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Federal Register

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

WHO: Sponsored by the Office of the Federal Register.

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

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

WHEN: Tuesday, January 25, 2011
9 a.m.–12:30 p.m.

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

RESERVATIONS: (202) 741–6008

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

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Presidential Documents

Title 3—

The President

Proclamation 8621 of December 22, 2010

National Slavery and Human Trafficking Prevention Month, 2011

By the President of the United States of America

A Proclamation

Our Nation was founded on the enduring principles of equality and freedom for all. As Americans, it is our solemn responsibility to honor and uphold this legacy. Yet, around the world and even within the United States, victims of modern slavery are deprived of the most basic right of freedom. During National Slavery and Human Trafficking Prevention Month, we rededicate ourselves to preventing and ending human trafficking, and we recognize all who continue to fight this serious human rights violation.

Human trafficking is a global travesty that takes many forms. Whether forced labor or sexual trafficking, child soldiering or involuntary domestic servitude, these abuses are an affront to our national conscience, and to our values as Americans and human beings. There is no one type of victim—men and women, adults and children are all vulnerable. From every corner of our Nation to every part of the globe, we must stand firm in defense of freedom and bear witness for those exploited by modern slavery.

At the start of each year, Americans commemorate the Emancipation Proclamation, which became effective on January 1, 1863, and the 13th Amendment, which was signed by President Abraham Lincoln and sent to the States for ratification on February 1, 1865. These seminal documents secured the promise of freedom for millions enslaved within our borders, and brought us closer to perfecting our Union. We also recall that, over 10 years ago, the Victims of Trafficking and Violence Protection Act of 2000 renewed America's commitment to combating modern slavery domestically and internationally. With this law, America reaffirmed the fundamental promise of "forever free" enshrined within the Emancipation Proclamation.

We cannot strengthen global efforts to end modern slavery without first accepting the responsibility to prevent, identify, and aggressively combat this crime at home. No country can claim immunity from the scourge of human rights abuses, or from the responsibility to confront them. As evidence of our dedication to a universal struggle against this heinous practice, the Department of State's "Trafficking in Persons Report 2010" included America in its rankings for the first time, measuring our efforts by the same standards to which we hold other nations. Looking ahead, we must continue to aggressively investigate and prosecute human trafficking cases within our own borders.

Although the United States has made great strides in preventing the occurrence of modern slavery, prosecuting traffickers and dismantling their criminal networks, and protecting victims and survivors, our work is not done. We stand with those throughout the world who are working every day to end modern slavery, bring traffickers to justice, and empower survivors to reclaim their rightful freedom. This month, I urge all Americans to educate themselves about all forms of modern slavery and the signs and consequences of human trafficking. Together, we can combat this crime within our borders and join with our partners around the world to end this injustice.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim January 2011 as National Slavery and Human Trafficking Prevention Month, culminating in the annual celebration of National Freedom Day on February 1. I call upon the people of the United States to recognize the vital role we can play in ending modern slavery and to observe this month with appropriate programs and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of December, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fifth.

[FR Doc. 2010–33058
Filed 12–29–10; 8:45 am]
Billing code 3195–W1–P

Rules and Regulations

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 25

[Docket ID OCC–2010–0020]

RIN 1557–AD32

FEDERAL RESERVE SYSTEM

12 CFR Part 228

[Regulation BB; Docket No. R–1403]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 345

RIN 3064–AD68

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 563e

[Docket ID OTS–2010–0032]

RIN 1550–AC45

Community Reinvestment Act Regulations

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision, Treasury (OTS).

ACTION: Joint final rule; technical amendment.

SUMMARY: The OCC, the Board, the FDIC, and the OTS (collectively, the "agencies") are amending their Community Reinvestment Act (CRA) regulations to adjust the asset-size thresholds used to define "small bank" or "small savings association" and "intermediate small bank" or "intermediate small savings association." As required by the CRA regulations, the adjustment to the threshold amount is based on the annual percentage change in the Consumer Price Index.

DATES: *Effective Date:* January 1, 2011.

FOR FURTHER INFORMATION CONTACT: *OCC:* Margaret Hesse, Special Counsel, Community and Consumer Law Division, (202) 874–5750; or Brian Borkowicz, National Bank Examiner, Compliance Policy Division, (202) 874–4428, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Rebecca Lassman, Supervisory Consumer Financial Services Analyst, (202) 452–3946; or Brent Lattin, Counsel, (202) 452–3667, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

FDIC: Janet R. Gordon, Senior Policy Analyst, Division of Supervision and Consumer Protection, Compliance Policy Branch, (202) 898–3850; or Susan van den Toorn, Counsel, Legal Division, (202) 898–8707, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

OTS: Stephanie M. Caputo, Senior Compliance Program Analyst, Compliance and Consumer Protection, (202) 906–6549; or Richard Bennett, Senior Compliance Counsel, Regulations and Legislation Division, (202) 906–7409, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

Background and Description of the Joint Final Rule

The agencies' CRA regulations establish CRA performance standards for small and intermediate small banks and savings associations. The regulations define small and intermediate small institutions by reference to asset-size criteria expressed in dollar amounts, and they further require the agencies to publish annual adjustments to these dollar figures based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPIW), not seasonally adjusted, for each twelve-month period ending in November, with rounding to the nearest million. 12 CFR 25.12(u)(2), 228.12(u)(2), 345.12(u)(2), and 563e.12(u)(2). This adjustment formula was first adopted for CRA purposes by the OCC, Board, and FDIC on August 2, 2005, effective September 1, 2005. 70 FR 44256. As explained in the preamble to these agencies' proposed rule, this particular index is used in other federal lending regulations such as the Home Mortgage Disclosure Act (HMDA). *See* 12 U.S.C. 2808; 12 CFR 203.2(e)(1).

OTS adopted an annual adjustment to the asset thresholds in its CRA rule on March 22, 2007, effective July 1, 2007. 72 FR 13429. As OTS explained in the preamble, OTS decided to index the asset thresholds in the same way as the other Federal banking agencies to ensure consistency between the standards used to evaluate savings associations and the standards used to evaluate banks. 72 FR at 13432. OTS also noted that the particular adjustment formula adopted is also used under HMDA. *Id.* Thus, it is an indexing method already familiar to both the agencies and regulated financial institutions. By adopting an adjustment formula consistent with that of the other federal banking agencies, OTS acted consistently with section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4803), which OTS interpreted as encouraging the federal banking agencies to work jointly to make uniform all regulations and guidelines implementing common statutory or supervisory policies.

The threshold for small banks and small savings associations was revised most recently effective January 1, 2010 (74 FR 68662 (Dec. 29, 2009)). The CRA regulations, as revised on December 29, 2009, provide that banks and savings associations that, as of December 31 of either of the prior two calendar years, had assets of less than $1.098 billion are "small banks" or "small savings associations." Small banks and small savings associations with assets of at least $274 million as of December 31 of both of the prior two calendar years and less than $1.098 billion as of December 31 of either of the prior two calendar years are "intermediate small banks" or "intermediate small savings associations." 12 CFR 25.12(u)(1), 228.12(u)(1), 345.12(u)(1), and 563e.12(u)(1). This joint final rule further revises these thresholds.

During the period ending November 2010, the CPIW increased by 2.21 percent. As a result, the agencies are revising 12 CFR 25.12(u)(1), 228.12(u)(1), 345.12(u)(1), and 563e.12(u)(1) to make this annual adjustment. Beginning January 1, 2011, banks and savings associations that, as of December 31 of either of the prior two calendar years, had assets of less than $1.122 billion are "small banks" or "small savings associations." Small banks or small savings associations with assets of at least $280 million as of December 31 of both of the prior two calendar years and less than $1.122 billion as of December 31 of either of the prior two calendar years are "intermediate small banks" or "intermediate small savings associations." The agencies also publish current and historical asset-size thresholds on the Web site of the Federal Financial Institutions Examination Council at *http://www.ffiec.gov/cra/.*

Administrative Procedure Act and Effective Date

Under 5 U.S.C. 553(b)(B) of the Administrative Procedure Act (APA), an agency may, for good cause, find (and incorporate the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

The amendments to the regulations to adjust the asset-size thresholds for small and intermediate small banks and savings associations result from the application of a formula established by a provision in the CRA regulations that the agencies previously published for comment. *See* 70 FR 12148 (Mar. 11, 2005), 70 FR 44256 (Aug. 2, 2005), 71 FR 67826 (Nov. 24, 2006), and 72 FR 13429 (Mar. 22, 2007). Sections 25.12(u)(1), 228.12(u)(1), 345.12(u)(1), and 563e.12(u)(1) are amended by adjusting the asset-size thresholds as provided for in §§ 25.12(u)(2), 228.12(u)(2), 345.12(u)(2), and 563e.12(u)(2).

Accordingly, since the agencies' rules provide no discretion as to the computation or timing of the revisions to the asset-size criteria, the agencies have determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary.

The effective date of this joint final rule is January 1, 2011. Under 5 U.S.C. 553(d)(3) of the APA, the required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except, among other things, as provided by the agency for good cause found and published with the rule. Because this rule adjusts asset-size thresholds consistent with the procedural requirements of the CRA rules, the agencies conclude that it is not substantive within the meaning of the APA's delayed effective date provision. Moreover, the agencies find that there is good cause for dispensing with the delayed effective date requirement, even if it applied, because their current rules already provide notice that the small and intermediate asset-size thresholds will be adjusted as of December 31 based on twelve-month data as of the end of November each year.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) does not apply to a rulemaking where a general notice of proposed rulemaking is not required. 5 U.S.C. 603 and 604. As noted previously, the agencies have determined that it is unnecessary to publish a general notice of proposed rulemaking for this joint final rule. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

Paperwork Reduction Act of 1995

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320), the agencies reviewed this final rule. No collections of information pursuant to the Paperwork Reduction Act are contained in the final rule.

Executive Order 12866

Pursuant to Executive Order 12866, OMB's Office of Information and Regulatory Affairs has designated this final rule to be significant but not to have an annual effect on the economy of $100 million or more.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that an agency must prepare a budgetary impact statement before promulgating any final rule for which a general notice of proposed rulemaking was published. As discussed above, the agencies have determined that the publication of a general notice of proposed rulemaking is unnecessary. Accordingly, this joint final rule is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects

12 CFR Part 25

Community development, Credit, Investments, National banks, Reporting and recordkeeping requirements.

12 CFR Part 228

Banks, banking, Community development, Credit, Investments, Reporting and recordkeeping requirements.

12 CFR Part 345

Banks, banking, Community development, Credit, Investments, Reporting and recordkeeping requirements.

12 CFR Part 563e

Community development, Credit, Investments, Reporting and recordkeeping requirements, Savings associations.

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Chapter I

■ For the reasons discussed in the joint preamble, 12 CFR part 25 is amended as follows:

PART 25—COMMUNITY REINVESTMENT ACT AND INTERSTATE DEPOSIT PRODUCTION REGULATIONS

■ 1. The authority citation for part 25 continues to read as follows:

Authority: 12 U.S.C. 21, 22, 26, 27, 30, 36, 93a, 161, 215, 215a, 481, 1814, 1816, 1828(c), 1835a, 2901 through 2907, and 3101 through 3111.

2. Revise § 25.12(u)(1) to read as follows:

§ 25.12 Definitions.

* * * * *

(u) *Small bank*—(1) *Definition.* Small bank means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than $1.122 billion. Intermediate small bank means a small bank with assets of at least $280 million as of December 31 of both of the prior two calendar years and less than $1.122 billion as of December 31 of either of the prior two calendar years.

* * * * *

Federal Reserve System

12 CFR Chapter II

■ For the reasons set forth in the joint preamble, the Board of Governors of the Federal Reserve System amends part 228 of chapter II of title 12 of the Code of Federal Regulations as follows:

PART 228—COMMUNITY REINVESTMENT (REGULATION BB)

■ 1. The authority citation for part 228 continues to read as follows:

Authority: 12 U.S.C. 321, 325, 1828(c), 1842, 1843, 1844, and 2901 *et seq.*

■ 2. Revise § 228.12(u)(1) to read as follows:

§ 228.12 Definitions.

* * * * *

(u) *Small bank*—(1) *Definition.* Small bank means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than $1.122 billion. Intermediate small bank means a small bank with assets of at least $280 million as of December 31 of both of the prior two calendar years and less than $1.122 billion as of December 31 of either of the prior two calendar years.

* * * * *

Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority and Issuance

■ For the reasons set forth in the joint preamble, the Board of Directors of the Federal Deposit Insurance Corporation amends part 345 of chapter III of title 12 of the Code of Federal Regulations to read as follows:

PART 345—COMMUNITY REINVESTMENT

■ 1. The authority citation for part 345 continues to read as follows:

Authority: 12 U.S.C. 1814–1817, 1819–1820, 1828, 1831u and 2901–2907, 3103–3104, and 3108(a).

■ 2. Revise § 345.12(u)(1) to read as follows:

§ 345.12 Definitions.

* * * * *

(u) *Small bank*—(1) *Definition.* Small bank means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than $1.122 billion. Intermediate small bank means a small bank with assets of at least $280 million as of December 31 of both of the prior two calendar years and less than $1.122 billion as of December 31 of either of the prior two calendar years.

* * * * *

Department of the Treasury

Office of Thrift Supervision

12 CFR Chapter V

■ For the reasons discussed in the joint preamble, 12 CFR part 563e is amended as follows:

PART 563e—COMMUNITY REINVESTMENT

■ 1. The authority citation for part 563e continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467a, 1814, 1816, 1828(c), and 2901 through 2907.

■ 2. Revise § 563e.12(u)(1) to read as follows:

§ 563e.12 Definitions.

* * * * *

(u) *Small savings association*—(1) *Definition. Small savings association* means a savings association that, as of December 31 of either of the prior two calendar years, had assets of less than $1.122 billion. *Intermediate small savings association* means a small savings association with assets of at least $280 million as of December 31 of both of the prior two calendar years and less than $1.122 billion as of December 31 of either of the prior two calendar years.

* * * * *

Dated: December 7, 2010.

Julie L. Williams,

First Senior Deputy Comptroller and Chief Counsel.

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary of the Board under delegated authority, December 15, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

By order of the Board of Directors.

Dated at Washington, DC, this 14th day of December 2010.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

Dated: December 9, 2010.

By the Office of Thrift Supervision,

John E. Bowman,

Acting Director.

[FR Doc. 2010–32321 Filed 12–29–10; 8:45 am]

BILLING CODE 6714–01–P, 4810–33–P, 6210–01–P, 6720–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0827; Directorate Identifier 2010–CE–029–AD; Amendment 39–16552; AD 2010–17–18 R1]

RIN 2120–AA64

Airworthiness Directives; Air Tractor, Inc. Models AT–802 and AT–802A Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are revising an existing airworthiness directive (AD) for Air Tractor, Inc. (Air Tractor) Models AT–802 and AT–802A airplanes. That AD currently requires you to repetitively inspect (using the eddy current method) the two outboard fastener holes in both of the wing main spar lower caps at the center splice joint for cracks and repair or replace any cracked spar, and changes the safe life for certain serial (SN) ranges. This AD retains the actions of AD 2010–17–18 and reduces the applicability from all serial numbers beginning with SN–0001 as required by the previous AD to SN–0001 through SN–0269. This AD was prompted by our evaluation of a comment from David Ligon, Air Tractor, and our determination that we should reduce the applicability from that already required by the previous AD. We are issuing this AD to detect and correct cracks in the wing main spar lower cap at the center splice joint, which could result in failure of the spar cap and lead to wing separation and loss of control of the airplane.

DATES: This AD is effective January 14, 2011.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of September 9, 2010 (75 FR 52255, August 25, 2010).

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of April 21, 2006 (71 FR 19994, April 19, 2006).

We must receive any comments on this AD by February 14, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–

30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

• *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Air Tractor, Inc., P.O. Box 485, Olney, Texas 76374; telephone: (940) 564–5616; fax: (940) 564–5612; E-mail: *airmail@airtractor.com;* Internet: *http://www.airtractor.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this 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: Andrew McAnaul, Aerospace Engineer, ASW–150 (c/o MIDO–43), 10100 Reunion Place, Suite 650, San Antonio, Texas 78216; phone: (210) 308–3365; fax: (210) 308–3370; e-mail: *andrew.mcanaul@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On August 11, 2010, we issued AD 2010–17–18, amendment 39–16412 (75 FR 52255, August 25, 2010), for all Air Tractor Models AT–802 and AT–802A airplanes. That AD requires you to repetitively inspect (using the eddy current method) the two outboard fastener holes in both of the wing main spar lower caps at the center splice joint for cracks and repair or replace any cracked spar, and changes the safe life for certain SN ranges. That AD resulted from the FAA's evaluation of service information issued by Air Tractor and our determination that we needed to add inspections, add modifications, and change the safe life for certain SN ranges. We issued that AD to detect and correct cracks in the wing main spar lower cap at the center splice joint, which could result in failure of the spar cap and lead to wing separation and loss of control of the airplane.

Actions Since AD was Issued

Since we issued AD 2010–17–18, we have evaluated a comment from David Ligon, Air Tractor, and determined that we should reduce the applicability from all serial numbers beginning with SN–0001 as required by the previous AD to SN–0001 through SN–0269. Airplane SN–0270 and subsequent wing main spar components are life limited at 11,700 hours time-in-service as described in Air Tractor, Inc. AT 802/802A Airworthiness Limitations, Pages 6–i, 6–1, and 6–2, dated: September 16, 2009.

Relevant Service Information

We reviewed the following service information from Snow Engineering Co.:

• Service Letter #80GG, revised December 21, 2005;

• Service Letter #284, dated October 4, 2009;

• Service Letter #281, dated August 1, 2009;

• Service Letter #245, dated April 25, 2005;

• Service Letter #240, dated September 30, 2004;

• Process Specification #197, page 1, revised June 4, 2002; pages 2 through 4, dated February 23, 2001; and page 5, dated May 3, 2002;

• Drawing Number 20995, Sheet 3, dated November 25, 2005;

• Drawing Number 20995, Sheet 2, Rev. D., dated November 25, 2005; and

• Drawing Number 20975, Sheet 4, Rev. A., dated January 7, 2009.

The service information describes procedures for the following actions:

• Inspection (repetitively) of the two outboard fastener holes in both of the wing main spar lower caps at the center splice joint for cracks;

• Repair or replacement of any cracked spar cap; and

• Modification option to extend the safe life limit.

FAA's Determination

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

AD Requirements

This AD requires accomplishing the actions specified in the service information described previously. The AD also requires sending the inspection results (if cracks are found) to Andrew McAnaul, Aerospace Engineer, ASW–150 (c/o MIDO–43), 10100 Reunion Place, Suite 650, San Antonio, Texas 78216; phone: (210) 308–3365; fax: (210) 308–3370.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because the public has already had the opportunity to comment on the actions of this unsafe condition. This action only reduces the applicability from that already required by the previous AD. Therefore, we find that notice and opportunity for prior public comment are unnecessary and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2010–0827 and directorate identifier 2010–CE–029–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

Costs of Compliance

We estimate that this AD affects 121 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Eddy current inspection	$500 to $800	Not Applicable	$500 to $800	$60,500 to $96,800
Spar cap replacement (two spars).	495 work-hours × $85 per hour = $42,075.	$39,100 (two spars)	$81,175	$9,822,175

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Center splice plate installation	185 work-hours × $85 per hour = $15,725	$4,300	$20,025

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Extended splice block installation	70 work-hours × $85 per hour = $5,950	$3,200	$9,150

We estimate the following costs to do any necessary cold-work lower spar cap fastener holes that would be required based on the results of the inspection. We have no way of determining the number of aircraft that might need this cold-work lower spar cap fastener holes:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Cold-work lower spar cap fastener holes	$1,350	Not Applicable	$1,350

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends part 39 of the Federal Aviation Regulations (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 removing airworthiness directive (AD) 2010–17–18, amendment 39–16412 (75 FR 52255, August 25, 2010) and adding the following new AD:

2010–17–18 R1 Air Tractor, Inc.: Amendment 39–16552; Docket No. FAA–2010–0827; Directorate Identifier 2010–CE–029–AD.

Effective Date

(a) This AD is effective January 14, 2011.

Affected ADs

(b) This AD revises AD 2010–17–18, Amendment 39–16412.

Applicability

(c) This AD affects Air Tractor, Inc. Models AT–802 and AT–802A airplanes, serial numbers (SNs) –0001 through –0269, that are:

(1) certificated in any category;

(2) engaged in agricultural dispersal operations, including those airplanes that have been converted from fire fighting to agricultural dispersal or airplanes that convert between fire fighting and agricultural dispersal;

(3) not equipped with the factory-supplied computerized fire gate (part number (P/N) 80540); and

(4) not engaged in only full-time fire fighting.

Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 57: Wings.

Unsafe Condition

(e) This AD was prompted by our evaluation of a comment from David Ligon, Air Tractor, and our determination that we should reduce the applicability from the all serial numbers beginning with SN –0001 as required by the previous AD to SN –0001 through SN–0269. We are issuing this AD to detect and correct cracks in the wing main spar lower cap at the center splice joint, which could result in failure of the spar cap and lead to wing separation and loss of control of the airplane.

Compliance

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

(g) To address this problem for Models AT–802 and AT–802A airplanes, SNs –0001 through –0091, you must do the following, unless already done:

TABLE 1—ACTIONS, COMPLIANCE, AND PROCEDURES

Actions	Compliance	Procedures
(1) Eddy current inspect for cracks the center splice joint outboard two fastener holes in both the left and right wing main spar lower caps.	Initially inspect upon accumulating 1,700 hours time-in-service (TIS) or within the next 50 hours TIS after April 21, 2006 (the effective date of AD 2006–08–09), whichever occurs later, and repetitively thereafter at intervals not to exceed 800 hours TIS. If, before September 9, 2010 (the effective date of AD 2010-17-18), you installed the center splice plate and extended 8-bolt splice blocks, use the inspection compliance times found in paragraph (g)(5) of this AD.	Follow Snow Engineering Co. Process Specification #197, page 1, revised June 4, 2002; pages 2 through 4, dated February 23, 2001; and page 5, dated May 3, 2002.
(2) If you find any cracks as a result of any inspection required in paragraph (g)(1) of this AD, do the following actions: (i) For cracks that can be repaired, repair the airplane by doing the following actions:. (A) Install center splice plate, P/N 20997–2, and extended 8-bolt splice blocks, P/N 20985–1 & –2, and cold-work the lower spar cap fastener holes; and. (B) Eddy current inspect for cracks the center splice joint outboard two fastener holes in both the left and right wing main spar lower caps. This eddy current inspection is required as part of the modification and is separate from the inspections required in paragraph (g)(1) of this AD. (ii) For cracks that cannot be repaired by incorporating the modification specified above, do the actions to replace the lower spar caps and associated parts listed following the procedures identified in paragraph (g)(3) of this AD.	Before further flight after the inspection where a crack was found. If, before the airplane reaches a total of 3,200 hours TIS, you repair your airplane following paragraph (g)(2)(i) of this AD, you must do the eddy current inspections following the compliance times found in paragraph (g)(5) of this AD. If, at 3,200 hours TIS or after, you repair your airplane following paragraph (g)(2)(i) of this AD, this repair terminates the inspection requirements of paragraph (g)(1) of this AD.	Follow Snow Engineering Co. Service Letter #284, dated October 4, 2009; Snow Engineering Co. Process Specification #197, page 1, revised June 4, 2002; pages 2 through 4, dated February 23, 2001; and page 5, dated May 3, 2002; Snow Engineering Co. Drawing Number 20995, Sheet 2, Rev. D., dated November 25, 2005; and Snow Engineering Co. Service Letter #240, dated September 30, 2004.

TABLE 1—ACTIONS, COMPLIANCE, AND PROCEDURES—Continued

Actions	Compliance	Procedures
(3) Replace the wing main spar lower caps, the web plates, the center joint splice blocks and hardware, and the wing attach angles and hardware, and install the steel web splice plate. This replacement terminates the repetitive inspections required in paragraph (g)(1) of this AD.	(i) Do the replacement at whichever of the following compliance times occurs first: (A) Before further flight when cracks are found that cannot be repaired by incorporating the modification in paragraph (g)(2)(i) of this AD; or (B) Before or when the airplane reaches the wing main spar lower cap safe life of a total of 4,100 hours TIS or within the next 50 hours TIS after September 9, 2010 (the effective date of AD 2010-17-18), whichever occurs later. (ii) After this replacement the new spar safe life is 11,700 hours TIS. If, before September 9, 2010 (the effective date of AD 2010-17-18), an airplane main spar lower cap was replaced with P/N 21083–1/–2, the spar safe life for that P/N spar cap is 8,000 hours TIS until the main spar lower cap is replaced with P/N 21118–1/–2. The new spar safe life for P/N 21118–1/–2 is 11,700 hours. (iii) To extend the initial 4,100 hours TIS safe life of the wing main spar lower cap to a total of 8,000 hours TIS, you may incorporate the optional modification specified in paragraph (g)(4) of this AD.	Follow Snow Engineering Co. Service Letter #284, dated October 4, 2009; Snow Engineering Co. Service Letter #80GG, revised December 21, 2005; Snow Engineering Co. Drawing Number 20975, Sheet 4, Rev. A, dated January 7, 2009.
(4) To extend the safe life of the wing main spar lower cap to a total of 8,000 hours TIS, you may incorporate the following optional modification. This modification terminates the repetitive inspections required in paragraph (g)(1) of this AD, unless you performed the modification before the airplane reaches a total of 3,200 hours TIS to repair cracks: (i) Install center splice plate, P/N 20997–2, and extended 8-bolt splice blocks, P/N 20985–1 & –2, and cold-work the lower spar cap fastener holes; and (ii) Eddy current inspect for cracks the center splice joint outboard two fastener holes in both the left and right wing main spar lower caps. This eddy current inspection is required as part of the modification and is separate from the inspections required in paragraph (g)(1) of this AD.	Modify at whichever of the following compliance times occurs first: (A) Before further flight after any inspection required in paragraph (g)(1) of this AD where a crack is found. If you modify your airplane before the airplane reaches a total of 3,200 hours TIS to repair cracks as required in paragraph (g)(2)(i) of this AD, you must do the eddy current inspections following the compliance times found in paragraph (g)(5) of this AD. (B) Between 3,200 hours TIS and 4,100 hours TIS.	Follow Snow Engineering Co. Service Letter #284, dated October 4, 2009; Snow Engineering Co. Process Specification #197, page 1, revised June 4, 2002; pages 2 through 4, dated February 23, 2001; and page 5, dated May 3, 2002; Snow Engineering Co. Drawing Number 20995, Sheet 2, Rev. D., dated November 25, 2005; and Snow Engineering Co. Service Letter #240, dated September 30, 2004.

(5) If, before September 9, 2010 (the effective date of AD 2010–17–18) or as a result of performing the repair for cracks following paragraph (g)(2) of this AD, you installed the center splice plate and extended 8-bolt splice blocks, use the following table for compliance times to do the eddy current inspections required in paragraph (g)(1) of this AD. If you find any cracks as a result of any inspection following the compliance times in the following table, you must do the replacement action in paragraph (g)(2)(ii) of this AD:

TABLE 2—EDDY CURRENT INSPECTION COMPLIANCE TIMES

Condition of the airplane	Initially inspect	Repetitively inspect thereafter at intervals not to exceed
(i) If the airplane has already had the center splice plate and extended 8-bolt splice blocks installed at or after 3,200 hours TIS but the fastener holes have not been cold worked, at any time you may cold work the fastener holes to terminate the repetitive inspection requirements of this paragraph.	When the airplane reaches a total of 2,400 hours TIS after the modification or within the next 100 days after September 9, 2010 (the effective date of AD 2010-17-18), whichever occurs later.	1,200 hours TIS until the 8,000 hours TIS spar replacement time.
(ii) Before reaching 3,200 hours TIS, the airplane had the center splice plate and extended 8-bolt splice blocks already installed but the fastener holes have not been cold worked.	When the airplane reaches a total of 2,400 hours TIS after the modification or within the next 100 days after September 9, 2010 (the effective date of AD 2010-17-18), whichever occurs later.	1,200 hours TIS. Upon reaching 4,800 hours TIS after the modification, inspect repetitively thereafter at intervals not to exceed 600 hours TIS until the 8,000 hours TIS spar replacement time.

TABLE 2—EDDY CURRENT INSPECTION COMPLIANCE TIMES—Continued

Condition of the airplane	Initially inspect	Repetitively inspect thereafter at intervals not to exceed
(iii) Before reaching 3,200 hours TIS, the airplane had the center splice plate and extended 8-bolt splice blocks installed and the fastener holes have been cold worked.	When the airplane reaches a total of 4,800 hours TIS after the modification or within the next 100 days after September 9, 2010 (the effective date of AD 2010-17-18), whichever occurs later.	600 hours TIS until the 8,000 hours TIS spar replacement time.

(h) To address this problem for AT–802 and AT–802A airplanes, SNs–0092 through –0101, you must do the following, unless already done:

TABLE 3—ACTIONS, COMPLIANCE, AND PROCEDURES

Actions	Compliance	Procedures
(1) Eddy current inspect for cracks the center splice joint outboard two fastener holes in both the left and right wing main spar lower caps.	Initially inspect upon accumulating 1,700 hours TIS or within the next 50 hours TIS after September 9, 2010 (the effective date of AD 2010–17–18), whichever occurs later, and repetitively thereafter at intervals not to exceed 800 hours TIS. If the center splice plate, P/N 20994–2, is installed as specified in paragraph (h)(4) of this AD, do the repetitive inspections at intervals not to exceed 2,000 hours TIS.	Follow Snow Engineering Co. Service Letter #284, dated October 4, 2009; and Snow Engineering Co. Process Specification #197, page 1, revised June 4, 2002; pages 2 through 4, dated February 23, 2001; and page 5, dated May 3, 2002.
(2) If you find any cracks as a result of any inspection required by paragraph (h)(1) of this AD, do the following actions. This repair modification terminates the repetitive inspections required in paragraph (h)(1) of this AD: (i) For cracks that can be repaired, repair the airplane by doing the following actions: (A) Install the 9-bolt splice blocks and cold-work the lower spar cap fastener holes; (B) Eddy current inspect for cracks the center splice joint outboard two fastener holes in both the left and right wing main spar lower caps. This eddy current inspection is required as part of the repair and is separate from the inspections required in paragraph (h)(1) of this AD; and (C) Install the center splice plate, P/N 20994–2, per paragraph (h)(4) if not already installed. (ii) For cracks that cannot be repaired by doing the actions in paragraph (h)(2)(i) of this AD, replace the lower spar caps and associated parts listed following the procedures identified in paragraph (h)(3) of this AD.	Before further flight after the inspection where a crack was found. This repair modification in paragraph (h)(2)(i) of this AD extends the safe life of the wing main spar lower cap to a total of 8,000 hours TIS.	Follow Snow Engineering Co. Service Letter #284, dated October 4, 2009; and Snow Engineering Co. Process Specification #197, page 1, revised June 4, 2002; pages 2 through 4, dated February 23, 2001; and page 5, dated May 3, 2002, Snow Engineering Co. Service Letter #281, dated August 1, 2009; and Snow Engineering Co. Drawing Number 20995, Sheet 3, dated November 25, 2005.
(3) Replace the wing main spar lower caps, the web plates, the center joint splice blocks and hardware, and the wing attach angles and hardware, and install the steel web splice plate. This replacement terminates the repetitive inspections required in paragraph (h)(1) of this AD.	(i) Do the replacement at whichever of the following compliance times occurs first: (A) Before further flight when cracks are found that cannot be repaired by incorporating the modification in paragraph (h)(2)(i) of this AD; or (B) Before or when the airplane reaches the wing main spar lower cap safe life of a total of 4,100 hours TIS or within the next 50 hours TIS after September 9, 2010 (the effective date of AD 2010–17–18), whichever occurs later. (ii) To extend the initial 4,100 hours TIS safe life of the wing main spar lower cap to a total of 8,000 hours TIS, you may incorporate the optional modification specified in paragraph (h)(4) of this AD. (iii)After replacement of the old spar with the new lower spar cap, P/N 21118–1/–2, the new spar safe life is 11,700 hours TIS.	Follow Snow Engineering Co. Service Letter #284, dated October 4, 2009; Snow Engineering Co. Service Letter #80GG, revised December 21, 2005; Snow Engineering Co. Drawing Number 20975, Sheet 4, Rev. A, dated January 7, 2009.

TABLE 3—ACTIONS, COMPLIANCE, AND PROCEDURES—Continued

Actions	Compliance	Procedures
(4) To extend the safe life of the wing main spar lower cap to a total of 8,000 hours TIS, you may incorporate the following optional modification: (i) Install center splice plate, P/N 20994–2, if not already installed as part of a repair, and cold-work the lower spar cap fastener holes; and (ii) Eddy current inspect for cracks the center splice joint outboard two fastener holes in both the left and right wing main spar lower caps. This eddy current inspection is required as part of the modification and is separate from the inspections required in paragraph (h)(1) of this AD.	Before the airplane reaches a total of 4,100 hours TIS. After installation of the center splice plate, P/N 20994–2, do the repetitive inspections required in paragraph (h)(1) at intervals not to exceed 2,000 hours TIS. If as of September 9, 2010 (the effective date of AD 2010–17–18) you have already exceeded the 4,100 hours TIS threshold for extending the safe life to 8,000 hours TIS, you may be eligible for an alternative method of compliance following paragraph (n) in this AD.	Follow Snow Engineering Co. Service Letter #284, dated October 4, 2009; Snow Engineering Co. Process Specification #197, page 1, revised June 4, 2002; pages 2 through 4, dated February 23, 2001; and page 5, dated May 3, 2002; Snow Engineering Co. Drawing Number 20975, Sheet 4, Rev. A., dated January 7, 2009; and Snow Engineering Co. Service Letter #245, dated April 25, 2005.
(5) If you find any cracks as a result of any repetitive inspection required by paragraph (h)(4) of this AD, do the following actions. This repair modification terminates the repetitive inspections required in paragraph (h)(4) of this AD: (i) For cracks that can be repaired, repair the airplane by doing the following actions: (A) Install the 9-bolt splice blocks and cold-work the lower spar cap fastener holes; and (B) Eddy current inspect for cracks the center splice joint outboard two fastener holes in both the left and right wing main spar lower caps. This eddy current inspection is required as part of the repair and is separate from the inspections required in paragraph (h)(1) of this AD. (ii) For cracks that cannot be repaired by doing the actions in paragraph (h)(5)(i) of this AD, replace the lower spar caps and associated parts listed following the procedures identified in paragraph (h)(3) of this AD.	Before further flight after the inspection where a crack was found.	Follow Snow Engineering Co. Service Letter #284, dated October 4, 2009; and Snow Engineering Co. Process Specification #197, page 1, revised June 4, 2002; pages 2 through 4, dated February 23, 2001; and page 5, dated May 3, 2002, Snow Engineering Co. Service Letter #281, dated August 1, 2009; and Snow Engineering Co. Drawing Number 20995, Sheet 3, dated November 25, 2005.

(i) To address this problem for AT–802 and AT–802A airplanes, SNs –0102 through –0178, you must do the following, unless already done:

TABLE 4—ACTIONS, COMPLIANCE, AND PROCEDURES

Actions	Compliance	Procedures
(1) Do an initial eddy current inspection for cracks of the center splice joint outboard two fastener holes in both the left and right wing main spar lower caps. After this initial inspection, you may do the optional cold-working of the lower spar cap fastener holes to increase the hours TIS between repetitive inspections required in paragraph (i)(2) of this AD.	Before the airplane reaches a total of 5,500 hours TIS or within the next 50 hours TIS after September 9, 2010 (the effective date of AD 2010-17-18), whichever occurs later.	Follow Snow Engineering Co. Process Specification #197, page 1, revised June 4, 2002; pages 2 through 4, dated February 23, 2001; and page 5, dated May 3, 2002; Snow Engineering Co. Service Letter #245, dated April 25, 2005; and Snow Engineering Co. Service Letter #284, dated October 4, 2009.
(2) Repetitively eddy current inspect for cracks the center splice joint outboard two fastener holes in both the left and right wing main spar lower caps.	(i) *For fastener holes that are cold-worked:* After the initial inspection, repetitively thereafter inspect at intervals not to exceed 2,200 hours TIS. (ii) *For fastener holes not cold-worked:* After the initial inspection, repetitively thereafter inspect at intervals not to exceed 1,100 hours TIS.	Follow Snow Engineering Co. Process Specification #197, page 1, revised June 4, 2002; pages 2 through 4, dated February 23, 2001; and page 5, dated May 3, 2002; Snow Engineering Co. Service Letter #284, dated October 4, 2009; and (optional) Snow Engineering Co. Service Letter #245, dated April 25, 2005.

TABLE 4—ACTIONS, COMPLIANCE, AND PROCEDURES—Continued

Actions	Compliance	Procedures
(3) If you find any cracks as a result of any inspection required by paragraphs (i)(1) and (i)(2) of this AD, do the following actions. This modification terminates the repetitive inspections required in paragraph (i)(1) and (i)(2) of this AD: (i) For cracks that can be repaired, repair the airplane by doing the following actions: (A) Install the 9-bolt splice blocks and cold-work the lower spar cap fastener holes; and (B) Eddy current inspect for cracks the center splice joint outboard two fastener holes in both the left and right wing main spar lower caps. This eddy current inspection is required as part of the repair and is separate from the inspections required in paragraphs (i)(1) and (i)(2) of this AD. (ii) For cracks that cannot be repaired by doing the actions in paragraph (i)(3)(i) of this AD, replace the lower spar caps and associated parts listed following the procedures in paragraph (i)(4) of this AD.	Before further flight after the inspection where a crack was found.	Follow Snow Engineering Co. Service Letter #281, dated August 1, 2009; and Snow Engineering Co. Drawing Number 20995, Sheet 3, dated November 25, 2005.
(4) Replace the wing main spar lower caps, the web plates, the center joint splice blocks and hardware, and the wing attach angles and hardware, and install the steel web splice plate. This replacement terminates the repetitive inspections required in paragraphs (i)(1) and (i)(2) of this AD.	(i) Do the replacement at whichever of the following compliance times occurs first: (A) Before further flight when cracks are found that cannot be repaired by incorporating the repair in paragraph (i)(3)(i) of this AD; or (B) Before or when the airplane reaches the wing main spar lower cap safe life of a total of 8,000 hours TIS or within the next 50 hours TIS after September 9, 2010 (the effective date of AD 2010-17-18), whichever occurs later. (ii) After this replacement the new spar safe life is 11,700 hours TIS.	Follow Snow Engineering Co. Service Letter #284, dated October 4, 2009; Snow Engineering Co. Service Letter #80GG, revised December 21, 2005; Snow Engineering Co. Drawing Number 20975, Sheet 4, Rev. A, dated January 7, 2009.

(j) To address this problem for AT–802 and AT–802A airplanes, SNs –0179 through –0269, you must do the following, unless already done:

TABLE 5—ACTIONS, COMPLIANCE, AND PROCEDURES

Actions	Compliance	Procedures
Replace the wing main spar lower caps, the web plates, the center joint splice blocks and hardware, and the wing attach angles and hardware, and install the steel web splice plate.	By the 8,000 hours TIS safe-life or within the next 50 hours TIS after September 9, 2010 (the effective date of AD 2010-17-18), whichever occurs later. After this replacement the subsequent new spar safe life is 11,700 hours TIS.	Follow Snow Engineering Co. Service Letter #284, dated October 4, 2009; Snow Engineering Co. Service Letter #80GG, revised December 21, 2005; Snow Engineering Co. Drawing Number 20975, Sheet 4, Rev. A, dated January 7, 2009.

(k) Report any crack from any inspection required in paragraphs (g), (h), or (i) of this AD within 10 days after the cracks are found on the form in Figure 1 of this AD.

(1) Send your report to Andrew McAnaul, Aerospace Engineer, ASW–150 (c/o MIDO–43), 10100 Reunion Place, Suite 650, San Antonio, Texas 78216; phone: (210) 308–3365; fax: (210) 308–3370.

(2) The Office of Management and Budget (OMB) approved the information collection requirements contained in this regulation under the provisions of the Paperwork Reduction Act and assigned OMB Control Number 2120–0056.

Special Permit Flight

(l) Under 14 CFR 39.23, we are allowing special flight permits for the purpose of compliance with this AD under the following conditions:

(1) Only operate in day visual flight rules (VFR).

(2) Ensure that the hopper is empty.

(3) Limit airspeed to 135 miles per hour (mph) indicated airspeed (IAS).

(4) Avoid any unnecessary g-forces.

(5) Avoid areas of turbulence.

(6) Plan the flight to follow the most direct route.

BILLING CODE 4910–13–P

AD 2010-17-18 R1 INSPECTION REPORT *(REPORT ONLY IF CRACKS ARE FOUND)*	
General Information	
1. Inspection Performed By:	2. Phone:
3. Aircraft Model:	4. Aircraft Serial Number:
5. Engine Model Number:	6. Aircraft Total Hours TIS:
7. Wing Total Hours TIS:	8. Lower Spar Cap Hours TIS:
Previous Inspection/Repair History	
9. Has the lower spar cap been inspected (eddy-current, dye penetrant, magnetic particle, or ultrasound) before? ☐ Yes ☐ No	If yes, an inspection has occurred: Date: _____ Inspection Method: _____ Lower Spar Cap TIS: _____ Cracks found? ☐ Yes ☐ No
10. Has there been any major repair or alteration performed to the spar cap? ☐ Yes ☐ No	If yes, specify (Description and hours TIS):
Inspection for AD 2010-17-18 R1	
11. Date of AD inspection: Inspection Results:	11a. Cracks found: ☐ Left Hand ☐ Right Hand
11b. Crack Length:_____ Location: _____	11c. Does drilling hole to next larger size remove all traces of the crack(s)? ☐ Yes ☐ No
12d. Corrective Action Taken:	

Send report (only if you find any cracks as a result of the inspection for AD 2010-17-18 R1) to: Andrew McAnaul, Aerospace Engineer, ASW-150 (c/o MIDO-43), 10100 Reunion Place, Suite 650, San Antonio, Texas 78216; phone: (210) 308-3365; fax: (210) 308-3370

Figure 1

BILLING CODE 4910–13–C

Paperwork Reduction Act Burden Statement

(m) A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

Alternative Methods of Compliance (AMOCs)

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

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

(3) AMOCs approved for AD 2010–17–18 are approved as AMOCs for this AD.

Related Information

(o) For more information about this AD, contact Andrew McAnaul, Aerospace Engineer, ASW–150 (c/o MIDO–43), 10100 Reunion Place, Suite 650, San Antonio, Texas 78216; phone: (210) 308–3365; fax: (210) 308–3370; e-mail: *andrew.mcanaul@faa.gov.*

Material Incorporated by Reference

(p)(1) You must use the service information contained in table 6 of this AD to do the actions required by this AD, unless the AD specifies otherwise. The Director of the Federal Register previously approved the incorporation by reference of the service information contained in table 6 of this AD on the date specified in the column "Incorporation by Reference Approval Date" of Table 6.

