason to believe this factor will become a threat to the species in the future. Therefore, based on a review of the available information, we do not consider overutilization for commercial, recreational, scientific, or educational purposes to be a threat to the salamander now or in the future.

C. Disease or Predation

The amphibian pathogenic fungus *Batrachochytrium dendrobatidis* (*Bd*) was found in a wild-caught Jemez Mountains salamander in 2003 on the east side of the species' range and again in another Jemez Mountains salamander in 2010 on the west side of the species' range (Cummer *et al.* 2005, p. 248; Pisces Molecular 2010, p. 3). *Batrachochytrium dendrobatidis* causes the disease chytridiomycosis, whereby the *Bd* fungus attacks keratin in amphibians. In adult amphibians, keratin primarily occurs in the skin. The symptoms of chytridiomycosis can include sloughing of skin, lethargy, morbidity, and death. Chytridiomycosis has been linked with worldwide amphibian declines, die-offs, and extinctions, possibly in association with climate change (Pounds *et al.* 2006, p. 161).

In New Mexico, *Bd* has caused significant population declines and local extirpations in the federally threatened Chiricahua leopard frog (*Lithobates chiricahuensis*) (USFWS 2007, p. 14). It is also implicated in the decline of other leopard frogs and the disappearance of the boreal toad (*Bufo boreas*) from the State (NMDGF 2006, p. 13). Prior to the detection of *Bd* in the Jemez Mountains salamander, *Bd* was considered an aquatic pathogen (Longcore *et al.* 1999, p. 221; Cummer *et al.* 2005, p. 248). The salamander does not have an aquatic life stage and is strictly terrestrial; thus the mode of transmission of *Bd* remains unknown. It is possible that the fungus was transported by other amphibian species that utilize the same terrestrial habitat. Both the tiger salamander (*Ambystoma tigrinum*) and the boreal chorus frog (*Pseudacris maculata*) are amphibians that have aquatic life stages and share terrestrial habitat with the Jemez Mountains salamander. In California, *Bd* has been present in wild populations of another strictly terrestrial salamander since 1973, without apparent population declines (Weinstein 2009, p. 653).

Cummer (2006, p. 2) reported that noninvasive skin swabs from 66 Jemez Mountains salamanders, 14 boreal chorus frogs, and 24 tiger salamanders from the Jemez Mountains were all negative for *Bd*. Approximately 30 additional Jemez Mountains salamanders have been tested through 2010, resulting in the second observation of *Bd* in the salamander. Overall, sampling for *Bd* from Jemez Mountains salamanders has been limited and only observed on two salamanders. The observation of *Bd* in the salamander indicates that the species is exposed to the pathogen and could acquire infection; however, whether the salamander will get or is susceptible to chytridiomycosis remains unknown. Although *Bd* can be highly infectious and can lead to disease and death, the pathogenicity of *Bd* and amphibians varies greatly among and within amphibian species.

Bd may be a threat to the Jemez Mountains salamander, because we know that this disease is a threat to many other species of amphibians, and the pathogen has been detected in the salamander. Currently, there is a lack of sufficient sampling to definitely conclude that *Bd* is a threat, but the best available information indicates that it could be a threat, and additional sampling and studies are needed. We intend to continue monitoring for the prevalence of *Bd* in the salamander to determine if disease rises to a level of a threat to the salamander now or in the future, and we request information on any potential threat posed by disease to the Jemez Mountains salamander.

Indirect effects from livestock activities may include the risk of aquatic disease transmission from earthen stock ponds that create areas of standing surface water. Earthen stock tanks are often utilized by tiger salamanders, which are known to be vectors for disease (i.e., they can carry and spread disease) (Davidson *et al.* 2003, pp. 601–607). Earthen stock tanks can also concentrate tiger salamanders, increasing chances of disease dispersal to other amphibian species. Some tiger salamanders use adjacent upland areas and may transmit disease to Jemez Mountains salamanders in areas where they co-occur. However, we do not have enough information to draw conclusions on the extent or role tiger salamanders may play in disease transmission. The connection between earthen stock tanks for livestock and aquatic disease transmission to Jemez Mountains salamanders is unclear.

We are not aware of any unusual predation outside of what may normally occur to the species by predators such as snakes (Squamata), shrews (Soricidae), skunks (Mephitidae), black

bears (*Ursus americanus*), and owls (Strigiformes).

In summary, we have no information indicating that predation is a threat to the Jemez Mountains salamander now or in the future. Also, the best available information does not indicate that disease is a threat to the salamander's continued existence now, but it could be a threat in the future. However, additional sampling and studies are needed.

D. The Inadequacy of Existing Regulatory Mechanisms

State Regulations

New Mexico State law provides some protection to the salamander. The salamander was reclassified by the State of New Mexico from threatened to endangered in 2005 (NMDGF 2005, p. 2). This designation provides protection under the New Mexico Wildlife Conservation Act of 1974 (i.e., State Endangered Species Act) (19 NMAC 33.6.8) by prohibiting direct take of the species without a permit issued from the State. The New Mexico Wildlife Conservation Act defines "take" or "taking" as harass, hunt, capture, or kill any wildlife or attempt to do so (17 NMAC 17.2.38). In other words, New Mexico's classification as an endangered species only conveys protection from collection or harm to the animals themselves without a permit. New Mexico's statutes are not designed to address habitat protection, indirect effects, or other threats to these species, and one of the primary threats to the salamander is the loss, degradation, and fragmentation of habitat, as discussed in Factor A. There is no provision for formal consultation process to address the habitat requirements of the species or how a proposed action may affect the needs of the species. Because most of the threats to the species are from effects to habitat, protecting individuals, without addressing habitat threats, will not ensure the salamander's long-term conservation and survival.

Although the New Mexico State statutes require the NMDGF to develop a recovery plan that will restore and maintain habitat for the species, the Jemez Mountains salamander does not have a finalized recovery plan. The Wildlife Conservation Act (N.M. Stat. Ann. §§ 17–2–37–46 (1995)) states that, to the extent practicable, recovery plans shall be developed for species listed by the State as threatened or endangered. While the species does not have a finalized recovery plan, NMDGF has the authority to consider and recommend actions to mitigate potential adverse effects to the salamander during its review of development proposals. However, there is no requirement to follow the State's recommendations, as was demonstrated during the construction and realignment of Highway 126, when NMDGF made recommendations to limit impacts to the salamander and its habitat, but none of the measures recommended were incorporated into the project design (New Mexico Game Commission 2006, pp. 12–13) (see *A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range* section, above).

Federal Regulations

Under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*) and the National Forest Management Act of 1976 (16 U.S.C. 1600 *et seq.*), the USFS is directed to prepare programmatic-level management plans to guide long-term resource management decisions. Under this direction, the salamander has been on the Regional Forester's Sensitive Species List since 1990 (USFS 1990). The Regional Forester's Sensitive Species List policy is applied to projects implemented under the 1982 National Forest Management Act Planning Rule (49 FR 43026, September 30, 1982). All existing plans continue to operate under the 1982 Planning Rule and all of its associated implementing regulations and policies.

The intent of the Regional Forester's sensitive species designation is to provide a proactive approach to conserving species, to prevent a trend toward listing under the Act, and to ensure the continued existence of viable, well-distributed populations. The USFS policy (FSM 2670.3) states that Biological Evaluations must be completed for sensitive species and signed by a journey-level biologist or botanist. The Santa Fe National Forest will continue developing biological evaluation reports and conducting analyses under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) for each project that will affect the salamander or its habitat. As noted above, the Santa Fe National Forest may implement treatments under the Collaborative Forest Landscape Restoration project that, if funded and effective, have the potential to reduce the threat of severe wildland fire in the southern and western part of the salamander's range over the next 10 years (USFS 2009c, p. 2). At this time, matching funding for the full implementation of the project is not certain, nor is it likely to address short-term risk of severe wildland fire. While the Regional Forester's sensitive species designation provides for consideration of the salamander during planning of activities, it does not preclude activities that may harm salamanders or their habitats on the Santa Fe National Forest.