TABLE 6—MATERIAL INCORPORATED BY REFERENCE

Document	Revision	Date	Incorporation by reference approval date
(i) Snow Engineering Co. Service Letter #80GG.	Not Applicable	December 21, 2005	September 9, 2010 (75 FR 52255, August 25, 2010).
(ii) Snow Engineering Co. Service Letter #284	Not Applicable	October 4, 2009	September 9, 2010 (75 FR 52255, August 25, 2010).
(iii) Snow Engineering Co. Service Letter #281	Not Applicable	August 1, 2009	September 9, 2010 (75 FR 52255, August 25, 2010).
(iv) Snow Engineering Co. Service Letter #245	Not Applicable	April 25, 2005	September 9, 2010 (75 FR 52255, August 25, 2010).
(v) Snow Engineering Co. Service Letter #240	Not Applicable	September 30, 2004	April 21, 2006 (71 FR 19994, April 19, 2006).
(vi) Snow Engineering Co. Process Specification #197:			April 21, 2006 (71 FR 19994, April 19, 2006).
page 1	Not Applicable	June 4, 2002	April 21, 2006 (71 FR 19994, April 19, 2006).
pages 2 through 4	Not Applicable	February 23, 2001	April 21, 2006 (71 FR 19994, April 19, 2006).
page 5	Not Applicable	May 3, 2002	April 21, 2006 (71 FR 19994, April 19, 2006).
(vii) Snow Engineering Co. Drawing Number 20995:			September 9, 2010 (75 FR 52255, August 25, 2010).
Sheet 2	Rev. D	November 25, 2005	September 9, 2010 (75 FR 52255, August 25, 2010).
Sheet 3	Not Applicable	November 25, 2005	September 9, 2010 (75 FR 52255, August 25, 2010).
(viii) Snow Engineering Co. Drawing Number 20975, Sheet 4.	Rev. A	January 7, 2009	September 9, 2010 (75 FR 52255, August 25, 2010).

(2) For service information identified in this AD, contact Air Tractor, Inc., P.O. Box 485, Olney, Texas 76374; telephone: (940) 564–5616; fax: (940) 564–5612; E-mail: *airmail@airtractor.com;* Internet: *www.airtractor.com.*

(3) You may review copies of the service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at an NARA facility, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Kansas City, Missouri, on December 16, 2010.

William J. Timberlake,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–32905 Filed 12–29–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

[Docket No. 30760; Amdt. No. 491]

IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rules) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. This regulatory action is needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

DATES: *Effective Date:* 0901 UTC, January 13, 2011.

FOR FURTHER INFORMATION CONTACT: Harry Hodges, Flight Procedure Standards Branch (AMCAFS–420),

Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to part 95 of the Federal Aviation Regulations (14 CFR part 95) amends, suspends, or revokes IFR altitudes governing the operation of all aircraft in flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in part 95.

The Rule

The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances that create the need for this amendment involve matters of flight safety and operational efficiency in the National Airspace System, are related to published aeronautical charts that are essential to the user, and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment are impracticable and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

Conclusion

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

List of Subjects in 14 CFR Part 95

Airspace, Navigation (air).

Issued in Washington, DC on December 16, 2010.

John M. Allen,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator, part 95 of the Federal Aviation Regulations (14 CFR part 95) is amended as follows effective at 0901 UTC, June 03, 2010.

■ 1. The authority citation for part 95 continues to read as follows:

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

■ 2. Part 95 is amended to read as follows:

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINTS

[Amendment 491 Effective Date, January 13, 2011]

From	To	MEA	MAA
§ 95.3000 Low Altitude RNAV Routes			
§ 95.3227 RNAV Route T227 Is Amended To Read in Part			
Port Heiden, AK NDB/DME *1900—MOCA.	Culti, AK FIX	*3700	17500
Culti, AK FIX *5400—MOCA.	Batty, AK FIX	*6100	17500
Batty, AK FIX *5200—MCA Amott, AK FIX, SW BND. **12300—MOCA.	*Amott, AK FIX	**13000	17500
§ 95.3266 RNAV Route T266 Is Amended To Read in Part			
Coghlan Island, AK NDB	Fredericks Point, AK NDB	6500	17500
Is amended by adding			
Fredericks Point, AK NDB	Annette Island, AK VOR/DME	6200	17500
§ 95.3267 RNAV Route T267 Is Added To Read			
Nome, AK VOR/DME *6000—MOCA.	Jiksa, AK FIX	*6700	17500
Jiksa, AK FIX *2700—MOCA.	Balin, AK FIX	*3400	17500
Is Amended To Read in Part			
Balin, AK FIX *2600—MOCA.	Kotzebue, AK VOR/DME	*3300	17500
§ 95.3271 RNAV Route T271 Is added To read			
Cold Bay, AK VORTAC	Binal, AK FIX	4400	17500
Binal, AK FIX	King Salmon, AK VORTAC	2700	17500

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINTS—Continued

[Amendment 491 Effective Date, January 13, 2011]

From	To	MEA	MAA
King Salmon, AK VORTAC	Jivco, AK FIX	3000	17500
Jivco, AK FIX	Wolci, AK FIX	4000	17500
Wolci, AK FIX	*Widva, AK FIX	7000	17500
*8000—MCA Widva, AK FIX, NE BND.			
Widva, AK FIX	*Zinam, AK FIX	11800	17500
*10700—MCA Zinam, AK FIX, SW BND.			
Zinam, AK FIX	Amott, AK FIX	2500	17500
§ 95.3273 RNAV Route T273 Is Amended To Read in Part			
Fairbanks, AK VORTAC	Aykid, AK FIX	6700	17500
Aykid, AK FIX	Tuvvo, AK FIX	6000	17500
Tuvvo, AK FIX	*Sotge, AK FIX	11300	17500
*8000—MCA Sotge, AK FIX, S BND.			
Sotge, AK FIX	Roces, AK FIX	*4000	17500
*2800—MOCA.			
§ 95.3277 RNAV Route T277 Is Amended To Read in Part			
Bettles, AK VOR/DME	Jigti, AK FIX	*6000	17500
*4000—MOCA.			
Jigti, AK FIX	Nokfe, AK FIX	*8000	17500
*7000—MOCA.			
Nokfe, AK FIX	Vovuy, AK FIX	*10300	17500
*9400—MOCA.			
Vovuy, AK FIX	Epeho, AK FIX	*16000	17500
*9500—MOCA.			
Epeho, AK FIX	Point Lay, AK NDB	*6400	17500
*5500—MOCA.			
§ 95.4000 High Altitude RNAV Routes			
§ 95.4008 RNAV Route Q8 Is Amended To Read in Part			
Galena, AK VOR/DME	Anchorage, AK VOR/DME	18000	45000

From	To	MEA
§ 95.6001 Victor Routes—U.S.		
§ 95.6002 VOR Federal Airway V2 Is Amended To Read in Part		
Spokane, WA VORTAC	Ropes, WA FIX	7100
Ropes, WA FIX	Mullan Pass, ID VOR/DME	9100
Mullan Pass, ID VOR/DME	Alton, MT FIX	9600
Alton, MT FIX	Missoula, MT VOR/DME.	
	SE BND	*9000
	NW BND	*9600
*8500—MOCA.		
§ 95.6005 VOR Federal Airway V5 Is Amended To Read in Part		
Shirt, OH FIX	*Gloom, OH FIX	3000
*4000—MRA.		
*Gloom, OH FIX	Appleton, OH VORTAC	3000
*4000—MRA.		
Appleton, OH VORTAC	Mansfield, OH VORTAC	3000
Mansfield, OH VORTAC	Dryer, OH VOR/DME	3000
§ 95.6006 VOR Federal Airway V6 Is Amended To Read in Part		
Dryer, OH VOR/DME	Morow, OH FIX	3100
Morow, OH FIX	Hires, OH FIX	*5000
*2700—MOCA.		
*3000—GNSS MEA.		
Hires, OH FIX	Youngstown, OH VORTAC	2900
Youngstown, OH VORTAC	Mercy, PA FIX	*5000
*3000—MOCA.		
*3000—GNSS MEA.		
Mercy, PA FIX	Clarion, PA VOR/DME	3600

From	To	MEA
§ 95.6007 VOR Federal Airway V7 Is Amended To Read in Part		
Lee County, FL VORTAC	Jocks, FL FIX	2600
Jocks, FL FIX	*Crowd, FL FIX	**2300
*5000—MRA.		
**1600—MOCA.		
*Crowd, FL FIX	Lakeland, FL VORTAC	2300
*5000—MRA.		
*Orate, FL FIX	Cross City, FL VORTAC	**2000
*3000—MRA.		
**1500—MOCA.		
§ 95.6009 VOR Federal Airway V9 Is Amended To Read in Part		
Safes, LA FIX	Wavez, LA FIX	*4000
*1600—MOCA.		
§ 95.6010 VOR Federal Airway V10 Is Amended To Read in Part		
U.S. Canadian Border	Fails, OH FIX	*4000
*1800—MOCA.		
*2300—GNSS MEA.		
Fails, OH FIX	*Wonop, OH FIX	**3000
*5000—MRA.		
**2000—MOCA.		
*Wonop, OH FIX	Youngstown, OH VORTAC	**5000
*5000—MRA.		
**2700—MOCA.		
**3000—GNSS MEA.		
Youngstown, OH VORTAC	Volan, PA FIX	*5000
*3000—MOCA.		
*3000—GNSS MEA.		
Volan, PA FIX	Talls, PA FIX	*5000
*3200—MOCA.		
*3300—GNSS MEA.		
Talls, PA FIX	Revloc, PA VOR/DME	4100
§ 95.6026 VOR Federal Airway V26 Is Amended To Read in Part		
*Obitt, SD FIX	Ghent, MN FIX	**6000
*5000—MRA.		
**3400—MOCA.		
**4000—GNSS MEA.		
§ 95.6029 VOR Federal Airway V29 Is Amended To Read in Part		
Watertown, NY VORTAC	*Letus, NY FIX	**3000
*4000—MRA.		
**1900—MOCA.		
Letus, NY FIX	#Massena, NY VORTAC	*3000
*GNSS MEA ONLY.		
#Massena R–255 Unusable. GNSS Required.		
§ 95.6054 VOR Federal Airway V54 Is Amended To Read in Part		
Sandhills, NC VORTAC	Raefo, NC FIX	*6000
*2000—MOCA.		
*3000—GNSS MEA.		
§ 95.6059 VOR Federal Airway V59 Is Amended To Read in Part		
Parkersburg, WV VORTAC	Newcomerstown, OH VOR/DME	3000
§ 95.6076 VOR Federal Airway V76 Is Amended To Read in Part		
Big Spring, TX VORTAC	*Hyman, TX FIX	4500
*5000—MRA.		
*Hyman, TX FIX	**Wator, TX FIX	4500
*5000—MRA.		
**7000—MRA.		
§ 95.6081 VOR Federal Airway V81 Is Amended To Read in Part		
Panhandle, TX VORTAC	Lantt, TX FIX	6100
Lantt, TX FIX	Exell, TX FIX	5400

From	To	MEA
Exell, TX FIX	Dalhart, TX VORTAC	5900
§ 95.6094 VOR Federal Airway V94 Is Amended To Read in Part		
Monroe, LA VORTAC	Greenville, MS VOR/DME	2100
§ 95.6098 VOR Federal Airway V98 Is Amended To Read in Part		
U.S. Canadian Border	Massena, NY VORTAC	2100
#Massena, NY VORTAC *2100—GNSS MEA. *GNSS MEA ONLY. #Massena R–085 Unusable. GNSS Required.	U.S. Canadian Border	*2100
§ 95.6104 VOR Federal Airway V104 Is Amended To Read in Part		
U.S. Canadian Border *1600—MOCA. *GNSS MEA ONLY. #Massena R–314 Unusable. GNSS Required.	#Massena, NY VORTAC	*2100
#Massena, NY VORTAC *2700—MOCA. *GNSS MEA ONLY. #Massena R–119 Unusable. GNSS Required.	Malae, NY FIX	*3500
Malae, NY FIX	Plattsburgh, NY VORTAC	6100
§ 95.6115 VOR Federal Airway V115 Is Amended To Read in Part		
Parkersburg, WV VORTAC	Newcomerstown, OH VOR/DME	3000
§ 95.6120 VOR Federal Airway V120 Is Amended To Read in Part		
Karps, ID FIX	Mullan Pass, ID VOR/DME	9100
Mullan Pass, ID VOR/DME *9600—MOCA.	Charl, MT FIX	*13000
Charl, MT FIX *7000—MRA. *7900—MCA Shimy, MT FIX, W BND. **12100—MOCA.	*Shimy, MT FIX	**13000
*Shimy, MT FIX *7000—MRA.	Great Falls, MT VORTAC	6800
§ 95.6121 VOR Federal Airway V121 Is Amended To Read in Part		
Fort Jones, CA VOR/DME *10000—MRA. *9000—MCA BAYTS, OR FIX, S BND. **9400—MOCA.	*Bayts, OR FIX	**10000
*Bayts, OR FIX *10000—MRA. **7500—MOCA.	Rogue Valley, OR VORTAC	**8000
§ 95.6138 VOR Federal Airway V138 Is Amended To Read in Part		
Grand Island, NE VORTAC	Brady, NE FIX	3600
Omaha, IA VORTAC *5500—MRA. **2900—MOCA. **3000—GNSS MEA.	*Madup, IA FIX	**4500
*Madup, IA FIX *5500—MRA. **2900—MOCA. **3000—GNSS MEA.	Fort Dodge, IA VORTAC	**3900
§ 95.6141 VOR Federal Airway V141 Is Amended To Read in Part		
#Burlington, VT VOR/DME *5100—MOCA. *5500—GNSS MEA. #Massena R–129 Unusable. Use Burlington R–311.	Bugsy, NY FIX	*9000
Bugsy, NY FIX *4000—MOCA. *4000—GNSS MEA. #Massena R–129 Unusable. Use Burlington R–311.	#Massena, NY VORTAC	*9000

From	To	MEA
§ 95.6152 VOR Federal Airway V152 Is Amended To Read in Part		
St Petersburg, FL VORTAC *2500—MOCA. *2500—GNSS MEA.	Jensn, FL FIX	*4000
§ 95.6175 VOR Federal Airway V175 Is Amended To Read in Part		
Worthington, MN VOR/DME	Redwood Falls, MN VOR/DME	3400
§ 95.6188 VOR Federal Airway V188 Is Amended To Read in Part		
U.S. Canadian Border *1800—MOCA. *2300—GNSS MEA.	Fails, OH FIX	*4000
Fails, OH FIX *5000—MRA. **2000—MOCA.	*Wonop, OH FIX	**3000
*Wonop, OH FIX *5000—MRA. **2200—MOCA.	Cleri, OH FIX	**3000
Cleri, OH FIX *2400—MOCA.	Jefferson, OH VOR/DME	*3000
§ 95.6203 VOR Federal Airway V203 Is Amended To Read in Part		
#Saranac Lake, NY VOR/DME *4500—MOCA. *5000—GNSS MEA. #Massena R–159 Unusable. Use Saranac Lake R–339.	#Massena, NY VORTAC	*10000
#Massena, NY VORTAC *1500—MOCA. *2000—GNSS MEA.	U.S. Canadian Border	*14000
§ 95.6210 VOR Federal Airway V210 Is Amended To Read in Part		
Volan, PA FIX *3200—MOCA. *3300—GNSS MEA.	Talls, PA FIX	*5000
Talls, PA FIX	Revloc, PA VOR/DME	4100
§ 95.6214 VOR Federal Airway V214 Is Amended To Read in Part		
*Gloom, OH FIX *4000—MRA. **2600—MOCA. **3000—GNSS MEA.	Zanesville, OH VOR/DME	**4000
§ 95.6236 VOR Federal Airway V236 Is Amended To Read in Part		
Emont, UT FIX *7000—MOCA. #MTA V236 NE TO V21–101 SE 12000.	#Ogden, UT VORTAC	*8000
§ 95.6265 VOR Federal Airway V265 Is Amended To Read in Part		
Dunkirk, NY VORTAC	U.S. Canadian Border	2400
§ 95.6297 VOR Federal Airway V297 Is Amended To Read in Part		
Talls, PA FIX *3200—MOCA. *3300—GNSS MEA.	Volan, PA FIX	*5000
§ 95.6415 VOR Federal Airway V415 Is Amended To Read in Part		
Felto, GA FIX *4000—MOCA.	Gorgo, GA FIX	*5000
Gorgo, GA FIX	Rome, GA VORTAC	4000
§ 95.6417 VOR Federal Airway V417 Is Amended To Read in Part		
Vulcan, AL VORTAC	Rome, GA VORTAC	4000

From	To	MEA
§ 95.6455 VOR Federal Airway V455 Is Amended To Read in Part		
Reserve, LA VOR/DME	Picayune, MS VOR/DME	2000
§ 95.6495 VOR Federal Airway V495 Is Amended To Read in Part		
Roseburg, OR VOR/DME *7500—MOCA.	Merli, OR FIX	*8000
Merli, OR FIX *10100—MRA. **6500—MOCA.	*Paple, OR FIX	**9000
*Paple, OR FIX *10100—MRA. **10000—MRA. ***7300—MOCA.	**Bayts, OR FIX	***10100
*Bayts, OR FIX *10000—MRA. **9400—MOCA.	Fort Jones, CA VOR/DME	**10000
§ 95.6505 VOR Federal Airway V505 Is Amended To Read in Part		
Mason City, IA VORTAC	Freed, MN FIX	3000
Freed, MN FIX *5000—MRA. **2800—MOCA.	*Almay, MN FIX	**4600
§ 95.6521 VOR Federal Airway V521 Is Amended To Read in Part		
*Orate, FL FIX *3000—MRA. **5000—MCA CROSS CITY, FL VORTAC, W BND. **1500—MOCA.	**Cross City, FL VORTAC	***2000
§ 95.6537 VOR Federal Airway V537 Is Amended To Read in Part		
Greenville, FL VORTAC *1600—MOCA. *2000—GNSS MEA.	Moultrie, GA VOR/DME	*5000
§ 95.6542 VOR Federal Airway V542 Is Amended To Read in Part		
Youngstown, OH VORTAC	Hagar, PA FIX	3000
Hagar, PA FIX	Tidioute, PA VORTAC	3600
§ 95.6543 VOR Federal Airway V543 Is Amended To Read in Part		
Safes, LA FIX *1600—MOCA.	Wavez, LA FIX	*4000
§ 95.6319 Alaska VOR Federal Airway V319 Is Amended To Read in Part		
Malas, AK FIX *5600—MOCA. #MEA is established with a gap in navigation signal coverage.	Katat, AK FIX	#*10000
Yonek, AK FIX	*Torte, AK FIX.	
	SW BND	**12000
	NE BND	**6000
*8100—MCA Torte, AK FIX, W BND. **4200—MOCA.		
§ 95.6452 Alaska VOR Federal Airway V452 Is Amended To Read in Part		
Galena, AK VOR/DME *3300—MOCA. *3300—GNSS MEA.	Zomby, AK FIX	*4000
Zomby, AK FIX	*Horsi, AK FIX.	
	E BND	**8000
	W BND	**4000
*8000—MRA. **4000—MOCA. **4000—GNSS MEA.		
*Horsi, AK FIX *8000—MRA. **4000—MOCA.	Bonet, AK FIX	**8000

From	To	MEA
**4000—GNSS MEA.		
Bonet, AK FIX	Nenana, AK VORTAC	*7000
*4400—MOCA.		
*4400—GNSS MEA.		

§ 95.6453 Alaska VOR Federal Airway V453 Is Amended To Read in Part

Bethel, AK VORTAC	Wapro, AK FIX	*9000
*4300—MOCA.		
Wapro, AK FIX	Unalakleet, AK VOR/DME	*11000
*5100—MOCA.		

§ 95.6489 Alaska VOR Federal Airway V489 Is Amended To Read in Part

Galena, AK VOR/DME	Zomby, AK FIX	*4000
*3300—MOCA.		
*3300—GNSS MEA.		
Zomby, AK FIX	*Horsi, AK FIX.	
	E BND	**8000
	W BND	**4000
*8000—MRA.		
**4000—MOCA.		
**4000—GNSS MEA.		

From	To	MEA	MAA
§ 95.7001 Jet Routes			
§ 95.7507 Jet Route J507 Is Amended To Read in Part			
Northway, AK VORTAC	U.S. Canadian Border	#21000	45000
#For that airspace over U.S. territory.			
U.S. Canadian Border	Yakutat, AK VOR/DME	#22000	45000
#For that airspace over U.S. territory.			
§ 95.7511 Jet Route J511 Is Amended To Read in Part			
Gulkana, AK VOR/DME	U.S. Canadian Border	#18000	45000
#For that airspace over U.S. territory.			
§ 95.7537 Jet Route J537 Is Amended To Read in Part			
#Mullan Pass, ID VOR/DME	U.S. Canadian Border	*18000	45000
*GNSS MEA, GNSS Required.			
#Mullan Pass R–357 Unusable.			

Airway Segment		Changeover Points	
From	To	Distance	From
§ 95.8003 VOR Federal Airway Changeover Points			
V5 Is Amended To Modify Changeover Point			
Appleton, OH VORTAC	Mansfield, OH VORTAC	28	Appleton
V6 Is Amended To Add Changeover Point			
Dryer, OH VOR/DME	Youngstown, OH VORTAC	39	Dryer
Youngstown, OH VORTAC	Clarion, PA VOR/DME	20	Youngstown
V59 Is Amended To Delete Changeover Point			
Parkersburg, WV VORTAC	Newcomerstown, OH VOR/DME	25	Parkersburg
V115 Is Amended To Delete Changeover Point			
Parkersburg, WV VORTAC	Newcomerstown, OH VOR/DME	25	Parkersburg
V542 Is Amended To Add Changeover Point			
Youngstown, OH VORTAC	Tidioute, PA VORTAC	21	Youngstown
Alaska V453 Is Amended To Modify Changeover Point			
Bethel, AK VORTAC	Unalakleet, AK VOR/DME	109	Bethel

Airway Segment		Changeover Points	
From	To	Distance	From
§ 95.8005 Jet Routes Changeover Points J537 Is Amended To Delete Changeover Point			
Mullan Pass, ID VOR/DME	Calgary, CA VORTAC	95	Mullan Pass

[FR Doc. 2010–32233 Filed 12–29–10; 8:45 am]
BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[Release No. IA–3128; File No. S7–23–07]

RIN 3235–AJ96

Principal Trades with Certain Advisory Clients

AGENCY: Securities and Exchange Commission.

ACTION: Temporary final rule.

SUMMARY: The Securities and Exchange Commission is amending rule 206(3)–3T under the Investment Advisers Act of 1940, a temporary rule that establishes an alternative means for investment advisers who are registered with the Commission as broker-dealers to meet the requirements of section 206(3) of the Investment Advisers Act when they act in a principal capacity in transactions with certain of their advisory clients. The amendment extends the date on which rule 206(3)–3T will sunset from December 31, 2010 to December 31, 2012.

DATES: The amendments in this document are effective December 30, 2010, and the expiration date for 17 CFR 275.206(3)–3T is extended to December 31, 2012.

FOR FURTHER INFORMATION CONTACT: Brian M. Johnson, Attorney-Adviser, Devin F. Sullivan, Senior Counsel, Matthew N. Goldin, Branch Chief, or Sarah A. Bessin, Assistant Director, at (202) 551–6787 or *IArules@sec.gov,* Office of Investment Adviser Regulation, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–5041.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission is adopting an amendment to temporary rule 206(3)–3T [17 CFR 275.206(3)–3T] under the Investment Advisers Act of 1940 [15 U.S.C. 80b] that extends the date on which the rule will sunset from December 31, 2010 to December 31, 2012.

I. Background

On September 24, 2007, we adopted, on an interim final basis, rule 206(3)–3T, a temporary rule under the Investment Advisers Act of 1940 (the "Advisers Act") that provides an alternative means for investment advisers who are also registered as broker-dealers to meet the requirements of section 206(3) of the Advisers Act when they act in a principal capacity in transactions with certain of their advisory clients.[1] In December 2009, we extended the rule's sunset period by one year to December 31, 2010.[2]

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[3] Under section 913 of the Dodd-Frank Act, we are required to conduct a study, and provide a report to Congress, concerning the obligations of broker-dealers and investment advisers, including the standards of care applicable to those intermediaries and their associated persons.[4] We intend to deliver the report concerning this study, as required by the Dodd-Frank Act, no later than January 21, 2011.[5]

Section 913 of the Dodd-Frank Act also authorizes us to promulgate rules concerning, among other things, the legal or regulatory standards of care for broker-dealers, investment advisers, and persons associated with these intermediaries for providing personalized investment advice about securities to retail customers. In enacting any rules pursuant to this authority, we are required to consider the findings, conclusions, and recommendations of the mandated study. The study and our consideration of the need for further rulemaking pursuant to this authority are part of our broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers in connection with the Dodd-Frank Act.[6]

In light of these legislative developments, we proposed on December 1, 2010 to extend the date on which rule 206(3)–3T will sunset for a limited amount of time, from December 31, 2010 to December 31, 2012.[7] We received 10 comment letters addressing our proposal prior to the expiration of the comment period.[8] Six of these commenters generally supported

[1] Rule 206(3)–3T [17 CFR 275.206(3)–3T]. All references to rule 206(3)–3T and the various sections thereof in this release are to 17 CFR 275.206(3)–3T and its corresponding sections. *See also Temporary Rule Regarding Principal Trades with Certain Advisory Clients,* Investment Advisers Act Release No. 2653 (Sep. 24, 2007) [72 FR 55022 (Sep. 28, 2007)] ("2007 Principal Trade Rule Release").

[2] *See Temporary Rule Regarding Principal Trades with Certain Advisory Clients,* Investment Advisers Act Release No. 2965 (Dec. 23, 2009) [74 FR 69009 (Dec. 30, 2009)] ("2009 Extension Release") and *Temporary Rule Regarding Principal Trades with Certain Advisory Clients,* Investment Advisers Act Release No. 2965A (Dec. 31, 2009) [75 FR 742 (Jan. 6, 2010)] (making a technical correction to the 2009 Extension Release).

[3] Pub. L. 111–203, 124 Stat. 1376 (2010).

[4] See generally section 913 of the Dodd-Frank Act and *Study Regarding Obligations of Brokers, Dealers, and Investment Advisers,* Investment Advisers Act Release No. 3058 (July 27, 2010) [75 FR 44996 (July 30, 2010)].

[5] See section 913(d)(1) of the Dodd-Frank Act (requiring us to submit the study to Congress no later than six months after the date of enactment of the Dodd-Frank Act).

[6] The study mandated by section 913 of the Dodd-Frank Act is one of several studies and other actions relevant to the regulation of broker-dealers and investment advisers mandated by that Act. *See, e.g.,* section 914 of the Dodd-Frank Act (requiring the Commission to review and analyze the need for enhanced examination and enforcement resources for investment advisers); section 919 of the Dodd-Frank Act (authorizing the Commission to issue rules designating documents or information that shall be provided by a broker or dealer to a retail investor before the purchase of an investment product or service by the retail investor).

[7] *See Temporary Rule Regarding Principal Trades with Certain Advisory Clients,* Investment Advisers Act Release No. 3118 (Dec. 1, 2010), [75 FR 75650 (Dec. 6, 2010)] ("Proposing Release").

[8] *See* Comment Letter of the Consumer Federation of America (Dec. 20, 2010) ("CFA Letter"); Comment Letter of Bank of America Corporation (Dec. 20, 2010) ("Bank of America Letter"); Comment Letter of Fiduciary360 (Dec. 20, 2010) ("Fiduciary360 Letter"); Comment Letter of Tamar Frankel, Professor of Law, Boston University School of Law (Dec. 14, 2010) ("Frankel Letter"); Comment Letter of the National Association of Personal Financial Advisors (Dec. 20, 2010) ("NAPFA Letter"); Comment Letter of Pickard and Djinis LLP (Dec. 10, 2010) ("Pickard and Djinis Letter"); Comment Letter of Public Investors Arbitration Bar Association (Dec. 20, 2010) ("PIABA Letter"); Comment Letter of Ron A. Rhoades, JD, CFP (Dec. 20, 2010) ("Rhoades Letter"); Comment Letter of the Securities Industry and Financial Markets Association (Dec. 20, 2010) ("SIFMA Letter"); Comment Letter of Winslow, Evans & Crocker (Dec. 8, 2009) ("Winslow, Evans & Crocker Letter"). The comment letters are available at *http://www.sec.gov/comments/s7-23-07/s72307.shtml.*

extending rule 206(3)–3T,[9] and two commenters opposed an extension.[10] Two other commenters did not address the extension directly.[11] The comments we received on our proposal are discussed below. After considering each of the comments, we are extending the rule's sunset period by two years to December 31, 2012, as proposed.

II. Discussion

We are amending rule 206(3)–3T only to extend the rule's expiration date by two years. Absent further action by the Commission, the rule will expire on December 31, 2012. We are adopting this extension because, as we discussed in the Proposing Release, we believe that firms' compliance with the substantive provisions of rule 206(3)–3T provides sufficient protection to advisory clients to warrant the rule's continued operation for the additional two years while we conduct the study mandated by section 913 of the Dodd-Frank Act and consider more broadly the regulatory requirements applicable to broker-dealers and investment advisers.[12] As part of our broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers, we intend to carefully consider principal trading by advisers, including whether rule 206(3)–3T should be substantively modified, supplanted, or permitted to expire.

If we permit rule 206(3)–3T to expire on December 31, 2010, after that date investment advisers also registered as broker-dealers who currently rely on rule 206(3)–3T would be required to comply with section 206(3)'s transaction-by-transaction written disclosure and consent requirements without the benefit of the alternative means of complying with these requirements currently provided by rule 206(3)–3T. This could limit the access of non-discretionary advisory clients of advisory firms that are also registered as broker-dealers to certain securities. In addition, certain of these firms have informed us that, if rule 206(3)–3T were to expire on December 31, 2010, it would be disruptive to their clients, and the firms would be required to make substantial changes to their disclosure documents, client agreements, procedures, and systems.

We expect to revisit the relief provided in rule 206(3)–3T soon after the completion of our study in January 2011. Although we anticipate that will occur prior to the amended expiration date for the temporary rule, we want to ensure that we have sufficient time to engage in any potential rulemaking or other process that may emerge from either the study or any broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers prior to the rule's expiration.

As discussed above, six commenters generally supported our proposal to amend rule 206(3)–3T to extend it,[13] and two commenters opposed it.[14] Commenters who supported the extension cited the disruption to investors that would occur if the rule expired at this time, asserting that investors would be forced to change their accounts and would lose access to a wider range of securities.[15] Commenters who supported the extension of the rule also asserted that allowing the rule to sunset would prove disruptive to advisory firms that are registered as broker dealers: they explained that expiration of the rule would act as an operational barrier to their ability to engage in principal trades with their customers.[16] These and other commenters further explained that, if the rule were allowed to expire, firms relying on the rule would be required to make considerable changes to their disclosure documents, client agreements, procedures, and technical systems at substantial expense.[17] These commenters agreed that extending the rule while the Commission conducted its review of the obligations of broker-dealers and investment advisers, as mandated by the Dodd-Frank Act, would be the least disruptive option.

Conversely, two commenters questioned whether the rule benefits clients and asserted that the Commission should not further extend the rule in light of what they view as risks posed by the compliance issues that the staff identified.[18] One commenter, while opposing the extension, encouraged the Commission to take additional measures to protect clients from the conflicts of interest raised by principal trading if we chose to extend the rule.[19] Another commenter challenged the proposition that firms and investors would face disruptions if the rule sunsets, asserting that few firms and investors rely on the rule.[20]

On balance, and after careful consideration of these comments, we conclude that the benefits from extending this rule outweigh the potential costs of an extension. First, we believe that permitting the rule to sunset just before we commence a comprehensive review of the obligations of broker-dealers and investment advisers could produce substantial disruption for investors with accounts serviced by firms relying on the rule. These investors might lose access to securities available through principal transactions and be forced to convert their accounts in the interim, only to face the possibility of future change — and the costs and uncertainty such additional change may entail.[21] This disruption will be avoided if we maintain the *status quo* while we engage in our broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers.[22] We continue to believe that the rule benefits investors because it provides investors with access to a wider range of securities and protects investors who hold billions of dollars in advisory accounts.

In reaching this conclusion, we have paid particular attention to our staff's observations about firms' compliance with the rule. We emphasize that we share the commenters' concerns about the compliance issues that the staff identified, the critical aspects of which we summarized in the Proposing Release.[23] Having carefully considered

[9] *See* Bank of America Letter; CFA Letter; PIABA Letter; Pickard and Djinis Letter; SIFMA Letter; Winslow, Evans & Crocker Letter. We note that PIABA supported a one-year extension.

[10] *See* Fiduciary360 Letter; NAPFA Letter.

[11] *See* Frankel Letter; Rhoades Letter.

[12] *See* Proposing Release, Section II.

[13] *See* Bank of America Letter; CFA Letter; PIABA Letter; Pickard and Djinis Letter; SIFMA Letter; Winslow, Evans & Crocker Letter.

[14] *See* Fiduciary360 Letter; NAPFA Letter.

[15] *See* Bank of America Letter; CFA Letter; SIFMA Letter.

[16] *See* Bank of America Letter; SIFMA Letter.

[17] *See* Bank of America Letter; SIFMA Letter; Winslow, Evans & Crocker Letter.

[18] *See* Fiduciary360 Letter; NAPFA Letter. We also note that one commenter who supported the extension, CFA, also expressed concern about these compliance issues. *See* CFA Letter.

[19] *See* NAPFA Letter. We also note that CFA, while supporting the extension, stated that the Commission should address "weaknesses identified in the current approach and [back] that rule with tough enforcement focused on the larger issue of the appropriateness of recommendations." CFA Letter.

[20] *See* Fiduciary360 Letter.

[21] As discussed in the 2007 Principal Trading Release and again in the 2009 Extension Release, firms have explained that they may refrain from engaging in principal trading with their advisory clients in the absence of the rule given the practical difficulties of complying with Section 206(3), and thus may not offer principal trading through advisory accounts. *See* 2007 Principal Trading Release, Section I.B; 2009 Release, Section I.

[22] *See* CFA Letter ("Although CFA has been critical of the temporary rule and has in the past urged the Commission to act expeditiously to replace it, we believe that, at this point, revision of the rule is best achieved in conjunction with the Commission's broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers.").

[23] Although some of the commenters suggested that the discussion of the staff's observations in the Proposing Release was not robust enough, we

Continued

the staff's observations, we conclude that the requirements of rule 206(3)–3T, coupled with regulatory oversight informed by those observations, will adequately protect advisory clients during the extension. Throughout the period of the extension, the staff will examine firms with higher risk characteristics, including firms that engage in principal transactions in reliance on rule 206(3)–3T,[24] and continue to take appropriate action to help ensure that firms are complying with the rule's conditions, including referring firms to the Division of Enforcement for possible enforcement action if warranted. One commenter asserted that the burdens placed on firms by rule 206(3)–3T are too stringent.[25] As this commenter noted, the staff did not identify instances of "dumping," a harm that section 206(3) is designed to redress, and we believe that the conditions and limitations in the rule serve as appropriate safeguards during the pendency of the extension.

We note that one commenter asserted that even if principal trading relief may have been appropriate when we originally adopted rule 206(3)–3T in 2007, it no longer is.[26] In particular, the commenter contended that the valuation of certain securities—such as municipal bonds—has become much more difficult, such that "a much greater amount of due diligence is required of the investment adviser who engages in advising clients on purchases of individual municipal bonds." But extension of the rule does not have any bearing on an adviser's due diligence obligations. The standard of care to which advisers are subject and the duties they owe clients are in no way diminished by their reliance on rule 206(3)–3T.[27]

Second, we further conclude that the extension of the rule's sunset date is warranted to avoid the disruption to firms relying on the rule that will occur if the rule expires. The letters submitted by three commenters demonstrated that some firms in fact do rely on the rule, and that those firms will be faced with uncertainty and disruption of operations should the rule expire just as the Commission is about to begin a comprehensive review process that may ultimately produce a different regulatory standard.[28] One commenter that represents securities firms described that large and small firms have relied upon the rule, and provided data showing that a substantial number of accounts and volume of trades would be affected by a change in the rule.[29]

We received four comment letters specifically addressing the duration of our proposed extension of rule 206(3)–3T.[30] Three expressed support for extending the rule for an additional two years, but argued that the rule should be made permanent.[31] One of these commenters cited uncertainty and its attendant costs as a reason to make the rule permanent.[32] Other commenters supported a shorter extension of the rule. For example, one commenter supported a one-year extension.[33] This commenter stated that a one-year extension of the rule strikes the proper balance between the concerns of investor protection and the burden of potential revised regulations applying to investment advisers and broker-dealers.[34] Two commenters generally opposed the extension and supported allowing the rule to expire: One commenter stated alternatively that the Commission should adopt a one-year extension with the imposition of other measures to ensure firms' compliance with the rule and with their fiduciary obligations generally, and the other indicated that it would support an extension of six months if the Commission provided "further explanation and supporting evidence."[35]

As we noted in the Proposing Release, we believe that the rule should be extended only for a limited amount of time.[36] That period of time, however, must be long enough to permit the Commission to engage in any rulemaking prompted by our study under section 913 of the Dodd-Frank Act and our broader review of regulatory requirements applicable to investment advisers and broker-dealers. Having considered the comments regarding the duration of the extension, and taking into account the importance of the issues that this process will address, the Commission believes on balance that a two-year extension is necessary to give the Commission adequate time to complete any such rulemaking. Because that process cannot begin until the completion of the study required by the Dodd-Frank Act, adopting a six-month or one-year extension, as certain commenters recommended, most likely would not provide sufficient time for such rulemaking, and thus could result in greater uncertainty (along with its attendant costs) for investors and firms that rely on the rule. We believe that certainty in this area is important, and we will complete any relevant rulemaking as soon as is feasible consistent with administrative procedure.

A number of commenters also raised issues that were beyond the scope of our proposal to extend rule 206(3)–3T, including the broader legal and policy questions related to the meaning, scope, and application of a fiduciary standard and the appropriate considerations related to principal trading.[37] These comments pertain to our broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers, and we will consider these comments in conducting this broader review.

III. Certain Administrative Law Matters

The amendment to rule 206(3)–3T is effective on December 30, 2010. The Administrative Procedure Act generally requires that an agency publish a final rule in the **Federal Register** not less than 30 days before its effective date.[38] However, this requirement does not apply if the rule is a substantive rule which grants or recognizes an exemption or relieves a restriction, or if the rule is interpretive.[39] Rule 206(3)–3T is a rule that recognizes an

believe the summary contained in the release outlined the critical aspects of the issues observed by the staff with respect to compliance with the rule. *See* NAPFA Letter; Fiduciary360 Letter; CFA Letter.

[24] One commenter suggested that the Commission's Office of Compliance Inspections and Examinations should conduct additional examinations to determine if firms are complying with rule 206(3)–3T, among other requirements. *See* NAPFA Letter.

[25] *See* Pickard and Djinis Letter.

[26] *See* NAPFA Letter.

[27] *See* rule 206(3)–3T(b) ("This section shall not be construed as relieving in any way an investment adviser from acting in the best interests of an advisory client, including fulfilling the duty with respect to the best price and execution for the particular transaction for the advisory client; nor shall it relieve such person or persons from any obligation that may be imposed by section 206(1) or (2) of the Advisers Act or by other applicable provisions of the federal securities laws.").

[28] *See* Bank of America Letter; SIFMA Letter; Winslow, Evans & Crocker Letter.

[29] *See* SIFMA Letter.

[30] *See* Bank of America Letter; Fiduciary360 Letter; Winslow, Evans & Crocker Letter; PIABA Letter.

[31] *See* Bank of America Letter; Winslow, Evans & Crocker Letter; Pickard and Djinis Letter.

[32] *See* Winslow, Evans & Crocker Letter.

[33] *See* PIABA Letter.

[34] *See id.*

[35] *See* NAPFA Letter; Fiduciary360 Letter.

[36] *See* Proposing Release, Section II. The statements in the Proposing Release should not be read as limiting the scope of the alternatives we will consider in conducting the study mandated by section 913 of the Dodd-Frank Act and considering more broadly the regulatory requirements applicable to broker-dealers and investment advisers.

[37] *See* CFA Letter; Fiduciary360 Letter; Frankel Letter; NAPFA Letter; Pickard and Djinis Letter; Rhoades Letter; SIFMA Letter.

[38] 5 U.S.C. 553(d).

[39] *Id.*

exemption and relieves a restriction and in part has interpretive aspects.

IV. Paperwork Reduction Act

Rule 206(3)–3T contains "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[40] The Office of Management and Budget ("OMB") approved the burden estimates presented in the 2007 Principal Trade Rule Release,[41] first on an emergency basis and subsequently on a regular basis. OMB approved the collection of information with an expiration date of March 31, 2011. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The title for the collection of information is: "Temporary rule for principal trades with certain advisory clients, rule 206(3)–3T" and the OMB control number for the collection of information is 3235–0630. The 2007 Principal Trade Rule Release and the Proposing Release solicited comments on our PRA estimates, but we did not receive comment on them.[42]

The amendment to the rule we are adopting today—to extend rule 206(3)–3T for two years—does not affect the burden estimates contained in the 2007 Principal Trade Rule Release. Therefore, as was the case when we extended rule 206(3)–3T in December 2009, we are not revising our Paperwork Reduction Act burden and cost estimates submitted to OMB as a result of this amendment. We will submit burden and cost estimates as part of our routine renewal of OMB's approval of the rule's collection of information.

V. Cost-Benefit Analysis

Other than extending rule 206(3)–3T's sunset period for two years, we are not otherwise modifying the rule from the form in which we initially adopted it on an interim final basis in September 2007 or as final in December 2009. We discussed the benefits provided by rule 206(3)–3T in both the 2007 Principal Trade Rule Release and the 2009 Extension Release.

In summary, as explained in the 2007 Principal Trade Rule Release, the 2009 Extension Release, and the Proposing Release,[43] we believe the principal benefit of rule 206(3)–3T is that it maintains investor choice and protects the interests of investors who formerly held an estimated $300 billion in fee-based brokerage accounts. A resulting second benefit of the rule is that non-discretionary advisory clients of advisory firms that are also registered as broker-dealers have easier access to a wider range of securities which, in turn, should continue to lead to increased liquidity in the markets for these securities and promote capital formation in these areas. A third benefit of the rule is that it provides the protections of the sales practice rules of the Securities Exchange Act of 1934 ("Exchange Act")[44] and the relevant self-regulatory organizations because an adviser relying on the rule must also be a registered broker-dealer. Another benefit of rule 206(3)–3T is that it provides a lower cost alternative for an adviser to engage in principal transactions.