In summary, while New Mexico Wildlife Conservation Act provides some protections for the salamander, specifically against take, it is not designed nor intended to protect the salamander's habitat, and one of the primary threats to the salamander is the loss, degradation, and fragmentation of habitat. Further, while NMDGF has the authority to consider and recommend actions to mitigate potential adverse effects to the salamander during review of development proposals, there is no requirement to follow these recommendations. With respect to Federal protections, the salamander has been on the Regional Forester's Sensitive Species List since 1990 (USFS 1990), but while this designation provides for consideration of the salamander during planning of activities, it does not prevent activities that may harm salamanders or their habitats on the Santa Fe National Forest.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Chemical Use

There is a potential for the salamander to be impacted by chemical use. Chemicals are used to suppress wildfire and for noxious weed control. Because the salamander has permeable skin, and breathes and carries out physiological functions with its skin, it may be susceptible if it comes in contact with fire retardants or herbicides. Many of these chemicals have not been assessed for effects to amphibians, and none have been assessed for effects to terrestrial amphibians. We do not currently have information that chemical use is a threat to the salamander. We request information on any potential threat posed by chemicals to the Jemez Mountains salamander.

Prior to 2006 (71 FR 42797; July 28, 2006), fire retardant used by the USFS contained sodium ferrocyanide, which is highly toxic to fish and amphibians (Pilliod *et al.* 2003, p. 175). In 2000, fire retardant was used in salamander habitat for the Cerro Grande Fire, but we have no information on the quantity or location of its use (USFS 2001, p. 1). While sodium ferrocyanide is no longer used by USFS to suppress wildfire, similar retardants and foams may still contain ingredients that are toxic to the salamander. Beginning in 2010, the USFS will begin phasing out the use of ammonium sulfate because of its toxicity to fish and replacing it with

ammonium phosphate (USFS 2009e, p. 1), which still may have adverse effects to the salamander. One of the ingredients of ammonium phosphate (a type of salt) appeared to have the greatest likelihood of adverse effects to terrestrial species assessed (birds and mammals) through ingestion (USFS/LABAT Environmental 2007, pp. 24–27), and in amphibians, salts can disrupt osmoregulation (regulation of proper water balance and osmotic or fluid pressure within tissues and cells). We do not currently have information that the chemicals in fire retardants or foams are a threat to the salamander. However, we will continue to evaluate whether these chemicals may be a threat to this species, and we request information on any potential threat posed by fire retardant chemicals to the Jemez Mountains salamander.

The USFS is in the process of completing an Environmental Impact Statement regarding the use of herbicides to manage noxious or invasive plants (Orr 2010, p. 2). Chemicals that could be used include 2,4,D; Clopyralid; Chorsulfuron; Dicamba; Glyphosate; Hexazinone; Imazapic; Imazapyr; Metasulfuron Methyl; Sulfometuron Methyl; Picloram; and Triclopyr (Orr 2010, p. 2). We reviewed the ecological risk assessments for these chemicals at *http://www.fs.fed.us/foresthealth/pesticide/risk.shtml*, but found few studies and data relative to amphibians. We found a single study for Sulfometuron Methyl conducted on the African clawed frog (*Xenopus laevis*) (an aquatic frog not native to the United States). This study resulted in alterations in limb and organ development and metamorphosis (Klotzbach and Durkin 2004, pp. 4–6, 4–7). The use of chemicals listed above by hand-held spot treatments or road-side spraying (Orr 2010, p. 2) in occupied salamander habitat could result in impacts to the salamander. Because of the lack of toxicological studies of these chemicals, we do not have information indicating that these chemicals pose a threat to the salamander. However, we will continue to evaluate whether these chemicals are a threat to the salamander, and we request information on any effects these chemicals may have on the Jemez Mountains salamander.

Climate Change

Our analyses under the Endangered Species Act include consideration of ongoing and projected changes in climate. The terms "climate" and "climate change" are defined by the Intergovernmental Panel on Climate Change (IPCC). "Climate" refers to the mean and variability of different types of weather conditions over time, with 30 years being a typical period for such measurements, although shorter or longer periods also may be used (IPCC 2007, p. 78). The term "climate change" thus refers to a change in the mean or variability of one or more measures of climate (e.g., temperature or precipitation) that persists for an extended period, typically decades or longer, whether the change is due to natural variability, human activity, or both (IPCC 2007, p. 78). Various types of changes in climate can have direct or indirect effects on species. These effects may be positive, neutral, or negative and they may change over time, depending on the species and other relevant considerations, such as the effects of interactions of climate with other variables (e.g., habitat fragmentation) (IPCC 2007, pp. 8–14, 18–19). In our analyses, we use our expert judgment to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change.

Habitat drying affects salamander physiology, behavior, and viability; will affect the occurrence of natural events such as fire, drought, and forest die-off; and will increase the risk of disease and infection. Trends in climate change and drought conditions have contributed to temperature increases in the Jemez Mountains, with a corresponding decrease in precipitation. Because the salamander is terrestrial, constrained in range, and isolated to the higher elevations of the Jemez Mountains, continued temperature increases and precipitation decreases could threaten the viability of the species over its entire range.

Climate simulations of Palmer Drought Severity Index (PSDI) (a calculation of the cumulative effects of precipitation and temperature on surface moisture balance) for the Southwest for the periods of 2006–2030 and 2035–2060 show an increase in drought severity with surface warming. Additionally, drought still increases during wetter simulations because of the effect of heat-related moisture loss (Hoerling and Eicheid 2007, p. 19). Annual average precipitation is likely to decrease in the Southwest as well as the length of snow season and snow depth (International Panel on Climate Change (IPCC) 2007b, p. 887). Most models project a widespread decrease in snow depth in the Rocky Mountains and earlier snowmelt (IPCC 2007b, p. 891). Exactly how climate change will affect precipitation is less certain, because precipitation predictions are based on continental-scale general circulation models that do not yet account for land use and land cover change effects on climate or regional phenomena. Consistent with recent observations in climate changes, the outlook presented for the Southwest and New Mexico predict warmer, drier, drought-like conditions (Seager *et al.* 2007, p. 1181; Hoerling and Eischeid 2007, p. 19).

McKenzie *et al.* (2004, p. 893) suggest, based on models, that the length of the fire season will likely increase further and that fires in the western United States will be more frequent and more severe. In particular, they found that fire in New Mexico appears to be acutely sensitive to summer climate and temperature changes and may respond dramatically to climate warming.

Plethodontid salamanders have a low metabolic rate and relatively large energy stores (in tails) that provide the potential to survive long periods between unpredictable bouts of feeding (Feder 1983, p. 291). Despite these specializations, terrestrial salamanders must have sufficient opportunities to forage and build energy reserves for use during periods of inactivity. As salamander habitat warms and dries, the quality and quantity of habitat decreases along with the amount of time that salamanders could be active above ground. Wiltenmuth (1997, pp. ii–122) concluded that the Jemez Mountains salamanders likely persist by utilizing moist microhabitats and they may be near their physiological limits relative to water balance and moist skin. During field evaluations, the species appeared to be in a dehydrated state. If the species has difficulty maintaining adequate skin moisture (e.g., see Wiltenmuth 1997, pp. ii–122), it will likely spend less time being active. As a result, energy storage, reproduction, and long-term persistence would be reduced.