One commenter disputed a number of the benefits of rule 206(3)–3T we have described above. The commenter did not provide any specific data, analysis, or other information in support of its comment.[45] No commenter provided any substantive or specific evidence to contradict the Commission's previous conclusion that the rule benefits investors, and the Commission continues to believe that the rule provides those benefits.[46]

In addition to the general benefits described above, there also are benefits to extending the rule for an additional two years. By extending the rule for two years, non-discretionary advisory clients who have had access to certain securities because of their advisers' reliance on the rule to trade on a principal basis will continue to have access to those securities without disruption. If we chose not to extend the rule in its current form, firms currently relying on the rule would be required to restructure their operations and client relationships on or before the rule's current expiration date—potentially only to have to do so again shortly thereafter (first when the rule expires or is modified, and again if we adopt a new approach after the study mandated by the Dodd-Frank Act, discussed above, is complete). Firms relying on the rule will continue to be able to offer clients and prospective clients access to certain securities on a principal basis as well and will not need during this two-year period to incur the cost of adjusting to a new set of rules or abandoning the systems established to comply with the current rule. In other words, extension will avoid disruption to clients and firms during the period while we complete the study mandated by section 913 of the Dodd-Frank Act and our broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers.

We also discussed the costs associated with rule 206(3)–3T in the 2007 Principal Trade Rule Release, the 2009 Extension Release, and the Proposing Release.[47] In the 2007 Principal Trade Rule Release, we presented estimates of the costs of each of the rule's disclosure elements, including: Prospective disclosure and consent; transaction-by-transaction disclosure and consent; transaction-by-transaction confirmations; and the annual report of principal transactions. We also provided estimates for the following related costs of compliance with rule 206(3)–3T: (i) The initial distribution of prospective disclosure and collection of consents; (ii) systems programming costs to ensure that trade confirmations contain all of the information required by the rule; and (iii) systems programming costs to aggregate already-collected information to generate compliant principal transactions reports. We did not receive comments directly addressing with supporting data the cost-benefit analysis we presented in the 2007 Principal Trade Rule Release.[48] We do not believe that a two-year extension of rule 206(3)–3T would materially affect those costs.[49]

We recognize that, as a result of our amendment, firms relying on the rule will incur the costs associated with complying with the rule for two additional years. We also recognize that a temporary rule, by nature, creates uncertainty, which in turn, may generate costs and inefficiency.[50]

[40] 44 U.S.C. 3501 *et seq.*

[41] *See* 2007 Principal Trade Rule Release, Section V.B&C.

[42] *See* 2009 Extension Release, Section IV; Proposing Release, Section IV.

[43] *See* 2007 Principal Trade Rule Release, Section VI.C; 2009 Extension Release, Section V; Proposing Release, Section V.

[44] 15 U.S.C. 78 *et seq.*

[45] *See* NAPFA Letter (questioning the benefits of the rule in: (1) Providing protections of the sales practice rules of the Exchange Act and the relevant self-regulatory organizations; (2) allowing non-discretionary advisory clients of advisory firms that are also registered as broker-dealers to have easier access to a wider range of securities which, in turn, should continue to lead to increased liquidity in the markets for these securities and promote capital formation in these areas; and (3) maintaining investor choice).

[46] *See* 2007 Principal Trade Rule Release, Section VI.C; 2009 Extension Release, Section V; Proposing Release, Section V.

[47] *See* 2007 Principal Trade Rule Release, Section VI.D; 2009 Extension Release, Section V; Proposing Release, Section V.

[48] In the 2007 Principal Trade Rule Release, we estimated the total overall costs, including estimated costs for all eligible advisers and eligible accounts, relating to compliance with rule 206(3)–3T to be $37,205,569. *See* 2007 Principal Trade Rule Release, Section VI.D.

[49] *See* Proposing Release, Section V.

[50] *See* Winslow, Evans & Crocker Letter ("We do, however, feel that extending the temporary rule is in the best interest of investors but think that doing

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However, we believe that a temporary extension of the rule is the most appropriate action that we can take at this time while we conduct the study mandated by section 913 of the Dodd-Frank Act and consider more broadly the regulatory requirements applicable to broker-dealers and investment advisers.[51]

VI. Promotion of Efficiency, Competition, and Capital Formation

Section 202(c) of the Advisers Act mandates that the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[52]

We explained in the 2007 Principal Trade Rule Release, the 2009 Extension Release, and the Proposing Release, the manner in which rule 206(3)–3T, in general, would promote these aims.[53] We continue to believe that this analysis generally applies today.

As noted in the 2009 Extension Release and Proposing Release, we received comments on the 2007 Principal Trade Rule Release from commenters who opposed the limitation of the temporary rule to investment advisers that are also registered as broker-dealers, as well as to accounts that are subject to both the Advisers Act and Exchange Act as providing a competitive advantage to investment advisers that are also registered broker-dealers.[54] Based on our experience with the rule to date, just as we noted in the 2009 Extension Release and Proposing Release, we have no reason to believe that broker-dealers (or affiliated but separate investment advisers and broker-dealers) are put at a competitive disadvantage to advisers that are themselves also registered as broker-dealers;[55] however we intend to continue to evaluate these effects in connection with our broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers.

We received one comment letter arguing that rule 206(3)–3T would impede capital formation because it would lead to "more numerous and more severe violations * * * of the trust placed by individual investors in their trusted investment adviser."[56] While we share the view that numerous and severe violations of trust could theoretically impede capital formation, we have not seen any evidence that rule 206(3)–3T has caused this result. We also reiterate that, in addition to conducting a broader review, we will continue to consider any potential violations of the rule and take appropriate action as necessary.

VII. Final Regulatory Flexibility Analysis

The Commission has prepared the following Final Regulatory Flexibility Analysis ("FRFA") regarding the amendment to rule 206(3)–3T in accordance with 5 U.S.C. 604. We prepared and included an Initial Regulatory Flexibility Analysis ("IRFA") in the Proposing Release.[57]

A. Need for the Rule Amendment

We are adopting an amendment to rule 206(3)–3T to extend the rule for two years in its current form because we believe that it would be premature to require firms relying on the rule to restructure their operations and client relationships before we complete our study and our broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers. The objective of the amendment to rule 206(3)–3T, as discussed above, is to permit firms currently relying on rule 206(3)–3T to limit the need to modify their operations and relationships on multiple occasions, both before and potentially after we complete our study and any related rulemaking.

We are amending rule 206(3)–3T pursuant to sections 206A and 211(a) of the Advisers Act [15 U.S.C. 80b–6a and 15 U.S.C. 80b–11(a)].

B. Significant Issues Raised by Public Comments

We received one comment letter related to our IRFA.[58] The commenter stated that extending the rule temporarily, rather than permanently, would create uncertainty, thereby causing certain inefficiencies, particularly with regard to smaller firms.[59] We recognize that a temporary rule, by nature, creates uncertainty, which in turn may generate costs and inefficiency, especially for smaller firms. However, as discussed above, we believe that a temporary extension of the rule is the most appropriate approach at this time while we conduct the study mandated by section 913 of the Dodd-Frank Act and consider more broadly the regulatory requirements applicable to broker-dealers and investment advisers.[60]

C. Small Entities Subject to the Rule

Rule 206(3)–3T is an alternative method of complying with Advisers Act section 206(3) and is available to all investment advisers that: (i) Are registered as broker-dealers under the Exchange Act; and (ii) effect trades with clients directly or indirectly through a broker-dealer controlling, controlled by or under common control with the investment adviser, including small entities. Under Advisers Act rule 0–7, for purposes of the Regulatory Flexibility Act an investment adviser generally is a small entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had $5 million or more on the last day of its most recent fiscal year.[61]

As noted in the Proposing Release, we estimate that as of November 1, 2010, 680 SEC-registered investment advisers were small entities.[62] As discussed in the 2007 Principal Trade Rule Release, we opted not to make the relief provided by rule 206(3)–3T available to all investment advisers, and instead have restricted it to investment advisers that also are registered as broker-dealers under the Exchange Act.[63] We therefore estimate for purposes of this FRFA that 38 of these small entities (those that are

so on a temporary basis is short sighted and leads to certain inefficiencies, particularly to smaller firms * * * We believe the Commission should adopt the rule on a permanent basis thus eliminating uncertainty with respect to compliance in this area."). *See also* Bank of America Letter (urging the Commission to consider a permanent rule that would allow firms to continue acting in a principal capacity in transactions with certain of their clients).

[51] *See* CFA Letter ("If, as we hope, more extensive revisions to the principal trading requirements are just around the corner, it would be unduly disruptive to abandon the existing system now absent evidence of significant harm to investors.").

[52] 15 U.S.C. 80b–2(c).

[53] *See* 2007 Principal Trade Rule Release, Section VII; 2009 Extension Release, Section VI; Proposing Release, Section VI.

[54] *See* 2009 Extension Release, Section VI; Proposing Release, Section VI; Comment Letter of the Financial Planning Association (Nov. 30, 2007).

[55] *See* 2009 Extension Release, Section VI; Proposing Release, Section VI.

[56] *See* NAPFA Letter.

[57] *See* Proposing Release, Section VII.

[58] *See* Winslow, Evans & Crocker Letter.

[59] *See id.*

[60] *See* CFA Letter ("If, as we hope, more extensive revisions to the principal trading requirements are just around the corner, it would be unduly disruptive to abandon the existing system now absent evidence of significant harm to investors.").

[61] *See* 17 CFR 275.0–7.

[62] IARD data as of November 1, 2010.

[63] *See* 2007 Principal Trade Rule Release, Section VIII.B.

both investment advisers and broker-dealers) could rely on rule 206(3)–3T.[64] We did not receive any comments on these estimates.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The provisions of rule 206(3)–3T impose certain reporting or recordkeeping requirements, and our amendment will extend the imposition of these requirements for an additional two years. The two-year extension will not alter these requirements.

Rule 206(3)–3T is designed to provide an alternative means of compliance with the requirements of section 206(3) of the Advisers Act. Investment advisers taking advantage of the rule with respect to non-discretionary advisory accounts are required to make certain disclosures to clients on a prospective, transaction-by-transaction and annual basis.

Specifically, rule 206(3)–3T permits an adviser, with respect to a non-discretionary advisory account, to comply with section 206(3) of the Advisers Act by, among other things: (i) Making certain written disclosures; (ii) obtaining written, revocable consent from the client prospectively authorizing the adviser to enter into principal trades; (iii) making oral or written disclosure and obtaining the client's consent orally or in writing prior to the execution of each principal transaction; (iv) sending to the client confirmation statements for each principal trade that disclose the capacity in which the adviser has acted and indicating that the client consented to the transaction; and (v) delivering to the client an annual report itemizing the principal transactions. Advisers are already required to communicate the content of many of the disclosures pursuant to their fiduciary obligations to clients. Other disclosures are already required by rules applicable to broker-dealers.

Our amendment will only extend the rule for two years in its current form. Advisers currently relying on the rule already should be making the disclosures described above.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small entities.[65] Alternatives in this category would include: (i) Establishing different compliance or reporting standards or timetables that take into account the resources available to small entities; (ii) clarifying, consolidating, or simplifying compliance requirements under the rule for small entities; (iii) using performance rather than design standards; and (iv) exempting small entities from coverage of the rule, or any part of the rule.

We believe that special compliance or reporting requirements or timetables for small entities, or an exemption from coverage for small entities, may create the risk that the investors who are advised by and effect securities transactions through such small entities would not receive adequate disclosure. Moreover, different disclosure requirements could create investor confusion if it creates the impression that small investment advisers have different conflicts of interest with their advisory clients in connection with principal trading than larger investment advisers. We believe, therefore, that it is important for the disclosure protections required by the rule to be provided to advisory clients by all advisers, not just those that are not considered small entities. Further consolidation or simplification of the rule for investment advisers that are small entities would be inconsistent with the Commission's goals of fostering investor protection.

We have endeavored through rule 206(3)–3T to minimize the regulatory burden on all investment advisers eligible to rely on the rule, including small entities, while meeting our regulatory objectives. It was our goal to ensure that eligible small entities may benefit from the Commission's approach to the new rule to the same degree as other eligible advisers. The condition that advisers seeking to rely on the rule must also be registered as broker-dealers and that each account with respect to which an adviser seeks to rely on the rule must be a brokerage account subject to the Exchange Act, and the rules thereunder, and the rules of the self-regulatory organization(s) of which it is a member, reflect what we believe is an important element of our balancing between easing regulatory burdens (by affording advisers an alternative means of compliance with section 206(3) of the Act) and meeting our investor protection objectives.[66] Finally, we do not consider using performance rather than design standards to be consistent with our statutory mandate of investor protection in the present context.

[64] IARD data as of November 1, 2010.

[65] See 5 U.S.C. 603(c).

[66] *See* 2007 Principal Trade Rule Release, Section II.B.7 (noting commenters that objected to this condition as disadvantaging small broker-dealers (or affiliated but separate investment advisers and broker-dealers)).

VIII. Statutory Authority

The Commission is amending rule 206(3)–3T pursuant to sections 206A and 211(a) of the Advisers Act.

List of Subjects in 17 CFR Part 275

Investment advisers, Reporting and recordkeeping requirements.

Text of Rule Amendment

■ For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows.

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 1. The authority citation for part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

§ 275.206(3)–3T [Amended]

■ 2. In § 275.206(3)–3T, amend paragraph (d) by removing the words "December 31, 2010" and adding in their place "December 31, 2012".

Dated: December 28, 2010.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–33077 Filed 12–28–10; 4:15 pm]

BILLING CODE 8011–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Part 141

[USCBP–2008–0062; CBP Dec. 10–33]

RIN 1515–AD61 (Formerly 1505–AB96)

Technical Correction: Completion of Entry and Entry Summary—Declaration of Value

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: Customs and Border Protection (CBP) periodically reviews its regulations to ensure that they are current, correct, and consistent. As a result of this review process, CBP has determined that a correction to part 141 of title 19 of the CBP Regulations (19 CFR part 141) is necessary to reflect that the underlying statutory authority for § 141.61(g) has expired and that this regulation is no longer necessary.

Accordingly, part 141 of the CBP regulations is amended by removing the obsolete regulation.

DATES: The final rule is effective December 30, 2010.

FOR FURTHER INFORMATION CONTACT: Robert Shervette, Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, (202) 325–0274.

SUPPLEMENTARY INFORMATION:

Background

It is the policy of Customs and Border Protection (CBP) to periodically review title 19 of the Code of Federal Regulations (19 CFR) to ensure that it is accurate and up-to-date so that the importing and general public is aware of CBP requirements and procedures regarding import-related activities. As part of this review policy, CBP has determined that a correction to 19 CFR part 141 is necessary.

Section 141.61 of the CBP regulations (19 CFR 141.61) prescribes the manner by which entry and entry summary documentation must be completed. Within § 141.61, paragraph (g) requires an importer to indicate on the CBP Form 7501 the manner by which the declared transaction value on imported merchandise was determined. This requirement is authorized by § 15422(a) of the Food, Conservative, and Energy Act of 2008 (the "Act"), Public Law 110–234, 122 Stat. 1547 (19 U.S.C. 1484 note), in which Congress required CBP to collect for a one-year period beginning August 20, 2008, and ending August 19, 2009, from importers information on whether the transaction value of imported merchandise is determined on the basis of the price paid by the buyer in the first or earlier sale occurring prior to introduction of the merchandise into the United States.

On August 25, 2008, CBP published an interim rule as CBP Dec. 08–31 in the **Federal Register** (73 FR 49939) implementing the Act's first sale declaration requirement that for a specified time period importers were required to declare, at the time of entry, the transaction value method employed. As the statutory authority for the importer declaration requirement expired on August 19, 2009, this document amends 19 CFR 141.61 by removing paragraph (g).

Inapplicability of Notice and Delayed Effective Date Requirements

Because the technical corrections set forth in this document merely conform to existing law, CBP finds that good cause exists for dispensing with notice and public procedure as unnecessary under 5 U.S.C. 553(b)(B). For this same reason, pursuant to 5 U.S.C. 553(d)(3), CBP finds that good cause exists for dispensing with the requirement for a delayed effective date.

Regulatory Flexibility Act

Because this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Executive Order 12866

These amendments do not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

Signing Authority

This document is limited to technical corrections of the CBP regulations. Accordingly, it is being signed under the authority of 19 CFR 0.1(b)(1).

List of Subjects in 19 CFR Part 141

Customs duties and inspection, Entry of merchandise, Reporting and recordkeeping requirements.

Amendments to the Regulations

■ For the reasons set forth above, part 141 of the CBP regulations (19 CFR part 141) is amended as set forth below.

PART 141—ENTRY OF MERCHANDISE

■ 1. The general authority for part 141 continues to read as follows, and the specific authority for § 141.61 is removed:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

* * * * *

■ 2. Section 141.61 is amended by removing paragraph (g).

Dated: December 23, 2010.

Alan Bersin,

Commissioner, U.S. Customs and Border Protection.

[FR Doc. 2010–32912 Filed 12–29–10; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF STATE

22 CFR Part 40

[Public Notice: 7285]

Visas: Waiver for Ineligible Nonimmigrants Under the Immigration and Nationality Act

AGENCY: State Department.

ACTION: Final rule.

SUMMARY: This rule incorporates a revision to the Immigration and Nationality Act made in section 5503(1) of the Intelligence Reform and Terrorism Prevention Act of 2004 relative to the grounds of inadmissibility under the Immigration and Nationality Act (INA) for which consular officers or the Secretary of State may recommend that the Secretary of Homeland Security exercise discretionary waiver authority in the case of an applicant for a nonimmigrant visa.

DATES: This rule is effective December 30, 2010.

FOR FURTHER INFORMATION CONTACT: Lauren A. Prosnik, Legislation and Regulations Division, Visa Services, Department of State, 2401 E Street, NW., Room L–603D, Washington, DC 20520–0106, (202) 663–2951.

SUPPLEMENTARY INFORMATION:

Why is the Department promulgating this rule?

The Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108–458, at Subtitle E, section 5501(a)(2), amended INA 212(d)(3)(A), replacing a bar against a waiver for an alien who is ineligible for a nonimmigrant visa under INA 212(a)(3)(E) with a bar against a waiver for an alien who is ineligible for a nonimmigrant visa under clauses (i) or (ii) of INA 212(a)(3)(E). The same legislation also amended INA 212(a)(3)(E) to add clause (iii), to which the waiver bar does not apply. This rule amends 22 CFR Part 40 to conform to these amended provisions.

Regulatory Findings

Administrative Procedure Act

This regulation involves a foreign affairs function of the United States and, therefore, in accordance with 5 U.S.C. 553(a)(1), is not subject to the rule making procedures set forth at 5 U.S.C. 553.

Regulatory Flexibility Act/Executive Order 13272: Small Business

Because this final rule is exempt from notice and comment rulemaking under 5 U.S.C. 553, it is exempt from the regulatory flexibility analysis requirements set forth at sections 603 and 604 of the Regulatory Flexibility Act (5 U.S.C. 603 and 604). Nonetheless, consistent with section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. This regulates individual aliens who are ineligible under INA 212(a)(3)(E)(i) and 212(a)(3)(E)(ii) and does not affect any

small entities, as defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48, 2 U.S.C. 1532, generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of $100 million or more by State, local, or tribal governments, or by the private sector. This rule will not result in any such expenditure, nor will it significantly or uniquely affect small governments.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and import markets.

Executive Order 12866

The Department of State has reviewed this proposed rule to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866 and has determined that the benefits of this final regulation justify its costs. The Department does not consider this final rule to be an economically significant action within the scope of section 3(f)(1) of the Executive Order since it is not likely to have an annual effect on the economy of $100 million or more or to adversely affect in a material way the economy, a sector of the economy, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities.

Executive Orders 12372 and 13132: Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Nor will the rule have federalism implications warranting the application of Executive Orders No. 12372 and No. 13132.

Executive Order 12988: Civil Justice Reform

The Department has reviewed the regulations in light of sections 3(a) and 3(b)(2) of Executive Order No. 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Paperwork Reduction Act

This rule does not impose information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 40

Aliens, Immigration,Visas.

■ For the reasons stated in the preamble, the Department of State amends 22 CFR part 40 as follows:

PART 40—REGULATIONS PERTAINING TO BOTH NONIMMIGRANTS AND IMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

■ 1. The authority citation for part 40 will continue to read as follows:

Authority: 8 U.S.C. 1104.

■ 2. Section 40.301 is amended by revising paragraph (a) to read as follows:

§ 40.301 Waiver for ineligible nonimmigrants under INA 212(d)(3)(A)

(a) *Report or recommendation to Department.* Except as provided in paragraph (b) of this section, consular officers may, upon their own initiative, and shall, upon the request of the Secretary of State or upon the request of the alien, submit a report to the Department for possible transmission to the Secretary of Homeland Security pursuant to the provisions of INA 212(d)(3)(A) in the case of an alien who is classifiable as a nonimmigrant but who is known or believed by the consular officer to be ineligible to receive a nonimmigrant visa under the provisions of INA 212(a), other than INA 212(a) (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), (3)(E)(i), or (3)(E)(ii).

* * * * *

Dated: December 7, 2010.

Janice L. Jacobs,

Assistant Secretary for Consular Affairs, Department of State.

[FR Doc. 2010–32944 Filed 12–29–10; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–1129]

RIN 1625–AA87

Security Zones; Moored Cruise Ships, Port of San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary security zone regulation from December 21, 2010, through June 20, 2011. The security zones created by this rule will encompass all navigable waters extending from the surface to the sea floor, within a 100 yard radius around any cruise ship that is moored at any berth within the San Diego port area inside the sea buoys bounding the Port of San Diego. This temporary final rule is necessary to provide for the safety of the cruise ship, vessels, and users of the waterway. Entry into these security zones will be prohibited unless specifically authorized by the Captain of the Port (COTP) San Diego, or his or her designated representative. This rule will also suspend paragraph (b)(2) of 33 CFR 165.1108, a related regulation.

DATES: This rule is effective from December 21, 2010, through June 20, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–1129 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–1129 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Commander Michael B. Dolan, Prevention, Coast Guard Sector San Diego, Coast Guard; telephone 619–278–7261, e-mail *Michael.B.Dolan@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is contrary to the public interest not to issue a rule that is effective by December 21, 2010. Good cause exists to issue a temporary rule amending Section 165.1108, due to the opening of the Broadway cruise ship terminal and the anticipated arrival of cruise ships immediately thereafter, including on December 22, 2010. It is in the public interest to avoid the potential disruption that could be caused to major roadways just onshore. Moreover, security interests can continue to be maintained during the ensuing notice and comment rulemaking to amend Section 165.1108(b)(2). In addition, this rule will relieve an unnecessary burden imposed by varying interpretations of 33 CFR 165.1108(b)(2) while providing an effective security zone regulation in its place during a notice-and-comment rulemaking to amend § 165.1108(b)(2). As noted in the Discussion of the Rule section below, the Coast Guard will initiate a separate, notice-and-comment rulemaking proposing to amend 33 CFR 165.1108(b)(2) while this temporary rule is in effect.

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** because it is contrary to the public interest not to suspend 33 CFR 165.1108(b)(2) and issue an effective temporary rule for moored cruise ships in San Diego Harbor by December 21, 2010.

Background and Purpose

Based on experience with actual security zone enforcement operations, the COTP San Diego has concluded that a security zone encompassing all navigable waters, extending from the surface to the sea floor, within a 100 yard radius around any cruise ship that is moored at any berth within the San Diego port area inside the sea buoys bounding the Port of San Diego would provide for the safety of the cruise ship, vessels, and users of the waterway.

Discussion of Rule

The Coast Guard is establishing a temporary security zone regulation from December 21, 2010, through June 20, 2011. The security zones created by this temporary final rule will encompass all navigable waters, extending from the surface to the sea floor, within a 100 yard radius around any cruise ship that is moored at any berth within the San Diego port area inside the sea buoys bounding the Port of San Diego. These security zones are necessary to provide for the safety of the cruise ship, vessels, and users of the waterway. Entry into these zones will be prohibited unless specifically authorized by the Captain of the Port (COTP) San Diego, or his or her designated representative.

This temporary rule also suspends paragraph (b)(2) of 33 CFR 165.1108. The Coast Guard will initiate a separate, notice-and-comment rulemaking, to amend § 165.1108(b)(2) and clarify what is meant by its reference to "shore area." The COTP has determined the security zones for moored cruise ships in San Diego Harbor need not include any land.

Regulatory Analyses

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

Regulatory Planning and Review

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

It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS). We expect the economic impact of this rule to be so minimal that full Regulatory Evaluation is unnecessary. Most of the entities likely to be affected are pleasure craft engaged in recreational activities and sightseeing. In addition, due to National Security interests, the implementation of this temporary security zone regulation is necessary for the protection of the United States and its people. The size of the zones is the minimum necessary to provide adequate protection for cruise ships.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor San Diego Bay within a 100-yard radius of cruise ships covered by this temporary final rule while it is effective from December 21, 2010 through June 20, 2011.

This security zone regulation will not have a significant economic impact on a substantial number of small entities for the following reasons. Vessel traffic can pass safely around the zones. Before the arrival of any cruise ship that would activate a security zone under this temporary final rule, the Coast Guard will issue local notice to mariners (LNM) and broadcast notice to mariners (BNM) alerts via VHF–FM marine channel 16 before the security zone is enforced.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves the establishment of security zones.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, 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, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

§ 165.1108 [Amended]

■ 2. From December 21, 2010, through June 20, 2011, temporarily suspend § 165.1108(b)(2).

■ 3. From December 21, 2010, through June 20, 2011, temporarily add § 165.T11–386 to read as follows:

§ 165.T11–386 Temporary Security Zones; Moored Cruise Ships, Port of San Diego, California.

(a) *Definition. Cruise ship* as used in this section means a passenger vessel, except for a ferry, 100 gross tons or more, authorized to carry more than 12 passengers for hire; capable of making international voyages lasting more than 24 hours, any part of which is on the high seas; and for which passengers are embarked, disembarked or at a port of call in the San Diego port.

(b) *Location.* The following areas are security zones: All navigable waters, extending from the surface to the sea floor, within a 100 yard radius around any cruise ship that is moored at any berth within the San Diego port area inside the sea buoys bounding the Port of San Diego.

(c) *Regulations.* Under regulations in 33 CFR part 165, subpart D, entry into or remaining in the security zones created by this section is prohibited unless authorized by the Coast Guard Captain of the Port, San Diego or his designated representative. Persons desiring to transit the area of the security zones may contact the Captain of the Port at telephone number (619) 683–6495 or on VHF–FM channel 16 (156.8 MHz) to seek permission to transit the area. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or his or her designated representative.

(d) *Authority.* In addition to 33 U.S.C. 1231 and 50 U.S.C. 191, the authority for this section includes 33 U.S.C. 1226.

(e) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the security zones by the San Diego Harbor Police.

Dated: December 20, 2010.

P.J. Hill,

Commander, U.S. Coast Guard, Acting Captain of the Port San Diego, CA.

[FR Doc. 2010–32914 Filed 12–28–10; 11:15 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2010–0107; FRL–9245–3]

RIN 2060–AQ45

Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is establishing a federal implementation plan (FIP) to apply in each of seven states that have not submitted by their established deadline a corrective state implementation plan (SIP) revision to apply their Clean Air Act (CAA or Act) Prevention of Significant Deterioration (PSD) program to sources of greenhouse gases (GHGs). This action will ensure that a permitting authority—EPA—is available in these states as of January 2, 2011, when PSD becomes applicable to GHG-emitting sources, to issue preconstruction PSD permits and thereby facilitate construction or expansion. The seven states are: Arizona: Both Pinal County and Rest of State (excluding Maricopa County, Pima County, and Indian Country), Arkansas, Florida, Idaho, Kansas, Oregon, and Wyoming. This action is related to EPA's recently promulgated final rule, published on December 13, 2010, which we call the GHG PSD SIP call, and in which EPA made a finding of substantial inadequacy and issued a SIP call for these seven states and several others on grounds that their SIPs do not apply the PSD program to GHG-emitting sources.

DATES: This action is effective on December 30, 2010.

ADDRESSES: EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2010–0107. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, Air Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Ms. Cheryl Vetter, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, NC 27711; *telephone number:* (919) 541–4391; *fax number:* (919) 541–5509; *e-mail address: vetter.cheryl@epa.gov.*

For information related to a specific state, local, or tribal permitting authority, please contact the appropriate EPA regional office:

EPA regional office	Contact for regional office (person, mailing address, telephone number)	Permitting authority
I	Dave Conroy, Chief, Air Programs Branch, EPA Region 1, 5 Post Office Square, Suite 100, Boston, MA 02109–3912, (617) 918–1661.	Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont
II	Raymond Werner, Chief, Air Programs Branch, EPA Region 2, 290 Broadway, 25th Floor, New York, NY 10007–1866, (212) 637–3706.	New Jersey, New York, Puerto Rico, and Virgin Islands.
III	Kathleen Cox, Chief, Permits and Technical Assessment Branch, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103–2029, (215) 814–2173.	District of Columbia, Delaware, Maryland, Pennsylvania, Virginia, and West Virginia.
IV	Lynorae Benjamin, Chief, Regulatory Development Section, Air, Pesticides and Toxics Management Division, EPA Region 4, Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, GA 30303–3104, (404) 562–9033.	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.
V	J. Elmer Bortzer, Chief, Air Programs Branch (AR–18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604–3507, (312) 886–1430.	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.
VI	Jeff Robinson, Chief, Air Permits Section, EPA Region 6, Fountain Place 12th Floor, Suite 1200, 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–6435.	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.
VII	Mark Smith, Chief, Air Permitting and Compliance Branch, EPA Region 7, 901 North 5th Street, Kansas City, KS 66101, (913) 551–7876.	Iowa, Kansas, Missouri, and Nebraska.
VIII	Carl Daly, Unit Leader, Air Permitting, Monitoring & Modeling Unit, EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202–1129, (303) 312–6416.	Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
IX	Gerardo Rios, Chief, Permits Office, EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972–3974.	Arizona, California, Hawaii and the Pacific Islands, Indian Country within Region 9 and Navajo Nation, and Nevada.
X	Nancy Helm, Manager, Federal and Delegated Air Programs Unit, EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101, (206) 553–6908.	Alaska, Idaho, Oregon, and Washington.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities affected by this rule include the seven state and local permitting authorities [1] identified by EPA to have not submitted by their deadline a SIP revision that would apply PSD requirements to GHG-emitting sources. In the GHG PSD SIP call,[2] EPA determined that these seven states have SIPs that are substantially inadequate to achieve CAA requirements because their PSD programs do not apply to GHG-emitting sources, and EPA established that deadline.

Entities potentially affected by this rule also include sources in all industry groups, which have a direct obligation under the CAA to obtain a PSD permit for GHGs for projects that meet the applicability thresholds set forth in the Tailoring Rule.[3] This independent obligation on sources is specific to PSD and derives from CAA section 165(a). Any source that is subject to a state PSD air permitting regulation not structured to apply to GHG-emitting sources will rely on this rule to obtain a permit that contains emission limitations that conform to requirements under CAA section 165(a). The majority of entities potentially affected by this action are expected to be in the following groups:

Industry group	NAICS [a]
Utilities (electric, natural gas, other systems)	2211, 2212, 2213.
Manufacturing (food, beverages, tobacco, textiles, leather)	311, 312, 313, 314, 315, 316.
Wood product, paper manufacturing	321, 322.
Petroleum and coal products manufacturing	32411, 32412, 32419.
Chemical manufacturing	3251, 3252, 3253, 3254, 3255, 3256, 3259.
Rubber product manufacturing	3261, 3262.
Miscellaneous chemical products	32552, 32592, 32591, 325182, 32551.
Nonmetallic mineral product manufacturing	3271, 3272, 3273, 3274, 3279.
Primary and fabricated metal manufacturing	3311, 3312, 3313, 3314, 3315, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329.
Machinery manufacturing	3331, 3332, 3333, 3334, 3335, 3336, 3339.
Computer and electronic products manufacturing	3341, 3342, 3343, 3344, 3345, 4446.
Electrical equipment, appliance, and component manufacturing	3351, 3352, 3353, 3359.
Transportation equipment manufacturing	3361, 3362, 3363, 3364, 3365, 3366, 3366, 3369.
Furniture and related product manufacturing	3371, 3372, 3379.
Miscellaneous manufacturing	3391, 3399.
Waste management and remediation	5622, 5629.
Hospitals/nursing and residential care facilities	6221, 6231, 6232, 6233, 6239.
Personal and laundry services	8122, 8123.
Residential/private households	8141.
Non-residential (commercial)	Not available. Codes only exist for private households, construction and leasing/sales industries.

[a] North American Industry Classification System.

B. How is the preamble organized?

The information presented in this preamble is organized as follows:

II. Overview of Rulemaking

In this rulemaking, EPA is establishing a FIP, which we call the GHG PSD FIP, or simply, the FIP, to apply in each of seven states that have not submitted by December 22, 2010, a corrective SIP revision to apply their CAA PSD program to sources of GHGs. This is the deadline EPA established after the affected states indicated that they would not object to it, to ensure that a permitting authority would be in place as of January 2, 2011 to facilitate issuance of PSD permits for construction and modification of sources.

This preamble should be read in conjunction with the preamble for the proposed rulemaking for this action, which we call the GHG PSD FIP proposal or the FIP proposal; [4] and the SIP call rulemaking that is associated with this rulemaking, including (i) the proposed SIP call rulemaking, which we call the GHG PSD SIP call proposal or the SIP call proposal, and which accompanied the FIP proposal,[5] and (ii) the final SIP call rulemaking, which we call the GHG PSD SIP call or the SIP call. Background information for this

[1] For convenience, we refer to "states" in this rulemaking to collectively mean states and local permitting authorities.

[2] Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call—Final rule, 75 FR 77698 (December 13, 2010).

[3] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule. 75 FR 31514 (June 3, 2010).

[4] Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan—Proposed rule, 75 FR 53883 (September 2, 2010).

[5] Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call—Proposed rule, 75 FR 53892 (September 2, 2010).

rulemaking is found in those rulemakings and in the rulemakings referenced therein and will not be reiterated here.

By notices dated September 2, 2010, EPA published as companion actions the SIP call proposal and the FIP proposal. In the SIP call proposal, EPA proposed to find that 13 states with EPA-approved SIP PSD programs are substantially inadequate to meet CAA requirements because they do not appear to apply PSD requirements to GHG-emitting sources. For each of these states, EPA proposed to require the state (through a SIP call) to revise its SIP as necessary to correct such inadequacies. In the FIP proposal, EPA proposed a FIP to apply in any state that is unable to submit, by its deadline, a corrective SIP revision to apply the PSD program to sources of GHGs. The FIP would provide authority to EPA to issue PSD permits for construction or modification of appropriate GHG sources in the state.

On December 1, 2010, EPA promulgated the GHG PSD SIP call, and EPA published it by notice dated December 13, 2010.[6] In the SIP call, EPA finalized its finding that the SIPs of 13 states (comprising 15 state and local programs) are substantially inadequate to meet CAA requirements because they do not apply PSD requirements to GHG-emitting sources. In addition, EPA finalized a SIP call for each of these states, which required the state to revise its SIP as necessary to correct such inadequacies. Further, EPA established a deadline for each state to submit its corrective SIP revision. These deadlines, which differed among the states, ranged from December 22, 2010, to December 1, 2011.

Seven states received a SIP submittal deadline of December 22, 2010, based on information received from each state during the public comment period that they would not object to this deadline. These seven states are: (1) Arizona: Both Pinal County and Rest of State (excluding Maricopa County, Pima County, and Indian Country);[7] (2) Arkansas; (3) Florida; (4) Idaho; (5) Kansas; (6) Oregon; and (7) Wyoming.

On December 23, 2010, EPA issued a finding under CAA section 110(c)(1)(A) that each of the seven states "failed to make [the] required submission" of the corrective SIP call-mandated SIP revision by its December 22, 2010 deadline. EPA notified each state of the finding by letter. Those letters are located in the docket for this rulemaking.

III. Final Action and Response to Comments

A. Authority To Promulgate a FIP

In this rulemaking, EPA is finalizing the GHG PSD FIP as proposed for each of the seven states: (1) Arizona: Both Pinal County and Rest of State (excluding Maricopa County Pima County, and Indian Country);[8] (2) Arkansas; (3) Florida; (4) Idaho; (5) Kansas; (6) Oregon; and (7) Wyoming.

The CAA authority for EPA to promulgate a FIP is found in CAA section 110(c)(1), which provides—

> The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—(A) finds that a State has failed to make a required submission * * * unless the State corrects the deficiency, and [EPA] approves the plan or plan revision, before the Administrator promulgates such [FIP].

As noted earlier in this preamble, on December 23, 2010, EPA issued a finding that each of the seven states affected by this rule "failed to make [the] required submission" of the corrective SIP call-mandated SIP revision by its December 22, 2010 deadline. Accordingly, under CAA section 110(c)(1), EPA is required to promulgate a FIP for each of the states.

It should be noted that EPA specifically proposed the FIP for six of the seven states affected by this rulemaking, all except for Wyoming. EPA did not include Wyoming among the states for which EPA specifically proposed the SIP call, and, as a result, did not include Wyoming among the states for which EPA specifically proposed the FIP. However, in the proposed SIP call, EPA stated that it was soliciting comment on all the other states, and, if EPA received information indicating that another state should receive the SIP call, then EPA would, without a supplemental or further proposal, issue a final SIP call for that other state.[9] Similarly, EPA stated in the FIP proposal that if EPA issued a SIP call for that other state, and the other state did not submit a corrective SIP revision by its deadline, then, EPA would finalize the FIP for that other state, too.[10]

We reiterate that each of the seven states affected by this rulemaking specifically indicated to EPA that it preferred that EPA promulgate a FIP to take effect by January 2, 2011—when sources in the state become subject to PSD—rather than EPA not promulgate a FIP until a later time. This is because each state sought to assure that, as of January 2, 2011, a permitting authority for GHG-emitting sources would be in place in the state. These states made this choice by indicating that they did not object to EPA establishing a SIP submittal date of December 22, 2010, when EPA made clear in the proposed SIP call and FIP that if the state did not submit the required SIP revision by that date, then EPA would promulgate the FIP the next day. 75 FR at 53904/2 (proposed SIP call); *id.* at 53889/2 (proposed FIP). For the most part, the remaining states that were subject to the SIP call indicated a later SIP submittal date, but they believe that although this will mean a short delay in the availability of a permitting authority for GHG-emitting sources in their state, that delay will not adversely affect their sources. EPA regional and headquarters officials conferred extensively with state officials concerning the states' progress and plans and with the National Association of Clean Air Agencies.[11]

In this rulemaking, EPA is not taking final action to promulgate a FIP for any of the other states which EPA included in the FIP proposal. This is because for each of the other states, either EPA did not finalize the SIP call or EPA did finalize the SIP call but established a SIP submittal deadline that has not yet arrived. As a result, EPA has not issued a finding of failure to submit the required SIP revision for any of these other states. It continues to be EPA's intent that if any of these other states does not submit the required SIP revision by its deadline, then EPA will immediately issue a finding of failure to submit a required SIP submission and immediately promulgate a GHG PSD FIP for that state.

In comments received, some commenters stated, "Remarkably, EPA states that it will also directly promulgate a SIP call and FIP for any

[6] Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call—Final Rule, 75 FR 77698 (December 13, 2010).

[7] EPA issued to Arizona a separate finding of substantial inadequacy, SIP call, and deadline for SIP submittal for each of Pinal County and for the rest of the state (excluding Maricopa County, Pima County, and Indian Country).

[8] In this rulemaking, EPA is finalizing for Arizona a separate GHG PSD FIP for each of Pinal County and for the rest of the state (excluding Maricopa County, Pima County, and Indian Country).

[9] Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call—Proposed rule, 75 FR 53,895–6 (September 2, 2010).

[10] Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan—Proposed rule, 75 FR 53,886 (September 2, 2010).

[11] Declaration of Gina McCarthy, ¶¶4–5, pp. 3–4, "EPA's Response To Motions To Stay," *Coalition for Responsible Regulation* v. *EPA,* No. 09–1322 (and consolidated cases) (McCarthy Declaration).

states it has inadvertently omitted from its notice of proposed rulemaking." Although the commenters do not elaborate upon this statement, they seem to imply that it would be improper for EPA to finalize a FIP for such states because we did not provide adequate notice and opportunity for comment.

The only state for which this comment may be relevant is Wyoming, as noted earlier in this preamble. We disagree with the commenters. In the proposal, we listed the states with approved SIP PSD programs for which we were not proposing a finding of substantial inadequacy and a SIP call, and so were not proposing a FIP. But we went on to specifically solicit comment on whether each of those states merited a finding, SIP call,[12] and, ultimately, a FIP; and we included citations to the relevant SIP provisions.[13] Moreover, we generally described the circumstances under which those states may merit a FIP. As a result, commenters had adequate notice that EPA could ultimately finalize a FIP for those states if and when they missed their SIP submittal deadlines, and they had full opportunity to comment if they had relevant views or information. This was discussed in greater detail in the SIP call rulemaking 75 FR at 77715/6.

B. Timing of GHG PSD FIP

In the GHG PSD FIP proposal, we stated:

> If any of the states for which we issue the SIP Call does not meet its SIP submittal deadline, we will immediately issue a finding of failure to submit a required SIP submission, under CAA section 110(c)(1)(A), and immediately thereafter promulgate a FIP for the state. This timing for FIP promulgation is authorized under CAA section 110(c)(1), which authorizes us to promulgate a FIP "at any time within 2 years after" finding a failure to submit a required SIP submission. We intend to take these actions immediately in order to minimize any period of time during which larger-emitting sources may be under an obligation to obtain PSD permits for their GHGs when they construct or modify, but no permitting authority is authorized to issue those permits.

75 FR at 53,889/2.

In this final rulemaking, we are proceeding in the same manner that we proposed, and for the same reasons. That is, we are exercising our discretion to promulgate the FIP for each of the seven affected states "immediately in order to minimize any period of time during which larger-emitting sources may be under an obligation to obtain PSD permits for their GHGs when they construct or modify, but no permitting authority is authorized to issue those permits." 75 FR at 53889/2. We believe that acting immediately is in the best interests of the states and the regulated community.

EPA received comments that the process EPA has employed in this action, which was to propose the FIP as a companion rule to the proposed SIP call, and then to finalize the FIP immediately after making a finding that a state has not submitted the required SIP revision by its deadline, "is not how CAA section 110 works or how Congress intended it to work." The commenter added that—

> [O]nly after a state has * * * failed to [submit a SIP revision] after an applicable period as specified in the CAA or EPA regulations * * * *and* after EPA has made a determination that the SIP revision is deficient in one or more respects, may the Agency step in to propose a FIP rule. And only after taking that step could EPA then proceed * * * [to take final action on the FIP.] Notwithstanding EPA's strained and out-of-context emphasis on the isolated sentence fragment, "at any time within," the very fact that the CAA affords EPA up to two full years in which to complete the cooperative task of considering whether a FIP is needed and how such a plan should be fashioned, and the corollary fact that the Act does not mandate any federal takeover in less than two years, militate against EPA's approach here to FIP rulemaking. In particular, those facts undermine EPA's assumption that it need not take the time to develop a proposed plan specifically directed at remedying identified deficiencies in a given state submission, and to give states and the regulated community a meaningful opportunity to comment on a proposed FIP that has been specifically developed to address the individual needs and circumstances of such a state. (Emphasis in original.)

EPA disagrees with these comments. As we stated in the proposed rule, CAA section 110(c)(1)(A) authorizes EPA to promulgate a FIP "at any time within 2 years after" finding a failure to submit a required SIP revision. We are promulgating the FIP immediately because we wish to minimize any disruption in permitting for the larger GHG-emitting sources and we are doing so after consultation with the affected states. The seven states that are the subject of this rulemaking told EPA that they would not object to the promulgation of a FIP at the earliest possible deadline, or December 22, 2010, because that would ensure a permitting authority would be in place as of January 2, 2011. Without the FIP, these states would be without an approved program to issue PSD permits for GHG-emitting sources until the states submit, and EPA approves, a SIP revision. The FIP provides sources in these states an immediate mechanism to obtain required permits for construction and modification until the revised SIPs are approved.

As for commenters' analysis of CAA section 110(c), that provision, by its terms, imposes no constraints on when EPA may propose a FIP. This stands in contrast to other CAA provisions that do impose requirements for the timing of proposals. See CAA sections 109(a)(1)(A), 111(b)(1)(B). In light of the lack of constraints in CAA section 110(c), EPA was free to propose the FIP at the same time that EPA proposed the SIP call. We do not agree that the overall construct of CAA section 110 imposes the implicit constraints that the commenter identifies.

Instead, what is important is that for each of the 13 states for which EPA specifically proposed the FIP, which were the same as the ones for which EPA proposed the SIP call, the public had adequate notice of the circumstances under which EPA proposed that the state would become subject to the FIP. Those circumstances were that if EPA finalized the SIP call, as proposed, for the state, and if the state did not submit a SIP revision applying its PSD program to GHG-emitting sources by the deadline, EPA would establish a FIP for that state. In fact, EPA did finalize the SIP call for all but one of those 13 states and is now finalizing the FIP for six of them. Further, EPA received comments on the proposed FIP from several states and/or industries located in states for which EPA proposed the FIP, which indicates that the FIP proposal provided adequate notice. *See, e.g.,* comments identified in the rulemaking docket as document numbers 0084.1 (Texas), 0055.1 (Arkansas), 0066.1 (Texas Industry Project), and 0109.1 (National Mining Association).

Although for Wyoming EPA did not specifically propose the SIP call or FIP, the public had the same opportunity to

[12] During the comment period, Wyoming did send information indicating that, in Wyoming's view, Wyoming did not have legal authority to apply PSD to GHG-emitting sources and therefore Wyoming should be included in the SIP call. A Wyoming environmental group provided comments during the comment period saying that it believed Wyoming did have legal authority to apply PSD to GHG-emitting sources. Accordingly, it is clear that the solicitation of comment was sufficient notice to the public. More detailed information regarding Wyoming and other states covered in this rulemaking may be found in the "Supplemental Information Document for Final Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call," located in the docket for this rulemaking.

[13] Thus, commenters are incorrect in characterizing EPA as having "inadvertently omitted [Wyoming] from its notice of proposed rulemaking."

comment on the prospect of a FIP for Wyoming as the public did for the states for which EPA did specifically propose the FIP. This is because EPA solicited comment on whether to issue a SIP call for Wyoming (along with other states with approved PSD programs); made clear that if EPA received certain information, EPA would finalize the SIP call for Wyoming; and, further, made clear that if EPA issued a SIP call for Wyoming and Wyoming did not submit the required SIP by Wyoming's deadline, then EPA would finalize the FIP. In fact, Wyoming commented on the FIP. *See* comment identified in the rulemaking docket as document number 0079.1.

Moreover, EPA was clear that for each state subject to the SIP call that did not submit the required SIP revision by its SIP submittal deadline, EPA would immediately make a finding of failure to submit and immediately promulgate a FIP. EPA explained that this approach was needed to assure the availability of a permitting authority for sources in the state.

Finally, each of the states and the public in general had adequate notice of the terms of the FIP as it would apply in any state. Specifically, EPA indicated that the FIP would apply PSD to GHG-emitting sources at the Tailoring Rule thresholds.

Therefore, the FIP proposal was clear as to the circumstances under which EPA proposed to promulgate a FIP, the timing for the FIP, and the terms of the FIP. Moreover, each of those three things applied to each state that would become subject to the SIP call. Accordingly, the FIP proposal did, in fact, "give states and the regulated community a meaningful opportunity to comment on a proposed FIP that has been specifically developed to address the individual needs and circumstances of such a state," as the commenter argues the FIP proposal needed to do.

Several commenters raised an additional objection, which was that in their view, EPA failed to comply with the requirements of CAA section 307(d)(3) that (i) the proposed FIP include a summary of "the factual data on which the proposed rule is based" and "the major legal interpretations and policy considerations underlying the proposed rule"; and (ii) "[a]ll data, information, and documents * * * on which the proposed rule relies shall be included in the docket *on the date of publication of the proposed rule.*" (Emphasis added by one of these commenters.) One of these commenters explained that (a) in the SIP call proposal, EPA had made a detailed request that states provide information as to whether their state law authorized the application of PSD to GHG-emitting sources; (b) this detailed request demonstrated that the proposal did not establish the legal basis for the SIP call; and (c) as a result, the FIP proposal did not include "information that is essential to determining *whether* a FIP for a given state is even appropriate and justified." (Emphasis in original.) This commenter added—

> Only *after* EPA has received such information, and then taken the necessary time to evaluate the information and to make judgments as to whether or not a given state has authority under its SIP and other elements of state law to regulate GHGs under the PSD program—i.e., the steps EPA would have to take under CAA section 307(d)(3) to provide to the public a meaningful "summary" of "the factual data on which the proposed rule is based" and "the major legal interpretations and policy considerations underlying the proposed rule"—may EPA propose a FIP for any state that has been determined to lack that authority. (Emphasis in original.)

We disagree with this comment. The preamble for the FIP proposal included the CAA section 307(d)(3)-required "summary" of the factual basis and legal interpretations. To reiterate, EPA identified the states for which EPA was proposing the FIP, 75 FR at 53886 and table II–1 and 53889/1, and added that EPA would subject other states to the FIP if they, too, became subject to the SIP call, *id.* 53886 and table II–2 and 53889/2; described the timing for the FIP, *id.* 53889/2–3; described the substance of the FIP, *id.* 53889/3–53890/1; and explained that CAA section 110(c)(1) provided the legal basis, *id.* 53889/2. The purpose of the CAA section 307(d)(3) requirements is to provide the public with adequate notice, and these statements did so by making clear the circumstances under which EPA was proposing to promulgate a FIP and the timing and substance of the proposed FIP.

It is true that for any state, whether and when EPA would finalize the FIP for any state depended on other factors, including whether EPA would finalize the SIP call for that state, what deadline EPA would establish, and whether the state would submit its required corrective SIP revision by that deadline. But the FIP proposal put the public on notice, with sufficient specificity, as to EPA's plan. In any event, any FIP is necessarily dependent on other factors, including state actions. That is, under any circumstances, whether EPA finalizes any proposed FIP depends on whether (i) if the proposed FIP is based on the failure of a state to make a required submittal, the state makes the required submittal; or (ii) if the proposed FIP is based on EPA's disapproval of a SIP revision, whether the state submits a revised SIP revision that EPA then approves.

Most broadly, commenters' approach—which is that EPA cannot propose a FIP in concert with a SIP call, but instead must proceed *in seriatim* by completing the SIP call first and then proposing the FIP—would result in lengthy delays in the establishment of a permitting authority to process GHG-emitting sources' PSD permit applications. As a result, commenters' approach could well cause delays in these sources' ability to undertake construction and modification projects.

We include related comments and responses in the Response to Comments document.[14]

C. Substance of GHG PSD FIP

In the FIP proposal, we stated:

> The proposed FIP constitutes the EPA regulations found in 40 CFR 52.21, including the PSD applicability provisions, with a limitation to assure that, strictly for purposes of this rulemaking, the FIP applies only to GHGs. Under the PSD applicability provisions in 40 CFR 52.21(b)(50), the PSD program applies to sources that emit the requisite amounts of any "regulated NSR pollutant[s]," including any air pollutant "subject to regulation." However, in states for which EPA would promulgate a FIP to apply PSD to GHG-emitting pollutants, the approved SIP already applies PSD to other air pollutants. To appropriately limit the scope of the FIP, EPA proposes in this action to amend 40 CFR 52.21(b)(50) to limit the applicability provision to GHGs.
>
> We propose this FIP because it would, to the greatest extent possible, mirror EPA regulations (as well as those of most of the states). In addition, this FIP would readily incorporate the phase-in approach for PSD applicability to GHG sources that EPA has developed in the Tailoring Rule and expects to develop further through additional rulemaking. As explained in the Tailoring Rule, incorporating this phase-in approach—including Steps 1 and 2 of the phase-in as promulgated in the Tailoring Rule—can be most readily accomplished through interpretation of the terms in the definition "regulated NSR pollutant," including the term "subject to regulation."
>
> In accordance with the Tailoring Rule, * * * the FIP would apply in Step 1 of the phase-in approach only to "anyway sources" (that is, sources undertaking construction or modification projects that are required to apply for PSD permits anyway due to their non-GHG emissions and that emit GHGs in the amount of at least 75,000 tpy on a CO_2e basis) and would apply in Step 2 of the phase-in approach to both "anyway sources" and sources that meet the 100,000/75,000-tpy threshold (that is, (i) sources that newly

[14] The Response to Comments document for the FIP can be found in the docket for this rulemaking.

construct and would not be subject to PSD on account of their non-GHG emissions, but that emit GHGs in the amount of at least 100,000 tpy CO_2e, and (ii) existing sources that emit GHGs in the amount of at least 100,000 tpy CO_2e, that undertake modifications that would not trigger PSD on the basis of their non-GHG emissions, but that increase GHGs by at least 75,000 tpy CO_2e).

Under the FIP, with respect to permits for "anyway sources," EPA will be responsible for acting on permit applications for only the GHG portion of the permit, and the state will retain responsibility for the rest of the permit. Likewise, with respect to permits for sources that meet the 100,000/75,000-tpy threshold, our preferred approach—for reasons of consistency—is that EPA will be responsible for acting on permit applications for only the GHG portion of the permit, that the state permitting authorities will be responsible for the non-GHG portion of the permit, and EPA will coordinate with the state permitting authority as needed in order to fully cover any non-GHG emissions that, for example, are subject to BACT because they exceed the significance levels. We recognize that questions may arise as to whether the state permitting authorities have authority to permit non-GHG emissions; as a result, we solicit comment on whether EPA should also be the permitting authority for the non-GHG portion of the permit for these latter sources.

We propose that the FIP consist of the regulatory provisions included in 40 CFR 52.21, except that the applicability provision would include a limitation so that it applies for purposes of this rulemaking only to GHGs.

75 FR 53889/3 to 53,890/1.

We are finalizing the FIP as we described it in the proposal, for the same reasons that we indicated in the proposal, all as quoted earlier in this preamble.

State, industry, and environmental commenters questioned how having EPA issue the GHG portions of a permit while allowing states under a FIP to continue to be responsible for issuing the non-GHG portions of a PSD permit will work in practice. Commenters raised concerns about the potential for a source to be "faced with conflicting requirements and the need to mediate among permit engineers making BACT decisions."

We appreciate the commenters' concern. We well recognize that dividing permitting responsibilities between two authorities—EPA for GHGs and the state for all other pollutants—will require close coordination between the two authorities to avoid duplication, conflicting determinations, and delays. We note that this situation is not without precedent. In many instances, EPA has been the PSD permitting authority but the state has accepted a delegation for parts of the PSD program, so that a source has had to go to both the state and EPA for its permit. In addition, all nonattainment areas in the nation are in attainment or are unclassifiable for at least one pollutant, so that every nonattainment area is also a PSD area. In some of these areas, the state is the permitting authority for nonattainment new source review (NSR) and EPA is the permitting authority for PSD. As a result, there are instances in which a new or modifying source in such an area has needed a nonattainment NSR permit from the state and a PSD permit from EPA.

EPA is working expeditiously to develop recommended approaches for EPA regions and affected states to use in addressing the shared responsibility of issuing PSD permits for GHG-emitting sources. In addition, as discussed below, we intend for the GHG PSD FIP to remain in place only as long as necessary for states' SIPs to be approved. Moreover, in this interim period, we intend to delegate permitting responsibility to those states that are able to implement it and that request it. States that request and receive a delegation will be responsible for issuing both the GHG part and the non-GHG part of the permit, and that will moot commenters' concerns about split permitting. EPA's most recent information is that of the seven states for which EPA is promulgating a FIP, four states have indicated to EPA that they intend to seek a delegation (Arizona, Idaho, Kansas, and Oregon) and a fifth has indicated that it is considering seeking a delegation (Arkansas).[15]

In addition, beginning on July 1, 2011, those states without authority to regulate GHG may not be able to issue PSD permits for non-GHG pollutants to sources that are major only because of their GHG emissions. This is because under the state's approved SIP, these sources are not major sources. In this circumstance, EPA will also be the PSD permitting authority for the non-GHG pollutants, but, as discussed in detail earlier in this preamble, EPA intends to work closely with each state to develop mutually acceptable approaches—including delegation of this authority where possible—to maximize the opportunity for the state to assume as much of the permitting responsibilities as possible.

Finally, we are providing regulatory language to address Oregon. Oregon's EPA-approved PSD SIP differs from the federal program with respect to which sources are subject to PSD. EPA is promulgating a FIP for Oregon that is consistent with the intent of the Tailoring Rule and that accommodates the difference in the Oregon program. That is, as of January 2, 2011, sources in Oregon that are currently required to get PSD permits under the approved SIP will be subject to review under the FIP for greenhouse gases if they exceed the Tailoring Rule thresholds. As of July 1, 2011, the determination of which sources will be subject to PSD review for greenhouse gases under the FIP will be consistent with how applicability is determined under the current Oregon SIP for other regulated NSR pollutants.

[15] McCarthy Declaration, pp. 136–38, Table II.

D. Period for GHG PSD FIP To Remain in Place

In the FIP proposal, we stated our intention to leave any promulgated FIP in place for as short a period as possible, and to process any corrective SIP revision submitted by the state to fulfill the requirements of the SIP call as expeditiously as possible. Specifically, we stated:

> After we have promulgated a FIP, it must remain in place until the state submits a SIP revision and we approve that SIP revision. CAA section 110(c)(1). Under the present circumstances, we will act on a SIP revision to apply the PSD program to GHG sources as quickly as possible. Upon request of the state, we will parallel-process the SIP submittal. That is, if the state submits to us the draft SIP submittal for which the state intends to hold a hearing, we will propose the draft SIP submittal for approval and open a comment period during the same time as the state hearing. If the SIP submittal that the state ultimately submits to us is substantially similar to the draft SIP submittal, we will proceed to take final action without a further proposal or comment period. If we approve such a SIP revision, we will at the same time rescind the FIP.

75 FR 53889/2–3.

We continue to have these same intentions. Thus, we reaffirm our intention to leave the GHG PSD FIP in place only as long as is necessary for the state to submit and for EPA to approve a SIP revision that includes PSD permitting for GHG-emitting sources. As discussed in more detail later in this preamble, EPA continues to believe that the states should remain the primary permitting authority.

E. Primacy of SIP Process

In the FIP proposal we stated,

> This proposal [to promulgate a FIP] is secondary to our overarching goal, which is to assure that in every instance, it will be the state that will be that permitting authority. EPA continues to recognize that the states are best suited to the task of permitting because they and their sources have experience working together in the state PSD program to process permit applications. EPA seeks to remain solely in its primary role of providing

guidance and acting as a resource for the states as they make the various required permitting decisions for GHG emissions.

Accordingly, beginning immediately we intend to work closely with the states—as we have already begun to do since earlier in the year—to help them promptly develop and submit to us their corrective SIP revisions that extend their PSD program to GHG-emitting sources. Moreover, we intend to promptly act on their SIP submittals. Again, EPA's goal is to have each and every affected state have in place the necessary permitting authorities by the time businesses seeking construction permits need to have their applications processed and the permits issued—and to achieve that outcome by means of engaging with the states directly through a concerted process of consultation and support.

EPA is taking up the additional task of proposing this FIP and the companion SIP Call action only because the Agency believes it is compelled to do so by the need to assure businesses, to the maximum extent possible and as promptly as possible, that a permitting authority is available to process PSD permit applications for GHG-emitting sources once they become subject to PSD requirements on January 2, 2011.

In order to provide that assurance, we are obligated to recognize, as both states and the regulated community already do, that there may be circumstances in which states are simply unable to develop and submit those SIP revisions by January 2, 2011, or for some period of time beyond that date. As a result, absent further action by EPA, those states' affected sources confront the risk that they may have to put on hold their plans to construct or modify, a risk that may have adverse consequences for the economy.

Given these exigent circumstances, EPA proposes this plan, within the limits of our power, with the intent to make a back-up permitting authority available—and to send a signal of assurance expeditiously in order to reduce uncertainty and thus facilitate businesses' planning. Within the design of the CAA, it is EPA that must fill that role of back-up permitting authority. This FIP and the companion SIP Call action fulfill the CAA requirements to establish EPA in that role.

At the same time, we propose these actions with the intent that states retain as much discretion as possible in the hand of the states. In the SIP Call rulemaking, EPA proposes that states may choose the deadline they consider reasonable for submission of their corrective SIP revision. If, under CAA requirements, we are compelled to promulgate a FIP, we invite the affected state to accept a delegation of authority to implement that FIP, so that it will still be the state that processes the permit applications, albeit operating under federal law. In addition, if we are compelled to issue a FIP, we intend to continue to work closely with the state to assist in developing and submitting for approval its corrective SIP revision, so as to minimize the amount of time that the FIP must remain in place.

75 FR at 53890/1–2.

In this rulemaking, we continue to have the same intentions and for the same reasons. Thus, we continue to believe that this action is necessary to ensure that sources in states with inadequate SIPs can obtain the necessary PSD permits for their GHG emissions. We have worked closely with states to establish reasonable deadlines for submitting revised SIPs and are finalizing this FIP based on deadlines agreed to by the affected states. We will continue to work with states, as we have done throughout the rulemaking process, to assist in development and expedite review of revised SIPs. In the meantime, however, this FIP is necessary for the seven states identified here in order to provide a permitting authority until an adequate SIP is submitted and approved.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. OMB has previously approved the information collection requirements contained in the existing regulations for PSD (*see, e.g.,* 40 CFR 52.21) and title V (*see* 40 CFR parts 70 and 71) under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0003 and OMB control number 2060–0336 respectively. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this notice on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (*see* 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

Although this rule would lead to federal permitting requirements for certain sources, those sources are large emitters of GHGs and tend to be large sources. After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, 2 U.S.C. 1531–1538) for state, local or tribal governments or the private section. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. This action merely prescribes EPA's action for states that have not met their existing obligation for PSD SIP submittal. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This action 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. This action merely prescribes EPA's action for states that have not met their existing obligation for PSD SIP submittal.

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 merely prescribes EPA's action for states that have not met their existing obligation for GHG PSD SIP submittal. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA

specifically solicited comment on the proposal for this action from state and local officials.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This action does not impose a FIP in any tribal area. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets E.O. 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the E.O. has the potential to influence the regulation. This action is not subject to E.O. 13045 because it merely prescribes EPA's action for states that do not meet their existing obligation for PSD SIP submittal.

H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action merely prescribes EPA's action for states that have not met their existing obligation for PSD SIP submittal.

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 EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, 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 U.S.

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. This rule merely prescribes EPA's action for states that have not met their existing obligation for PSD SIP submittal.

K. Determination Under Section 307(d)

Pursuant to section 307(d)(1)(B) of the CAA, this action is subject to the provisions of section 307(d). Section 307(d)(1)(B) provides that the provisions of section 307(d) apply to "the promulgation or revision of an implementation plan by the Administrator under section 110(c) of this Act."

L. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action does not constitute a "major rule" as defined by 5 U.S.C. 804(2). Therefore, this action will be effective December 30, 2010.

V. Judicial Review

Section 307(b)(1) of the CAA specifies which Federal Courts of Appeal have jurisdiction to hear petitions for review of which final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) When the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

This rule is nationally applicable under CAA section 307(b)(1). The circumstances that have led to this rulemaking are national in scope and are substantially the same for each affected state. They include EPA's promulgation of nationally applicable GHG requirements that, in conjunction with the operation of the CAA PSD provisions, have resulted in GHG-emitting sources becoming subject to PSD; as well as EPA's finding of substantial SIP inadequacy, imposition of a SIP call, and establishment of a deadline for SIP submittal. Moreover, in this rule, EPA is applying uniform principles for promulgating the FIP for each of the affected states, concerning, *e.g.,* timing (that is, that EPA is promulgating the FIP for each affected state immediately) and scope (that is, that EPA is applying the FIP for GHG-emitting sources). The FIP for each affected state has substantially the same, if not identical, terms. This rulemaking action is supported by a single administrative record, and does not involve factual questions unique to the different affected states. In addition, this rule applies to multiple States across the country, and in several judicial circuits.

For similar reasons, this rule is based on determinations of nationwide scope or effect. For each of the seven affected States, EPA is determining that it is appropriate to promulgate the FIP immediately and to apply it to GHG-emitting sources, but not other sources. These determinations are the same for each of the states. The other provisions of the FIP are substantially the same, if not identical, for each affected state. Moreover, EPA is making these determinations and promulgating this action within the context of nationwide rulemakings and interpretation of the applicable CAA provisions, as noted above.

Thus, under section 307(b)(1) of the Act, judicial review of this final action is available by filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by February 28, 2011. Any such judicial

review is limited to only those objections that were raised with reasonable specificity in timely comments. Under section 307(b)(2) of the Act, the requirements of this final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

VI. Statutory Authority

The statutory authority for this action is provided by sections 110, 165, 301, and 307(d)(1)(B) of the CAA as amended (42 U.S.C. 7410, 7475, 7601, and 7407(d)(1)(B)). This action is subject to section 307(d) of the CAA (42 U.S.C. 7407(d)).

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Carbon monoxide, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Incorporation by reference, Intergovernmental relations, Lead, Methane, Nitrogen dioxide, Nitrous oxide, Ozone, Particulate matter, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride, Sulfur oxides, Volatile organic compounds.

Dated: December 23, 2010.

Lisa P. Jackson,

Administrator.

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations 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. Section 52.1987 is revised to read as follows:

§ 52.1987 Significant deterioration of air quality.

* * * * *

(d) The requirements of sections 160 through 165 of the Clean Air Act are not met for greenhouse gases since the plan does not include approvable procedures for permitting major sources of greenhouse gas emissions. Therefore, the Oregon Department of Environmental Quality rules identified in paragraph (a) of this section, and the Lane Regional Air Pollution Authority rules identified in paragraph (b) of this section, are hereby incorporated by reference with the following changes and made part of the applicable plan for the State of Oregon:

(1) The definition of "*Regulated NSR pollutant*" at § 52.21(b)(50) and the definition of "*Subject to regulation*" at § 52.21(b)(49) are incorporated by reference, replacing the definition of "Regulated air pollutant" at OAR 340–200–0020(97), for the purpose of greenhouse gases only;

(2) The provisions of § 52.21(q) *Public participation* are incorporated by reference for the purposes of EPA permits issued pursuant to this paragraph; and

(3) All references to "Director" in the Oregon Department of Environmental Quality rules and the Lane Regional Air Pollution Authority rules incorporated in this paragraph shall mean the EPA Administrator for the purposes of EPA permits issued pursuant to this paragraph.

■ 3. Section 52.37 is added to read as follows:

§ 52.37 What are the requirements of the Federal Implementation Plans (FIPs) to issue permits under the Prevention of Significant Deterioration requirements to sources that emit greenhouse gases?

(a) The requirements of sections 160 through 165 of the Clean Air Act are not met to the extent the plan, as approved, of the states listed in paragraph (b) of this section does not apply with respect to emissions of the pollutant GHGs from certain stationary sources. Therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby made a part of the plan for each state listed in paragraph (b) of this section for:

(1) Beginning January 2, 2011, the pollutant GHGs from stationary sources described in § 52.21(b)(49)(iv), and

(2) beginning July 1, 2011, in addition to the pollutant GHGs from sources described under paragraph (a)(1) of this section, stationary sources described in § 52.21(b)(49)(v).

(b) Paragraph (a) of this section applies to:

(1) Arizona, Pinal County; Rest of State (Excludes Maricopa County, Pima County, and Indian Country);

(2) Arkansas;

(3) Florida;

(4) Idaho;

(5) Kansas;

(6) Wyoming.

(c) For purposes of this section, the "pollutant GHGs" refers to the pollutant GHGs, as described in § 52.21(b)(49)(i).

[FR Doc. 2010–32784 Filed 12–29–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 70

[EPA–HQ–OAR–2009–0517; FRL–9245–4]

RIN 2060–AQ63

Action To Ensure Authority To Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: The final greenhouse gas (GHG) Tailoring Rule includes a step-by-step implementation strategy for issuing Federally-enforceable permits to the largest, most environmentally significant sources beginning January 2, 2011. In this action, EPA is finalizing its proposed rulemaking to narrow EPA's previous approval of State title V operating permit programs that apply (or may apply) to GHG-emitting sources. Specifically, in this final rule, EPA is narrowing its previous approval of certain State permitting thresholds for GHG emissions so that only sources that equal or exceed the GHG thresholds established in the final Tailoring Rule would be covered as major sources by the Federally-approved programs in the affected States. By raising the GHG thresholds that apply title V permitting to major sources in the affected States, this final rule will reduce the number of sources that will be issued Federally-enforceable title V permits and thereby significantly reduce permitting burdens for permitting agencies and sources alike in those States.

DATES: This final rule is effective on December 30, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2009–0517. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Docket Center EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue, Northwest, 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 EPA Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Herring, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–3195; fax number: (919) 541–5509; e-mail address: *herring.jeff@epa.gov.*

SUPPLEMENTARY INFORMATION: For information related to a specific State, local, or Tribal permitting authority, please contact the appropriate EPA regional office:

EPA regional office	Contact for regional office (person, mailing address, telephone number)	Permitting authority
I	Dave Conroy, Chief, Air Programs Branch, EPA Region 1, 5 Post Office Square, Suite 100, Boston, MA 02109–3912, (617) 918–1661.	Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont.
II	Raymond Werner, Chief, Air Programs Branch, EPA Region 2, 290 Broadway, 25th Floor, New York, NY 10007–1866, (212) 637–3706.	New Jersey, New York, Puerto Rico, and Virgin Islands.
III	Kathleen Cox, Chief, Permits and Technical Assessment Branch, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103–2029, (215) 814–2173.	District of Columbia, Delaware, Maryland, Pennsylvania, Virginia, and West Virginia.
IV	Lynorae Benjamin, Chief, Regulatory Development Branch, Air, Pesticides and Toxics Management Division, EPA Region 4, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, GA 30303–3104, (404) 562–9033.	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.
V	J. Elmer Bortzer, Chief, Air Programs Branch (AR–18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604–3507, (312) 886–1430.	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.
VI	Jeff Robinson, Chief, Air Permits Section, EPA Region 6, Fountain Place 12th Floor, Suite 1200, 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–6435.	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.
VII	Mark Smith, Chief, Air Permitting and Compliance Branch, EPA Region 7, 901 North 5th Street, Kansas City, KS 66101, (913) 551–7876.	Iowa, Kansas, Missouri, and Nebraska.
VIII	Carl Daly, Unit Leader, Air Permitting, Monitoring & Modeling Unit, EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202–1129, (303) 312–6416.	Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
IX	Gerardo Rios, Chief, Permits Office, EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972–3974.	Arizona; California; Hawaii and the Pacific Islands; Indian Country within Region 9 and Navajo Nation; and Nevada.
X	Nancy Helm, Manager, Federal and Delegated Air Programs Unit, EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101, (206) 553–6908.	Alaska, Idaho, Oregon, and Washington.

I. General Information

A. Does this action apply to me?

Entities affected by this action include States, local permitting authorities, and Tribal authorities.

Entities potentially affected by this rule also include sources in all industry groups, which have a direct obligation under the Clean Air Act (CAA or Act) to apply for and operate pursuant to a title V permit for GHGs that meet the applicability thresholds set forth in the Tailoring Rule. The majority of entities potentially affected by this action are expected to be in the following groups:

Industry group	NAICS [a]
Agriculture, fishing, and hunting	11.
Mining	21.
Utilities (electric, natural gas, other systems)	2211, 2212, 2213.
Manufacturing (food, beverages, tobacco, textiles, leather)	311, 312, 313, 314, 315, 316.
Wood product, paper manufacturing	321, 322.
Petroleum and coal products manufacturing	32411, 32412, 32419.
Chemical manufacturing	3251, 3252, 3253, 3254, 3255, 3256, 3259.
Rubber product manufacturing	3261, 3262.
Miscellaneous chemical products	32552, 32592, 32591, 325182, 32551.
Nonmetallic mineral product manufacturing	3271, 3272, 3273, 3274, 3279.
Primary and fabricated metal manufacturing	3311, 3312, 3313, 3314, 3315, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329.
Machinery manufacturing	3331, 3332, 3333, 3334, 3335, 3336, 3339.
Computer and electronic products manufacturing	3341, 3342, 3343, 3344, 3345, 4446.
Electrical equipment, appliance, and component manufacturing	3351, 3352, 3353, 3359.
Transportation equipment manufacturing	3361, 3362, 3363, 3364, 3365, 3366, 3366, 3369.
Furniture and related product manufacturing	3371, 3372, 3379.
Miscellaneous manufacturing	3391, 3399.
Waste management and remediation	5622, 5629.

Industry group	NAICS [a]
Hospitals/nursing and residential care facilities	6221, 6231, 6232, 6233, 6239.
Personal and laundry services	8122, 8123.
Residential/private households	8141.
Non-residential commercial	Not available. Codes only exist for private households, construction, and leasing/sales industries.

[a] North American Industry Classification System.

B. How is this preamble organized?

The information presented in this preamble is organized as follows:

II. Overview of the Final Rule

This action finalizes EPA's proposal to narrow the approval of title V operating permit programs that we included in what we call the proposed Tailoring Rule, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule: Proposed Rule," 74 FR 55292, 55340 (October 27, 2009). EPA finalized the Tailoring Rule by **Federal Register** notice dated June 3, 2010, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule: Final Rule," 75 FR 31,514.

In the final Tailoring Rule, EPA narrowed the applicability of title V to GHG-emitting sources at or above specified thresholds by setting thresholds at which GHG emissions become subject to regulation for Prevention of Significant Deterioration (PSD) and title V purposes.[1] Title V requires all "major sources," and certain other sources, to apply for and operate pursuant to an operating permit, which is generally issued by a State or local permitting authority pursuant to an approved State title V program. As discussed in more detail subsequently, "major source" under title V includes any source that emits, or has the potential to emit, 100 tons per year (tpy) or more of any air pollutant. Under EPA's longstanding interpretation, codified in the final Tailoring Rule, this requirement applies to emissions of air pollutants "subject to regulation." Absent the Tailoring Rule, GHGs would become "subject to regulation" for title V purposes on January 2, 2011. Under the Tailoring Rule, however, a source becomes a "major source" subject to title V requirements based on its GHG emissions only if, as of July 1, 2011, it emits GHGs at or above 100,000 tpy measured on a carbon dioxide equivalent (CO_2e) basis, and it also emits GHGs at levels at or above the statutory 100 tpy mass-based threshold generally applicable to all pollutants subject to regulation. The Tailoring Rule thresholds alleviate the overwhelming administrative burdens and costs that using the statutory thresholds alone for the permitting thresholds would place on title V permitting authorities and sources.

However, in proposing the Tailoring Rule, EPA recognized that even after it finalized the Tailoring Rule, some approved State title V programs would—until they were revised—continue to use the statutory thresholds for purposes of the permitting thresholds, even though the States would not have sufficient resources to implement the title V program at those levels. Accordingly, the proposed Tailoring Rule included a proposal to limit EPA's previous approval of title V programs to the extent those provisions required permits for sources whose emissions of GHG equal or exceed 100 tpy but are less than the permitting threshold of the Tailoring Rule.[2] When EPA finalized the Tailoring Rule, EPA did not finalize that part of the proposal. Instead, EPA waited to collect more information from the States to determine whether such action was necessary, and if so, for which States. As detailed in the following, EPA is now finalizing that part of the Tailoring Rule proposal for most permitting authorities.

EPA asked States to submit information—in the form of letters due within 60 days of publication of the Tailoring Rule (which we refer to as the 60-day letters)—that would help EPA determine whether it needed to narrow its approval of any title V programs. Some States informed EPA in their "60 day letters" or subsequently that they have adequate authority to issue permits to sources of GHGs and that they have interpreted the requirements of their approved title V programs consistent with the final Tailoring Rule thresholds. Other States and permitting authorities either indicated that their programs would require changes to permit GHG sources at the final Tailoring Rule thresholds, or did not provide a clear indication of the scope of their title V programs with respect to GHG sources.

Thus, in this action, EPA is narrowing its previous approval of most State title V programs to the extent the programs require title V permits for sources of GHG emissions below the Tailoring Rule thresholds. The other portions of these title V programs, including portions requiring permits for GHG-emitting sources with emissions at or above the Tailoring Rule thresholds, remain approved. States affected by this rule will not be required to take any action under the Federal CAA as a result of this rule.

The effect of EPA narrowing its approval in this manner is that there will be no Federally-approved title V program that requires permits for sources due to emissions of GHG below

[1] Only the title V provisions are relevant for this action.

[2] The permitting threshold originally proposed for the Tailoring Rule was 25,000 tpy CO_2e. After considering public comment on the proposal, EPA increased its estimates of the costs and burdens of permitting and finalized a permitting threshold of 100,000 tpy CO_2e.

the final Tailoring Rule threshold of 100,000 tpy CO_2e (and 100 tpy mass basis). This action ensures that the Federally-approved programs applicable in the affected States do not require title V permitting for sources due to their status as major sources of GHG emissions as of January 2, 2011.

III. Proposed Rule

We assume familiarity here with the statutory and regulatory background discussed in the preambles for the Tailoring Rule proposal and final action, and will only briefly summarize that background here.

Title V of the CAA requires, among other things, a "major source" to obtain an operating permit that: consolidates all CAA requirements applicable to the source into a document; includes conditions necessary to assure compliance with such requirements; provides for review of these documents by EPA, States, and the public; and requires permit holders to track, report, and annually certify their compliance status with respect to their permit requirements.

A "major source" is defined to include, among other things, a source that actually emits or has the potential to emit 100 tpy or more of "any air pollutant." CAA sections 501(2), 302(j). *See also* 40 CFR 70.2 and 71.2. Since 1993, EPA has interpreted the CAA to define a "major source" for purposes of title V to include any source that emits, or has the potential to emit, at least 100 tpy of an air pollutant subject to regulation under the CAA. Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, "Definition of Regulated Air Pollutant for Purposes of Title V" (Apr. 26, 1993); 75 FR 31553–54.

In recent months, EPA completed four distinct actions related to regulation of GHGs under the CAA. These actions include, as they are commonly called, the "Endangerment Finding" and "Cause or Contribute Finding," which we issued in a single final action,[3] the "Johnson Memo Reconsideration" (also called the "Timing Decision"),[4] the "Light-Duty Vehicle Rule" (LDVR, or simply the "Vehicle Rule"),[5] and the "Tailoring Rule."[6] In the Endangerment Finding, which is governed by CAA § 202(a), the Administrator exercised her judgement, based on an exhaustive review and analysis of the science, to conclude that "six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations." 74 FR 66496. The Administrator also found "that the combined emissions of these greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas air pollution that endangers public health and welfare under CAA section 202(a)." *Id.* The Endangerment Finding led directly to promulgation of the Vehicle Rule, also governed by CAA § 202(a), in which EPA set standards for the emission of GHGs for new motor vehicles built for model years 2012–2016. 75 FR 25324. The other two actions, the Timing Decision and the Tailoring Rule, governed by the PSD and title V provisions in the CAA, were issued to address the automatic statutory triggering of these programs for GHGs due to the establishment of the first controls for GHGs under the Act. More specifically, the Timing Decision reiterated EPA's interpretation that only pollutants subject to regulation under the Act can trigger major source status for purposes of title V, and further concluded that the earliest date GHG would be subject to regulation for purposes of title V would be January 2, 2011. The Tailoring Rule established a series of steps by which PSD and title V permit requirements for GHG could be phased in, starting with the largest sources of GHG emissions. 75 FR 31514.

In the proposed Tailoring Rule, EPA proposed a major stationary source threshold for purposes of title V of 25,000 tpy for GHG on a CO_2e basis, for at least a specified period. EPA recognized that even so, approved State title V programs would—until they were revised—continue to use the statutory threshold of 100 tpy for GHG on a mass basis for purposes of the permitting threshold, even though permits for sources below the Tailoring Rule threshold were not required under Federal regulations and the States would not have sufficient resources to implement the title V program at the statutory threshold for GHG-emitting sources. This would result in the same problems of overwhelming administrative burdens and costs that we designed the Tailoring Rule to address. Accordingly, the proposed Tailoring Rule included a proposal to limit EPA's previous approval of title V programs to the extent those provisions required permits for sources whose emissions of GHG equal or exceed 100 tpy but are less than the permitting threshold of the Tailoring Rule.

EPA relied for its authority for the proposed limitations of approval on CAA section 301(a), as it incorporates the authority of an agency to reconsider its actions, and in the Administrative Procedure Act (APA) section 553. *See* 74 FR 55345. EPA indicated in the proposal that it considered and decided against issuing a notice of deficiency under CAA section 502(i)(1), in part because EPA did not anticipate that program submissions would be necessary following EPA's action to limit approvals. 74 FR 55345–55346.

In the final Tailoring Rule, EPA adopted a 100,000 tpy CO_2e permitting threshold for title V permitting of GHG emissions as of July 1, 2011, committed the agency to take future steps addressing smaller sources, and excluded the smallest sources from title V permitting for GHG emissions until at least April 30, 2016.

The mechanism EPA chose in the final rule to implement the 100,000 tpy CO_2e threshold for GHG emissions was slightly different than what EPA had proposed. In response to comments from States, in place of providing a definition in part 70 of "major source" with thresholds specific to GHG sources, the final Tailoring Rule amended the definition of "major source" to reflect EPA's long-standing interpretation that applicability for "major stationary source" under CAA sections 501(2)(B) and 302(j) and 40 CFR 70.2 and 71.2 is triggered by sources of pollutants "subject to regulation." EPA then reflected the permitting thresholds for GHGs within a definition of the term "subject to regulation" that was also added to parts 70 and 71.

Some States advised EPA that they would likely be able to implement the Tailoring Rule thresholds by interpreting provisions in their approved title V programs. A State's implementation of the Tailoring Rule in this manner would obviate the need for EPA to narrow its approval of the State's title V program. Thus, in the final Tailoring Rule, EPA deferred making any decision regarding whether to narrow its approval of any title V programs until after learning how States intended to implement the Tailoring Rule. Rather than taking final action on

[3] "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66496 (December 15, 2009).

[4] "Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 FR 17004 (April 2, 2010). This action finalizes EPA's response to a petition for reconsideration of "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program" (commonly referred to as the "Johnson Memo"), December 18, 2008.

[5] "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25324 (May 7, 2010).

[6] "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule." 75 FR 31514 (June 3, 2010).

our proposal to limit approval for State title V programs, EPA asked States to submit information—in the form of letters due within 60 days of publication of the final Tailoring Rule (which we refer to as the 60-day letters)—that would help EPA determine what action it would need to take to ensure that GHG sources would be permitted consistent with the final Tailoring Rule, and specifically for which States it would need to limit its approval of State title V programs.

Almost all States submitted 60-day letters. After reviewing the letters, some States have indicated that they have been able to interpret their existing approved title V programs in a manner consistent with the final Tailoring Rule. Other permitting authorities indicated that they needed regulatory or legislative changes either to implement title V permitting for GHG sources, or else to apply the final Tailoring Rule thresholds when they implement title V permitting for GHG sources. Some States indicated that some regulatory or legislative changes to their title V programs were necessary, but did not clearly indicate which types of changes were required. In some cases, the State's 60-day letter addressed PSD permitting but not title V permitting, or else did not clearly distinguish between the two programs in discussing how the State intended to implement permitting of GHG sources. Finally, a few States did not submit 60-day letters.

Most States that need to take some action indicated that they were actively in the process of updating their title V programs to be consistent with the final Tailoring Rule. Indeed, many programs were projected, as of the date of the 60-day letter, to be revised to incorporate the Tailoring Rule threshold at the State level before January 2, 2011.

IV. Final Rule

A. Narrowing of Title V Programs Under Parts 70 and 52

EPA is taking final action to narrow its approval of the title V program for certain States. In the final Tailoring Rule, EPA established levels of GHG emissions for purposes of determining applicability of title V. However, most EPA-approved State title V programs currently provide that sources of GHGs will become subject to title V requirements even where the sources emit GHGs below the final Tailoring Rule thresholds. Under the final Tailoring Rule, GHGs emitted below the Tailoring Rule thresholds are not treated as a pollutant "subject to regulation" under the CAA (and thus, under the final Tailoring Rule, a source emitting GHGs below the Tailoring Rule thresholds would not be treated as a major stationary source subject to title V on account of its GHG emissions). Thus, EPA is now narrowing its approval of most approved title V programs so that those title V programs are approved to apply to GHG-emitting sources only if those sources emit GHGs at or above the final Tailoring Rule thresholds. EPA is accomplishing this by reconsidering and narrowing its previous approval of those title V programs to the extent they apply to GHG-emitting sources that emit below the final Tailoring Rule thresholds.

In the proposed Tailoring Rule, EPA proposed to narrow its approval for all 50 States, as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.[7] EPA now finalizes this narrowing of approval for the States with title V programs that will apply to GHG emissions at below-Tailoring Rule levels as of January 2, 2011, and for States that EPA cannot clearly determine do not fall in this category. The States for whom EPA is narrowing its approval of the title V program in this action are: Alabama, California, Colorado, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, and Wisconsin. For all the other States—States with no authority to permit sources due to their status as major sources of GHG or States which apply the Tailoring Rule thresholds by interpretation—EPA is not taking final action on its proposal to narrow its approval of the title V program at this time because those States will not subject GHG sources with emissions below the Tailoring Rule thresholds to the requirements of title V on January 2, 2011.