Wiltenmuth (1997, p. 77) reported rates of dehydration and rehydration were greatest for the Jemez Mountains salamander compared to the other salamanders, and suggested greater skin permeability. While the adaptation to relatively quickly rehydrate and dehydrate may allow the salamander to more quickly rehydrate when moisture becomes available, it may also make it more susceptible and less resistant to longer dry times because it also quickly dehydrates. Dehydration affects the salamander by increasing heart rate, oxygen consumption, and metabolic rate (Whitford 1968, p. 249), thus increasing energy demand, limiting movements (Wiltenmuth 1997, p. 77), increasing concentration and storage of waste products (Duellman and Trueb 1986, p. 207), decreasing burst locomotion (stride length, stride frequency, and speed) (Wiltenmuth 1997, p. 45), and sometimes causing death. Moisture-

stressed salamanders prioritize hydration over all else, thereby reducing salamander survival and persistence. Additional impacts from dehydration could include increased predation because burst locomotion is impaired (which reduces ability to escape) and increased susceptibility to pathogens resulting from depressed immunity from physiological stress of dehydration. Any of these factors, alone or in combination, could lead either to the reduction or extirpation of salamander localities, especially in combination with the threats of habitat-altering activities, as discussed under Factor A.

The IPCC (2007, pp. 12, 13) predicts that changes in the global climate system during the 21st century will very likely be larger than those observed during the 20th century. For the next 2 decades, a warming of about 0.4 degrees Fahrenheit (°F) (0.2 degrees Celsius (°C)) (per decade is projected (IPCC 2007, p. 12). The Nature Conservancy of New Mexico analyzed recent changes in New Mexico's climate. Parts I and II of a three-part series have been completed. In Part I, the time period 1961–1990 was used as the reference condition for analysis of recent departures (1991–2005; 2000–2005). This time period is consistent with the baseline used by National Oceanic and Atmospheric Administration and the IPCC for presenting 20th-century climate anomalies and generating future projections (Enquist and Gori 2008, p. 9). In Part II, trends in climate water deficit (an indicator of biological moisture stress, or drying), snowpack, and timing of peak stream flows were assessed for the period of 1970–2006 (Enquist *et al.* 2008, p. iv). The Nature Conservancy of New Mexico concludes the following regarding climate conditions in New Mexico and the Jemez Mountains:

(1) Over 95 percent of New Mexico has experienced mean temperature increases; warming has been greatest in the Jemez Mountains (Enquist and Gori 2008, p. 16).

(2) Ninety-three percent of New Mexico's watersheds experienced increasing annual trends in moisture stress during 1970–2006, that is, they have become relatively drier (Enquist *et al.* 2008, p. iv).

(3) Snowpack has declined in 98 percent of sites analyzed in New Mexico; the Jemez Mountains has experienced significant declines in snowpack (Enquist *et al.* 2008, p. iv).

(4) In the period 1980–2006, the timing of peak run-off from snowmelt occurred 2 days earlier than in the 1951–1980 period (Enquist *et al.* 2008, pp. 9, 25).

(5) The Jemez Mountains have experienced warmer and drier conditions during the 1991–2005 time period (Enquist and Gori 2008, pp. 16, 17, 23).

(6) The Jemez Mountains ranked highest of 248 sites analyzed in New Mexico in

climate exposure—a measure of average temperature and average precipitation departures (Enquist and Gori 2008, pp. 10, 22, 51–58).

Although the extent of warming likely to occur is not known with certainty at this time, the IPCC (2007a, p. 5) has concluded that the summer season will experience the greatest increase in warming in the Southwest (IPCC 2007b, p. 887). Temperature has strong effects on amphibian immune systems and may be an important factor influencing susceptibility of amphibians to pathogens (e.g., see Raffel *et al.* 2006, p. 819); thus increases in temperature in the Jemez Mountains have the potential to increase the salamander's susceptibility to disease and pathogens. As noted, we have no information that indicates disease is a threat to the species, but we intend to evaluate this issue further.

Climate Change Summary

In summary, we find that current and future effects from warmer climate conditions in the Jemez Mountains could reduce the amount of suitable salamander habitat, reduce the time period when the species can be active above ground, and increase the moisture demands and subsequent physiological stress on salamanders. Warming and drying trends in the Jemez Mountains currently are threats to the species, and these threats are projected to continue into the future.

Proposed Listing Determination

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Jemez Mountains salamander. Habitat loss, degradation, and modification through the interrelated effects from severe wildland fire, historical and current fire management practices, forest composition and structure conversions, and climate change have impacted the salamander by curtailing its range and affecting its behavioral and physiological functions. Because the salamander has highly permeable skin used for breathing and gas exchange, it must stay moist at all times or it will die. Salamanders have little control in maintaining water balance except through behaviorally changing where they are in the environment, seeking high-moisture areas to hydrate and avoiding warm, dry areas where they would otherwise dehydrate. Warmer temperatures increase water use and dehydration, as well as increase metabolic processes, which then in turn require additional energy for the salamander. This life-history trait renders hydration maintenance above all other life functions.

Therefore, any action or factor that warms and dries its habitat adversely affects the salamander and its ability to carry out normal behavior (foraging and reproduction). Furthermore, historical silvicultural practices removed most of the large-diameter Douglas fir trees from the Jemez Mountains, and this change affects the salamander now and will continue to do so in the future, because a lack of these trees results in a lack of the highest quality cover objects available to salamanders now and in the future. It has been shown for other related plethodontid salamanders that these types of cover objects were an important component in providing resiliency from the effects of factors that warm and dry habitat, such as climate change (See Factor A).

On the basis of this information, we find that the threats to the salamander most significantly result from habitat loss, degradation, and modification, including severe wildland fire, but also alterations to habitat of varying magnitude from fire suppression, forest composition and structure conversions, post-fire rehabilitation, forest and fire management, roads, trails, habitat fragmentation, and recreation (see Factor A). Some of these threats may be exacerbated by the current and projected effects of climate change, and we have determined that the current and projected effects from climate change are a direct threat to the salamander. The loss of one of the largest known populations, the documented modification of the habitat from a variety of factors, and the cascading behavioral and physiological effects from these alterations places this species at great risk of extinction.

The Act defines an endangered species as any species that is "in danger of extinction throughout all or a significant portion of its range" and a threatened species as any species "that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future." We find that the Jemez Mountains salamander is presently in danger of extinction throughout all of its range based on the severity of threats currently impacting the salamander. The threats are both current and expected to continue in the future, and

are significant in that they limit all behavioral and physiological functions, including living, breathing, feeding, and reproduction and reproductive success, and extend across the entire range of the species. Therefore, on the basis of the best available scientific and commercial information, we propose listing the Jemez Mountains salamander as an endangered species, in accordance with sections 3(6) and 4(a)(1) of the Act.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. The Jemez Mountains salamander proposed for listing in this rule is highly restricted in its range, and the threats occur throughout its range. Therefore, we assessed the status of the species throughout its entire range. The threats to the survival of the species occur throughout the species' range and are not restricted to any particular significant portion of that range. Accordingly, our assessment and proposed determination applies to the species throughout its entire range.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation by Federal, State, tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The NMEST Cooperative Management Plan and Conservation Agreement were completed in 2000 (see *Previous Federal Actions* section above). These are nonregulatory documents and were intended to be a mechanism to provide for conservation and protection in lieu of listing the salamander under the Endangered Species Act, as amended, (U.S. General Accounting Office 1993, p. 9), The goal of these documents was to "...provide guidance for the conservation and management of sufficient habitat to maintain viable populations of the species" (NMEST 2000, p. i.). However, they have been ineffective in preventing the ongoing loss of salamander habitat, and they are not expected to prevent further declines of the species. As discussed in the *Previous Federal Actions* section, above, the intent of the agreement was to protect the salamander and its habitat on lands administered by the USFS; however, there have been projects that have negatively affected the species (e.g., State Highway 126 project described under Factor A). The Cooperative Management Plan and Conservation Agreement have been unable to prevent ongoing loss of habitat, and they are not expected to prevent further declines of the species. They do not provide adequate protection for the salamander or its habitat.

Additionally, Los Alamos National Laboratory has committed to, whenever possible, retaining trees in order to maintain greater than 80 percent canopy cover, and avoiding activities that either compact soils or dry habitat (Los Alamos National Laboratory 2010, p. 7).

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed, preparation of a draft and final recovery plan, and revisions to the plan as significant new information becomes available. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. The recovery plan identifies site-specific management actions that will achieve recovery of the species, measurable criteria that determine when a species may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (comprising species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, tribal, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and tribal lands.

If this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of New Mexico would be eligible for Federal funds to implement management actions that promote the protection and recovery of the Jemez Mountains salamander. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants*.

Although the Jemez Mountains salamander is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize,

fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agency actions within the species habitat that may require conference or consultation or both as described in the preceding paragraph include landscape restoration projects (e.g., forest thinning); prescribed burns, wildland-urban-interface projects; forest silvicultural practices; other forest management or landscape-altering activities on Federal lands administered by the National Park Service (Bandelier National Monument), VCNP, and the Department of Energy (Los Alamos National Laboratory), and USFS; issuance of section 404 Clean Water Act permits by the Army Corps of Engineers; and construction and maintenance of roads or highways by the Federal Highway Administration.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.21 for endangered wildlife, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import, export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. Under the Lacey Act (18 U.S.C. 42–43; 16 U.S.C. 3371–3378), it is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species, and at 17.32 for threatened species. With regard to endangered wildlife, a permit must be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of species proposed for listing. The following activities could potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Unauthorized collecting, handling, possessing, selling, delivering, carrying, or transporting of the species, including import or export across State lines and international boundaries, except for properly documented antique specimens of these taxa at least 100 years old, as defined by section 10(h)(1) of the Act;

(2) Unauthorized modification or manipulation of forested habitat, including restoration and thinning activities;

(3) Unauthorized actions that may further degrade salamander habitat following severe stand-replacing wildfires, such as salvage logging;

(4) Unauthorized use of heavy equipment in forested habitat in which the Jemez Mountains salamander is known to occur;

(5) Unauthorized release or introduction of nonnative or native plant species that would make salamander habitat unsuitable in areas where the Jemez Mountains salamander is known to occur;

(6) Unauthorized discharge of chemicals into forested habitat in which the Jemez Mountains salamander is known to occur; and

(7) Capture, survey, or collection of specimens of this taxon without a permit from us pursuant to section 10(a)(1)(A) of the Act.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Critical Habitat Designation for the Jemez Mountains Salamander

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features:

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the

conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are the specific elements of physical or biological features that provide for a species' life-history processes, are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species, but that was not occupied at the time of listing, may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographic area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the species. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

There is no documentation that the salamander is currently threatened by collection, and it is unlikely to experience increased threats by identifying critical habitat. Moreover, the identification and mapping of critical habitat is not expected to initiate any such threat. In the absence of a finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. The potential benefits include: (1) Triggering consultation under section 7 of the Act in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it has become unoccupied or the occupancy is in question; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the species.

The primary regulatory effect of critical habitat is the section 7(a)(2) requirement that Federal agencies refrain from taking any action that destroys or adversely modifies critical habitat. Lands proposed for designation as critical habitat would be subject to Federal actions that trigger the section 7 consultation requirements. There may also be some educational or informational benefits to the designation of critical habitat. Educational benefits include the notification of the general public of the importance of protecting habitat.

Therefore, because we have determined that the designation of critical habitat will not likely increase the degree of threat to the species, and will provide considerable conservation benefit to the species, we find that designation of critical habitat is prudent for the Jemez Mountains salamander.

Critical Habitat Determinability

As stated above, section 4(a)(3) of the Act requires the designation of critical habitat concurrently with the species' listing "to the maximum extent prudent and determinable." Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(1) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(2) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

When critical habitat is not determinable, the Act provides for an additional year to publish a critical

habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where this species is located. This and other information represent the best scientific data available, and the available information is sufficient for us to identify areas to propose as critical habitat. Therefore, we conclude that the designation of critical habitat is determinable for the Jemez Mountains salamander.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographic, and ecological distributions of a species.

We derive the specific physical or biological features required for the Jemez Mountains salamander from studies of this species' habitat, ecology, and life history as described below. Unfortunately, there have been relatively few studies on the salamander and its habitat, and information gaps remain. However, we have used the best available information as described in the background and threats assessment above and summarized below, as well as information from other salamanders with similar biological requirements. To identify the physical and biological needs of the Jemez Mountains salamander, we have relied on current conditions at locations where the salamander has been observed during surveys, and the best information available on the species and its close relatives. We have determined that the following physical or biological features are essential for the Jemez Mountains salamander:

Space for Individual and Population Growth and for Normal Behavior

The Jemez Mountains salamander has been observed in forested areas of the Jemez Mountains, ranging in elevation from 6,998 to 10,990 ft (2,133 to 3,350 m) (Ramotnik 1988, pp. 78, 84). Redondo Peak contains both the maximum elevation in the Jemez Mountains (11,254 ft (3,430 m)) and the highest salamander observation (10,990 ft (3,350 m)). Surveys have not yet been conducted above this highest observation on Redondo Peak, but the habitat contains those principal biological or physical constituent elements we have identified from areas known to contain the salamander. Alternatively, the vegetation communities and moisture conditions at elevations below 6,998 ft (2,133 m) are not suitable for the Jemez Mountains salamander.

The Jemez Mountains salamander spends much of its life underground, but it can be found active above ground from July through September, when environmental conditions are warm and wet. The salamander's underground habitat appears to be deep, fractured, subterranean rock in areas with high soil moisture, where geologic and moisture constraints likely limit the distribution of the species (NMEST 2000, p. 2). The aboveground habitat occurs within forested areas, primarily within areas that contain Douglas fir, blue spruce, Engelman spruce, white fir, limber pine, ponderosa pine, Rocky Mountain maple, and aspen (Degenhardt *et al.* 1996, p. 28; Reagan 1967, p. 17).

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Terrestrial amphibians generally inhabit environments that are hostile to their basic physiology, but nonetheless have developed combinations of unique morphological structures (e.g., shape, structure, color, pattern), physiological mechanisms, and behavioral responses to inhabit diverse terrestrial habitats (Duellman and Trueb 1986, p. 197). Terrestrial salamanders are generally active at night and have diurnal (daytime) retreats to places that have higher moisture content relative to surrounding areas that are exposed to warming from the sun and air currents (Duellman and Trueb 1986, p. 198). These daytime retreats can be under rocks, interiors of logs, depths of leaf mulch, shaded crevices, and burrows in the soil (Duellman and Trueb 1986, p. 198). These retreats provide opportunities for terrestrial salamanders to rehydrate during the day, and if water uptake is sufficient during the day, the animal can afford to lose water during nocturnal activities (Duellman and Trueb 1986, p. 198). Even though many kinds of terrestrial amphibians are normally active only at night, they often become active during the day immediately after heavy rains (Duellman and Trueb 1986, p. 198).