For most States, title V programs are Federally-approved only under 40 CFR part 70, and EPA need only amend Appendix A to part 70 in order to narrow its approval of the title V program. However, in some cases, States have chosen to submit their title V programs as part of their State implementation plans (SIPs) and EPA has approved those programs into the SIP as codified in 40 CFR part 52. Three States [Arizona (Pinal County Air Quality Control District)], Minnesota, and Wisconsin) whose title V programs require narrowing have title V applicability provisions that were Federally approved under both part 70 and part 52. For these States, EPA is amending its approval of the title V program in both part 70 and part 52, in order to ensure that the scope of the approved title V program is consistent in both parts.

B. Legal Basis

EPA is narrowing its previous approval for most State title V programs because of an important flaw in the approved title V programs. EPA is rescinding its previous approval for the part of the title V program that is flawed, and EPA is leaving in place its previous approval for the rest of the program. Since there is no need under Federal law to permit sources below the final Tailoring Rule threshold, the title V programs whose approval is being narrowed by this action will continue to be fully approved under CAA section 502.

Among the minimum requirements for a title V program are those for "adequate personnel and funding to administer the program." CAA section 502(b)(4). These requirements need to be understood in context of Congress' clear concern for "the need for expeditious action by the permitting authority on permit applications and related matters." CAA section 502(b)(8); *see also* CAA sections 502(b)(6), 502(b)(7), & 503(c), 40 CFR 70.4(b)(8).

The flaw in the prior approved programs is that certain program provisions were phrased so broadly that they could, under certain circumstances, sweep in more sources than the permitting authority could process in an expeditious manner in light of the resources that were available or could be made available. Thus, EPA is narrowing the scope of its approval of those title V provisions to include, for purposes of GHG emissions, only title V permitting for sources emitting GHGs at or above final Tailoring Rule thresholds. EPA believes permitting at these thresholds will require resources at a level consistent with the descriptions of adequate resources the State provided, and EPA determined in the final Tailoring Rule that States will have adequate resources to issue operating permits to sources emitting GHGs at this level.

As noted above, for three States it is necessary to revise the SIP in order to

[7] 40 CFR 70.2 defines "State" to include any non-Federal permitting authority, including local, interstate and statewide permitting authorities, and also including the District of Columbia, the Commonwealth of Puerto Rico, and U.S. territories, although "[w]here such meaning is clear from the context, 'State' shall have its conventional meaning." This notice follows the same approach to the use of the term "State."

narrow the approved title V program. The basis for narrowing the program is the same under part 52 as under part 70. Indeed, EPA does not believe it would make sense to narrow its approval under part 70 without also narrowing its approval under part 52. Accordingly, for these States EPA is not only exercising its authority to reconsider its approval of the title V program, but also its authority to reconsider and to correct errors in its approval of a SIP.

EPA is narrowing its approval of the title V programs for all States that have indicated that they have authority under their title V programs to issue permits to sources of GHG emissions, but at the statutory level of 100 tpy or more on a mass emissions basis. As a precautionary measure, EPA is also narrowing its approval for States that did not clearly indicate to EPA whether they are in this situation. EPA recognizes that the actual status of the States subject to this rule varies to some degree; while some States have authority to issue permits to sources due to their emissions of GHGs under their title V programs but at the statutory threshold only, other States may have been able to alter their State regulations but have not yet submitted such changes or had them approved by EPA, and still other States did not provide a 60-day letter with sufficient information to determine the status of their title V permit programs in relation to GHG sources. EPA believes it is appropriate to narrow the approved title V program for all of these States. In the case of programs that have made State-level changes but have not yet received EPA approval for those changes, this approach provides an efficient means of ensuring that at no time is there a requirement under a Federally-approved program for sources below the final Tailoring Rule threshold to obtain a permit. For this reason, as a precautionary matter, EPA is narrowing approval for States that did not inform us that they can implement the thresholds in the final Tailoring Rule under their current approved programs.

Some States may lack authority to require permits for GHG sources at all. Where there is clear and unambiguous evidence that such State programs do not require permits for any sources due to their status as a major source of GHG emissions, EPA is not narrowing such programs, because they do not present the flaw discussed previously.[8] There may be some States that similarly lack authority to issue title V permits to sources due to their status as major sources of GHG emissions, but have not clearly articulated that fact to EPA in their 60-day letters. EPA intends to narrow its approval for all States where the status of the title V program in relation to major sources of GHG is unclear. Although it may turn out that some of these programs do not present the flaw discussed previously, EPA is only narrowing its approval of programs "to the extent" they require sources of GHG in excess of the threshold to apply for title V permits as major sources of GHG. Thus, if indeed a State's program does not require permits for these sources at all, there are no consequences to sources or the permitting authority from EPA's decision to narrow the scope of the State's approval.[9] On the other hand, if EPA were to refrain from narrowing its approval, and then learn that the program indeed does require sources that emit or have the potential to emit 100 tpy or more of GHGs on a mass basis to apply for title V permits, there would be significant adverse consequences for the permitting authority and sources, as described previously in this final rule and in the final Tailoring Rule. Accordingly, EPA is refraining from narrowing the title V programs for States that cannot implement the Tailoring Rule thresholds only if EPA is certain that those State programs do not require permits for sources due to their emissions of GHG.

The following section discusses these issues in more detail, beginning with the title V applicability provisions; then the minimum State program requirements; and then how the two, read together, gave rise to the flaws in the approved State title V programs.

1. Title V Applicability

Each of the States subject to this rule has an approved title V operating permits program and has not clearly indicated to EPA that it has the ability to permit sources of GHG consistent with the thresholds in the final Tailoring Rule. In most of these States, the approved title V program contains applicability provisions that are written broadly to include all pollutants subject to regulation under the CAA for the purposes of determining whether a source is a major source covered by the title V operating permits program. As a result, as soon as EPA promulgates a rule regulating a new pollutant under any provision of the CAA, these title V programs expand to cover additional sources that are major for that new pollutant. Depending on the pollutant, and the number and size of sources that emit it, these applicability provisions could result in a required significant and rapid expansion of the title V program. This is precisely what is happening at present, now that GHG will become subject to regulation under CAA section 202(a) and will become subject to PSD when emitted from certain stationary sources starting on January 2, 2011.

Importantly, the States affected by this action do not interpret their applicability provisions or any other provision in the title V programs to incorporate any limits on title V applicability with respect to new pollutants, and the programs do not contain any other mechanism that would allow the State to interpret applicability more narrowly, at least for GHGs. As a result, the affected States' title V applicability provisions include no way to limit the speed or extent of the expansion a title V program might be required to undergo to address new pollutants.

This sudden expansion of permitting responsibilities is precisely what is now happening in the case of GHGs. As described in the Timing Decision and final Tailoring Rule, GHG will become subject to regulation on January 2, 2011. EPA defined GHGs as the group of six air pollutants made up of carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, and perfluorocarbons. 75 FR 31514, 31519 (June 3, 2010) (Tailoring Rule discussion); 75 FR 25324 (May 7, 2010) (LDVR). Absent the limits of the final Tailoring Rule, sources that emit or have the potential to emit at least 100 tpy of GHGs would be potentially subject to title V permitting as of that date. EPA does not have information showing that the approved title V programs in States subject to this rule can interpret their programs more narrowly, to apply to only GHG-emitting sources at or above the final Tailoring Rule thresholds. In contrast, as noted elsewhere, several other States are able to interpret their title V programs more narrowly and, as a result, are not subject to this action.

[8] If a State with an approved title V program lacks any authority to permit sources that are major sources subject to title V as a result of their GHG emissions, then there is no title V permit program "applicable to the source" and those sources in that State have no obligation to apply for a title V permit until after such time as a permit program becomes applicable to them. See CAA section 503(a). EPA intends to work with States, through program revisions, notices of deficiency and/or application of the Federal title V program, in order to assure that major sources of GHGs in all States are subject to title V programs.

[9] Likewise, if a State did not provide sufficient information to EPA in a 60-day letter and it turned out that the State could apply the permitting thresholds of the final Tailoring Rule under its existing approved title V program, there would be no harm to the permitting authority or sources as a result of EPA's decision to narrow its approval consistent with the final Tailoring Rule thresholds.

The scale of the administrative program needed to effectively permit all sources emitting GHGs at the 100 tpy level has highlighted the unconstrained nature of the title V program's applicability provisions. EPA has recognized that immediately subjecting major sources of GHGs at the 100 tpy level to title V requirements is administratively unmanageable and creates absurd results that were not intended by Congress when it enacted title V. Thus, in the final Tailoring Rule, EPA implemented limits on when GHGs become "subject to regulation" for purposes of title V, such that emissions of GHGs will not trigger major source status, and thus will not trigger title V permit requirements, unless the source emits both 100 tpy of GHG on a mass basis and 100,000 tpy CO_2e of GHG as of July 1, 2011 or later. EPA included this limit in its regulations, and through this limit greatly reduced the extent of title V applicability. This limit was set at a level at which EPA determined States would have the resources to implement a title V program for GHG emissions. By contrast, the approved State programs that are subject to this rule do not incorporate the thresholds of the final Tailoring Rule. As a result, many or all of these State programs implement title V applicability for GHG sources more broadly—indeed, much more broadly, to far more sources and to much smaller sources—than EPA's regulations do. This is problematic to the extent it may interfere with the State's ability to meet minimum requirements for title V programs, as discussed in the following section.

2. Minimum Requirements for Approved State Title V Programs

Each of the States subject to this rule submitted a title V program for approval. In order to be approved by EPA, the State program was required to meet certain minimum requirements laid out in the CAA and in 40 CFR part 70. One of these requirements, contained in section 502(b)(4), specifies that every program must provide "for adequate personnel and funding to administer the program." These requirements are further detailed in 40 CFR 70.4(b)(6) through (b)(8).

As noted previously in this rule, and in the Tailoring Rule, the CAA also contains several other provisions making clear Congress' intent that title V permits be processed in an expeditious manner, and these are likewise reflected in 40 CFR part 70. *See* generally CAA section 502 and 40 CFR 70.4.

Therefore, at the time that the State submitted the title V program for EPA approval, the title V program was required to include assurances that adequate resources would be available to process title V permits in an expeditious manner, according to the requirements of the CAA and part 70.

The title V programs affected by this action, however, will not be able to meet these minimum requirements for a title V program as a result of their applicability to GHG-emitting sources. In the proposed and final Tailoring Rule, EPA stated that on a nationwide basis, applying title V to GHG-emitting sources at the 100 tpy level will result in far greater numbers of sources (over 6 million) requiring permitting than currently do (about 15,000), and the great majority of these additional sources would be smaller than the sources currently subject to title V. EPA added that the administrative burdens associated with permitting these large numbers of small sources would overwhelm the affected permitting authorities. As a result, for each State, EPA proposed to rescind approval of the part of the title V program that applies title V to GHG-emitting sources below the Tailoring Rule thresholds. During the comment period on this proposal, no authority contested this understanding of the facts, none stated that it could administer title V at the 100 tpy levels, and none contested the proposal on grounds that it has adequate resources. In the final Tailoring Rule, EPA refined, on the basis of comments, the precise extent of the administrative burden, but confirmed that the burden was overwhelming and that States lacked adequate resources. As noted above, in the final Tailoring Rule, EPA requested that States submit letters within 60 days of publication of the rule describing how they intended to implement title V for GHG-emitting sources. In those letters, none of the States claimed they could, or intended to, implement the approved title V program at the statutory levels. From all this, it is clear that none of the States had included in the title V program submitted for approval an adequate plan or strategy to assure resources to administer the title V program for their GHG-emitting sources at the 100 tpy level.

We note that there is nothing inherently problematic with a title V program submission that did not include the previously-described plan to acquire additional resources. Only title V programs that lack appropriate constraints to limit title V applicability for new pollutants (consistent with Federal law) to match their resources must be narrowed to include such constraints.[10]

3. Basis for Reconsideration and Narrowing of Approval

Based on the previous analysis, it is clear that EPA's approval of the title V programs subject to this action was flawed. They each are structured in a manner that may impose a title V permitting requirement on sources of pollutants newly subject to regulation under the Act without limitations, and yet they do not have a plan for acquiring resources to adequately permit large new categories of sources. As explained previously, the combination of these title V programs' broader applicability to additional stationary sources that emit pollutants newly subject to regulation, and the failure of the approved title V program to plan for adequate resources for that broader applicability—and to ensure that permits could be issued consistent with the requirements for expeditious processing of permit applications—is a flaw in these programs. In short, the title V program applicability provisions and the assurances provided in the State program submission are mismatched and therefore EPA needs to reconsider its approval of these programs. As discussed previously, EPA's recently promulgated GHG rules have highlighted this flaw.

It may be true that at the time the affected States submitted their State programs for approval, the precise course of events that have recently transpired concerning GHGs and that have exposed the mismatch between title V applicability and State assurances may have been difficult to foresee. Even so, it could have been generally foreseen that the breadth of the affected State program applicability provisions, combined with the programs' limited State assurances, was at least a potential mismatch that could eventually lead to title V applicability greatly outstripping permitting authority resources. EPA does not believe it is required to wait for that to occur, and then issue a Notice of Deficiency (NOD), to address the issue. Rather, this is a flaw in the title V programs that provides a basis for EPA to reconsider its approval.

In the proposed Tailoring Rule, EPA proposed to narrow its approval for all approved State programs. EPA now finalizes this narrowing of approval for only the States which have indicated

[10] As stated earlier, States included in this rule are in this situation, or else EPA currently lacks sufficient information to determine that they are not in this situation.

that their title V programs will apply to sources that emit or have the potential to emit at least 100 tpy of GHG as of January 2, 2011, or for which EPA has not been able to clearly establish whether or not the program will apply to such sources. The States for which EPA is narrowing its approval of the approved State title V program in this action include: Alabama, California, Colorado, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, and Wisconsin. For each of these States, EPA is finalizing an amendment to Appendix A of 40 CFR part 70 that will state "For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011." [11] EPA is also finalizing very similar language in the SIPs of Arizona, Minnesota and Wisconsin in order to ensure that the federally approved title V program in each of these States is appropriately narrowed under part 52 as well as part 70. The language being used for this final narrowing rule reflects minor changes from the language proposed in the Tailoring Rule in order to clarify and reflect the decisions about permitting thresholds reached in the final Tailoring Rule.

EPA notes that the following States have stated either that they can permit major sources of GHG in their approved title V program consistent with the Tailoring Rule thresholds or that they have no authority under their current approved title V program to permit sources due to their status as major sources of GHG: Alaska, Arkansas, Arizona, Connecticut, Delaware, Florida, Idaho, Indiana, Kentucky, Massachusetts, Michigan, Montana, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Puerto Rico, Texas, and Wyoming. Accordingly, it is not necessary at present to narrow the title V program approval for these States. As noted previously, EPA intends to work with these States as necessary, through program revisions, notices of deficiency and/or application of the Federal title V program, to assure that major sources of GHGs in all States are subject to title V programs, but only at the Tailoring Rule thresholds.

C. Authority for EPA Action

EPA has determined that this flaw in the approved State programs warrants reconsideration of the prior program approvals, and narrowing of those approvals. EPA believes it may reconsider its prior actions under authority inherent in CAA section 502, with further support from CAA section 301(a), and the reconsideration mechanisms provided under CAA section 307(b) and APA section 553(e).[12] In addition, with respect to the two SIP revisions, EPA has authority to correct errors in SIP approvals, as well as to reconsider them.

In approving the State programs under CAA 502(d), EPA retained authority to revise that action. The courts have found that an administrative agency has the inherent authority to reconsider its decisions, unless Congress specifically proscribes the agency's discretion to do so. *See, e.g., Gun South, Inc.* v. *Brady,* 877 F.2d 858, 862 (11th Cir. 1989) (holding that agencies have implied authority to reconsider and rectify errors even though the applicable statute and regulations do not provide expressly for such reconsideration); *Macktal* v. *Chao,* 286 F.3d 822, 826–26 (5th Cir. 2002); *Trujillo* v. *General Electric Co.,* 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider"); *see also New Jersey* v. *EPA,* 517 F.3d 574 (DC Cir. 2008) (holding that an agency normally can change its position and reverse a prior decision but that Congress limited EPA's ability to remove sources from the list of hazardous air pollutant source categories, once listed, by requiring EPA to follow the specific delisting process at CAA section 112(c)(9)).[13]

Section 301(a) of the CAA, in conjunction with CAA section 502 and the case law just described, provides statutory authority for EPA's reconsideration action in this rulemaking. Section 301(a) of the CAA authorizes EPA "to prescribe such regulations as are necessary to carry out [EPA's] functions" under the CAA. Reconsidering prior rulemakings, when necessary, is part of "[EPA's] functions" under the CAA. Cf. CAA section 307(b). Furthermore, the case law previously cited establishes that a grant of authority to approve State title V programs carries with it the inherent right to reconsider that approval, particularly since Congress has not prescribed any specific alternative mechanism for such reconsideration. Thus, CAA sections 502 and 301(a) confer authority upon EPA to undertake this rulemaking.

EPA finds further support for its authority to narrow its approvals in APA section 553(e), which requires EPA to give interested persons "the right to petition for the issuance, amendment, or repeal of a rule," and CAA section 307(b)(1), which expressly contemplates that persons may file a petition for reconsideration under certain circumstances (at the same time that a rule is under judicial review). The right to petition to reconsider, amend, or repeal presumes that an agency has the discretion to grant such a petition. If EPA has the authority to grant a petition from another person to reconsider, amend or repeal a rule if justified under the CAA, then it follows that EPA should be considered as having authority to reconsider, amend or repeal a rule when it determines such an action is justified under the CAA, even without a petition from another person.

EPA recently used its authority to reconsider prior actions and limit its prior approval of a SIP in connection with California conformity SIPs. *See, e.g.,* 68 FR 15720, 15723 (discussing prior action taken to limit approvals); 67 FR 69139 (taking final action to amend prior approvals to limit their duration); 67 FR 46618 (proposing to amend prior approvals to limit their duration, based on CAA sections 110(k) and 301(a)). EPA had previously approved SIPs with emissions budgets based on a mobile source model that was current at the time of EPA's approval. Later, EPA updated the mobile source model. But, even though the model had been updated, emissions budgets would continue to be based on the older, previously approved model in the SIPs, rather than the updated model. To rectify this problem, EPA conducted a rulemaking that revised the previous SIP approvals so that the approvals of

[11] EPA notes that where an approved State program includes multiple permitting authorities, EPA is narrowing the approved State program if any permitting authority requires narrowing.

[12] *See* CAA section 307(d) (omitting title V program approvals from the list of specific types of rulemakings under the CAA not subject to the APA).

[13] For additional case law, *see Belville Mining Co.* V. *United States,* 999 F.2d 989, 997 (6th Cir. 1993); *Dun & Bradstreet Corp.* v. *United States Postal Service,* 946 F.2d 189, 193 (2d Cir. 1991); *Iowa Power & Light Co.* v. *United States,* 712 F.2d 1292 (8th Cir. 1983).

the emissions budgets would expire early, when the new ones were submitted by States and found adequate, rather than when a SIP revision was approved. This helped California more quickly adjust its regulations to incorporate the newer model.

EPA notes that it considered but decided not to use the NOD process, which is explicitly provided for in CAA section 502(i), to address the flaw presented by these program approvals. There are several reasons why EPA determined that it was neither necessary nor appropriate to use the NOD process to address this issue in this rule.

The CAA provides that the NOD is to be used "whenever the Administrator makes a determination that a permitting authority is not adequately administering or enforcing a program" and provides that States must correct the deficiency within 18 months. CAA section 502(i).

Here, the problem is not with the way the State is administering or enforcing its approved State title V program. States are issuing permits, and modifications, and enforcing the various requirements of title V as provided for under the Act. The flaw is the mismatch between the breadth of the applicability provisions and the limited State assurances of adequate resources, in light of the possibility that a very large number of new major sources could become subject to title V. This flaw does not relate at all to the current administration and enforcement of the title V program, but rather to the overbroad nature of the underlying structure and scope of the title V program. The distinction is further underlined by the fact that section 502(i) contemplates that States would need to take corrective action to address the notice of deficiency. However, in the case of the flaw addressed here, EPA believes that no further State action will be necessary to address this mismatch once the approved title V program has been narrowed by this action.[14]

EPA views the NOD as specific authority for addressing specific circumstances, but concludes that it is not the sole means of changing an approved State program, and it is not the appropriate means in these circumstances. EPA believes nothing in section 502(i) displaces its authority to reconsider prior program approvals and, for the reasons described previously in this rule and in the Tailoring Rule proposal, concludes that such a reconsideration and narrowing is warranted and appropriate.

With respect to the two SIPs being revised, EPA is also exercising its authority to correct errors in SIPs, pursuant to CAA section 110(k)(6), as well as its authority to reconsider its actions. Under CAA section 110(k)(6), once EPA determines that its action in approving the PSD SIPs was in error, EPA has the authority to correct the error in an "appropriate" manner, and through the same process as the original approval, but without requiring any further State submission.

EPA's narrowing of its approval of the title V program corrects an error by addressing the flaw previously discussed, that the approved program could, under certain circumstances, sweep in more sources than the permitting authority could process in an expeditious manner in light of the resources that were available or could be made available. EPA believes correcting these SIPs is a reasonable exercise of its authority for the reasons stated herein and for the reasons stated in the PSD Narrowing Rule ("Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans").

V. Comments and Responses

Comments: Several industry commenters (4019, 4118, 4691, 5083, 5140, 5181, 5278, 5317) and one State commenter (4019) generally disagreed with our proposal to narrow our approval of previously-approved title V programs. Specific arguments against the proposed approach include the following:

- The EPA has overstated its authority under CAA section 301(a). The DC Circuit has observed that section 301(a)(1) "does not provide the Administrator with carte blanche authority to promulgate any rules, on any matter relating to the CAA, in any manner that the Administrator wishes." Where the CAA includes express provisions—such as section 110(k)(5) (the SIP call provision)—EPA is required to follow those provisions. (4019, 5083, 5140, 5181, 5278, 5317).
- The EPA's invocation of 5 U.S.C. 553(e) is legally indefensible. The EPA has mentioned no outstanding petition for EPA to revisit its PSD SIP approvals, so section 553(e) appears to be inapposite. Even where section 553(e) applies, it merely directs agencies to allow parties to seek revisions of rules; it plainly does not permit agencies to disregard procedural requirements—whether under the APA or under organic statutes such as the CAA—that agencies must follow in effecting any such revisions. (5317)

An industry commenter (4298) supports EPA's efforts to limit or conform its prior approvals through CAA sections 301(a)(1) and 110(k)(6) with respect to applicability thresholds. However, the commenter believes EPA should take affirmative steps to ensure that States immediately either revise their regulations to raise existing lower thresholds or demonstrate that they have adequate resources and funding to manage their programs utilizing those existing lower thresholds.

The same commenter states that EPA should issue a NOD, under CAA section 502(i)(1), to all States concurrent with the final Tailoring Rule, unless a State can demonstrate that it has commenced and is committed to finalizing any changes necessary under State law to make it consistent with the Tailoring Rule (4298). The commenter adds that EPA should not finalize any action that would trigger GHG permitting until each State program has been amended. Another commenter (5306) suggests EPA establish an expeditious deadline for States to submit corrective program revisions by adopting model guidelines to help inform State rulemaking, and EPA should complete this process by the end of 2010. The commenter explains that EPA can promptly issue a notice of deficiency and call for expeditious corrective action. *See* 42 U.S.C. 7661a(i). (5306).

Several comments state that there is no provision in title V, similar to error correction provisions for SIPs, for EPA to use to correct an error in its original approval of a title V program (5140, 5181, 5278).

Response: As discussed previously, EPA believes that it has authority under sections 502 and 301 to reconsider its approvals of State title V programs and under section 110 to reconsider SIP approvals and correct errors in the SIP. Section 502(d) explicitly requires EPA to approve or disapprove State title V programs, and EPA believes under the case law cited previously, this authority inherently includes the authority for EPA to reconsider its prior approval. EPA is citing CAA 307(b) and APA section 553(e) to indicate that Congress understood that EPA had the authority to reconsider its action in response to a petition. There is no reason to believe that EPA's authority to reconsider its

[14] As noted in the Tailoring Rule, there may be good reasons for States to update their State laws and regulations to reflect the narrowing and the thresholds of the Tailoring Rule, but the States will still have fully approved programs, and once the Federally-approved program is narrowed, the obligation under Federally approved programs to apply for a permit will no longer exist for sources below the Tailoring Rule thresholds.

action is limited solely to situations where a person has filed a petition.[15]

While Congress "undoubtedly can limit an agency's discretion to reverse itself," and "EPA may not construe a statute in a way that completely nullifies textually applicable provisions meant to limit its discretion," *New Jersey* v. *EPA,* 517 F.3d 574, 583 (DC Cir. 2008) (quotation omitted), there is no evidence that Congress limited EPA's discretion to reconsider its decisions with respect to title V program approvals, or that EPA's approach would nullify any provisions intended to limit its discretion. The only provision that commenters have identified as potentially limiting EPA's discretion is section 502(i), but that section is explicitly directed to the administration and enforcement of an approved program. Where there are problems with how an approved program is being implemented, the notice of deficiency process provides an avenue for working with States to fix those problems. Where, however, EPA realizes (as here) that its approval of a program was based on a structural flaw in the program—that is, a mismatch between the scope of sources potentially covered and the resources to cover them—that may cause future problems with administrability, there is no reason to believe that Congress intended to limit EPA's ability to reconsider its decision.

As noted previously, the distinction between current deficiencies in the administration and enforcement of the title V program, as compared to the overbroad nature of the underlying structure and scope of the title V program, is further underlined by the fact that section 502(i) contemplates that States would need to take corrective action to address the notice of deficiency. However, in the case of the flaw addressed here, EPA believes that no further State action will be necessary once the approved title V program has been narrowed by this action.

The conclusion that Congress did not intend to limit EPA's ability to reconsider its decisions is further supported by the fact that (unlike the situation the DC Circuit considered in *New Jersey* v. *EPA,* discussed previously) Congress did not establish any specific substantive limits on EPA's discretion in issuing a notice of deficiency. Rather, EPA is to issue a notice "whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program * * * " Section 502(i)(1). Thus, EPA's decision to reconsider its approval in no way nullifies any provisions meant to limit its discretion.

Finally, the fact that there is no provision similar to section 110(k)(6) for title V provides no basis for concluding that Congress intended to limit EPA's ability to reconsider its approvals. Section 110(k)(6) was enacted in response to a court decision, *Concerned Citizens of Bridesburg* v. *EPA,* 836 F.2d 777 (2d Cir. 1987), where the court narrowly construed EPA's authority to correct errors in SIP approvals as limited to typographical or similar errors. In response, Congress added section 110(k)(6) as part of the 1990 amendments to make clear that EPA has authority to correct any errors. No court has ever suggested that EPA lacks authority to reconsider its decisions to approve title V programs, and under the case law the lack of an explicit mechanism to correct errors in title V program approvals is entirely consistent with EPA's view that such authority is inherent in CAA section 502, as discussed previously.

EPA believes this case law also supports its authority to reconsider the approvals into part 52 of two title V programs which are being narrowed. Furthermore, EPA believes we have authority not only to reconsider these SIP approvals, but also to narrow these SIPs using our error correction authority under CAA section 110(k)(6). EPA disagrees with commenters who believe that this provision may only be used for technical or clerical errors. EPA's view is that Section 110(k)(6) of the CAA is available to correct any error EPA made in approving a SIP. The text of CAA section 110(k)(6) applies the provision broadly to any mistake, and does not limit the provision's applicability to only technical or clerical errors. Congress's passage of CAA section 110(k)(6) in 1990 in fact indicated Congress's intent to reinforce EPA's broad authority to unilaterally correct any errors in SIP approvals, coming as it did after the Third Circuit adopted a narrow interpretation of error correction authority in *Concerned Citizens of Bridesburg* v. *U.S. EPA,* 836 F.2d 777 (1987).[16]

EPA notes that the question of whether EPA should have postponed promulgation of the Vehicle Rule until each State title V program had been revised is not germane to this rule, and EPA is not, in this rule, reopening any issue as to the timing of its promulgation of the Vehicle Rule. Nonetheless, EPA had compelling reasons to issue the Vehicle Rule at the time it did so. In the Vehicle Rule, EPA explained that although it has some discretion with respect to the timing of standards, our discretion was not unlimited, and that three years had already passed since the Supreme Court had directed EPA to take appropriate actions under CAA section 202(a). 75 FR 25402. EPA explained further that any additional delay in setting standards would frustrate implementation of the national program for regulation of motor vehicles, resulting in substantial prejudice to vehicle manufacturers and consumers. 75 FR 25326. EPA also explained that consideration of indirect stationary source costs has no relevance to the issue of the appropriate level at which to set vehicle emission standards. Vehicle Rule RTC 5–456.

As noted previously, once the Federally-approved program is narrowed, the obligation under Federally approved programs to apply for a permit will no longer exist for sources below the Tailoring Rule thresholds. Further, EPA notes that the Agency has no authority to amend State law, but the majority of States have informed EPA that they are revising their State programs to incorporate the thresholds in the final Tailoring Rule for GHG-emitting sources. Indeed, many programs report that these changes will be in place by January 2, 2011. Other programs report that their changes will be implemented by the spring of 2011, which should be timely for State law purposes in light of the fact that sources newly subject to title V generally have up to a year to file their application.

EPA is continuing to work with States to implement the final Tailoring Rule and title V permitting for GHG sources. EPA intends to use program revisions, notices of deficiency and/or application of the Federal title V program, as appropriate, in order to assure that GHG sources in all States are subject to title V programs (and that those programs are not overwhelmed by permitting sources below the Tailoring Rule thresholds). EPA reiterates that once the Federally-approved program is narrowed (in this action), the obligation under Federally approved programs to apply for a permit will no longer exist for sources below the Tailoring Rule thresholds. EPA reiterates further that this approach is preferable to the NOD process for States subject to this action and that it is not necessary to issue notices of deficiency as part of this rulemaking.

[15] We further note that it is not clear the comment challenging the citation of section 553(e) in the absence of a petition was intended to reference title V.

[16] For further discussion of SIP-related issues, see the PSD Narrowing Rule, particularly section V.A ("Comments Regarding the Legal Mechanism for the Current Action").

VI. Effective Date

This rule is being issued under CAA § 307(d)(1)(V). CAA section 307(d) specifies that rules issued under its provisions are not subject to APA section 553. Thus, the 30-day delay in effective date from the date of signature required under the APA does not apply. In addition, APA section 553(d) provides exceptions to this requirement for good cause and for any action that grants or recognizes an exemption or relieves a restriction. The effect of this rule is to relieve many small sources (and permitting authorities) from permitting obligations under title V and to address the potential for permitting authorities to be overwhelmed by processing permits not required under 40 CFR part 70. Therefore, EPA finds that there is good cause for an immediate effective date, and that an immediate effective date is consistent with the purposes underlying APA section 553(d). In addition, since this is not a major rule under the Congressional Review Act (CRA), the 60-day delay in effective date required for major rules under the CRA does not apply. This rule is thus effective upon publication.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it will raise novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. Instead, this will significantly reduce costs incurred by sources and permitting authorities relative to the costs that would be incurred if EPA did not revise this rule. In the final Tailoring Rule, EPA stated that based on its GHG threshold data analysis, it estimated that over 6 million new facilities nationally would be required to obtain operating permits based on applying an emissions threshold for major source status of 100 tpy of GHG emissions on a mass basis. This was compared with the approximately 15,000 title V permits that have been issued to date. Thus, without the final Tailoring Rule, the administrative burden for permitting GHG emissions would increase 400-fold, an unmanageable increase. The current action takes further steps to implement the burden-reduction implemented by the final Tailoring Rule by raising the GHG thresholds in the approvals of the title V programs of the identified State and local agencies from 100 tpy to the higher thresholds required under the final Tailoring Rule (100,000 tpy CO2e under title V during step 2 of the final Tailoring Rule implementation). However, OMB has previously approved the information collection requirements contained in the existing regulations under 40 CFR part 70 under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0336. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In making such determinations, the impact of concern is any significant adverse economic impact on small entities (5 U.S.C. 603 and 604). This rule will relieve Federal regulatory burdens for affected small entities, including small businesses that are subject to title V permitting in the affected States by raising the GHG applicability thresholds in those States to the levels specified in the final Tailoring Rule, which in turn, will result that fewer sources being subject to title V permitting in those States. Thus, the program changes provided by this rule will not result in a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or Tribal governments or the private sector. The action is merely an administrative action designed to ensure consistency with the requirements of the final Tailoring Rule. This action does not require any State or local permitting agency or private entity to take on any new regulatory burdens; any burden resulting from changing State or local GHG thresholds was already accounted for in the final Tailoring Rule, which already imposes the higher GHG thresholds addressed by this action. Thus, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action 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. This rule is expected to result in cost savings and administrative burden reduction for affected permitting agencies and sources in the affect States, including governments.

E. Executive Order 13132—Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action merely seeks to reduce the number of sources subject to title V permitting in the affected States by raising the GHG thresholds in those States to the levels specified in the final Tailoring Rule, resulting in a significant reduction in burdens for affected State and local agencies. Thus, Executive Order 13132 does not apply to this action. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicited comment on the proposed action from State and local officials.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

Subject to Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has Tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by Tribal governments, or EPA consults with Tribal officials early in the process of developing the proposed regulation and develops a Tribal summary impact statement.

EPA has concluded that this action may have Tribal implications. However, it will neither impose substantial direct compliance costs on Tribal government, nor preempt Tribal law. There are no Tribal authorities with an EPA-approved part 70 title V permitting program to date;[17] however, this may change in the future.

EPA consulted with Tribal officials early in the process of developing the final Tailoring Rule, which the current rule helps to implement, to allow them to have meaningful and timely input into its development. EPA specifically solicited comments from Tribal officials on the proposal for this approach to narrowing title V program approvals, which was part of the GHG Tailoring Rule proposal (74 FR 55292, October 27, 2009). EPA consulted with Tribal officials early in the regulatory development process for the GHG Tailoring Rule, including by publishing an Advanced Notice of Proposed Rulemaking (73 FR 44354, July 30, 2009), where we received several comments from Tribal officials which were considered in the proposed and final rules.

G. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

[17] One Tribe is operating a title V permit program pursuant to a delegation under part 71.

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. Further, we have concluded that this rule is not likely to have any adverse energy effects because it does not create any new requirements for sources in the energy supply, distribution, or use sectors.

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 EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has concluded that it is not practicable to determine whether there would be disproportionately high and adverse human health or environmental effects on minority and/or low income populations from this rule. This rule is necessary in order to allow for the continued implementation of permitting requirements established in the Clean Air Act. Specifically, without this rule, the affected States' CAA title V permitting programs would become overwhelmed and unmanageable by the untenable number of GHG sources that would become newly subject to them. This would result in severe impairment of the functioning of these programs with potentially adverse human health and environmental effects nationwide. Under this rule and the findings under the final Tailoring Rule, EPA is ensuring that the affected States' CAA permitting programs continue to operate by limiting their applicability to the maximum number of sources the programs can possibly handle. This approach is consistent with congressional intent as it phases in applicability, starting with the largest sources initially, and then other sources over time, so as not to overwhelm State permitting programs. By doing so, this rule allows for the maximum degree of environmental protection possible while providing regulatory relief for the unmanageable burden that would otherwise exist. Therefore, we believe it is not practicable to identify and address disproportionately high and adverse human health or environmental effects on minority populations and low income populations in the United States under this final rule, though we do believe that this rule will ensure that States can continue to issue title V permits to significant sources of air pollution.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective December 30, 2010.

L. Judicial Review

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by February 28, 2011.

Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Under section 307(b)(2) of the Act, the requirements of this final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements. Pursuant to section 307(d)(1)(V) of the Act, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to "such other actions as the Administrator may determine." This action finalizes some, but not all, elements of a previous proposed action—the Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Proposed Rule (74 FR 55292, October 27, 2009).

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have jurisdiction for petitions of review of final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) When the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

This rule narrowing approvals of title V programs is "nationally applicable" within the meaning of section 307(b)(1). This rule narrows the approval of most approved title V programs across the country. At the core of this rulemaking is EPA's interpretation of its authority to reconsider its prior approvals under the Clean Air Act, and its application of that interpretation to areas across the country. EPA is finalizing this rule with a goal of ensuring that no State will become unable to implement national Clean Air Act requirements, including those for permitting sources of greenhouse gases. This action is being taken on the basis of a single administrative record. The factual questions in this rule are not unique to particular geographical areas, but are asked uniformly of all States. The large number of States, spanning much of the country, being affected, the common core of knowledge and analysis involved in formulating the rule, and the common legal interpretation advanced of section 502 and other sections of the Clean Air Act, all combine to make this a nationally applicable rule.

For the same reasons, the Administrator also is finding that this action is based on determinations of nationwide scope and effect for the purposes of section 307(b)(1). This is particularly appropriate because, in the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator's determination that an action is of "nationwide scope or effect" would be appropriate for any action that has a scope or effect beyond a single judicial circuit. H.R. Rep. No. 95–294 at 323, 324, reprinted in 1977 U.S.C.C.A.N. 1402–03. Here, the scope and effect of this rulemaking extends to numerous judicial circuits since most approved title V programs across the country are affected by this action. EPA also applied a consistent analytical approach broadly across the country to determine which action to take, and for which States. EPA used a nationally applicable, uniform legal interpretation of section 502 and other sections of the Clean Air Act and of EPA's general authority in conducting this analysis. In these circumstances under section 307(b)(1), the Administrator is finding the rule to be based on determinations of "nationwide scope or effect" and for jurisdiction to be in the DC Circuit.

Thus, any petitions for review of the narrowing of title V program approvals must be filed in the Court of Appeals for the District of Columbia Circuit by February 28, 2011.

Statutory Authority

The statutory authority for this action is provided by sections 110, 301 and 502 of the CAA as amended (42 U.S.C. 7410, 7601 and 7661a). This action is also subject to section 307(d) of the CAA (42 U.S.C. 7407(d)).

List of Subjects

40 CFR Part 52

Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

Dated: December 23, 2010.

Lisa P. Jackson,

Administrator.

■ For reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as set forth in the following.

PART 52—[AMENDED]

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

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

■ 2. Section 52.151 is added to subpart D to read as follows:

§ 52.151 Operating permits.

Insofar as the permitting threshold provisions in the Pinal County Code of Regulations for the Pinal County Air Quality Control District concern the treatment of sources of greenhouse gas emissions as major sources for purposes of title V operating permits, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2 equivalent emissions, as well as 100 tpy on a mass basis, as of July 1, 2011.

■ 3. Section 52.1233 is revised by redesignating the existing text as paragraph (a) and adding a new paragraph (b) to read as follows:

§ 52.1233 Operating permits.

* * * * *

(b) For any permitting program located in the State, insofar as the permitting threshold provisions in Chapter 7007 rules concern the treatment of sources of greenhouse gas emissions as major sources for purposes of title V operating permits, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2 equivalent emissions, as well as 100 tpy on a mass basis, as of July 1, 2011.

■ 4. Section 52.2590 is added to subpart YY to read as follows:

§ 52.2590 Operating permits.

For any permitting program located in the State, insofar as the permitting

threshold provisions in Chapter NR 407 of the Wisconsin Administrative Code concern the treatment of sources of greenhouse gas emissions as major sources for purposes of title V operating permits, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2 equivalent emissions, as well as 100 tpy on a mass basis, as of July 1, 2011.

PART 70—[AMENDED]

■ 5. The authority citation for part 70 continues to read as follows:

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

■ 6. Appendix A to Part 70 is amended as follows:
■ a. By adding paragraph (d) under Alabama; and
■ b. By adding paragraph (jj) under California;
■ c. By adding paragraph (c) under Colorado;
■ d. By adding paragraph (d) under District of Columbia;
■ e. By adding paragraph (c) under Georgia;
■ f. By adding paragraph (d) under Hawaii;
■ g. By adding paragraph (c)under Illinois;
■ h. By adding paragraph (m) under Iowa;
■ i. By adding paragraph (e) under Kansas;
■ j. By adding paragraph (c) under Louisiana;
■ k. By adding paragraph (c) under Maine;
■ l. By adding paragraph (d) under Maryland;
■ m. By adding paragraph (d) under Minnesota;
■ n. By adding paragraph (c) under Mississippi;
■ o. By adding paragraph (x) under Missouri;
■ p. By adding paragraph (k) under Nebraska, City of Omaha; Lincoln-Lancaster County Health Department;
■ q. By adding paragraph (d) under Nevada;
■ r. By adding paragraph (c) under New Hampshire;
■ s. By adding paragraph (e) under New York;
■ t. By adding paragraph (d) under Ohio;
■ u. By adding paragraph (c) under Oklahoma;
■ v. By adding paragraph (c) under Pennsylvania;
■ w. By adding paragraph (c) under Rhode Island;
■ x. By adding paragraph (c) under South Carolina;
■ y. By adding paragraph (c) under South Dakota;
■ z. By adding paragraph (f) under Tennessee;
■ aa. By adding paragraph (c) under Utah;
■ bb. By adding paragraph (c) under Vermont;
■ cc. By adding paragraph (c) under Virgin Islands;
■ dd. By adding paragraph (c) under Virginia;
■ ee. By adding paragraph (j) under Washington;
■ ff. By adding paragraph (f) under West Virginia; and
■ gg. By adding paragraph (c) under Wisconsin.

Additions to the Appendix are set out to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

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Alabama

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(d) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

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California

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(jj) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Colorado

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

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District of Columbia

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(d) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Georgia

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Hawaii

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(d) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

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Illinois

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

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Iowa

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(m) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Kansas

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(e) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

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Louisiana

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Maine

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Maryland

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(d) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

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Minnesota

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(d) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Mississippi

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Missouri

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(x) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

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Nebraska; City of Omaha; Lincoln-Lancaster County Health Department

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(k) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Nevada

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(d) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

New Hampshire

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

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New York

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(e) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

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Ohio

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(d) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Oklahoma

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

* * * * *

Pennsylvania

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

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Rhode Island

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

South Carolina

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

South Dakota

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Tennessee

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(f) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

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Utah

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Vermont

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Virgin Islands

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Virginia

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Washington

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(j) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

West Virginia

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(f) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Wisconsin

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(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

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[FR Doc. 2010–32757 Filed 12–29–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R04–OAR–2010–0392(a); FRL–9246–6]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants; State of Florida; Control of Large Municipal Waste Combustor (LMWC) Emissions From Existing Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule; notice of administrative change.