When Jemez Mountains salamanders have been observed above ground during the day, they are primarily found in high moisture retreats (such as under and inside decaying logs and stumps, and under rocks and bark) (Everett 2003, p. 24) with high overstory canopy cover. Everett (2003, p. 24) characterized Jemez Mountains salamander's habitat as having an average canopy cover of 76 percent, with a range between 58 to 94 percent. Areas beneath high tree canopy cover provide moist and cool conditions when compared to adjacent areas with low canopy cover. Diurnal retreats that provide moist and cool microhabitats are important for physiological requirements and also influence the salamander's ability to forage, because foraging typically dehydrates individuals and these retreats allow for rehydration. Temperature also affects hydration and dehydration rates, oxygen consumption, heart rate, and metabolic rate, and thus influences body water and body mass in Jemez Mountains salamanders ((Duellman and Treub 1986, p. 203; Whitford 1968, pp. 247–251). Because salamanders must address hydration needs above all other life-history needs, the salamander must obtain its water from its habitat, and the salamander has no physiological mechanism to stop dehydration or water loss to the environment. Based on this information, we conclude that substrate moisture through its effect on absorption and loss of water is the most important factor in the ecology of this species (Heatwole and Lim 1961, p. 818). Thus, moist and cool microhabitats are essential for the conservation of the species.

In regard to food, Jemez Mountains salamanders have been found to consume prey species that are diverse in size and type with ants, mites, and beetles being eaten most often (Cummer 2005, p. 43).

Cover or Shelter

When active above ground, the Jemez Mountains salamander is usually found within forested areas under decaying logs, rocks, bark, moss mats, or inside decaying logs and stumps. Jemez Mountains salamanders are generally found in association with decaying coniferous logs, particularly Douglas fir,

considerably more often than deciduous logs, likely due to the differences in physical features (e.g., coniferous logs have blocky pieces with more cracks and spaces than deciduous logs) (Ramotnik 1988, p. 53). Large-diameter (greater than 10 in (25 cm)) decaying logs provide important aboveground habitat because they are moist and cool compared to other cover; larger logs maintain higher moisture and lower temperature longer than smaller logs. These high-moisture retreats also offer shelter and protection from some predators (e.g., skunks, owls).

The percent surface area of occupied salamander habitat covered by decaying logs, rocks, bark, moss mats, and stumps averaged 25 percent (Everett 2003, p. 35); however, Everett (2003, p. 35) noted that areas with high percentages of area of habitat covered by decaying logs, rocks, bark, moss mats, and stumps are difficult to survey and locate salamanders when present, and may bias the data toward lower percentages of area covered by decaying logs, rocks, bark, moss mats, and stumps.

Furthermore, there may be high-elevation meadows located within the critical habitat units that are used by the Jemez Mountains salamander. The Jemez Mountains salamanders utilize habitat vertically and horizontally above ground and below ground. Currently, we do not fully understand how salamanders utilize areas like meadows, where the aboveground vegetation component differs from areas where salamanders are more commonly encountered (e.g., forested areas); however, salamanders have been found in high-elevation meadows. Therefore, meadows are considered part of the physical or biological features for the Jemez Mountains salamander.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Little is known about the reproduction of the Jemez Mountains salamander. Although many terrestrial salamanders deposit eggs in well hidden sites, such as underground cavities, decaying logs, and moist rock crevices (Pentranka 1998, p. 6), an egg clutch has never been observed during extensive Jemez Mountains salamander surveys. Because the salamander spends the majority of its life below ground, eggs are probably laid and hatch underground. However, we currently lack the information to identify the specific elements of the physical or biological features needed for breeding, reproduction, or rearing of offspring.

Habitats Protected From Disturbance or Representative of the Historical, Geographic, and Ecological Distributions of the Species

All occupied salamander habitat has undergone change resulting from historical grazing practices and effective fire suppression, most often resulting in shifts in vegetation composition and structure and increased risk of large-scale, stand-replacing wildfire (see discussion in *Factor A: The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*, above). This species was first described in 1950, about halfway through the approximate 100-year period of shifting vegetation composition and structure and building of fuels for wildfire in the Jemez Mountains. Thus, research and information pertaining to this species are in the context of a species existing in an altered ecological situation. Nonetheless, while we do not have a full understanding of how these particular alterations affect the salamander (potentially further drying habitat through increased water demand of increased density of trees, or, alternatively, potentially increasing habitat moisture from a higher canopy cover), we do know that the changes in the vegetative component of salamander habitat has greatly increased the risk of large-scale, stand-replacing wildfire. Furthermore, we are only aware of small-scale treatments or implemented forest-restoration projects to reduce this risk. Thus, there does not seem to be any areas in occupied salamander habitat that are protected from disturbance.

However, based on the biology and the physiological requirements of this and other terrestrial plethodontid salamanders, we believe that the Jemez Mountains salamander is distributed in areas not burned by large-scale, stand-replacing fires. These areas are believed to contain the physical or biological features essential to the conservation of the species. Managing for an appropriate vegetation composition and designing forest restoration treatments to minimize the risk of wildfire are difficult because we lack the information to quantify or qualify these historical attributes. We specifically solicit further input on methods or mechanisms that can better describe the appropriate vegetation composition and assist in the design of forest restoration treatments. Specific research is needed on forest restoration treatments that could minimize impacts and maximize benefits to the salamander.

Primary Constituent Elements for the Jemez Mountains Salamander

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of the Jemez Mountains salamander in the geographic area occupied by the species at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be the elements of physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required sustaining the species' life-history processes, we determine that the primary constituent elements (PCEs) specific to the Jemez Mountains salamander's forested habitat are:

1. Tree canopy cover greater than 58 percent consisting of the following tree species alone or in any combination:
   a. Douglas fir (*Pseudotsuga menziesii*);
   b. blue spruce (*Picea pungens*);
   c. Engelman spruce (*Picea engelmannii*);
   d. white fir (*Abies concolor*);
   e. limber pine (*Pinus flexilis*);
   f. ponderosa pine (*Pinus ponderosa*);
   g. aspen (*Populus tremuloides*)

and having an understory that predominantly comprises:

   a. Rocky Mountain maple (*Acer glabrum*);
   b. New Mexico locust (*Robinia neomexicana*);
   c. oceanspray (*Holodiscus* sp.); or
   d. shrubby oaks (*Quercus* spp.).

2. Elevations from 6,988 to 11,254 ft (2,130 to 3,430 m).

3. Ground surface in forest areas with
   a. at least 25 percent or greater of ground surface area of coniferous logs at least 10 in (25 cm) in diameter, particularly Douglas fir and other woody debris, which are in contact with the soil in varying stages of decay from freshly fallen to nearly fully decomposed, or
   b. structural features, such as rocks, bark, and moss mats that provide the species with food and cover.

4. Underground habitat in forest or meadow areas containing interstitial spaces provided by:
   a. igneous rock with fractures or loose rocky soils;
   b. rotted tree root channels; or
   c. burrows of rodents or large invertebrates.

With this proposed designation of critical habitat, we intend to identify the

physical or biological features essential to the conservation of the species through the identification of the PCEs sufficient to support the life-history processes of the species. Because not all life-history functions require all the PCEs, not all areas proposed as critical habitat will contain all the PCEs. All units proposed to be designated as critical habitat are currently occupied by the Jemez Mountains salamander and contain one or more of the PCEs sufficient to support the life-history needs of the species.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographic area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of this species may require special management considerations or protection to reduce the following threats: Historical and current fire management practices; severe wildland fire; forest composition and structure conversions; post-fire rehabilitation; forest management (including silvicultural practices); roads, trails, and habitat fragmentation; recreation; and climate change. Furthermore, disease and the use of fire retardants or other chemicals may threaten the salamander, and may need special management considerations.

Management activities that could ameliorate these threats include (but are not limited to): (1) Reducing fuels to minimize the risk of severe wildfire in a manner that considers the salamander's biological requirements; (2) not implementing post-fire rehabilitation techniques that are detrimental to the salamander in the geographic areas of occupied salamander habitat, and (3) removing unused roads and trails and restoring habitat. A more complete discussion of the threats to the salamander and its habitats can be found in "Summary of Factors Affecting the Species" above.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. We review available information pertaining to the habitat requirements of the species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas outside those geographic areas currently occupied are necessary to ensure the conservation of the species. We are not proposing to designate any areas outside the geographic area occupied by the species because occupied areas are sufficient for the conservation of the species.

Our initial step in identifying critical habitat was to determine the physical or biological habitat features essential to the conservation of the species, as explained in the previous section. We then identified the geographic areas that are occupied by the Jemez Mountains salamander and that contain one or more of the physical or biological features. We used various sources of available information and supporting data that pertains to the habitat requirements of the Jemez Mountains salamander. These included, but were not limited to, the 12-month finding published on September 2, 2010 (75 FR 54822), reports under section 6 of the Act submitted by NMDGF, the salamander Conservation Management Plan, research published in peer-reviewed articles, unpublished academic theses, agency reports, and mapping information from agency sources. We plotted point data of survey locations for the salamander using ArcMap (Environmental Systems Research Institute, Inc.), a computer GIS program, which were then used in conjunction with elevation, topography, vegetation, and land ownership information The point data consisted of detection (367 points) and nondetection (1,022 points) survey locations.

The units proposed for designation are based on sufficient elements of physical and biological features being present to support life-history processes of the species and are within the GIS model output. Areas that have been burned in recent fires (e.g., Las Conchas Fire and Cerro Grande Fire) were not excluded from the proposed units because fire burns in a mosaic pattern (a mix pattern of burned and unburned patches), and at least in the short-term (10 to 15 years), sufficient elements of physical and biological features remain subsequent to wildfire that allow salamanders to continuously occupy areas that have been burned. We selected areas within the geographical area occupied at the time of listing that contain the physical or biological features essential to their conservation and may require special management considerations or protection. Large areas that consisted of predominantly nondetection survey locations were not included in the proposed designation, but may contain detections. Finally, at the scale of the unit, both units are considered wholly occupied because salamanders use both aboveground and belowground habitat continuously, moving and utilizing habitat vertically and horizontally. Also, there may be high elevation meadows located within the units, but these areas are also considered wholly occupied because the salamanders have been found in high elevation meadows. While it is possible that salamanders may not be detected at the small scale of a survey (measured in meters), the entire unit is considered occupied because of the similarity and continuous nature of the physical and biological features within the units that are used by salamanders for foraging, seasonal movements, and maintaining genetic variation. For clarity, we defined occupied proposed critical habitat as those forested areas in the Jemez Mountains that:

a. Include the majority of salamander point observations that are representative of the distribution of the Jemez Mountains salamander habitat needs throughout the geographical range of the species;

b. Provide the essential physical or biological features necessary to support the species' life-history requirements surrounding salamander point observations ; and

c. Provide connectivity between Jemez Mountains salamander habitat to provide for seasonal surface movement and genetic variability.

After utilizing the above methods, we refined the model to remove isolated historical point data, because the survey data for those areas are insufficient, and we do not know if those areas contain sufficient physical or biological features to support life-history functions essential to the conservation of the salamander. The areas removed are predominantly on Forest Service and VCNP lands within the northeastern and northwestern part of the Jemez Mountains, but also include small areas on the Pueblo of Santa Clara, Los Alamos National Laboratory, and private lands.

When determining proposed critical habitat boundaries, we also made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features for the Jemez Mountains salamander. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed

rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

In summary, we are proposing for designation of critical habitat geographic areas that we have determined are occupied by the salamander at the time of listing and contain sufficient elements of physical or biological features to support life-history processes essential for the conservation of the species. The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the rule portion. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R2–ES–2012–0063, on our Internet site at *http://www.fws.gov/southwest/es/NewMexico/*, and at the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** above).

Proposed Critical Habitat Designation

We are proposing two units as critical habitat for the Jemez Mountains salamander. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the salamander. The two areas we propose as critical habitat are: (1) Western Jemez Mountains Unit and (2) Southeastern Jemez Mountains Unit. Both units are currently occupied by the species. The approximate area of each proposed critical habitat unit and land ownership are shown in Table 1.

TABLE 1—PROPOSED CRITICAL HABITAT UNITS FOR THE JEMEZ MOUNTAINS SALAMANDER

Critical habitat unit	Land ownership by type	Size of unit in acres (hectares)
1. Western Jemez Mountains Unit	Federal	41,467 (16,781)
	Private	978 (396)
Total Unit 1		42,445 (17,177)
2. Southeastern Jemez Mountains Unit	Federal	46,505 (18,820)
	Private	1,839 (744)
Total Unit 2		48,344 (19,564)
Total	Federal	87,972 (35,601)
	Private	2,817 (1,140)
	Total	90,789 (36,741)

NOTE: Area sizes may not sum due to rounding.

We present brief descriptions of the units, and reasons why they meet the definition of critical habitat for the Jemez Mountains salamander, below.

Unit 1: Western Jemez Mountains Unit

Unit 1 consists of 42,445 ac (17,177 ha) in Sandoval and Rio Arriba Counties in the western portion of the Jemez Mountains of which 41,467 ac (16,781 ha) is federally managed, with 26,532 ac (10,737 ha) on USFS lands, 14,935 ac (6,044 ha) on VCNP lands, and 978 ac (396 ha) on private lands. This unit is located in the western portion of the distribution of the Jemez Mountains salamander and includes Redondo Peak. This unit is within the geographical area occupied by the salamander and contains elements of essential physical or biological features. The physical or biological features require special management or protection from large-scale, stand-replacing wildfire; actions that would disturb salamander habitat by warming and drying; actions that reduce the availability of aboveground cover objects including downed logs; or actions that would compact or disturb the soil or otherwise interfere with the capacity of salamanders to move between subterranean habitat and aboveground habitat.

Unit 2: Southeastern Jemez Mountains Unit

Unit 2 consists of 48,344 ac (19,564 ha) in Sandoval and Los Alamos Counties in the eastern, southern, and southeastern portions of the Jemez Mountains of which 46,505 ac (18,820 ha) is federally managed, with 30,502 ac (12,344 ha) on USFS lands, 8,784 ac (3,555 ha) on VCNP lands, and 7,219 ac (2,921 ha) on National Park Service lands (Bandelier National Monument), and 1,839 ac (744 ha) are on private lands. This unit is within the geographical area occupied by the salamander and contains elements of essential physical or biological features. The physical or biological features require special management or protection from large-scale, stand-replacing wildfire; actions that would disturb salamander habitat by warming and drying; actions that reduce the availability of aboveground cover objects including downed logs; or actions that would compact or disturb the soil or otherwise interfere with the capacity of salamanders to move between subterranean habitat and aboveground habitat.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442 (5th Cir. 2001)), and we

do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, or are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define "reasonable and prudent alternatives" (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the "Adverse Modification" Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for the Jemez Mountains salamander. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the Jemez Mountains salamander. These activities include, but are not limited to:

(1) Actions that would disturb salamander habitat by warming and drying. Such activities could include, but are not limited to, landscape restoration projects (e.g., forest thinning and manipulation); prescribed burns; wildland fire use; wildland-urban-interface projects (forest management at the boundary of forested areas and urban areas); forest silvicultural practices (including salvage logging); other forest management or landscape-altering activities that reduce canopy cover, or warm and dry habitat. These activities could reduce the quality of salamander habitat or reduce the ability of the salamander to carry out normal behavior and physiological functions, which are tightly tied to moist cool microhabitats. Additionally, these actions could also reduce available high-moisture retreats, which could increase the amount of time necessary to regulate body water for physiological function and thus reduce the amount of time available for foraging and finding a mate, ultimately reducing fecundity.