SUMMARY: EPA is approving the Clean Air Act (CAA) section 111(d)/129 State Plan (the Plan) submitted by the Florida Department of Environmental Protection (FDEP) for the State of Florida on July 12, 2007, for implementing and enforcing the Emissions Guidelines (EGs) applicable to existing Large Municipal Waste Combustors (LMWCs). These EGs apply to municipal waste combustors with a capacity to combust more than 250 tons per day of municipal solid waste (MSW).

DATES: This direct final rule is effective February 28, 2011 without further notice, unless EPA receives adverse comment by January 31, 2011. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R04–OAR–2010–0392 by one of the following methods:

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

2. *E-mail: garver.daniel@epa.gov.*

3. *Fax:* (404) 562–9095.

4. *Mail:* EPA–R04 OAR–2010–0392, Daniel Garver, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303.

5. *Hand Delivery or Courier:* Mr. Daniel Garver, Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 am to 4:30 pm, excluding federal holidays.

Instructions: Direct your comments to Docket ID Number EPA–R04–OAR–2010–0392. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on

the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 am to 4:30 pm, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Daniel Garver, Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9839. Mr. Garver can also be reached via electronic mail at *garver.daniel@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 129(a)(5) of the CAA requires EPA to conduct a 5-year review of the solid waste incinerator new source performance standards (NSPS) and emission guidelines (EGs) and revise both, as appropriate. Accordingly, in the May 10, 2006, edition of the **Federal Register**, EPA promulgated revised LMWC rules under sections 111 and 129 of the CAA. Section 129(b)(2) of the CAA requires states to submit to EPA for approval state plans and revisions that implement and enforce the amended EGs, in this case, 40 CFR part 60, subpart Cb. State plans and revisions must be at least as protective as the EGs, and become federally enforceable as a section 111(d)/129 plan revision upon approval by EPA. The procedures for adoption and submittal of state plans and revisions are codified in 40 CFR part 60, subpart B.

II. Review of Florida's MWC Plan Revision

The required Florida 111(d)/129 Plan revision was submitted by FDEP to EPA on July 12, 2007. EPA has reviewed the plan revision for existing LMWC units in the context of the requirements of 40 CFR part 60, and subparts B and Cb, as amended. State plans must include the following nine essential elements: (1) Identification of legal authority, (2) identification of mechanism for implementation, (3) inventory of affected facilities, (4) emissions inventory, (5) emissions limits, (6) compliance schedules, (7) testing, monitoring, recordkeeping, and reporting, (8) public hearing records, and (9) annual state progress reports on facility compliance.

A. Identification of Legal Authority

Federal regulations found at 40 CFR 60.26 require the plan to demonstrate that the State has legal authority to adopt and implement the emission standards and compliance schedules. FDEP has demonstrated that it has the legal authority to adopt and implement the emission standards and compliance governing MWC emissions. FDEP's legal authority is derived from state law found at Florida Statutes (F.S.) Sec. 403.031 (Definitions), F.S. Sec. 403.061 (Department powers and duties), F.S. Sec. 403.0872 (Title V air operating permits), and F.S. Sec. 403.8055 (Authority to adopt federal standards by reference). F.S. Subsections 403.061(6), (7), (8), and (13) give the authority for obtaining information and for requiring recordkeeping, and use of monitors. F.S. Subsection 403.061(35) gives the department authority to exercise the duties, powers, and responsibilities required of the State under the CAA. The sections of the Florida Statutes that give authority for compliance and enforcement authority are 403.121 (Judicial and administrative remedies), F.S. Sec. 403.131 (Injunctive relief), F.S. Sec. 403.141 (Civil remedies), and 403.161 (Civil and criminal penalties) Finally, F.S. Sec. 119.07 is the authority for making the information available to the public. Furthermore, FDEP has submitted and EPA has approved a previous Florida 111(d)/129 Plan for LMWCs that demonstrate the required legal authority (40 CFR 62.2355). Therefore, the Plan meets the requirements of 40 CFR 60.26.

B. Identification of Enforceable State Mechanisms for Implementing the Plan

The subpart B provision at 40 CFR 60.24(a) requires that state plans include emissions standards, defined 40 CFR 60.21(f) as "a legally enforceable regulation setting forth an allowable rate of emissions into the atmosphere, or prescribing equipment specifications for control of air pollution emissions." Florida Administrative Code (F.A.C.) Chapter 62–204.800, "Federal Regulations Adopted by Reference" has been amended to incorporate revisions to subpart Cb. These amendments to F.A.C. Rule 62–204.800(8) and (9), for Standards of Performance for New Stationary Sources and Emission Guidelines and Compliance Times, respectively, were proposed on April 6, 2007, and became effective on May 31, 2007. These rules meet the requirement of 40 CFR 60.24(a) to have a legally enforceable emission standard.

C. Inventory of Affected MWC Units

Federal regulations found at 40 CFR 60.25(a) require the plan to include a complete source inventory of all LMWC units. FDEP has identified ten (10) affected facilities. An affected facility is not exempt from applicable sections 111(d)/129 requirements because it is not listed in the inventory compiled by FDEP. The affected facilities identified by FDEP are shown in the table below:

Facility name	City
Lake County Resource Recovery	Okahumpka.
Pasco County Solid Waste	Hudson.
Hillsborough County Resource Recovery	Tampa.
McKay Bay Refuse-to-Energy	Tampa.
Pinellas Resource Recovery	St. Petersburg.
Lee County Resource Recovery	Fort Myers.
Palm Beach Solid Waste Authority	West Palm Beach.
North Broward County Resource Recovery	Pompano Beach.
South Broward County Resource Recovery	Fort Lauderdale.
Dade County Resource Recovery	Miami.

D. Inventory of Emissions From Affected MWC Units

Federal regulations found at 40 CFR 60.25(a) require that the plan include an emissions inventory that estimates emissions of the pollutant regulated by the EGs. Emissions from MWC units contain organics (dioxin/furans), metals (cadmium, lead, mercury, particulate matter, opacity), and acid gases (hydrogen chloride, sulfur dioxide, and nitrogen oxides). FDEP submitted a supplement to its 111(d)/129 Plan to EPA on September 30, 2009. This supplement contains MWC unit emissions rates for each regulated pollutant for each designated facility based on the most recent stack test data. This meets the emission inventory requirements of 40 CFR 60.25(a).

E. Emissions Limitations for MWC Units

Federal regulations found at 40 CFR 60.24(c) specify that the state plan or revision must include emission standards that are no less stringent than the EGs, except as specified in 40 CFR 60.24(f), which allows for less stringent emission limitations on a case-by-case basis if certain conditions are met. This exception clause is superseded by section 129(b)(2) of the CAA, which requires that state plans be "at least as protective" as the EGs. Since F.A.C. Rule 62–204.800(9) b.3.a. through i., specifically adopts by reference the EGs contained in 40 CFR part 60 subpart Cb, the emission standards are "at least as protective" as those in subpart Cb, as amended.

F. Compliance Schedules

Federal regulations found at 40 CFR 60.24(c) and (e), require that a state plan must include an expeditious compliance schedule that owners and operators of affected MWC units must meet in order to comply with the requirements of the plan. F.A.C. Rule 62–204.800(9) b.3.a. through i., specifically adopts by reference the compliance schedules listed in 40 CFR 60.33b. The Plan revision meets applicable Federal requirements for compliance schedules.

G. Testing, Monitoring, Recordkeeping, and Reporting Requirements

The provisions of subpart B, 40 CFR 60.24(b) and 60.25(b), stipulate facility testing, monitoring, recordkeeping and reporting requirements for state plans. F.A.C. Rule 62–204.800(9)b.7., and 8., adopts by reference the monitoring, recordkeeping, and reporting requirements found at 40 CFR 60.58b and 60.59b, respectively. The Plan revision meets applicable Federal requirements for testing, monitoring, recordkeeping, and reporting requirements.

H. A Record of Public Hearing on the State Plan Revision

A public hearing on the plan revision was held on April 27, 2007. Applicable portions of F.A.C. Chapter 62–204.800, amendments became effective on May 31, 2007. FDEP provided evidence of complying with public notice and other hearing requirements, including a record of public comments received. FDEP also certified that "the public notice and hearing requirements of all applicable state and federal regulations have been satisfied with respect to this submittal." FDEP has met the requirement of 40 CFR 60.23 for a public hearing.

I. Annual State Progress Reports to EPA

FDEP must submit to EPA on an annual basis a report which details the progress in the enforcement of the plan in accordance with 40 CFR 60.25(e) and (f). Accordingly, FDEP will submit annual reports on progress in plan enforcement to EPA on an annual (calendar) basis, commencing with the first full report period after plan revision approval.

III. Final Action

Based upon the rationale discussed above, EPA is approving the Florida Plan revision and related F.A.C. Rule 62–204.800(9) amendments, as adopted on May 31, 2007. This approval excludes certain authorities retained by EPA, and as stated in 40 CFR 60.30b(b) and 60.50b(n). As required by 40 CFR 60.28(c), any revisions to the Florida Plan or supporting regulations will not be considered part of the applicable plan until submitted by FDEP in accordance with 40 CFR 60.28(a) or (b), as applicable, and until approved by EPA in accordance with 40 CFR part 60, subpart B, requirements.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. This action simply reflects already existing Federal requirement for state air pollution control agencies and existing LMWC units that are subject to the provisions of 40 CFR part 60, subpart Cb and related subpart Eb. However, in the "Proposed Rules" section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the section 111(d)/129 Plan revision should relevant adverse or critical comments be filed. This rule will be effective January 31, 2011 without further notice unless EPA receives adverse comments by January 31, 2011. If EPA receives adverse comments, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule did not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. If no such comments are received, the public is advised that this rule will be effective on February 28, 2011 and no further action will be taken on the proposed rule.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a 111(d)/129 plan 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 111(d)/129 plan 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 111(d)/129 Plan is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 28, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2)).

List of Subjects in 40 CFR Part 62

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: November 8, 2010.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

■ 40 CFR part 62, subpart K, is amended as follows:

PART 62—[AMENDED]

■ 1. The authority citation for part 62 continues to read as follows:

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

Subpart K—Florida

■ 2. Section 62.2355 is revised to read as follows:

§ 62.2355 Identification of sources.

(a) The plan applies to existing facilities with a municipal waste combustor (MWC) unit capacity greater than 250 tons per day of municipal solid waste (MSW), and for which construction, reconstruction, or modification was commenced on or before July 12, 2007.

(b) On July 12, 2007, Florida submitted a revised State plan and related Florida Administrative Code amendments as required by 40 CFR part 60, subpart Cb, amended on May 10, 2006.

(c) The plan is effective as of May 31, 2007.

[FR Doc. 2010–32971 Filed 12–29–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1162]

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the Base (1% annual-chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

DATES: These modified BFEs are currently in effect on the dates listed in the table below and revise the Flood Insurance Rate Maps (FIRMs) in effect prior to this determination for the listed communities.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Deputy Federal Insurance and Mitigation Administrator reconsider the changes. The modified BFEs may be changed during the 90-day period.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

SUPPLEMENTARY INFORMATION: The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based on knowledge of changed conditions or new scientific or technical data.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other

Federal, State, or regional entities. The changes in BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act. This interim rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This interim rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This interim rule involves no policies that have federalism implications under Executive Order 13132, Federalism.

Executive Order 12988, Civil Justice Reform. This interim rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Arkansas: Benton	City of Bentonville (09–06–3053P).	July 30, 2010; August 6, 2010; *The Benton County Daily Record*.	The Honorable Bob McCaslin, Mayor, City of Bentonville, 117 West Central Avenue, Bentonville, AR 72712.	December 6, 2010	050012
Oklahoma: Tulsa	City of Tulsa (10–06–2150P).	August 6, 2010; August 13, 2010; *The Tulsa World*.	The Honorable Dewey Bartlett, Mayor, City of Tulsa, 175 East 2nd Street, Suite 690, Tulsa, OK 74103.	July 30, 2010	405381
Pennsylvania: Montgomery.	Township of Upper Merion (10–03–0510P).	July 23, 2010; July 30, 2010; *The Times Herald*.	Mr. Ronald Wagenmann, Upper Merion Township Manager, 175 West Valley Forge Road, King of Prussia, PA 19406.	July 16, 2010	420957
Texas:					
Potter and Randall.	City of Amarillo (10–06–2283P).	August 20, 2010; August 26, 2010; *The Amarillo Globe-News*.	The Honorable Debra McCartt, Mayor, City of Amarillo, P.O. Box 1971, Amarillo, TX 79105.	August 13, 2010	480529
Brazoria	Unincorporated areas of Brazoria County (10–06–1185P).	August 9, 2010; August 16, 2010; *The Facts*.	The Honorable Joe King, Brazoria County Judge, 111 East Locust Street, Angleton, TX 77515.	August 26, 2010	485458
Williamson	City of Cedar Park (09–06–3455P).	September 9, 2010; September 16, 2010; *The Hill Country News*.	The Honorable Bob Lemon, Mayor, City of Cedar Park, 600 North Bell Boulevard, Cedar Park, TX 78613.	January 14, 2011	481282
Tarrant	City of Fort Worth (10–06–1675P).	July 13, 2010; July 20, 2010; *The Fort Worth Star-Telegram*.	The Honorable Michael J. Moncrief, Mayor, City of Fort Worth, 1000 Throckmorton Street, Fort Worth, TX 76102.	November 17, 2010	480596
Harris	Unincorporated areas of Harris County (10–06–0320P).	September 7, 2010; September 14, 2010; *The Houston Chronicle*.	The Honorable Ed Emmett, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	January 12, 2011	480287
Johnson	Unincorporated areas of Johnson Countyn (10–06–0427P).	July 20, 2010; July 27, 2010; *The Fort Worth Star-Telegram*.	The Honorable Roger Harmon, Johnson County Judge, 2 Main Street, Cleburne, TX 76033.	November 24, 2010	480879
Johnson	City of Mansfield (10–06–0427P).	July 20, 2010; July 27, 2010; *The Fort Worth Star-Telegram*.	The Honorable David Cook, Mayor, City of Mansfield, 1200 East Broad Street, Mansfield, TX 76063.	November 24, 2010	480606
Brazoria	City of Manvel (10–06–1185P).	August 9, 2010; August 16, 2010; *The Alvin Sun*.	The Honorable Delores Martin, Mayor, City of Manvel, P.O. Box 187, Manvel, TX 77578.	August 26, 2010	480076
Tarrant	City of North Richland Hills (10–06–1011P).	August 4, 2010; August 11, 2010; *The Fort Worth Star-Telegram*.	The Honorable Oscar Trevino, Mayor, City of North Richland Hills, 7301 Northeast Loop 820, North Richland Hills, TX 76180.	July 28, 2010	480607
Comal	City of Schertz (09–06–3497P).	August 23, 2010; August 30, 2010; *The Daily Commercial Recorder*.	The Honorable Harold D. Baldwin, Mayor, City of Schertz, 1400 Schertz Parkway, Schertz, TX 78154.	August 13, 2010	480269
Tarrant	City of Watauga (09–06–3519P).	June 8, 2010; June 15, 2010; *The Fort Worth Star-Telegram*.	The Honorable Henry Jeffries, Mayor, City of Watauga, 7105 Whitley Road, Watauga, TX 76148.	October 13, 2010	480613
Collin	City of Wylie (10–06–1838P).	August 25, 2010; September 1, 2010; *The Wylie News*.	The Honorable Eric Hogue, Mayor, City of Wylie, 2000 State Highway 78 North, Wylie, TX 75098.	December 30, 2010	480759

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: December 3, 2010.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–32899 Filed 12–29–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1146]

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the Base (1% annual-chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

DATES: These modified BFEs are currently in effect on the dates listed in the table below and revise the Flood Insurance Rate Maps (FIRMs) in effect prior to this determination for the listed communities.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Deputy Federal Insurance and Mitigation Administrator reconsider the changes. The modified BFEs may be changed during the 90-day period

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

SUPPLEMENTARY INFORMATION: The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based on knowledge of changed conditions or new scientific or technical data.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The changes in BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act. This interim rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This interim rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This interim rule involves no policies that have federalism implications under Executive Order 13132, Federalism.

Executive Order 12988, Civil Justice Reform. This interim rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Alabama: Cullman ...	City of Cullman (10–04–0559P).	June 1, 2010; June 8, 2010; *The Cullman Times.*	The Honorable Max A. Towson, Mayor, City of Cullman, 204 2nd Avenue, Cullman, AL 35055.	October 6, 2010	010209
Colorado:					
Gunnison	City of Gunnison (09–08–0466P).	June 10, 2010; June 17, 2010; *The Gunnison Country Times.*	The Honorable Stu Ferguson, Mayor, City of Gunnison, 201 West Virginia Avenue, Gunnison, CO 81230.	October 15, 2010	080080
Gunnison	Unincorporated areas of Gunnison County (09–08–0466P).	June 10, 2010; June 17, 2010; *The Gunnison Country Times.*	The Honorable Paula Swenson, Chairperson, Gunnison County Board of Commissioners, 200 East Virginia Avenue, Suite 104, Gunnison, CO 81230.	October 15, 2010	080078
Weld	Town of Miliken (09–08–0927P).	June 18, 2010; June 25, 2010; *The Tribune.*	The Honorable L. Jane Lichtfuss, Mayor, Town of Milliken, P.O. Box 290, Milliken, Colorado 80543.	October 25, 2010	080187

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Weld	Unincorporated areas of Weld County (09–08–0927P).	June 18, 2010; June 25, 2010; *The Tribune*.	The Honorable Douglas Rademacher, Chairman, Weld County Board of Commissioners, P.O. Box 758, Greeley, CO 80632.	October 25, 2010	080266
Florida: Bay	City of Panama City (10–04–2741P).	June 25, 2010; July 2, 2010; *The News-Herald*.	The Honorable Gayle Oberst, Mayor, City of Panama City Beach, 110 South Arnold Road, Panama City Beach, FL 32413.	November 2, 2010	120013
Nevada:					
Clark	Unincorporated areas of Clark County (09–09–2398P).	June 10, 2010; June 17, 2010; *Las Vegas Review-Journal*.	The Honorable Rory Reid, Chair, Clark County Board of Commissioners, 500 South Grand Central Parkway, Las Vegas, NV 89106.	June 28, 2010	320003
Clark	Unincorporated areas of Clark County (09–09–3102P).	June 10, 2010; June 17, 2010; *Las Vegas Review-Journal*.	The Honorable Rory Reid, Chair, Clark County Board of Commissioners, 500 South Grand Central Parkway, Las Vegas, NV 89106.	October 15, 2010	320003
Clark	Unincorporated areas of Clark County (10–09–1718P).	June 24, 2010; July 1, 2010; *Las Vegas Review-Journal*.	The Honorable Rory Reid, Chair, Clark County Board of Commissioners, 500 South Grand Central Parkway, Las Vegas, NV 89106.	June 16, 2010	320003
North Carolina:					
Currituck	Unincorporated areas of Currituck County (09–04–5228P).	May 21, 2010; May 28, 2010; *The Daily Advance*.	Mr. Daniel F Scanlon II, Currituck County Manager, 153 Courthouse Road, Currituck, NC 27929.	May 11, 2010	370078
South Carolina:					
Richland	Unincorporated areas of Richland County (09–04–2521P).	May 28, 2010; June 4, 2010; *The Columbia Star*.	The Honorable Paul Livingston, Richland County Council Chairman, 2020 Hampton Street, 2nd Floor, Columbia, SC 29202.	October 4, 2010	450170

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: December 3, 2010.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–32902 Filed 12–29–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1150]

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the Base (1% annual-chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

DATES: These modified BFEs are currently in effect on the dates listed in the table below and revise the Flood Insurance Rate Maps (FIRMs) in effect prior to this determination for the listed communities.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Deputy Federal Insurance and Mitigation Administrator reconsider the changes. The modified BFEs may be changed during the 90-day period.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

SUPPLEMENTARY INFORMATION: The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based on knowledge of changed conditions or new scientific or technical data.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The changes in BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act. This interim rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental

impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This interim rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This interim rule involves no policies that have federalism implications under Executive Order 13132, Federalism.

Executive Order 12988, Civil Justice Reform. This interim rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Alabama: Houston ...	City of Dothan (10–04–5284P).	July 9, 2010; July 16, 2010; *Dothan Eagle*.	The Honorable Mike Schmitz, Mayor, City of Dothan, P.O. Box 2128, Dothan, AL 36302.	November 15, 2010	010104
Arizona: Navajo	City of Show Low (09–09–2789P).	July 9, 2010; July 16, 2010; *White Mountain Independent*.	The Honorable Rick Fernau, Mayor, City of Show Low, 550 North 9th Place, Show Low, AZ 85901.	June 28, 2010	040069
Arizona: Yavapai	Unincorporated areas of Yavapai County (10–09–2672P).	July 9, 2010; July 16, 2010; *The Daily Courier*.	Mr. Chip Davis, Chairman, Yavapai County Board of Supervisors, 1015 Fair Street, Prescott, AZ 86305.	November 15, 2010	040093
California: Merced	City of Merced (10–09–0548P).	July 9, 2010; July 16, 2010; *Merced Sun-Star*.	The Honorable Bill Spriggs, Mayor, City of Merced, 678 West 18th Street, Merced, CA 95340.	November 15, 2010	060191
Sacramento	City of Sacramento (10–09–0525P).	July 9, 2010; July 16, 2010; *The Sacramento Bee*.	The Honorable Kevin Johnson, Mayor, City of Sacramento, 915 I Street, 5th Floor, Sacramento, CA 95814.	November 15, 2010	060266
San Bernardino	City of Colton (09–09–2788P).	July 9, 2010; July 16, 2010; *San Bernardino Bulletin*.	The Honorable Kelly J. Chastain, Mayor, City of Colton, 650 North La Cadena Drive, Colton, CA 92324.	November 15, 2010	060273
San Bernardino	City of San Bernardino (09–09–2788P).	July 9, 2010; July 16, 2010; *San Bernardino Bulletin*.	The Honorable Patrick J. Morris, Mayor, City of San Bernardino, 300 North D Street, San Bernardino, CA 92418.	November 15, 2010	060281
Santa Barbara ..	Unincorporated areas of Santa Barbara County (10–09–1185P).	July 9, 2010; July 16, 2010; *Santa Barbara News-Press*.	The Honorable Janet Wolf, Chair, Santa Barbara County Board of Supervisors, 105 East Anapamu Street, Santa Barbara, CA 93101.	June 29, 2010	060331
Santa Clara	Unincorporated areas of Santa Clara County (09–09–2556P).	June 30, 2010; July 7, 2010; *Santa Clara Weekly*.	The Honorable Ken Yeager, Chairperson, Santa Clara County Board of Supervisors, 70 West Hedding Street, 10th Floor, San Jose, CA 95110.	June 23, 2010	060337
Ventura	City of Simi Valley (10–09–2783P).	July 9, 2010; July 16, 2010; *The Ventura County Star*.	The Honorable Paul Miller, Mayor, City of Simi Valley, 2929 Tapo Canyon Road, Simi Valley, CA 93063.	November 15, 2010	060421
Florida: Miami-Dade	City of Sunny Isles Beach (10–04–4666P).	July 9, 2010; July 16, 2010; *Miami Daily Business Review*.	The Honorable Norman S. Edlecup, Mayor, City of Sunny Isles Beach, 18070 Collins Avenue, Sunny Isles Beach, FL 33160.	June 30, 2010	120688
Orange	City of Orlando (10–04–0789P).	May 20, 2010; May 27, 2010; *Orlando Weekly*.	The Honorable Buddy Dyer, Mayor, City or Orlando, P.O. Box 4990, Orlando, FL 32802.	September 24, 2010	120186
Polk	City of Winter Haven (10–04–1058P).	June 4, 2010; June 11, 2010; *News Chief*.	The Honorable Jeff Potter, Mayor, City of Winter Haven, 451 3rd Street Northwest, Winter Haven, FL 33881.	October 12, 2010	120271
Sumter	Unincorporated areas of Sumter County (10–04–1900P).	July 22, 2010; July 29, 2010; *Sumter County Times*.	Mr. Doug Gilpin, Chairman, Sumter County Board of Commissioners, 910 North Main Street, Bushnell, FL 33513.	November 26, 2010	120296
Nevada: Clark	City of Las Vegas (10–09–1223P).	July 1, 2010; July 8, 2010; *Las Vegas Review-Journal*.	The Honorable Oscar B. Goodman, Mayor, City of Las Vegas, City Hall, 10th Floor, 400 Stewart Avenue, Las Vegas, NV 89101.	June 22, 2010	325276
New York: Niagara ..	Town of Cambria (07–02–0919P).	October 18, 2007; October 25, 2007; *The Niagara Gazette*.	The Honorable Wright H. Ellis, Cambria Town Board Supervisor, 4160 Upper Mountain Road, Sanborn, NY 14132.	January 24, 2008	360499
North Carolina: Catawba	City of Conover (10–04–2641P).	July 7, 2010; July 14, 2010; *The Observer News-Enterprise*.	The Honorable Lee E. Moritz, Jr., Mayor, City of Conover, P.O. Box 549, Conover, NC 28613.	July 30, 2010	370053

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Catawba	City of Newton (10–04–2641P).	July 7, 2010; July 14, 2010; *The Observer News-Enterprise*.	The Honorable Robert A. Mullinax, Mayor, City of Newton, 401 North Main Avenue, Newton, NC 28658.	July 30, 2010	370057
Tennessee:					
Knox	Unincorporated areas of Knox County (10–04–1555P).	July 9, 2010; July 16, 2010; *Knoxville News-Sentinel*.	The Honorable Mike Ragsdale, Knox County Mayor, 400 Main Street, Suite 615, Knoxville, TN 37902.	June 30, 2010	475433
Shelby	Town of Collierville (10–04–1188P).	June 24, 2010; July 1, 2010; *The Collierville Herald*.	The Honorable Stan Joyner, Mayor, Town of Collierville, 500 Poplar View Parkway, Collierville, TN 38017.	June 17, 2010	470263
Utah: Washington	City of Washington (10–08–0519P).	July 9, 2010; July 16, 2010; *The Spectrum*.	The Honorable Kenneth Neilson, Mayor, City of Washington, 111 North 100 East, Washington, UT 84780.	November 15, 2010	490182
Wisconsin: Dane	City of Madison (10–05–3876P).	July 9, 2010; July 16, 2010; *Wisconsin State Journal*.	The Honorable Dave Cieslewicz, Mayor, City of Madison, 210 Martin Luther King, Jr. Boulevard, City-County Building, Room 403, Madison, WI 53703.	July 30, 2010	550083

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: December 3, 2010.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–32903 Filed 12–29–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 158

[Docket No. HHS–OS–2010–0026]

RIN 0950–AA06

Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the Patient Protection and Affordable Care Act; Corrections to the Medical Loss Ratio Interim Final Rule With Request for Comments

AGENCY: Office of Consumer Information and Insurance Oversight (OCIIO), HHS.

ACTION: Correction of interim final rule with request for comments.

SUMMARY: This document corrects technical errors that appeared in the interim final rule with request for comments that appeared in the December 1, 2010 **Federal Register** (FR Doc 2010–29596 (75 FR 74864)) entitled "Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the Patient Protection and Affordable Care Act."

DATES: *Effective Date:* January 1, 2011.

FOR FURTHER INFORMATION CONTACT: Carol Jimenez, (301) 492–4457.

SUPPLEMENTARY INFORMATION:

I. Background

In the interim final rule with request for comments that appeared in the December 1, 2010 **Federal Register** (FR Doc 2010–29596 (75 FR 74864)), there were technical and typographical errors that are identified and corrected in the Correction of Errors section below. The provisions in this correction notice are effective as if they had been included in the December 1, 2010 interim final rule with request for comments entitled "Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements under the Patient Protection and Affordable Care Act."

Accordingly, the corrections are effective January 1, 2011.

II. Summary of Errors

In the regulation text and preamble sections regarding the scope of the regulation, on pages 74921 and 74867, respectively, we are correcting a typographical error by replacing the Public Health Service Act section reference from "2718(b)(A)(ii)" to "2718(b)(1)(A)(ii)".

In the regulation text section regarding exceptions to the general aggregate reporting requirements (§ 158.120(d)) we are making two changes. On page 74922 (§ 158.120(d)(1)), we are replacing the words "State that has jurisdiction over" the certificate of coverage, which was inadvertently used, with "issue State of" the certificate of coverage. The correct phrase was inadvertently deleted and should be corrected.

On page 74923 (§ 158.120(d)(4)), we are inserting the words "non-U.S." before "citizens working in their home country." The words "non-U.S." were inadvertently omitted and are necessary to make clear that this exception does not apply to U.S. citizens working in their home country. We have corrected the preamble section on page 74871 as well to reflect this revision to the text.

On page 74923 (§ 158.140(a)(1)), regarding group conversion charges, we are adding a sentence that we inadvertently omitted. The sentence clarifies paragraph(a)(1) with respect to an issuer that transfers portions of earned premium associated with group conversion privileges between group and individual lines of business in its Annual Statement accounting.

Also on page 74923, we are deleting a phrase from §§ 158.140(a)(2) and (3), regarding reimbursement for clinical services provided to enrollees. The preamble makes clear we intended to adopt the NAIC model regulation language, which does not include this phrase. The phrase had appeared in an earlier draft of the NAIC model regulation, and was correctly deleted from part of the interim final rule, but was inadvertently retained in subparagraphs (a)(2) and (3). Because the preamble makes clear that we intended to adopt the NAIC model regulation language, and the inconsistency between § 158.140(a)(1) and §§ 158.140(a)(2)and(3) creates an ambiguity that may cause confusion, we believe it should be corrected.

On page 74923, in two subsections regarding adjustments to incurred claims (§§ 158.140(b)(2) and (4))we are also replacing the words "may" and "can" with the word "must" to indicate that such adjustments are mandatory. This misuse of "may" and "can" was inadvertent and should be corrected.

We correct an inadvertent omission in § 158.140(b)(5)(i) on page 74924, regarding the choice by affiliated issuers who offer blended rates to choose whether to make an adjustment to each affiliate's incurred claims and activities to improve health care quality to reflect the experience of the issuer with respect to the employer as a whole. We

inadvertently omitted the requirement that if an issuer makes this choice, it must apply it for a minimum of 3 MLR reporting years. This correction is necessary in order to implement this option accurately.

We are also correcting an inadvertent discrepancy between the NAIC model regulation and the interim final rule regarding the treatment of fraud recovery expenses. We are, first, deleting the phrase "other than fraud detection/recovery expenses up to the amount recovered that reduces incurred claims" from § 158.150(c)(8) of the interim final rule on page 74925, because in the NAIC model regulation this language does not apply to expenses that improve health care quality. We are then amending § 158.140(b)(2) of the interim final rule, on page 74923, to add language from the NAIC model regulation regarding fraud recovery expenses. This changes how the fraud recovery amounts in question are labeled. The correction has no substantive effect on the medical loss ratio calculation. We are also amending the preamble to reflect this correction, by deleting two sentences from page 74874 and by changing two phrases on page 74876, and by deleting a parenthetical on page 74875.

On page 74925, we are also redesignating § 158.161 as § 158.162 and revising the section heading from "Reporting of Federal and State licensing and regulatory fees" to "Reporting of Federal and State taxes." On page 74926, we are also revising subparagraph (b)(1)(vii)(B) of this newly redesignated section, to add language that we inadvertently omitted. In addition, we are adding a new § 158.161 to replace text that had been unintentionally deleted, but referenced in the preamble.

We are adding the words "or non-credible" after "partially credible" in § 158.231(c)(2) on page 74928, which were inadvertently omitted. Adding these words is consistent with other sections of the regulation and is consistent with the preamble section on page 74882 regarding this subject.

Finally, we are correcting several typographical errors that appear in Table 2 to § 158.232 and in the preamble regarding Table 2, on pages 74928 and 74882 respectively.

III. Waiver of Proposed Rulemaking and Waiver of the Delay in Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a rule take effect in accordance with § 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). However, we can waive this notice and comment procedure if the Secretary finds, for good cause, that the notice and comment process is impracticable, unnecessary, or contrary to the public interest, and incorporates a statement of the finding and the reasons therefore in the notice.

Section 553(d) of the APA (5 U.S.C. 553(d)) ordinarily requires a 30-day delay in effective date of final rules after the date of their publication in the **Federal Register**. This 30-day delay in effective date can be waived, however, if an agency finds for good cause that the delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued.

This document merely corrects typographical and technical errors made in the MLR interim final rule with request for comments published in the **Federal Register** on December 1, 2010 (FR Doc. 2010–29596) under the Patient Protection and Affordable Care Act, which will be effective on January 1, 2011. The corrections contained in this document are consistent with and do not make substantive changes to the policies adopted in the MLR interim final rule with request for comments. The preamble to the MLR interim final rule with request for comments correctly refers to and discusses the substance of the sections affected by this technical correction and the table of contents correctly refers to the section headings that are the subject of this technical correction. Therefore, we find for good cause that it is unnecessary and would be contrary to the public interest to undertake further notice and comment procedures to incorporate these corrections.

For the same reasons, we are also waiving the 30-day delay in effective date for these corrections. We believe that it is in the public interest to ensure that the Interim Final Rule setting forth Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements accurately states our policies as of the date they take effect. Therefore, we find that delaying the effective date of these corrections beyond the effective date of the MLR interim final rule with request for comments would be contrary to the public interest. In doing so, we find good cause to waive the 30-day delay in the effective date.

IV. Correction of Errors

In 75 FR 74864, FR Doc 2010–29596, published December 1, 2010, make the following corrections:

A. Correction of Errors in the Preamble

1. On page 74867, second column, first full paragraph, line 3, the citation 2718(b)(A)(ii) is corrected to read "2718(b)(1)(A)(ii)".

2. On page 74871, third column, first paragraph, line 20, the term "citizens" is corrected to read "non-U.S. citizens".

3. On page 74874, first column, second full paragraph, line 22 through the second column, line 2, after the phrase "conversion policies.", the second full paragraph is corrected by deleting the two sentences beginning with the phrase "Incurred claims" and ending with the phrase "quality improving activities", without inserting any additional language.

4. On page 74875, third column, last partial paragraph, lines 2 and 3, after the phrase "(3) Fraud Prevention activities" at line 1, the last partial paragraph is corrected by deleting "(beyond the scope of those activities which recover incurred claims)," without inserting any additional language.

5. On page 74876—

a. In the third column—

(1) In the first partial paragraph, lines 9–15 are corrected by deleting the phrase "and fraud recovery activities up to the amount of fraudulent claims recovered", without inserting any additional language.

(2) In the first full paragraph, line 11, the phrase "a quality improving activity" is corrected to read "an adjustment to claims".

6. On page 74882, Table 2, the term "$0" in the first line of the "Deductible" column on the left side of Table 2 is corrected to read "<$2,500".

B. Correction of Errors to the Regulation Text

■ 1. On page 74921, third column, second full paragraph (§ 158.101(b)), line 26, the citation 2718(b)(A)(ii) is corrected to read "2718(b)(1)(A)(ii)".

■ 2. On page 74922, third column, first full paragraph from the bottom of the page (§ 158.120(d)(1)), line 5, the phrase "State that has jurisdiction over" is corrected to read "issue State of".

■ 3. On page 74923—

■ a. In the first column, second full paragraph (§ 158.120(d)(4)), line 8, the term "citizens" is corrected to read "non-U.S. citizens".

■ b. In the second column—

■ (1) In the fourth full paragraph from the bottom of the page (§ 158.140(a)(1)), paragraph (a)(1) is corrected by adding the following sentence at the end of it: "If an issuer transfers portions of earned premium associated with group conversion privileges between group and individual lines of business in its

Annual Statement accounting, these amounts must be added to or subtracted from incurred claims."

■ (2) In the third full paragraph from the bottom of the page (§ 158.140(a)(2)), lines 2 and 3, paragraph (a)(2) is corrected by deleting the phrase "changes in unpaid claims between the prior year's and".

■ (3) In the second full paragraph from the bottom of the page (§ 158.140(a)(3)), lines 1 through 5 are corrected by deleting the phrase "the change in" following "Incurred claims must include" and by deleting the phrase "from the prior year to the current year. Except where inapplicable, the reserve should be" following the phrase "claims incurred but not reported".

■ c. In the third column—

■ (1) In the fifth full paragraph (§ 158.140(b)(2)), line 1, the term "may" is corrected to read "must".

■ (2) After § 158.140(b)(2)(iii), line 20, paragraph (b)(2) is corrected by adding the following paragraph: "(iv) The amount of claims payments recovered through fraud reduction efforts not to exceed the amount of fraud reduction expenses."

■ (3) In the fourth full paragraph from the bottom of the page (§ 158.140(b)(4)), line 1, the term "can" is corrected to read "must".

■ 4. On page 74924, first column, first partial paragraph (§ 158.140(b)(5)(i)), line 14 (immediately following the term "aggregate."), paragraph (b)(5)(i) is corrected by adding the following sentence: "An issuer that chooses to use such an adjustment must use it for a minimum of three MLR reporting years."

■ 5. On page 74925—

■ a. In the first column, third full paragraph (§ 158.150(c)(8)), lines 1 through 4, (after the phrase "Fraud prevention activities"), paragraph (c)(8) is corrected by deleting the phrase ", other than fraud detection/recovery expenses up to the amount recovered that reduces incurred claims".

■ b. In the third column—

■ (1) After the eighth full paragraph (§ 158.160(b)(2)(vi)), lines 31 and 32, the sentence "§ 158.161 Reporting of Federal and State licensing and regulatory fees" is corrected to read "§ 158.162 Reporting of Federal and State taxes".

■ (2) After the eighth full paragraph (§ 158.160(b)(2)(vi)) and before the corrected sentence "§ 158.162 Reporting of Federal and State taxes", on line 31, add the following paragraphs:

"§ 158.161 Reporting of Federal and State licensing and regulatory fees.

■ (a) *Licensing and regulatory fees included.* The report required in § 158.110 must include statutory assessments to defray operating expenses of any State or Federal department, and examination fees in lieu of premium taxes as specified by State law.

■ (b) *Licensing and regulatory fees excluded.* The report required in § 158.110 must include fines and penalties of regulatory authorities, and fees for examinations by any State or Federal departments other than as specified in § 158.161(a) as other non-claims costs, but not as an adjustment to premium revenue."

■ 6. On page 74926, first column, fifth paragraph (§ 158.161(b)(1)(vii)(B)), line 10 is corrected by adding the phrase "made due to a" before the phrase "State based requirement".

■ 7. On page 74928—

■ a. In the first column, third full paragraph (§ 158.231(c)(2)), line 3, the sentence is corrected by adding the phrase "or non-credible" after the phrase "partially credible".

■ b. In the second column, after the third full paragraph (§ 158.232(c)(2)), the term "$2,500" in the first line of the "Health plan deductible" column on the left side of Table 2 is corrected to read "<$2,500".

Dated: December 17, 2010.

Dawn L. Smalls,

Executive Secretary to the Department.

[FR Doc. 2010–32526 Filed 12–29–10; 8:45 am]

BILLING CODE 4150–03–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 10–2280]

Radio Broadcasting Services; Various Locations

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission amends the Table of FM Allotments to unreserved FM allotments that are reserved for noncommercial educational (NCE) use for Channel *272A at Homer, Louisiana, and Channel *260A at Fountain Green, Utah.

DATES: Effective December 30, 2010.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* adopted December 1, 2010, and released December 3, 2010. These amendments are necessary to reflect that Channel 272A at Homer, Louisiana, and Channel 260A at Fountain Green, Utah are no longer reserved for NCE use. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* The Commission will not send a copy of the *Report & Order* in this proceeding pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because the adopted rules are rules of particular applicability.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ As stated in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCASTING SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments, is amended as follows:

■ a. Under Louisiana, the table is amended by removing Channel *272A and by adding Channel 272A at Homer.

■ b. Under Utah, the table is amended by removing Channel *260A and by adding Channel 260A at Fountain Green.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 2010–32466 Filed 12–29–10; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 0907271173–0629–03]

RIN 0648–AY11

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery Off the Southern Atlantic States; Amendment 17B

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement Amendment 17B to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP), as prepared and submitted by the South Atlantic Fishery Management Council (Council). This final rule establishes annual catch limits (ACLs) and accountability measures (AMs) for eight snapper-grouper species in the FMP that are undergoing overfishing, and for black grouper, which was recently assessed and determined to not be undergoing overfishing or overfished; modifies management measures to limit total mortality of those species to the ACL; and adds ACLs, annual catch targets (ACTs), and AMs to the list of management measures that may be amended via the framework process. The intent of this final rule is to address overfishing of eight snapper-grouper species while maintaining catch levels consistent with achieving optimum yield.

DATES: This rule is effective January 31, 2011.

ADDRESSES: Copies of the Final Regulatory Flexibility Analysis (FRFA) and the record of decision may be obtained from Kate Michie, Southeast Regional Office, NMFS, 263 13th Avenue, South, St. Petersburg, FL 33701.

FOR FURTHER INFORMATION CONTACT: Kate Michie, telephone: 727–824–5305.

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery off the southern Atlantic States is managed under the FMP. The FMP was prepared by the Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

On September 22, 2010, NMFS published a notice of availability of Amendment 17B and requested public comment (75 FR 57734). On October 10, 2010, NMFS published a proposed rule for Amendment 17B and requested public comment (75 FR 62488). NMFS approved Amendment 17B on December 21, 2010. This final rule for Amendment 17B implements ACLs and AMs for eight snapper-grouper species undergoing overfishing. The rationale for the measures contained in Amendment 17B is provided in the amendment and in the preamble to the proposed rule and is not repeated here.

Comments and Responses

A total of 175 comments were received on Amendment 17B and the proposed rule, including comments from individuals, State and Federal agencies, environmental organizations, and fishing associations. NMFS received 25 comments of general support and 48 individual comments in general opposition of Amendment 17B, 31 of which specifically oppose the deepwater closure for six deepwater snapper-grouper species. Included in the letters of opposition was a minority report submitted by the five members of the Council who voted against the final approval of Amendment 17B. NMFS also received 85 identical postcards opposing implementation of Amendment 17B, and 8 comments that did not support or oppose Amendment 17B but contained remarks on specific actions contained in the amendment. Additionally, 5 comments were received from environmental organizations, one of which was endorsed by two of the organizations, and one which was endorsed by 30,794 individuals. One State and one Federal agency submitted comments on Amendment 17B, and 2 comments were unrelated to actions contained in Amendment 17B. Of the 175 comments received, 22 contained remarks on the potential economic impacts of Amendment 17B. Specific comments related to the actions contained in the amendment and the rule as well as NMFS'S respective responses, are summarized below.

Comment 1: Several commenters suggested the prohibition on harvest and possession of six deepwater snapper-grouper species beyond 240 feet (73 m) is not necessary, and reductions in incidental harvest of speckled hind and warsaw grouper could be achieved through: (1) A temporary prohibition on commercial harvest and sale of speckled hind and warsaw grouper; (2) responsible fishing methods such as venting fish; (3) a temporary deepwater closure; or (4) seasonal closures.

Response: Commercial sale of speckled hind and warsaw grouper is currently prohibited. NMFS previously considered a Council-approved measure to use venting tools for snapper-grouper species to reduce bycatch mortality caused by barotrauma (injuries sustained in response to the sudden pressure change when brought to the surface from depth), in Amendment 16 to the FMP. The measure requiring the use of venting tools was disapproved based on data indicating the benefits of venting are not clear for all species, and venting could potentially cause harm in some cases if excluded unnecessarily or improperly. NMFS determined that additional guidance is needed to identify species that would benefit from venting to ensure the maximum benefit is provided to these species. If future research on the use of venting tools, and/or any other barotrauma mitigation methods, indicate speckled hind or warsaw grouper would benefit from the required use of such tools or techniques, the Council has the option to consider the issue again in a future amendment.

Implementing the deepwater snapper-grouper closure for any period of time less than year-round could result in incidental harvest and bycatch mortality of speckled hind and warsaw grouper, and could negatively impact efforts to protect South Atlantic speckled hind and warsaw grouper. At its December 2010 meeting, the Council requested a regulatory amendment be prepared to examine new information related to the prohibition on harvest and possession of the six deepwater snapper-grouper species beyond 240 ft (73 m). The regulatory amendment would re-evaluate the deepwater snapper-grouper closure and the new information, and determine if there are more effective measures to reduce bycatch mortality of speckled hind and warsaw grouper. Additionally, a new benchmark stock assessment for speckled hind and warsaw grouper is scheduled to be conducted in 2013. If the results of this new stock assessment indicate some modification to the management measures implemented through Amendment 17B is needed, the Council would make such adjustments as appropriate.

Comment 2: Several commenters stated the prohibition on all bottom fishing beyond 240 ft (73 m) is draconian in nature, and too expansive to protect only two rarely captured snapper-grouper species.

Response: The deepwater snapper-grouper closure proposed in Amendment 17B would not prohibit all bottom fishing beyond 240 ft (73 m). The closure would prohibit the harvest

and possession of six snapper-grouper species that co-occur with specked hind and warsaw grouper including, snowy grouper, blueline tilefish, yellowedge grouper, misty grouper, queen snapper, and silk snapper.

Both speckled hind and warsaw grouper are undergoing overfishing, and the extent to which they are overfished is unknown. These species are extremely vulnerable to overfishing because they are slow growing, long-lived, and change sex from female to male with increasing size and age. These species are not often targeted due to the current bag limits (one of each per vessel per trip), but when they are caught they are likely to suffer release mortality. The incidental catch of speckled hind and warsaw grouper, particularly in deep water where release mortality is high, may be responsible for the continued overfishing of these species. Therefore, the Council determined that a prohibition on the harvest and possession of speckled hind and warsaw grouper, along with their co-occurring species caught in 240 ft (73 m) and greater, was an appropriate action to reduce bycatch mortality of speckled hind and warsaw grouper in depths where depth-related release mortality is very high. Like gag, speckled hind and warsaw grouper are slow growing, long lived, and have similar life histories. Therefore, speckled hind and warsaw grouper may be expected to have similar depth-related bycatch mortality rates to gag. If depth-related mortality of speckled hind and warsaw grouper is similar to gag, release mortality at depths of 240 ft (73 m) would be expected to be greater than 70 percent. The deepwater closure is expected to provide protection to the largest, most fecund fish and help ensure a natural sex ratio into the future. According to the Amendment 17B biological impacts analysis, prohibiting all harvest of deepwater snapper-grouper species beyond 240 ft (73 m) would also protect spawning aggregations.

Comment 3: One commenter stated that NMFS should concentrate efforts on managing other overexploited species such as mutton snapper and yellowtail snapper.

Response: Mutton snapper and yellowtail snapper are among the 73 species in this FMP. Recent assessments indicate that mutton snapper and yellowtail snapper are not overfished and are not experiencing overfishing. The Reauthorized Magnuson-Stevens Act requires that ACLs and AMs be specified for all species undergoing overfishing in 2010 and species not undergoing overfishing in 2011. Speckled hind and warsaw grouper are both undergoing overfishing according to the 2009 Report to Congress on the Status of U.S. Fisheries (and in all previous such Reports to Congress). Therefore, NMFS is required to establish ACLs at levels to end and prevent overfishing of speckled hind and warsaw grouper, along with management measures to limit harvest levels to the ACL. In the case of speckled hind and warsaw grouper, the ACL is zero, and the deep water closure is intended to reduce depth-related bycatch mortality to reduce the probability that overfishing will occur. The Council is currently developing a Comprehensive ACL Amendment, which would specify ACLs and AMs for mutton snapper and yellowtail snapper.

Comment 4: One commenter stated the cumulative impact of the recent regulations approved through Amendment 17A to the FMP and the regulations contained in this final rule are overly complex for commercial and for-hire fishermen to abide by.

Response: The Magnuson-Stevens Act, as reauthorized in 2006, mandates the Council and NMFS establish ACLs and AMs for species undergoing overfishing by 2010. Section 303(a)(15) of the Magnuson-Stevens Act states, in relevant part, that any FMP which is prepared by any Council "shall establish a mechanism for specifying annual catch limits in the plan * * * implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability." Therefore, in order to meet these mandates, several recent regulatory changes have been made in the snapper-grouper fishery. NMFS strives to minimize complexity in its regulations, but must meet statutory mandates such as the requirements for ACLs and AMs.

Comment 5: Several commenters stated the data upon which the prohibition on the harvest and possession of the six deepwater snapper-grouper species beyond 240 ft (73 m) is based is out of date, insufficient, and/or incorrect, and is not the best available science. One commenter inquired if the data used to inform the deepwater closure action was subject to an independent review. Additionally, two commenters cite the recently published **Federal Register** notice that denies a petition to list warsaw grouper as threatened or endangered under the Endangered Species Act (ESA) as based on a lack of substantial scientific or commercial information, and implied that the speckled hind and warsaw grouper management measures in Amendment 17B are not based on adequate scientific information.

Response: The intent of the action to prohibit the harvest of six deepwater species is to reduce bycatch mortality of speckled hind and warsaw grouper. Speckled hind and warsaw grouper are undergoing overfishing, and therefore, action must be taken to ensure overfishing is ended and does not occur. The Southeast Fisheries Science Center (SEFSC) certified, in a memorandum dated May 19, 2010, that Amendment 17B is based upon the best available scientific information. At its December 2010 meeting, the Council requested that a regulatory amendment be prepared to examine new information related to the prohibition on the harvest and possession of the six deepwater snapper-grouper species. The regulatory amendment would evaluate the new information and the deepwater snapper-grouper closure and determine if there are more effective measures to reduce bycatch mortality of speckled hind and warsaw grouper.

The petition to list speckled hind and warsaw grouper as endangered or threatened was denied by NMFS under the ESA because "the petition does not present substantial scientific or commercial information indicating the petition action may be warranted" (75 FR 59690, September 28, 2010). This means that warsaw grouper was not determined to be endangered (*i.e.,* is in danger of extinction throughout all or a significant portion of its range) or threatened (*i.e.,* is likely to become endangered within the foreseeable future throughout all or a significant portion of its range). The negative finding on the ESA petition does not necessarily mean that inadequate scientific information was used in Amendment 17B. Under the Magnuson-Stevens Act, NMFS must use the best scientific information available when establishing management measures, including ACLs and AMs.

Comment 6: Several commenters are concerned that the prohibition on harvest and possession of six deepwater snapper-grouper species beyond a depth of 240 ft (73 m) will lead to increased incidences of release mortality.

Response: Prohibiting the harvest and possession of species that are most often caught with speckled hind and warsaw grouper in deeper waters would reduce the incentive to target those co-occurring species. As a result, a reduction in depth-related bycatch mortality of speckled hind and warsaw grouper is expected.

Comment 7: Several commenters feel the deepwater closure in Amendment

17B should only apply to the commercial sector.

Response: In the northern portion of the Council's area of jurisdiction, fisheries and fishery components in depths greater than 240 ft (73 m) are primarily prosecuted by the commercial sector. However, the Council chose to include the recreational sector in the prohibition on harvest and possession of snowy grouper, blueline tilefish, yellowedge grouper, misty grouper, queen snapper, and silk snapper beyond 240 ft (73 m) because recreational fishing in deeper waters is common in the southern area of the Council's jurisdiction *i.e.,* southeast Florida and the Florida Keys, the 240-ft (73-m) depth contour is close to shore. Because deep water is much more accessible to recreational fishermen off southern Florida, recreational fishermen are more likely to incidentally capture speckled hind and warsaw grouper in depths where these fish are more likely to die as a result of barotrauma-related injuries.

Comment 8: One commenter stated the lack of warsaw grouper landings data was due to fishermen misidentifying warsaw grouper as snowy grouper.

Response: It is unlikely warsaw grouper landings are significantly underreported due to misidentification with snowy grouper. Snowy grouper and warsaw grouper do share some common physical characteristics, however, these species also have several distinguishing characteristics that make it possible to easily identify both species. When fishermen submit species landings information to NMFS, identification accuracy is not expected to be 100 percent, and this is taken into consideration when conducting stock assessments.

Comment 9: One commenter asked how NMFS will determine when the speckled hind and warsaw grouper stocks are rebuilt, if fishing for them is prohibited.

Response: The overfished status of speckled hind and warsaw grouper is unknown. Therefore, a rebuilding plan is not required. The deepwater closure is intended to reduce depth-related bycatch mortality to help end overfishing of speckled hind and warsaw grouper. Prohibiting harvest of one or more species in a certain area does not prevent the collection of scientific information on those species. The SEFSC conducts fishery-independent studies and surveys to measure the overall abundance of fish stocks in the South Atlantic. In Amendment 17A to the FMP, the Council required implementation of a fishery-independent monitoring program. This program would continue the long-term data set that already exists for snapper-grouper species from sampling programs such as the Southeast Monitoring Assessment and Prediction program, and the Marine Resources Monitoring Assessment and Prediction program in the South Atlantic, which monitor fish stocks in depths shallower and deeper than 240 ft (73 m), and these programs should continue to provide information on warsaw grouper and speckled hind.

Fishery-dependent data may also be collected during a period when certain species may not be landed. These data may be collected through the Cooperative Research Program (CRP), which is a competitive Federal assistance program that funds projects seeking to increase and improve the working relationship between researchers from NMFS, State fishery agencies, universities, and fishermen. The intent of the CRP in the Southeast Region is to utilize the collective experience of fishermen and scientists to advise fishery managers of best fishery management practices based on fishing experience and sound scientific research procedures. Other fishery-dependent data collection sources include the Marine Recreational Fisheries Statistical Survey (MRFSS) (now part of the Marine Recreational Information Program (MRIP)), commercial logbooks, headboat logbooks, observer data, the Trip Interview Program, and dealer reported landings.

Comment 10: After the Council voted to approve Amendment 17B for Secretarial review, the five members of the Council who voted against the final approval of Amendment 17B submitted a minority report to NMFS, dated March 23, 2010. This report is endorsed by one fishing organization and one State agency. The minority report outlines the dissenting Council members' opposition to the deepwater closure for the six co-occurring snapper-grouper species. Specifically, these Council members oppose the inclusion of blueline tilefish in the list of snapper-grouper species prohibited beyond 240 ft (73 m). The report states the deepwater closure was based on inadequate assessments, does not include rebuilding plans for speckled hind and warsaw grouper, and does not consider and properly analyze the impacts of the prohibition on the sale of bag limit-caught snapper-grouper. The report also notes a lack of data on the range where speckled hind and warsaw grouper are found, particularly off the coast of North Carolina. The report mentions that the species most commonly caught with speckled hind are vermilion snapper, red grouper, and scamp, which are not deepwater species. The minority report suggests that other alternatives besides the deep water closure should have been considered by the Council, including allowing fishing for species other than speckled hind and warsaw grouper on various well-known ship wrecks or other potential sites and closing only a percentage of the most productive bottom habitat. The minority report also lists fish stocks that have been successfully rebuilt or are currently rebuilding without the utilization of large area closures for fishery management, namely Atlantic king and Spanish mackerel, greater amberjack, and golden tilefish.

Response: Speckled hind and warsaw grouper have not undergone a recent stock assessment. However, the 2009 Report to Congress on the Status of U.S. Fisheries states that both speckled hind and warsaw grouper are undergoing overfishing and their overfished status is unknown. The stock status determination for these two species included in the Report to Congress is the best scientific information available for speckled hind and warsaw grouper. Therefore, NMFS is required to establish ACLs for these species at levels that can end, as well as prevent, overfishing and implement management measures to limit harvest levels of these species to the ACL. Since the overfished status of speckled hind and warsaw grouper is currently unknown, rebuilding plans are not required at this time. To address overfishing of speckled hind and warsaw grouper, the Council's Scientific and Statistical Committee (SSC) recommended an Acceptable Biological Catch (ABC) of zero for both species based on landed catch, rather than total removals. Subsequent to the SSC ABC recommendation, the Council specified an ACL of zero for speckled hind and warsaw grouper.

Speckled hind and warsaw grouper are extremely vulnerable to overfishing because they are slow growing, long-lived, change sex from female to male with increasing size and age, and occur in deep water where release mortality is very high. The prohibition on the harvest and possession of six deepwater snapper-grouper species, including blueline tilefish, that co-occur with speckled hind and warsaw grouper is expected to reduce the incidental take of speckled hind and warsaw grouper in water depths where survival of released fish is low. Of the six species for which harvest and possession would be prohibited beyond 240 ft (73 m), commercial and recreational landings

are highest for blueline tilefish and snowy grouper, which are often caught together in the same location and during the same trip. Speckled hind and warsaw grouper can be incidentally caught while blueline tilefish and other deepwater species are being targeted. This incidental catch, if allowed to continue, may contribute to the continued overfishing of speckled hind and warsaw grouper. Furthermore, recent snowy grouper regulations resulted in effort shifts from snowy grouper to blueline tilefish, which could increase the probability of snowy grouper bycatch after the 100-lb (45-kg) trip limit or quota for snowy grouper is met, in addition to a potential for increased bycatch of speckled hind and warsaw grouper. If blueline tilefish were eliminated from the list of prohibited deepwater species, incidental take of speckled hind and warsaw grouper could persist in that portion of the snapper-grouper fishery; therefore, the Council determined it would be prudent to retain blueline tilefish in the list of prohibited species beyond a depth of 240 ft (73 m).

The minority report includes an examination of trip ticket information from vessels fishing for blueline tilefish north of Cape Hatteras, North Carolina, which suggests blueline tilefish can be captured without resultant incidental catch of speckled hind and warsaw grouper. At its December 2010 meeting, the Council considered this new information, and voted to request the preparation of a regulatory amendment to examine the new information and to determine if there are more effective management measures that could be implemented to reduce the depth-related bycatch mortality of speckled hind and warsaw grouper.

The Magnuson-Stevens Act requires the establishment of ACLs and AMs. In the comments and responses section of the final rule implementing the National Standard 1 Guidelines, NMFS states, "ACLs must be implemented using the best data and information available * * * NMFS believes that Councils must implement the best ACLs possible with the existing data" (74 FR 3178, January 16, 2009). As required by the Magnuson-Stevens Act, the Council has developed ACLs and AMs for speckled hind and warsaw grouper using the best scientific information available during the amendment development process.

The minority report points out that the species most commonly caught with speckled hind are vermilion snapper, red grouper, and scamp, none of which are deepwater species. Juvenile speckled hind and warsaw grouper are found in depths less than 240 ft (73 m) and are often caught with species such as vermilion snapper, red grouper, scamp, and others. However, the Council chose not to prohibit catch in shallower water because it is likely that some portion of released speckled hind and warsaw grouper would survive the trauma of capture. Like gag, speckled hind and warsaw grouper are slow growing, long lived, and have similar life histories. Therefore, they may be expected to have similar bycatch mortality rates to gag. If release mortality rates of speckled hind and warsaw grouper are similar to those published for gag, release mortality at depths greater than 240 ft (73 m) would be expected to be greater than 70 percent. Based on this assumption, the Council determined the most effective method of reducing the incidence of bycatch related mortality in deepwater was to prohibit the harvest and possession of the species that co-occur with speckled hind and warsaw grouper beyond 240 ft (73 m).

During the development process for Amendment 17B, alternatives such as allowing fishing for species other than speckled hind and warsaw grouper on various well-known ship wrecks or other potential sites, and closing only a percentage of the most productive bottom habitat, were not proposed by Council members and thus were not included in the document for analysis. The approval and implementation of the prohibition on harvest and possession of six deepwater snapper-grouper species beyond 240 ft (73 m) does not preclude the Council from proposing future action to modify this prohibition if scientific information indicates it is appropriate to do so. Re-addressing the deepwater closure will be accomplished through a regulatory amendment proposed by the Council at its December 2010 meeting.

The minority report states the impact of the prohibition on bag-limit sales of snapper-grouper implemented through Amendment 15B to the FMP was not properly analyzed in Amendment 17B because the impact of sales from only snapper-grouper fishermen with Federal permits was not determined. The impacts of the bag limit sale prohibition were analyzed and documented by NMFS in the supporting documentation for Amendment 15B, including the National Environmental Policy Act document, the Regulatory Impact Review, and the Regulatory Flexibility Analysis. The analysis conducted for Amendment 15B to the FMP used State trip ticket data because at the time the analysis was conducted, fishermen that did not possess a Federal permit for snapper-grouper could still sell their bag limit caught fish. The analysis conducted for Amendment 17B, however, did not use trip ticket data and used only Federal logbook data, because at that time the prohibition on bag limit sales had been implemented. As such, the relevant economic analysis does not include bag limit sales information and was conducted correctly.

Different actions are needed to end overfishing of species depending on their life history and habitat requirements. Snapper-grouper species such as speckled hind and warsaw grouper are long-lived and slow growing and require more stringent management measures, such as area closures, to end overfishing. King mackerel and Spanish mackerel are not as long lived nor do they suffer the high release mortality rates of speckled hind and warsaw grouper. Therefore, management measures that would be needed to end overfishing of mackerel species may not be as onerous as those that would be needed for long-lived species found in deep water.

Golden tilefish has never been determined to be overfished and it will not be known if actions taken to end overfishing of golden tilefish were successful until the stock is assessed again in 2011. Greater amberjack have never been determined to be overfished or experienced overfishing.

Comment 11: One commenter questioned why co-occurring species deeper than 240 ft (73 m) would be prohibited to protect speckled hind and warsaw grouper when these species are not frequently caught in these depths. The species most commonly caught along with speckled hind are vermilion snapper, red grouper, and scamp, none of which are considered by the Council to be deepwater species. Since speckled hind predominately live inshore of 40 fathoms and warsaw grouper are common inside of 100 ft (31 m), at least off the Florida coast, NMFS should consider closing the entire EEZ.

Response: The Council is aware that speckled hind and warsaw grouper are currently not commonly caught by fishermen and that the inshore shelf edge in 160 ft (49 m) is the area where juveniles are most abundant. However, adults of these species do occur in deep water where release mortality is extremely high and are incidentally captured when fishermen target co-occurring species. Therefore, the Council determined that prohibiting the harvest of species that co-occur with warsaw grouper and speckled hind in water deeper than 240 ft (73 m) could help reduce bycatch mortality, particularly as population biomass increases and more adults occur in

deeper water. Speckled hind and warsaw grouper occur in shallower water as juveniles with vermilion snapper and others. This is their zone of greatest abundance where some level of survival of released fish would be expected to occur. Therefore, the Council did not feel it was necessary to close the harvest of co-occurring species in depths less than 240 ft (73 m). As noted previously, speckled hind and warsaw grouper share similar biological characteristics to gag. Therefore, if depth related bycatch is similar to gag, in depths greater than 240 ft (73 m), release mortality would be expected to be greater than 70 percent. By prohibiting the harvest and possession of co-occurring species, in addition to prohibiting all harvest and possession of speckled hind and warsaw grouper, fishing mortality of speckled hind and warsaw grouper is expected to decrease and protection would be provided to adult fish with the greatest spawning potential.

Comment 12: One commenter feels the deepwater closure will result in an effort shift to the black sea bass, gray triggerfish, and vermilion snapper components of the snapper-grouper fishery, and lead to more out-of-state fishing by southern vessels in waters off North Carolina.

Response: Effort shifts resulting from the deepwater closure are difficult to predict. Negative biological impacts of effort shifts may be mitigated by ACLs and AMs in Amendment 17B and the Comprehensive ACL Amendment, which are designed to prevent the ACL from being exceeded or correct for ACL overages should they occur. However, negative social and economic effects could result from ACLs being met more quickly due to effort shifts.

The commercial sector for vermilion snapper is currently managed under a quota split into two seasons, and this amendment will specify the same split season for commercial ACLs, as well as specify a recreational ACL. Additionally, trip limits for vermilion snapper are being considered by the Council in Regulatory Amendment 9 to the FMP. Therefore, effort shift into the vermilion snapper portion of the fishery is unlikely to have negative biological impacts on vermilion snapper because the commercial harvest and sale of vermilion snapper would be prohibited when the ACLs are projected to be met.

The Council is developing Amendment 18A to the FMP, which includes actions to: Limit the number of black sea bass pots allowed per vessel; limit the number of participants in the black sea bass component of the snapper-grouper fishery; and require that pots be returned to port at the completion of a fishing trip. If approved, these controls should limit effort shift into the black sea bass component of the snapper-grouper fishery, minimizing the occurrence of black sea bass pot "ghost fishing" on snapper-grouper species, as well as interactions with protected species.

Gray triggerfish are included within the 20 snapper-grouper aggregate bag limit for the recreational sector, and there is a 12-inch (30.5-cm) total length size limit in Federal waters off the east coast of Florida for the commercial and recreational sectors. The Comprehensive ACL Amendment, currently under development, would establish an ACL for gray triggerfish. This ACL would be associated with an AM intended to maintain harvest at or below the specified ACL. Therefore, if the Comprehensive ACL Amendment is implemented, a mechanism for controlling harvest of gray triggerfish would be established and could mitigate effort shifts that may result from actions contained in Amendment 17B. The deepwater closure could result in some amount of permanent and/or temporary effort shifting, however, the number of vessels that may or may not shift effort to other fisheries in response to the deepwater area closure cannot be predicted.

Comment 13: One commenter states the Council discussion concerning warsaw grouper and speckled hind was inadequate considering the scope of the deepwater closure being implemented through Amendment 17B.

Response: The Council discussed management measures for speckled hind and warsaw grouper beginning in June 2008. Since that time, the Council has met seven times and discussed actions in Amendment 17B before taking final action to approve the amendment. At its December 2010 meeting, the Council requested a regulatory amendment be prepared to examine new information related to the prohibition on harvest and possession of the six deepwater snapper-grouper species and evaluate the new information to determine if the deepwater closure in certain areas of the South Atlantic is still necessary.

Comment 14: One commenter states that the Amendment 17B cumulative impacts assessment of the role of the marine protected areas (MPAs) implemented through Amendment 14 to the FMP is inaccurate, and the ancillary impacts of the Oculina Experimental Closed Area for speckled hind and warsaw grouper were not mentioned in Amendment 17B.

Response: The effective date of the eight MPAs implemented through Amendment 14 to the FMP was February 13, 2009. Because these MPAs have been in place for a short period of time, little is known about their potential to positively impact snapper-grouper species beyond the basic protections afforded to habitats in these MPAs, and subsequent benefits realized by local fish populations. It is expected that the MPAs may help, to some extent, to protect a portion of the population (including spawning aggregations) and habitat of long-lived, slow growing, deepwater snapper-grouper species (speckled hind, snowy grouper, warsaw grouper, yellowedge grouper, misty grouper, golden tilefish, and blueline tilefish) from directed fishing pressure to achieve a more natural sex ratio, age, and size structure within the MPAs. Because the snapper-grouper species most affected by the MPAs and the Oculina closed area are long-lived, quantifiable biological benefits may not be measureable in the short-term. However, future studies are expected to analyze the affects of the MPAs and the Oculina closure on snapper-grouper species. Over time, continued research will provide further insight on the ecological benefits of conservation areas.

Comment 15: One commenter states that snowy grouper is the main driver for deepwater snapper-grouper fishing and past regulations to reduce snowy grouper harvest have not been considered in Amendment 17B as they relate to effort-reduction in the deepwater portion of the snapper-grouper fishery.

Response: Effort reductions resulting from previously implemented snowy grouper regulations were taken into account when analyzing the biological and socioeconomic impacts of the deepwater closure. As required under NEPA, Amendment 17B analyzes the impacts of the status quo alternative for each action, including the action to prohibit the harvest and possession of six deepwater species beyond 240 ft (73 m). The baseline condition used in the status quo (no action) analysis for the action to prohibit the harvest and possession of six deepwater species beyond 240 ft (73 m) included the snowy grouper harvest restrictions implemented through Amendment 13C to the FMP. These restrictions included a recreational bag limit for snowy grouper of one per person per day, a commercial trip limit of 100 lb (45 kg) gutted weight, and a reduced commercial quota of 84,000 lb (38,102 kg) gutted weight. Amendment 15A to the FMP specified an ABC for snowy

grouper that is consistent with the rebuilding plan for the species.

Comment 16: One commenter is opposed to reducing the recreational ACL for snowy grouper to 523 fish, and favors allowing existing regulations to rebuild the stock.

Response: The Magnuson-Stevens Act requires that ACLs and AMs be specified in 2010 for species undergoing overfishing. The Council chose to base the ACL for snowy grouper on the current total allowable catch (TAC). The Council also chose to specify sector ACLs for snowy grouper rather than one ACL for the commercial and recreational sectors. The Council determined the recreational sector ACL to be 523 fish, based on landings data from 2005–2008. Because this ACL is quite small, and recreational landings data is associated with a high degree of uncertainty, the AM will compare a 3-year running average of recreational landings to the recreational ACL. The AMs established for snowy grouper are intended to maintain harvest levels at or below the specified ACLs.

Comment 17: One commenter recommended additional inshore seasonal closures in the Florida Keys area to help rebuild overfished stocks.

Response: The Florida Keys area has an extensive network of marine sanctuaries, where fishing is limited or prohibited, and there is the offshore East Hump MPA, which was established in Amendment 14 to the FMP. The Council has not requested consideration of inshore area closures in the Florida Keys to address overfishing of the species addressed in Amendment 17B.

Comment 18: Several commenters state that aggregating the gag, black grouper, and red grouper ACLs, and the associated AMs is not an appropriate method for managing these stocks. One commenter emphasizes the fact that black grouper is no longer considered to be undergoing overfishing or overfished, further justifying not including it in the aggregate ACL. One commenter recommended developing a catch share program for these species in order to ensure all commercial sector participants are given the opportunity to harvest them.

Response: Amendment 16 established a commercial AM for red grouper and black grouper through a prohibition on the harvest of all shallow-water snapper-grouper species that would be effective when the commercial ACL for gag (a biologically similar species) is projected to be met each year. Because black grouper and red grouper had not been recently assessed at the time Amendment 17B was developed, and the Council was aware that a new stock assessment for both species was forthcoming, the Council chose to establish an aggregate ACL that includes gag, red grouper, and black grouper, based on expected catch resulting from management measures implemented through Amendment 16 to the FMP.

The red grouper and black grouper Southeast Data, Assessment, and Review (SEDAR) stock assessment (SEDAR 19) was completed in 2010, after Amendment 17B had been submitted to NMFS for Secretarial review. The assessment indicated black grouper is not overfished and is not undergoing overfishing, and red grouper is overfished and undergoing overfishing. Therefore, a new FMP amendment is currently under development to establish a rebuilding plan and assign an individual ACL and AM for red grouper. The black grouper stock assessment was not completed until after Amendment 17B was submitted to the Secretary for review. Black grouper ACLs and AMs have been retained in Amendment 17B, however, the Council will immediately consider whether adjustments to ACLs and AMs are needed in light of the new assessment. The Comprehensive ACL Amendment, which is also under development by the Council, would consider a new ACL and AM for black grouper, as well as species groups for many different snapper-grouper species that could include gag, red grouper, and black grouper.

Comment 19: Several commenters state they have witnessed the progressive decline in deepwater snapper-grouper species over many years, and support measures to end overfishing and rebuild deepwater snapper-grouper stocks.

Response: NMFS agrees that effective management strategies must be utilized to rebuild stocks that are overfished to sustainable levels and prevent future overfishing from occurring. Actions have been taken through previous amendments to address overfishing of black sea bass, vermilion snapper, gag, red grouper, black grouper, snowy grouper, speckled hind, warsaw grouper, red snapper, and golden tilefish. It is the intent of the Council and NMFS to employ a system of ACLs and AMs to achieve these goals.

Comment 20: One commenter feels the restrictions on vermilion snapper are too restrictive and have fostered a derby fishery, and suggests a trip limit be implemented for vermilion snapper. Another commenter recommended the implementation of a system of trip limits, also known as the "Fisherman's Plan," as a means of maintaining harvest levels of vermilion snapper below the specified ACLs.

Response: Regulatory Amendment 9 to the FMP includes an action to specify trip limits for vermilion snapper. It is the Council's intent to alleviate the derby nature of the vermilion snapper component of the snapper-grouper fishery by implementing a trip limit as soon as possible. Additionally, Amendment 21 to the FMP, which is in the early stages of the development process, includes an action to establish a catch share program for vermilion snapper. Establishing a catch share program would eliminate the derby-style fishery, and would promote safety at sea.

Comment 21: One commenter feels Amendment 17B would not reduce harvest enough to end overfishing of the subject stocks, and recommends reducing all the ACLs contained in Amendment 17B by 66 percent.

Response: The best scientific information available supports the recently implemented harvest reductions in previous amendments and the ACLs contained in Amendment 17B. Actions have been taken in previous amendments to address overfishing of most species addressed in Amendment 17B. A reduction of the current ACLs by 66 percent is not supported by the best available scientific information, and could result in unnecessary adverse socioeconomic impacts on the fishing community. Therefore additional harvest restrictions beyond those in Amendment 17B are not necessary to end overfishing of the species addressed in Amendment 17B as required by the Magnuson-Stevens Act. Amendment 17B specifies ACLs and AMs for speckled hind, warsaw grouper, snowy grouper, black sea bass, vermilion snapper, black grouper, red grouper, gag, and golden tilefish to end overfishing and help ensure that overfishing does not occur in the future.

Comment 22: One commenter stated the impacts of anthropogenic pollutants such as sunscreens, pharmaceuticals, and cruise ships could have an effect on snapper-grouper reproductive fitness.

Response: The direct impacts of anthropogenic toxins introduced into the marine environment have been studied in recent years, but their impacts on snapper-grouper species are not quantifiable at this time. Ongoing research in the field is likely to continue as human impacts on the environment increase. Several studies show a correlation between pharmaceutical waste and subsequent lowered reproductive fitness in marine organisms. The extent to which chemical waste impacts snapper-

grouper species in the South Atlantic is unknown, and may be more difficult to measure in deepwater species, which do not spend the majority of their live cycles in close proximity to known pollution sources.

The Environmental Protection Agency (EPA) has participated in several surveys to assess the impacts of cruise ship discharge of food waste, gray water, bilge water, and ballast water on the marine environment, including a survey conducted in August 2001 to estimate the dilution of cruise ship discharges into receiving waters. Another survey, conducted in Skagway Harbor, Alaska, in July 2008, estimated the near-field dilution of treated sewage/gray water discharges from docked cruise ships. The EPA also prepared a Cruise Ship Discharge Assessment Report (Assessment Report), which examines waste streams generated by cruise ships. The report is available at: *http://water.epa.gov/polwaste/vwd/cruise_ship_disch_assess_report.cfm.* Despite these and other ongoing studies, the direct impact of cruise ship waste discharge on snapper-grouper species in the South Atlantic is not known at this time.

Comment 23: One commenter suggests requiring permits and logbooks on all vessels in all sectors of the snapper-grouper fishery.

Response: Logbooks and snapper-grouper permits are required for participants in the commercial snapper-grouper fishery. Permits are also required for all participants in the for-hire sector of the snapper-grouper fishery, and logbooks are required on headboats if selected by NMFS. Amendment 15B, which became effective in December 2009, requires any vessel fishing for snapper-grouper in the South Atlantic EEZ, if selected by NMFS, to maintain and submit fishing records; and requires any vessel that fishes in the EEZ, if selected by NMFS, to carry an observer and install an electronic logbook (ELB) and/or video monitoring equipment provided by NMFS. The reporting and record-keeping requirements contained in Amendment 15B only include selected vessels because these requirements are cost prohibitive if applied to every fisher in the South Atlantic at this time.

Comment 24: One commenter stated that a prohibition on all longline fishing would end overfishing of golden tilefish.

Response: Golden tilefish are primarily harvested using bottom longline gear. Actions were taken in Amendment 13C to end the overfishing of golden tilefish, which included a reduction in the quota to 295,000 lb (133,810 kg) gutted weight. Therefore, eliminating the longline harvest for golden tilefish could have unnecessary negative economic and social effects. The effectiveness of management measures in ending overfishing for golden tilefish will be determined in an assessment scheduled for 2011. Amendment 17B established ACLs and AMs to help ensure golden tilefish overfishing does not occur.

Currently, for the snapper-grouper fishery, the use of bottom longline fishing gear is limited by species and area. A vessel that has on board a valid Federal commercial permit for South Atlantic snapper-grouper, excluding wreckfish, that fishes in the EEZ on a trip with a longline on board, may possess only snowy grouper, warsaw grouper, yellowedge grouper, misty grouper, golden tilefish, blueline tilefish, and sand tilefish. Additionally, under the FMP, a longline may not be used to fish in the EEZ for South Atlantic snapper-grouper south of 27°10′ N. latitude (due east of the entrance to St. Lucie Inlet, FL); or north of 27°10′ N. latitude where the charted depth is less than 50 fathoms (91.4 m), as shown on the latest edition of the largest scale NOAA chart of the location. Under the FMP, a person aboard a vessel with a longline on board that fishes on a trip in the South Atlantic EEZ south of 27°10′ N. latitude, or north of 27°10′ N. latitude where the charted depth is less than 50 fathoms (91.4 m), is limited on that trip to the bag limit for South Atlantic snapper-grouper for which a bag limit is specified, and to zero for all other South Atlantic snapper-grouper.

Additionally, Amendment 18A to the FMP is addressing potential effort control mechanisms for the golden tilefish component of the snapper-grouper fishery, including an endorsement for hook-and-line and longline gear. Therefore, Amendment 18A may mitigate, to some extent, any effort shift into the golden tilefish component of the snapper-grouper fishery.

Comment 25: Three commenters felt the golden tilefish allocation of 97-percent commercial and 3-percent recreational is unfair and allocates too much of the total ACL to the commercial sector.

Response: The sector allocations for golden tilefish were chosen based on long-term and short-term landings histories. The preferred allocation of 97 percent for the commercial sector and 3 percent for the recreational sector is representative of past and current harvest levels for both sectors and thus would cause the least disruption to the economic and social environments. The Council considered an alternative that would allocate half of the ACL to the commercial sector and half to the recreational sector, but rejected this alternative because it would result in the largest deviation from the short and long-term landings trend for the two sectors. It was concluded that the preferred allocation is fair and equitable based on the best scientific information available.

Comment 26: Two commenters suggested that the Federal government buy out those fishermen who are ready to leave the fishery because of overly burdensome regulations. One commenter suggested the U.S. Department of Commerce develop a fisheries disaster assistance program for commercial and for-hire fishermen affected by recently implemented regulations.

Response: The Council discussed the establishment of a buy-out program for commercial snapper-grouper fishermen in Georgia during the development process for Amendment 17A to the FMP, which was drafted concurrently with Amendment 17B. A buy-out program for the commercial sector would require a great deal of planning, time, funds, and acceptance from fishery participants. Because of these limiting factors and the need to end overfishing immediately as required by the Magnuson-Stevens Act, a buy-out program was not pursued by the Council or NMFS during the development of Amendment 17B.

The Magnuson-Stevens Act states the Secretary may establish a regional economic transition program to provide immediate disaster relief assistance upon the request and concurrence with the Governors of the affected States. Neither the Secretary nor NMFS has received a request from any of the four affected States' governors for disaster relief. Therefore, a disaster relief program for the snapper-grouper fishery has not been considered.

Comment 27: Several commenters feel the economic impact analysis for actions contained in Amendment 17B is either absent or inadequately represents the true impacts expected from the implementation of Amendment 17B.

Response: Amendment 17B contains a complete economic impact analysis of all actions and alternatives considered by the Council in Amendment 17B. Additionally, Amendment 17B contains a social impact analysis of all the alternatives considered by the Council. Furthermore, in compliance with Magnuson-Stevens Act, Amendment 17B contains a Regulatory Impact Review, an initial Regulatory Flexibility Analysis, a Fishery Impact Statement,

and a Social Impact Assessment. These economic and social analyses utilize recent landings, trip ticket, logbook, permit, and financial data for the commercial and recreational sectors. As such, the subject analyses have been determined to represent an accurate and complete economic picture of potential impacts that may result from the implementation of Amendment 17B.

Comment 28: Three commenters feel Amendment 17B contained several deficiencies, including: the absence of overfishing limits (OFLs) for six species, the absence of ABCs for five species, the lack of an ABC control rule, failing to account for management uncertainty in the ACLs, and failing to include discard mortality in the ACLs (most notably for speckled hind and warsaw grouper). One commenter states that Amendment 17B establishes ACLs and management measures that are unlikely to end overfishing for golden tilefish, black sea bass, and snowy grouper. Additionally, one commenter states that Amendment 17B should include an ACL performance standard, and re-evaluation of the ACLs and AMs that would be triggered if the catch exceeds the ACL more often than once in a given period of time.

Response:

OFL: The Magnuson-Stevens Act National Standard 1 Guidelines give the Councils flexibility to use either the maximum fishing mortality threshold (MFMT) or the overfishing limit (OFL) to determine if overfishing is occurring. The National Standard 1 Guidelines state, "The OFL is an annual level of catch that corresponds directly to the MFMT, and is the best estimate of the catch level above which overfishing is occurring." Furthermore, in June 2008, the SSC stated that for species assessed through SEDAR, OFL is equal to the yield at MFMT. Golden tilefish, snowy grouper, black sea bass, vermilion snapper, red grouper, and black grouper have been assessed through SEDAR and, therefore, have estimates of MFMT. The numerical estimates of MFMT for black grouper and red grouper will be provided in the Comprehensive ACL Amendment and Amendment 24, respectively.

The SSC was unable to provide recommendations of the OFL for speckled hind and warsaw grouper at its June 2008 meeting, based on current data, and, therefore, specified OFL as "unknown." The SSC encountered similar problems when attempting to specify OFLs for species at its April 2010 meeting. Discussion at the April 2010 meeting focused on what the SSC was responsible for providing to the Council under National Standard 1 Guidelines. To explain its reasoning and judgment, the April 2010 SSC report states, "It became clear that recommending an ABC was the main goal, and providing this recommended value without an estimate of OFL was acceptable in situations where only catch series data were available."

ABC: At its December 2008 meeting, the SSC considered the guidance given in the proposed Magnuson-Stevens Act National Standard 1 Guidelines and rescinded all estimates of ABC from its June 2008 meeting (except for an ABC of zero for speckled hind and warsaw grouper based on landed catch). At its December 2008 meeting, the SSC also recommended that the ABC levels for snowy grouper, black sea bass, and red snapper be set consistent with the rebuilding plans for those species until they can be further amended using more updated scientific information. The SSC reaffirmed, at its April 2010 meeting, that "For overfished stocks and stock complexes, a rebuilding ABC must be set to reflect the annual catch that is consistent with the schedule of fishing mortality rates in the rebuilding plan." At its June 2009 meeting, the SSC recommended ABCs for gag and vermilion snapper based on a P* analysis, which is being used as the Council's preferred ABC control rule for assessed species that are not experiencing overfishing in the Comprehensive ACL Amendment.

The SSC did not provide an ABC value for golden tilefish because of the age of the assessment and because of the lack of a current estimate of abundance. Golden tilefish will be assessed by SEDAR in 2011. The ABC control rule being used in the Comprehensive ACL Amendment will be applied to golden tilefish to obtain an ABC value when the assessment and amendment are completed in 2011. The SSC did not provide an ABC value for black grouper and red grouper because assessments were ongoing for those species when Amendment 17B was being developed by the Council, and since the SEDAR assessments have now been completed, OFLs, ABCs, and ACLs will be specified in the Comprehensive ACL Amendment and Amendment 24 for black grouper and red grouper, respectively.

ABC Control Rule: For overfished stocks and stock complexes, the SSC has indicated that the ABC must be set to reflect the annual catch that is consistent with the schedule of fishing mortality rates in the rebuilding plan. Amendment 17B did not specify ABC control rules for assessed species that were not overfished or for data poor species because these control rules were under development by the SSC. The SSC met in March and June of 2009 to determine ABC control rules for data rich species, and met in April and August of 2010 to identify the protocol for determining the ABC for data poor species. A final version of the SSC's recommendation of an ABC control rule for assessed species was provided to the Council at its March 2010 meeting, after the Council had voted to submit Amendment 17B for Secretarial review. The SSC has not completed its recommendations for ABC control rules for non-assessed species. ABC control rules for assessed and data poor species will be included in the Comprehensive ACL Amendment.

The SSC recommended and the Council chose an ACL of zero for speckled hind and warsaw grouper based on landings only. Choosing an ACL based on total mortality rather than landed catch would require the SEFSC to monitor discarded speckled hind and warsaw grouper in the commercial and recreational sectors. The Council's SSC expressed concerns about monitoring discards when discussing ACLs for speckled hind and warsaw grouper at its March 2009 meeting. The SSC was not only concerned about the accuracy of discard data as currently collected from the recreational and commercial sector but also the possibility that some members of the fishing community might under-report discarded fish if they believed further restrictions might be imposed if levels of dead discards became elevated. Therefore, due to concern about monitoring discards, the SSC recommended an acceptable biological catch equal to zero for speckled hind and warsaw grouper based on landed catch only.

Management Measures: Action is being taken in Amendment 17B to reduce discards of speckled hind and warsaw grouper by prohibiting the take of co-occurring species in depths greater than 240 ft (73 m). Rather than retain and monitor speckled hind and warsaw grouper discards, the intent of the area closure is to reduce bycatch in an area where release mortality is expected to be very high. The relationship between depth and mortality has not been specified for speckled hind and warsaw grouper. However, as previously discussed, speckled hind and warsaw grouper share similar biological characteristics to gag; therefore, if depth related release mortality of speckled hind and warsaw grouper is similar to gag, release mortality would be expected to be approximately 70 percent in depths of 240 ft (73 m).

Actions were taken to end overfishing of golden tilefish, snowy grouper, and black sea bass in Amendment 13C to the

FMP. It will not be known if the measures were successful in ending overfishing until new assessments are conducted for these species. New benchmark assessments will be conducted for golden tilefish and black sea bass in 2011, and snowy grouper will be assessed in 2013. Amendment 17B specifies ACLs and AMs for speckled hind, warsaw grouper, snowy grouper, gag, vermilion snapper, black sea bass, golden tilefish, black grouper, and red grouper, to ensure overfishing of these species does not occur.