(2) Actions that reduce the availability of the ground surface within forested areas containing downed logs that are greater than 10 in (0.25 m) diameter and of any stage of decomposition or removal of large-diameter trees (especially Douglas fir) that would otherwise become future high quality cover. Such activities could include but are not limited to activities listed above. Aboveground cover objects within the forest provide high-moisture retreats relative to surrounding habitat and offer opportunities to regulate body water and influence the salamander's capacity to forage and reproduce.

(3) Actions that would compact or disturb the soil or otherwise interfere with the capacity of salamanders to move between subterranean habitat and aboveground habitat. Such activities could include but are not limited to use of heavy equipment, road construction, and pipeline installation.

(4) Actions that spread disease into salamander habitat. Such activities could include water drops (i.e., picking up surface water contaminated with aquatic amphibian pathogens (e.g., *Bd*) and dropping it in forested habitat). While we do not know the susceptibility of amphibian pathogens on the Jemez Mountains salamander, some pathogens (e.g., *Bd*) have caused many other amphibian species extinctions and declines and could potentially threaten the Jemez Mountains salamander.

(5) Actions that contaminate forested habitats with chemicals. Such activities could include aerial drop of chemicals such as fire retardants or insecticides. We do not know the effects of most chemicals on Jemez Mountains salamanders; amphibians in general are sensitive to chemicals with which they

come in contact because they use their skin for breathing and other physiological functions.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

There are no Department of Defense lands within the proposed critical habitat designation.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors. Potential land use sectors that may be affected by Jemez Mountains salamander critical habitat designation include forest management (including silvicultural practices); road or trail construction; recreation; fire suppression or other chemical use; and grazing. We also consider any social impacts that might occur because of the designation.

We will announce the availability of the draft economic analysis as soon as it is completed. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.regulations.gov*, or by contacting the New Mexico Ecological Services Field Office directly (see **FOR FURTHER INFORMATION CONTACT** section). During the development of a final designation, we will consider economic impacts, public comments, and other new information, and areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense (DOD) or lands where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the Jemez Mountains salamander are not owned or managed by the DOD, but there are national security interests found at Los Alamos Laboratory. Currently, there are no areas proposed for exclusion based on impacts on national security, but we seek comment on whether there is a national security interest at Los Alamos Laboratory that could be adversely affected by the proposed designation.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this proposal, we have determined that there are currently no HCPs for the Jemez Mountains salamander, and the proposed designation does not include any tribal lands occupied by the species that contain the physical or biological features essential for conservation of the salamander. Moreover, we are unaware of any tribal lands that are considered unoccupied by Jemez Mountains salamander that are essential for the conservation of the species. Therefore, we have not proposed designation of critical habitat for Jemez Mountains salamander on tribal lands. However, we will coordinate with tribes in nearby areas should there be any concerns or questions arising from this proposed critical habitat designation. We anticipate no impact to tribal lands, partnerships, or HCPs from this

proposed critical habitat designation. There are no areas proposed for exclusion from this proposed designation based on other relevant impacts.

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our listing determination and critical habitat designation is based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period in this proposed designation of critical habitat.

We will consider all comments and information received during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

Public Hearings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Persons needing reasonable accommodations to attend and participate in a public hearing should contact the New Mexico Ecological Services Field Office at 505–346– 2525, as soon as possible. To allow sufficient time to process requests, please call no later than 1 week before the hearing date. Information regarding this proposed rule is available in alternative formats upon request.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, we lack the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, we defer the RFA finding until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and Executive Order 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will announce availability of the draft economic analysis of the proposed designation in the **Federal Register** and reopen the public comment period for the proposed designation. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination.

We have concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a sufficiently informed determination based on adequate economic information and provide the necessary opportunity for public comment.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. A small portion of an existing gas pipeline is within proposed critical habitat; however, we do not expect the designation of this proposed critical habitat to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or tribal

governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because only Federal lands are involved in the proposed designation. Therefore, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment if appropriate.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we will analyze the potential takings implications of designating critical habitat for the Jemez Mountains salamander in a takings implications assessment. Following completion of the proposed rule, a draft economic analysis will be completed for the proposed designation. The draft economic analysis will provide the foundation for us to use in preparing a takings implications assessment.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in New Mexico. The designation of critical habitat in geographic areas currently occupied by the Jemez Mountains salamander imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the elements of physical or biological features essential to the conservation of the Jemez Mountains salamander within the designated areas to assist the public in understanding the habitat needs of the species.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as endangered or threatened under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).] However, when the range of the species includes States within the Tenth Circuit, such as that of Jemez Mountains salamander, under the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we will undertake a NEPA analysis for critical habitat designation and notify the public of the availability of the draft environmental assessment for this proposal when it is finished.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994

(Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

Because we are not proposing designation of critical habitat for Jemez Mountains salamander on any tribal lands, we anticipate no impact to tribal lands.

Clarity of the 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 feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this document are the staff members of the New Mexico Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.11(h), add an entry for "Salamander, Jemez Mountains" in alphabetical order under Amphibians to the List of Endangered and Threatened Wildlife, to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
AMPHIBIANS							
*	*	*	*	*	*		*
Salamander, Jemez Mountains.	*Plethodon neomexicanus.*	U.S. (NM)	U.S. (NM)	E	.....	17.95(d)	NA
*	*	*	*	*	*		*

3. In § 17.95, amend paragraph (d) by adding an entry for "Jemez Mountains Salamander (*Plethodon neomexicanus*)," in the same alphabetical order that the species appears in the table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(d) *Amphibians.*

* * * * *

Jemez Mountains Salamander (*Plethodon neomexicanus*)

(1) Critical habitat units are depicted for Los Alamos, Rio Arriba, and Sandoval Counties, New Mexico, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of Jemez Mountains salamander consist of four components:

(i) Tree canopy cover greater than 58 percent that

(A) Consists of the following tree species alone or in any combination: Douglas fir (*Pseudotsuga menziesii*); blue spruce (*Picea pungens*); Engelman spruce (*Picea engelmannii*); white fir (*Abies concolor*); limber pine (*Pinus flexilis*); ponderosa pine (*Pinus ponderosa*); and aspen (*Populus tremuloides*) and

(B) That may also have an understory that predominantly comprises: Rocky Mountain maple (*Acer glabrum*); New Mexico locust (*Robinia neomexicana*); oceanspray (*Holodiscus sp.*); and shrubby oaks (*Quercus spp.*).

(ii) Elevations of 6,988 to 11,254 feet (2,130 to 3,430 meters).

(iii) Ground surface in forest areas with

(A) At least 25 percent or greater of ground surface area of coniferous logs at least 10 in (25 cm) in diameter, particularly Douglas fir and other woody debris, which are in contact with the soil in varying stages of decay from freshly fallen to nearly fully decomposed, or

(B) Structural features, such as rocks, bark, and moss mats, that provide the species with food and cover; and

(iv) Underground habitat in forest or meadow areas containing interstitial spaces provided by:

(A) Igneous rock with fractures or loose rocky soils;

(B) Rotted tree root channels; or

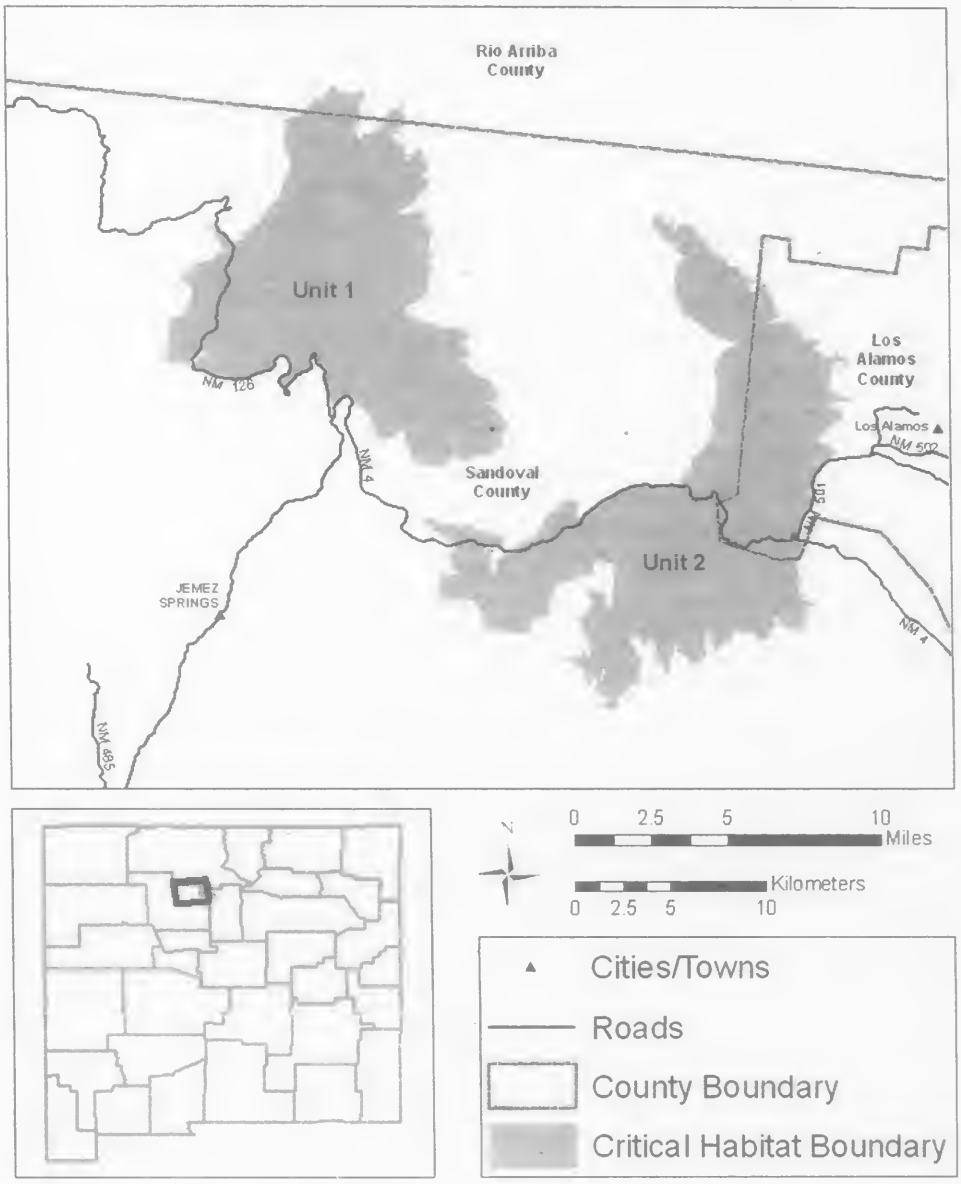
(C) Burrows of rodents or large invertebrates.

(3) Critical habitat does not include manmade structures (such as buildings, fire lookout stations, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) *Critical habitat map units.* Data layers defining map units were created using digital elevation models, GAP landcover data, salamander observation data, salamander habitat suitability models, and were then mapped using the USA Contiguous Albers Equal Area Conic USGS version projection. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's Internet site (*http://www.fws.gov/southwest/es/NewMexico/*), at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2012–0063, and at the New Mexico Ecological Services Field Office. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) **Note:** Index map of critical habitat for the Jemez Mountains salamander follows:

Critical Habitat for *Plethodon neomexicanus* (Jemez Mountains salamander)



* * * * *

Dated: August 23, 2012.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–21882 Filed 9–11–12; 8:45 am]

BILLING CODE 4310–55–C

FEDERAL REGISTER

Vol. 77 Wednesday,
No. 177 September 12, 2012

Part V

The President

Federal Register
Vol. 77, No. 177
Wednesday, September 12, 2012

Presidential Documents

Title 3—

The President

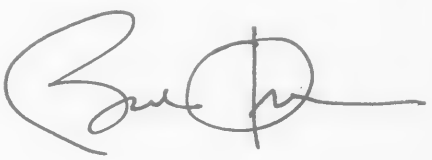
Notice of September 11, 2012

Continuation of the National Emergency With Respect to Certain Terrorist Attacks

Consistent with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency previously declared on September 14, 2001, in Proclamation 7463, with respect to the terrorist attacks of September 11, 2001, and the continuing and immediate threat of further attacks on the United States.

Because the terrorist threat continues, the national emergency declared on September 14, 2001, and the powers and authorities adopted to deal with that emergency must continue in effect beyond September 14, 2012. Therefore, I am continuing in effect for an additional year the national emergency that was declared on September 14, 2001, with respect to the terrorist threat.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
Washington, September 11, 2012.

[FR Doc. 2012–22708
Filed 9–11–12; 2:15 pm]
Billing code 3295–F2–P

Presidential Documents

Notice of September 11, 2012

Continuation of the National Emergency With Persons Who Commit, Threaten To Commit, or Support Terrorism

On September 23, 2001, by Executive Order 13224, the President declared a national emergency with respect to persons who commit, threaten to commit, or support terrorism, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706). The President took this action to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States constituted by the grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks on September 11, 2001, in New York and Pennsylvania and against the Pentagon, and the continuing and immediate threat of further attacks against United States nationals or the United States. Because the actions of these persons who commit, threaten to commit, or support terrorism continue to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, the national emergency declared on September 23, 2001, and the measures adopted on that date to deal with that emergency, must continue in effect beyond September 23, 2012. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to persons who commit, threaten to commit, or support terrorism.

This notice shall be published in the *Federal Register* and transmitted to the Congress.

THE WHITE HOUSE,
Washington, September 11, 2012.

[FR Doc. 2012–22710
Filed 9–11–12; 2:15 pm]
Billing code 3295–F2–P

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Vol. 77, No. 177

Wednesday, September 12, 2012

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H.R. 1402/P.L. 112–170
To authorize the Architect of the Capitol to establish battery recharging stations for privately owned vehicles in parking areas under the jurisdiction of the House of Representatives at no net cost to the Federal Government. (Aug. 16, 2012; 126 Stat. 1303)

H.R. 3670/P.L. 112–171
To require the Transportation Security Administration to comply with the Uniformed Services Employment and Reemployment Rights Act. (Aug. 16, 2012; 126 Stat. 1306)

H.R. 4240/P.L. 112–172
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S. 3510/P.L. 112–173
To prevent harm to the national security or endangering the military officers and civilian employees to whom internet publication of certain information applies, and for other purposes. (Aug. 16, 2012; 126 Stat. 1310)

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