The National Standard 1 Guidelines states that "if catch exceeds the ACL for a given stock or stock complex more than once in the last 4 years, the system of ACLs and AMs should be re-evaluated, and modified if necessary, to improve its performance and effectiveness." Amendment 17B follows this guidance for performance measures with an action to update the framework procedure to allow for adjustments to OFL, ABC, and ACL based on SEDAR reports or other new information. Under the updated framework procedure, the SSC would examine the social and economic impact analyses for a specific allocation, ACL, ACT, AM, quota, bag limit, or other fishing restriction. If it is determined by the Council and its SSC that the management measures in place are not constraining catch to a target level, adjustments could be made through a future regulatory amendment.

Comment 29: One commenter stated Amendment 17B does not adequately demonstrate that speckled hind and warsaw grouper are undergoing overfishing.

Response: According to the most recent Report to Congress on the Status of U.S. Fisheries, warsaw grouper and speckled hind are undergoing overfishing and have been identified as experiencing overfishing every year since the Report was initiated in 1997. Status determinations in the Report to Congress on the Status of U.S. Stocks are generally made during a formal review of a scientific stock assessment using the best available scientific information and status determination criteria specified in a fishery management plan. However, many resources can be used to make status determinations, including final peer-reviewed documents such as Stock Assessment Review Committee reports and recommendations of each Council's Scientific and Statistical Committee. The Council and NMFS are mandated to end overfishing by the Reauthorized Magnuson-Stevens Act, and to specify ACLs and AMs for species undergoing overfishing and to implement management measures to ensure overfishing does not continue to occur. New SEDAR benchmark assessments for speckled hind and warsaw grouper are scheduled for 2012 or 2013.

Comment 30: Three commenters felt the Finding of No Significant Impact (FONSI) for Amendment 17B erroneously concluded that there are no significant impacts as a result of this amendment. One commenter requests that an environmental impact statement (EIS) be prepared for Amendment 17B.

Response: An environmental assessment (EA) was conducted for Amendment 17B, instead of an EIS, because most of the ACLs and AMs implemented through this final rule are based on previously implemented quotas and allocations, and the deepwater closure was concluded to result in a low to moderate level of socioeconomic impact to the snapper-grouper fishery. The deepwater closure is expected to primarily affect commercial fishermen who target blueline tilefish off North Carolina, and commercial and recreational fishermen in areas of the Florida Keys where the 240-ft (73-m) depth boundary is close to shore.

The significance of an action under NEPA is determined by considering the action's context and intensity. In the case of the deepwater area closure, the impacts are not considered significant because select groups of snapper-grouper fishery participants are expected to be impacted, and those impacts are anticipated to be low to moderate relative to the entire snapper-grouper fishery. For the entire South Atlantic, the prohibition on harvest and possession of six deepwater snapper-grouper species beyond a depth of 240 ft (73 m) is expected to reduce annual overall net operating revenues in the commercial snapper-grouper fishery by about $292,000, or by 3.3 percent. For the State of North Carolina alone, the action is expected to reduce net operating revenue in the commercial sector by approximately 7 percent. As such, the FONSI appropriately concludes the actions in Amendment 17B are not expected to result in significant impacts on the human environment; and therefore, an EIS was not prepared.

Comment 31: Several commenters stated that the amendment would have severe economic impacts on commercial and recreational fishing opportunities and operations, including their support industries and local communities. Many comments especially singled out the ban on fishing for, retaining, and possessing of six deepwater species in waters beyond 240 ft (73 m) deep as a major factor that would put many people out of work.

Response: The economic analysis of the actions and alternatives considered concluded that, with the exception of the no action alternatives, practically all management measure alternatives would result in restricted fishing opportunities and short-term adverse economic effects on fishers, support industries, and associated communities. However, it is imperative that we take some action to protect species undergoing overfishing. The actions adopted are expected to be those which best achieve the Council's objectives while minimizing, to the extent practicable, the adverse economic and social effects on fishing participants and associated communities.

Comment 32: One commenter stated that no consideration was made of potential differences in economic impacts based on differences in fishing practices and economic activities along the coast.

Response: The economic analysis evaluated the effects of the various measures in Amendment 17B on vessels by gear type used and geographic area in the South Atlantic. Thus, the analysis addressed, to the extent possible using available data, the differential economic effects of the alternatives based on gear type and geographic location.

Comment 33: One commenter stated that once the Council and NMFS decided what the economic impacts are, public comments would not count at all.

Response: The Council and NMFS have taken multiple steps to solicit comments from the public through meetings, public hearings, and dissemination of written materials on the various issues considered in the amendment. The law, as well as the policies of the Council and NMFS, requires consideration of public comments as an integral part of the regulatory process even after the economic analysis is completed. However, economic impacts are not the only factor the Council and NMFS must take into account.

Comment 34: Two commenters noted that the 97 percent commercial and 3 percent recreational allocation of golden tilefish neglects the contribution of the recreational sector into the local economy.

Response: The commercial/recreational allocation for golden tilefish took into account the past and present landing records of both the commercial and recreational sectors. The economic effects of the various allocation measures were evaluated independently and in conjunction with the other alternatives in the amendment.

The economic analysis concluded that the allocation ratio was not expected to introduce severe dislocations of commercial and recreational fishing activities.

Comment 35: One commenter mentioned the lack of analysis of the cumulative economic impacts of the amendment.

Response: The economic analysis evaluated the cumulative effects of past and present regulatory measures affecting the snapper-grouper recreational and commercial sectors. Both quantitative and qualitative discussions of cumulative economic effects were presented.

Comment 36: One commenter remarked that serious attention to socioeconomic aspects of fisheries management is grossly overlooked as real science.

Response: NMFS has always recognized the important role of social science in fisheries management, as specifically required by the Magnuson-Stevens Act, Regulatory Flexibility Act, and Executive Order 12866. Although the overriding objective of Amendment 17B has been to protect or rebuild the subject snapper-grouper species, the socioeconomic effects of the various alternatives were evaluated and considered in the choice of preferred alternatives.

Classification

The Regional Administrator, Southeast Region, NMFS has determined that Amendment 17B is necessary for the conservation and management of South Atlantic snapper-grouper and is consistent with the Magnuson-Stevens Act, and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared a FRFA, as required by section 604 of the Regulatory Flexibility Act. The FRFA describes the economic impact this final rule is expected to have on small entities. A description of the action, why it is being considered, and the objectives of, and legal basis for, this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of this analysis is available from the NMFS (*see* **ADDRESSES**). The FRFA follows.

No public comments specific to the IRFA were received. However, 22 of the 175 comments contained statements regarding the economic effects of the amendment, and they are addressed in comments/responses section, specifically comments/responses number 31 through 36.

NMFS agrees with the Council's choice of preferred alternatives as those which would be expected to best achieve the Council's objectives while minimizing, to the extent practicable, the adverse effects on fishers, support industries, and associated communities.

No changes to the proposed rule were made in response to public comments.

The final rule introduces several changes to the management of the South Atlantic snapper-grouper fishery. This rule establishes an ACL of zero for speckled hind and warsaw grouper, and this prohibits the harvest and possession of speckled hind and warsaw grouper. The rule prohibits fishing for and possession of snowy grouper, blueline tilefish, yellowedge grouper, warsaw grouper, speckled hind, misty grouper, queen snapper, and silk snapper beyond a depth of 240 ft (73 m).

This rule establishes a 97-percent commercial and 3-percent recreational allocation of golden tilefish. This rule establishes a commercial ACL (quota) for golden tilefish of 282,819 lb (128,284 kg) gutted weight and a recreational ACL of 1,578 fish based on the chosen allocation for golden tilefish. The commercial AM for golden tilefish prohibits the harvest, possession, purchase, and sale of golden tilefish after the quota is met or projected to be met. The recreational AM is specified as follows: If the ACL is exceeded, the Regional Administrator (RA) shall publish a notice to reduce the length of the following fishing season by the amount necessary to ensure landings do not exceed the sector ACL in the following fishing year. The recreational ACL would be compared to recreational landings using only 2010 landings for 2010, an average of 2010 and 2011 landings for 2011, and a 3-year average of landings for 2012 and beyond.

This rule establishes a recreational daily bag limit of one snowy grouper per vessel, with a recreational ACL of 523 fish and a recreational AM specified as follows: If the ACL is exceeded, the RA shall publish a notice to reduce the length of the following fishing season by the amount necessary to ensure landings do not exceed the sector ACL in the following fishing year. The recreational ACL would be compared to recreational landings using only 2010 landings for 2010, an average of 2010 and 2011 landings for 2011, and a 3-year average of landings for 2012 and beyond.

This rule establishes an aggregate ACL (quota) for gag, black grouper, and red grouper of 662,403 lb (300,461 kg) gutted weight (commercial) and 648,663 lb (294,229 kg) gutted weight (recreational), but retains the commercial ACL (quota) for gag or 352,940 lb (160,091 kg) gutted weight and recreational ACL for gag of 340,060 lb (154,249 kg) gutted weight. This rule prohibits the commercial possession of shallow-water groupers (gag, black grouper, red grouper, scamp, red hind, yellowmouth grouper, tiger grouper, yellowfin grouper, graysby, and coney) when the gag ACL (currently at 352,940 lb (160,091 kg) gutted weight) or the aggregate gag, black grouper, and red grouper ACL is met or projected to be met. This rule implements recreational AMs for black grouper, black sea bass, gag, red grouper, and vermilion snapper as follows: If a species is overfished and the sector ACL is met or projected to be met, prohibit the harvest and retention of the species or species group. If the ACL is exceeded, independent of stock status, the RA shall publish a notice to reduce the sector ACL in the following fishing season by the amount of the overage. The recreational ACL would be compared to recreational landings using only 2010 landings for 2010, an average of 2010 and 2011 landings for 2011, and a 3-year running average of landings for 2012 and beyond.

Finally, this rule updates the framework procedure for specification of Total Allowable Catch (TAC) for the FMP to incorporate ACLs, ACTs, and AMs. Such modifications are based upon new scientific information indicating such modifications are prudent.

The Magnuson-Stevens Act provides the statutory basis for the final rule.

No duplicative, overlapping, or conflicting Federal rules have been identified. The final rule does not alter existing reporting, recordkeeping, or other compliance requirements.

The final rule is expected to directly affect commercial fishers and for-hire operators. The SBA has established size criteria for all major industry sectors in the U.S. including commercial fish harvesters and for-hire operations. A business involved in fish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $4.0 million (NAICS code 114111, finfish fishing) for all its affiliated operations worldwide. For for-hire vessels, the other qualifiers apply and the annual receipts threshold is $7.0 million (NAICS code 713990, recreational industries).

From 2003–2007, an average of 944 vessels per year was permitted to operate in the commercial sector of the snapper-grouper fishery. Of these vessels, 749 held transferable permits and 195 held non-transferable permits.

As of December 17, 2010, there are 604 vessels with transferable permits and 138 vessels with non-transferable permits. On average, 890 vessels landed 6.43 million lb (2.92 million kg) of snapper-grouper species and 1.95 million lb (0.88 million kg) of other species on snapper-grouper trips. Total dockside revenues from snapper-grouper species stood at $13.81 million and at $2.30 million from other species. Considering revenues from both snapper-grouper and other species, the revenues per vessel were approximately $18,101. An average of 27 vessels per year harvested more than 50,000 lb (22,680 million kg) of snapper-grouper species per year, generating dockside revenues of at least $107,500, at an average price of $2.15 (2007 dollars) per pound. Commercial vessels that operate in the snapper-grouper fishery may also operate in other fisheries, the revenues of which cannot be determined with available data and are not reflected in these totals.

Although a vessel that possesses a commercial snapper-grouper permit can harvest any snapper-grouper species, not all permitted vessels or vessels that landed snapper-grouper landed all of the major species in this amendment. The following average number of vessels landed the subject species in 2003–2007: 292 vessels landed gag, 253 vessels landed vermilion snapper, 32 vessels landed speckled hind, 64 vessels landed golden tilefish, 160 vessels landed snowy grouper, 323 vessels landed black grouper, 237 vessels landed black sea bass, and 402 vessels landed red grouper. Combining revenues from snapper-grouper and other species on the same trip, the average revenue per vessel for vessels landing the subject species were $20,551 for gag, $28,454 for vermilion snapper, $6,250 for speckled hind, $17,266 for golden tilefish, $7,186 for black grouper, $19,034 for black sea bass, and $17,164 for red grouper.

Based on revenue information, all commercial vessels that would be affected by the final action are considered to be small entities.

For the period 2003–2007, an average of 1,635 vessels were permitted to operate in the snapper-grouper for-hire sector, of which 82 are estimated to have operated as headboats and 1,553 as charter boats. As of December 17, 2010, there are 1,474 permitted for-hire vessels. The for-hire fleet is comprised of charterboats, which charge a fee on a vessel basis, and headboats, which charge a fee on an individual angler (head) basis. Within the total number of vessels, 227 also possessed a commercial snapper-grouper permit and would be included in the summary information provided on the commercial sector. The charterboat annual average gross revenue is estimated to range from approximately $62,000–$84,000 for Florida vessels, $73,000–$89,000 for North Carolina vessels, $68,000–$83,000 for Georgia vessels, and $32,000–$39,000 for South Carolina vessels. For headboats, the appropriate estimates are $170,000–$362,000 for Florida vessels, and $149,000–$317,000 for vessels in the other States.

Based on average revenue figures, all for-hire operations that would be affected by the final action are considered to be small entities.

Some fleet activity (*i.e.,* multiple vessels owned by a single entity) may exist in both the commercial and for-hire snapper-grouper sectors, but the extent of such is unknown and all vessels are treated as independent entities in this analysis.

The measure to establish an ACL of zero for speckled hind and warsaw grouper, together with the ban on fishing for deepwater species co-occurring with these two species beyond 240 ft (73 m), is expected to reduce net operating revenues of commercial vessels by about $292,000. This measure is also expected to reduce net operating revenues of for-hire vessels by less than $102,000.

Establishing a 97 percent commercial and 3 percent recreational allocation of golden tilefish would maintain the long-term and short-term proportional landings history of the commercial and recreational sectors, with possible small short-term changes (depending on the ACL) in net operating revenues of both commercial and for-hire vessels. At this allocation ratio, the corresponding commercial ACL (quota) would be 282,819 lb (128,284 kg) gutted weight and the recreational allocation would be 1,578 fish (8,747 lb (3,968 kg) gutted weight). The golden tilefish commercial quota in combination with the AM of closing the fishery after the quota is met is expected to reduce net operating revenues of vessels with snapper-grouper commercial permits by about $8,000. The recreational allocation is expected to result in net revenue reductions of for-hire snapper-grouper vessels by about $7,000. It is worth noting, however, that the reduction in net operating revenues of for-hire vessels is not immediate because the recreational AM would shorten only the subsequent year's fishing season and only when recreational landings over a number of years (except for 2010) exceed the ACL.

Establishing a daily bag limit of one snowy grouper per vessel is expected to reduce net operating revenues of for-hire snapper-grouper vessels by about $7,000. This reduction in net operating revenues would not be immediate because the recreational AM would shorten only the subsequent year's fishing season and only when recreational landings over a number of years (except for 2010) exceed the ACL.

The combined measures of retaining the commercial ACL for gag of 352,940 lb (160,091 kg) gutted weight, to establish an aggregate commercial ACL for gag, red grouper, and black grouper of 662,403 lb (300,461 kg) gutted weight, and to close the fishery when the gag ACL or the aggregate ACL is reached is expected to reduce net operating revenues of commercial vessels by about $103,000. For the recreational component of the snapper-grouper fishery, the combined measures of retaining the recreational ACL for gag of 340,060 lb (154,249 kg) gutted weight and establishing an aggregate recreational ACL for gag, red grouper, and black grouper of 648,663 lb (294,229 kg) gutted weight are not expected to affect the net operating revenues of for-hire snapper-grouper vessels because these are the expected landings from implementation of previous amendments, notably Amendment 16 to the FMP. There is a possibility that the recreational AM of prohibiting the harvest and retention of an overfished species when the sector ACL is met or projected to be met would have negative impacts on for-hire snapper-grouper vessels fishing for black sea bass. Under this AM, for-hire snapper-grouper vessels as a whole could potentially lose about $860,000 in net revenues. This reduction is likely to be an overestimate for at least two reasons. First, the method used in estimating the economic effects on the recreational sector likely overestimated the number of headboat angler trips affected by the measure. Second, the trend of recreational black sea bass landings has been downward due to the implementation of more restrictive measures provided in previous amendments. Therefore, using average landings over the period 2005–2008 inflated the landings when compared to the ACL.

Updating the framework procedure for specification of TAC has no direct effects on the net operating revenues of commercial and for-hire snapper-grouper vessels.

Five alternatives, including the final action, were considered for establishing an ACL for speckled hind and warsaw grouper. The first alternative to the final

action, the no action alternative, would not conform to the requirements of the Magnuson-Stevens Act, as reauthorized in 2006, to establish an ACL for the subject species. The second alternative to the final action would establish an ACL of zero for speckled hind and warsaw grouper but would not close any areas to fishing for deepwater species that co-occur with these two species. Although this alternative would have smaller negative economic effects on small entities than the final action, it would not be sufficient to end overfishing of speckled hind and warsaw grouper due to discard mortality from fishing for other co-occurring deepwater species. The third alternative to the final action is the same as the final action, except that the fishing prohibition for other co-occurring deepwater species would apply to all depths. In this case, this alternative would result in greater negative economic effects on small entities than the final action. The fourth alternative to the final action is similar to the final action, except that the prohibition on fishing for other co-occurring deepwater species would be beyond 300 ft (92 m). With smaller closed areas, this alternative would result in slightly smaller negative economic effects on small entities. On the other hand, the protection this alternative provides for adult speckled hind and warsaw grouper would be less than that of the final action. The possibility of continued overfishing for the subject species may still occur under this alternative.

Four alternatives, including the final action, were considered for the golden tilefish allocation. The first alternative to the final action, the no action alternative, would not establish a commercial and recreational allocation for golden tilefish. Without a defined sector allocation, it would be difficult to define sector ACLs and to take corrective actions should the sector ACLs or overall ACL be exceeded. This would weaken the ability of fishery managers to effectively manage the stock. The second alternative to the final action would establish a 96-percent commercial and 4-percent recreational allocation. This allocation is very close to that provided under the final action, and thus its economic effects would only minimally differ from those of the final action. This alternative uses only the most current landings records (2006–2008) while the final action uses both the long-run (1986–2008) and short-run (2006–2008) landings history. The third alternative to the final action would establish a 50-percent commercial and 50-percent recreational allocation. This alternative would create significant disruptions to the commercial sector operations, and thus would impose relatively large costs to this sector. The recreational sector would stand to gain from this allocation, but whether or not the gains to the recreational sector would outweigh losses to the commercial sector cannot be determined. At least in the short-term and given the current bag limit of one fish per person per day, benefits to the recreational sector would be relatively small and would not compensate for the losses in the commercial sector. Thus, the expected net economic effects of this alternative in the short-term would be negative.

Five alternatives, including the final action, were considered for the golden tilefish ACL and AM. The first alternative to the final action, the no action alternative, would retain the current ACL (quota) for the commercial sector based on F_{MSY} and would not establish an ACL for the recreational sector. The current AM would close all fishing for golden tilefish once the commercial quota is reached. This alternative would not add any more fishery restrictions and economic losses to the fishery participants, but it would be less conservative than the final action in rebuilding the stock as to potentially lengthen the recovery of the stock beyond the specified rebuilding period. In addition, it would provide less flexibility in implementing sector-specific AMs. The second alternative to the final action would establish a single commercial and recreational ACL which would combine the commercial ACL at the F_{OY} level and the recreational allowable harvest at the OY level. The AM would prohibit commercial and recreational harvest when the ACL is projected to be met. This alternative would result in approximately the same economic losses to the commercial sector as the final action. There is some potential for this alternative to result in smaller economic losses to the recreational sector than the final action, especially if only the commercial landings were effectively monitored because then the recreational fishing season would remain open longer. But to the extent that the AM under this alternative would be imposed in-season while that of the final action would become effective only in subsequent years, the economic effects of this alternative over time could very well exceed those of the final action. The third alternative to the final action would establish a recreational AM of one golden tilefish per vessel per day when the single ACL (sum of the commercial ACL at the F_{OY} level and recreational harvest at the OY level) is met or projected to be met. This alternative offers potential for smaller economic losses to the recreational sector than the final action by maintaining a year-round recreational fishing season although at a very limited bag limit. However, because this alternative requires an in-season adjustment in lieu of subsequent-year adjustments, as under the final action, the resulting economic losses over time due to this alternative could exceed those of the final action. The fourth alternative to the final action would establish a commercial and recreational ACL based on the yield at F_{OY} for the commercial fishery. The AM for both sectors would be to prohibit harvest, possession, and retention of golden tilefish when commercial landings exceed the ACL. This alternative would have the same economic effects on the commercial sector as the final action, but losses to the recreational sector would likely exceed those of the final action.

Four alternatives, including the final action, were considered for establishing a snowy grouper ACL and AM. The first alternative, the no action alternative, to the final action would retain the commercial ACL (quota) of 82,900 lb (37,603 kg) gutted weight as the ACL based on the current TAC of 87,254 lb (39,578 kg) gutted weight; would retain the commercial AM which is to prohibit harvest, possession, and retention of snowy grouper when the quota is met or projected to be met; would maintain the recreational ACL of 523 fish; and, would not implement a recreational AM. This alternative would not add any restrictions to either the commercial or recreational sector. The absence of an AM for the recreational sector would make it difficult to implement sector-specific adjustments. The second alternative to the final action would establish a single commercial/recreational ACL based on the current TAC of 87,254 lb (39,578 kg) gutted weight, and the AM for both sectors would be a closure of the fishery when the ACL is met or projected to be met. This alternative may result in slightly better economic effects on the commercial sector than the final action or the no action alternative, but this slight advantage of the commercial sector would come at the expense of the recreational sector. In effect, this alternative would have slightly larger short-term economic losses on the recreational sector than the final action. In addition, this alternative would not

allow for sector-specific adjustments should ACL overages occur. The third alternative to the final action would establish a recreational AM of one fish per vessel per day when the commercial quota is met or projected to be met. The commercial AM would be a fishery closure when the quota is met. This alternative would have similar economic effects for the commercial sector as the no action alternative and slightly lower short-term negative effects on the recreational sector than the final action. However, unlike the final action, this alternative could result in overages in the recreational sector without a possible compensating adjustment in succeeding years, thereby potentially resulting in less protection to the stock.

Five alternatives, two of which comprise the final action, were considered for the black grouper, black sea bass, gag, red grouper, and vermilion snapper ACL, AM, and ACT. The alternative for establishing commercial and recreational ACLs consisted of two sub-alternatives, one of which is the final action. The ACT alternative for the recreational sector consisted of three sub-alternatives, none of which were selected as the final action. The AM alternative for the recreational sector consisted of three sub-alternatives, one of which is the final action. The first alternative to the final action, the no action alternative, would retain the commercial and recreational ACLs (quotas) for black sea bass, gag, and vermilion snapper and would not establish commercial and recreational ACLs for black grouper and red grouper. This alternative would not comply with the requirements of the Magnuson-Stevens Act, as reauthorized in 2006. The second alternative to the final action for commercial and recreational ACLs would establish black grouper commercial and recreational ACLs of 86,886 lb (39,411 kg) gutted weight and 31,863 lb (14,453 kg) gutted weight, respectively. It would also establish red grouper commercial and recreational ACLs of 221,577 lb (100,505 kg) gutted weight and 276,740 lb (125,527 kg) gutted weight, respectively. This alternative would have similar biological effects as the final action. However, it could result in slightly worse economic effects as the final action because it would allow less flexibility for small entities in adjusting their fishing operations with respect to gag, black grouper, and red grouper. The third alternative to the final action for the recreational AM consisted of two sub-alternatives. The first sub-alternative would require the RA to reduce the length of the following fishing year if the ACL were exceeded in the current year. Although this alternative would provide less negative effects in the short-term, it would provide less biological benefits than the final action, particularly with respect to overfished species, so as to delay further the generation of economic benefits from the fishery. The second sub-alternative would close the fishery if the sector ACT were exceeded for an overfished species or species group and would require the RA to reduce the sector ACT the following year. By not selecting any ACT, this alternative would not be a viable alternative. If ACTs were selected, this alternative would likely result in larger short-term economic losses than the final alternative.

Two alternatives, including the final action, were considered for updating the framework procedure for specification of TAC in the FMP to incorporate ACLs, ACTs, and AMs. The only alternative to the final action, the no action alternative, would delay the implementation or modification of ACLs, ACTs, and AMs when new scientific information becomes available because this would require the FMP amendment process which would incur more administrative costs than the final action.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: December 22, 2010.

Samuel D. Rauch III,

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

■ For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.2, the definitions of "Deep-water grouper (DWG)" and "Shallow-water grouper (SWG)" are revised and definitions of "Deep-water snapper-grouper (DWSG)" and "South Atlantic shallow-water grouper (SASWG)" are added in alphabetical order to read as follows:

§ 622.2 Definitions and acronyms.

* * * * *

Deep-water grouper (DWG) means, in the Gulf, yellowedge grouper, misty grouper, warsaw grouper, snowy grouper, and speckled hind. In addition, for the purposes of the IFQ program for Gulf groupers and tilefishes in § 622.20, scamp are also included as DWG as specified in § 622.20(b)(2)(vi).

Deep-water snapper-grouper (DWSG) means, in the South Atlantic, yellowedge grouper, misty grouper, warsaw grouper, snowy grouper, speckled hind, blueline tilefish, queen snapper, and silk snapper.

* * * * *

Shallow-water grouper (SWG) means, in the Gulf, gag, red grouper, black grouper, scamp, yellowfin grouper, rock hind, red hind, and yellowmouth grouper. In addition, for the purposes of the IFQ program for Gulf groupers and tilefishes in § 622.20, speckled hind and warsaw grouper are also included as SWG as specified in § 622.20(b)(2)(v).

* * * * *

South Atlantic shallow-water grouper (SASWG) means, in the South Atlantic, gag, black grouper, red grouper, scamp, red hind, rock hind, yellowmouth grouper, tiger grouper, yellowfin grouper, graysby, and coney.

* * * * *

■ 3. In § 622.4, the first sentence of paragraph (a)(2)(vi) is revised to read as follows:

§ 622.4 Permits and fees.

(a) * * *

(2) * * *

(vi) * * * For a person aboard a vessel to be eligible for exemption from the bag limits for South Atlantic snapper-grouper in or from the South Atlantic EEZ, to sell South Atlantic snapper-grouper in or from the South Atlantic EEZ, to engage in the directed fishery for tilefish in the South Atlantic EEZ, to use a longline to fish for South Atlantic snapper-grouper in the South Atlantic EEZ, or to use a sea bass pot in the South Atlantic EEZ between 35°15.19′ N. lat. (due east of Cape Hatteras Light, NC) and 28°35.1′ N. lat. (due east of the NASA Vehicle Assembly Building, Cape Canaveral, FL), a commercial vessel permit for South Atlantic snapper-grouper must have been issued to the vessel and must be on board. * * *

* * * * *

■ 4. In § 622.9, the first sentence of paragraph (a)(1) is revised to read as follows:

§ 622.9 Vessel monitoring systems (VMSs).

(a) * * *

(1) * * * An owner or operator of a vessel that has been issued a limited

access endorsement for South Atlantic rock shrimp (until January 27, 2010) or a Commercial Vessel Permit for Rock Shrimp (South Atlantic EEZ) must ensure that such vessel has an operating VMS approved by NMFS for use in the South Atlantic rock shrimp fishery on board when on a trip in the South Atlantic. * * *

* * * * *

■ 5. In § 622.32, paragraph (c)(3) is removed and paragraph (b)(3)(vii) is added to read as follows:

§ 622.32 Prohibited and limited-harvest species.

* * * * *

(b) * * *

(3) * * *

(vii) Speckled hind and warsaw grouper may not be harvested or possessed in or from the South Atlantic EEZ. Such fish caught in the South Atlantic EEZ must be released immediately with a minimum of harm. These restrictions also apply in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, *i.e.,* in State or Federal waters.

* * * * *

■ 6. In § 622.35, the first sentence of paragraph (j) is revised and paragraph (o) is added to read as follows:

§ 622.35 Atlantic EEZ seasonal and/or area closures.

* * * * *

(j) * * * During January through April each year, no person may fish for, harvest, or possess in or from the South Atlantic EEZ any SASWG (gag, black grouper, red grouper, scamp, red hind, rock hind, yellowmouth grouper, tiger grouper, yellowfin grouper, graysby, and coney). * * *

* * * * *

(o) *Depth closure for deep-water snapper-grouper (DWSG).* No person may fish for or possess DWSG (yellowedge grouper, misty grouper, warsaw grouper, snowy grouper, speckled hind, blueline tilefish, queen snapper, and silk snapper) in or from the South Atlantic EEZ offshore of rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	36°31′01″	74°48′10″
B	35°57′29″	74°55′49″
C	35°30′49″	74°49′17″
D	34°19′41″	76°00′21″
E	33°13′31″	77°17′50″
F	33°05′13″	77°49′24″
G	32°24′03″	78°57′03″
H	31°39′04″	79°38′46″
I	30°27′33″	80°11′39″
J	29°53′21″	80°16′01″
K	29°24′03″	80°16′01″
L	28°19′29″	80°00′27″
M	27°32′05″	79°58′49″
N	26°52′45″	79°58′49″
O	26°03′36″	80°04′33″
P	25°31′03″	80°04′55″
Q	25°13′44″	80°09′40″
R	24°59′09″	80°19′51″
S	24°42′06″	80°46′38″
T	24°33′53″	81°10′23″
U	24°25′20″	81°50′25″
V	24°25′49″	82°11′17″
W	24°21′35″	82°22′32″
X	24°21′29″	82°42′33″
Y	24°25′37″	83°00′00″

■ 7. In § 622.39, paragraph (d)(1)(ii)(B) is revised to read as follows:

§ 622.39 Bag and possession limits.

* * * * *

(d) * * *

(1) * * *

(ii) * * *

(B) No more than one fish per vessel may be a snowy grouper;

* * * * *

■ 8. In § 622.42, paragraph (e)(1)(ii) is removed; paragraphs (e)(1), (e)(2), (e)(5), and (e)(6) are revised; and paragraph (e)(8) is added to read as follows:

§ 622.42 Quotas.

* * * * *

(e) * * *

(1) *Snowy grouper*—82,900 lb (37,603 kg).

(2) *Golden tilefish*—282,819 lb (128,284 kg).

* * * * *

(5) *Black sea bass*—309,000 lb (140,160 kg).

(6) *Red porgy*—190,050 lb (86,205 kg).

* * * * *

(8) *Gag, black grouper, and red grouper, combined*—662,403 lb (300,461 kg).

* * * * *

■ 9. In § 622.43, the heading for paragraph (a)(5) and paragraph (a)(5)(iii) are revised to read as follows:

§ 622.43 Closures.

(a) * * *

(5) *South Atlantic gag, black grouper, red grouper, greater amberjack, snowy grouper, golden tilefish, vermilion snapper, black sea bass, and red porgy.*

* * * * *

(iii) For gag and for gag, black grouper, and red grouper, combined, when the appropriate commercial quota is reached, the provisions of paragraphs (a)(5)(i) and (ii) of this section apply to gag and all other SASWG.

* * * * *

■ 10. In § 622.44, paragraph (c)(3) is revised to read as follows:

§ 622.44 Commercial trip limits.

* * * * *

(c) * * *

(3) *Snowy grouper.* Until the quota specified in § 622.42(e)(1) is reached—100 lb (45 kg). *See* § 622.43(a)(5) for the limitations regarding snowy grouper after the fishing year quota is reached.

* * * * *

■ 11. In § 622.48, paragraph (f) is revised to read as follows:

§ 622.48 Adjustment of management measures.

* * * * *

(f) *South Atlantic snapper-grouper and wreckfish.* Biomass levels, age-structured analyses, target dates for rebuilding overfished species, MSY, ABC, TAC, quotas, annual catch limits (ACLs), target catch levels, accountability measures (AMs), trip limits, bag limits, minimum sizes, gear restrictions (ranging from regulation to complete prohibition), seasonal or area closures, definitions of essential fish habitat, essential fish habitat, essential fish habitat HAPCs or Coral HAPCs, and restrictions on gear and fishing activities applicable in essential fish habitat and essential fish habitat HAPCs.

* * * * *

■ 12. In § 622.49, paragraph (b) is added to read as follows:

§ 622.49 Accountability measures.

* * * * *

(b) *South Atlantic snapper-grouper.* (1) *Golden tilefish*—(i) *Commercial fishery.* If commercial landings, as estimated by the SRD, reach or are projected to reach the quota specified in § 622.42(e)(2), the AA will file a notification with the Office of the Federal Register to close the commercial fishery for the remainder of the fishing year.

(ii) *Recreational fishery.* If recreational landings, as estimated by the SRD, exceed the recreational annual catch limit (ACL) of 1,578 fish, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. Recreational landings will be evaluated relative to the ACL as follows. For 2010, only 2010 recreational landings will be compared to the ACL; in 2011, the average of 2010 and 2011 recreational landings will be compared to the ACL; and in 2012 and subsequent fishing

years, the most recent 3-year running average recreational landings will be compared to the ACL.

(2) *Snowy grouper*—(i) *Commercial fishery.* If commercial landings, as estimated by the SRD, reach or are projected to reach the quota specified in § 622.42(e)(1), the AA will file a notification with the Office of the Federal Register to close the commercial fishery for the remainder of the fishing year.

(ii) *Recreational fishery.* If recreational landings, as estimated by the SRD, exceed the recreational ACL of 523 fish, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. Recreational landings will be evaluated relative to the ACL as follows. For 2010, only 2010 recreational landings will be compared to the ACL; in 2011, the average of 2010 and 2011 recreational landings will be compared to the ACL; and in 2012 and subsequent fishing years, the most recent 3-year running average recreational landings will be compared to the ACL.

(3) *Gag*—(i) *Commercial fishery.* If commercial landings, as estimated by the SRD, reach or are projected to reach the quota specified in § 622.42(e)(7), the AA will file a notification with the Office of the Federal Register to close the commercial fishery for gag and all other SASWG for the remainder of the fishing year.

(ii) *Recreational fishery.* (A) If recreational landings, as estimated by the SRD, reach or are projected to reach the recreational ACL of 340,060 lb (154,249 kg), gutted weight, and gag are overfished, based on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register to close the gag recreational fishery for the remainder of the fishing year. On and after the effective date of such notification, the bag and possession limit for gag in or from the South Atlantic EEZ is zero. This bag and possession limit also applies in the South Atlantic on board a vessel for which a valid Federal charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in State or Federal waters.

(B) Without regard to overfished status, if gag recreational landings exceed the ACL, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year, to reduce the ACL for that fishing year by the amount of the overage.

(C) Recreational landings will be evaluated relative to the ACL as follows. For 2010, only 2010 recreational landings will be compared to the ACL; in 2011, the average of 2010 and 2011 recreational landings will be compared to the ACL; and in 2012 and subsequent fishing years, the most recent 3-year running average recreational landings will be compared to the ACL.

(4) *Gag, black grouper, and red grouper, combined*—(i) *Commercial fishery.* If commercial landings, as estimated by the SRD, reach or are projected to reach the quota specified in § 622.42(e)(8), the AA will file a notification with the Office of the Federal Register to close the commercial fishery for gag, black grouper, red grouper and all other SASWG for the remainder of the fishing year.

(ii) *Recreational fishery.* (A) If recreational landings, as estimated by the SRD, reach or are projected to reach the combined recreational ACL of 648,663 lb (294,229 kg), gutted weight, and gag, black grouper, or red grouper are overfished, based on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register to close the recreational fishery for gag, black grouper, and red grouper for the remainder of the fishing year. On and after the effective date of such notification, the bag and possession limit of gag, black grouper, and red grouper in or from the South Atlantic EEZ is zero. This bag and possession limit also applies in the South Atlantic on board a vessel for which a valid Federal charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in State or Federal waters.

(B) Without regard to overfished status, if gag, black grouper, and red grouper recreational landings exceed the combined ACL, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year, to reduce the combined ACL for that fishing year by the amount of the overage.

(C) Recreational landings will be evaluated relative to the ACL as follows. For 2010, only 2010 recreational landings will be compared to the ACL; in 2011, the average of 2010 and 2011 recreational landings will be compared to the ACL; and in 2012 and subsequent fishing years, the most recent 3-year running average recreational landings will be compared to the ACL.

(5) *Black sea bass*—(i) *Commercial fishery.* If commercial landings, as estimated by the SRD, reach or are projected to reach the quota specified in § 622.42(e)(5), the AA will file a notification with the Office of the Federal Register to close the commercial fishery for the remainder of the fishing year.

(ii) *Recreational fishery.* (A) If recreational landings, as estimated by the SRD, reach or are projected to reach the recreational ACL of 409,000 lb (185,519 kg), gutted weight, and black sea bass are overfished, based on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register to close the recreational fishery for black sea bass for the remainder of the fishing year. On and after the effective date of such notification, the bag and possession limit of black sea bass in or from the South Atlantic EEZ is zero. This bag and possession limit also applies in the South Atlantic on board a vessel for which a valid Federal charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in State or Federal waters.

(B) Without regard to overfished status, if black sea bass recreational landings exceed the ACL, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year, to reduce the ACL for that fishing year by the amount of the overage.

(C) Recreational landings will be evaluated relative to the ACL as follows. For 2010, only 2010 recreational landings will be compared to the ACL; in 2011, the average of 2010 and 2011 recreational landings will be compared to the ACL; and in 2012 and subsequent fishing years, the most recent 3-year running average recreational landings will be compared to the ACL.

(6) *Vermilion snapper*—(i) *Commercial fishery.* If commercial landings, as estimated by the SRD, reach or are projected to reach a quota specified in § 622.42(e)(4)(i) or (ii), the AA will file a notification with the Office of the Federal Register to close the commercial fishery for that portion of the fishing year applicable to the respective quota.

(ii) *Recreational fishery.* (A) If recreational landings, as estimated by the SRD, reach or are projected to reach the recreational ACL of 307,315 lb (139,396 kg), gutted weight, and vermilion snapper are overfished, based

on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register to close the recreational fishery for vermilion snapper for the remainder of the fishing year. On and after the effective date of such notification, the bag and possession limit of vermilion snapper in or from the South Atlantic EEZ is zero. This bag and possession limit also applies in the South Atlantic on board a vessel for which a valid Federal charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in State or Federal waters.

(B) Without regard to overfished status, if vermilion snapper recreational landings exceed the ACL, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year, to reduce the ACL for that fishing year by the amount of the overage.

(C) Recreational landings will be evaluated relative to the ACL as follows. For 2010, only 2010 recreational landings will be compared to the ACL; in 2011, the average of 2010 and 2011 recreational landings will be compared to the ACL; and in 2012 and subsequent fishing years, the most recent 3-year running average recreational landings will be compared to the ACL.

[FR Doc. 2010–32831 Filed 12–29–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 0908191244–91427–02]

RIN 0648–XA073

Fisheries of the Northeastern United States; Summer Flounder Fishery; Quota Transfer

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

ACTION: Temporary rule; quota transfer.

SUMMARY: NMFS announces that the State of North Carolina is transferring a portion of its 2010 commercial summer flounder quota to the Commonwealth of Virginia. In addition, the State of Maine is transferring a portion of its 2010 commercial summer flounder quota to the State of Rhode Island. By this action, NMFS adjusts the quotas and announces the revised commercial quota for each state involved.

DATES: Effective December 27, 2010, through December 31, 2010.

FOR FURTHER INFORMATION CONTACT: Sarah Heil, Fishery Management Specialist, 978–281–9257.

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state are described in § 648.100.

The final rule implementing Amendment 5 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, which was published on December 17, 1993 (58 FR 65936), provided a mechanism for summer flounder quota to be transferred from one state to another. Two or more states, under mutual agreement and with the concurrence of the Administrator, Northeast Region, NMFS (Regional Administrator), can transfer or combine summer flounder commercial quota under § 648.100(d). The Regional Administrator is required to consider the criteria set forth in § 648.100(d)(3) in the evaluation of requests for quota transfers or combinations.

North Carolina has agreed to transfer 11,815 lb (5,359 kg) of its 2010 commercial quota to Virginia. This transfer was prompted by summer flounder landings of two North Carolina vessels that were granted safe harbor in Virginia due to mechanical problems on November 19, 2010, and December 6, 2010. In addition, Maine has agreed to transfer 6,000 lb (2,722 kg) of its 2010 commercial quota to Rhode Island. The Regional Administrator has determined that the criteria set forth in § 648.100(d)(3) have been met. The revised summer flounder quotas for calendar year 2010 are: North Carolina, 3,358,231 lb (1,523,268 kg); Virginia, 2,922,226 lb (1,325,499 kg); Maine, 126 lb (57 kg); and Rhode Island, 2,025,915 lb (918,940 kg).

Classification

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

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

Dated: December 27, 2010.

Emily H. Menashes,

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

[FR Doc. 2010–32947 Filed 12–27–10; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 100204079–0199–02]

RIN 0648–XA084

Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; Quota Transfer

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

ACTION: Temporary rule; inseason quota transfer.

SUMMARY: NMFS announces that the Commonwealth of Virginia is transferring commercial bluefish quota to the State of North Carolina from its 2010 quota. By this action, NMFS adjusts the quotas and announces the revised commercial quotas for Virginia and North Carolina.

DATES: Effective December 27, 2010 through December 31, 2010.

FOR FURTHER INFORMATION CONTACT: Sarah Heil, Fishery Management Specialist, (978) 281–9257.

SUPPLEMENTARY INFORMATION: Regulations governing the Atlantic bluefish fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned among the coastal States from Florida through Maine. The process to set the annual commercial quota and the percent allocated to each State is described in § 648.160.

Two or more States, under mutual agreement and with the concurrence of the Administrator, Northeast Region, NMFS (Regional Administrator), can transfer or combine bluefish commercial quota under § 648.160(f). The Regional Administrator is required to consider the criteria set forth in § 648.160(f)(1) in the evaluation of requests for quota transfers or combinations.

Virginia has agreed to transfer 250,000 lb (113,398 kg) of its 2010 commercial quota to North Carolina. The Regional Administrator has determined that the criteria set forth in § 648.160(f)(1) have been met. The revised bluefish quotas for calendar year 2010 are: Virginia, 963,280 lb (436,937 kg); and North Carolina, 3,524,441 lb (1,528,860 kg).

Classification

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

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

Dated: December 27, 2010.

Emily H. Menashes,

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

[FR Doc. 2010–32951 Filed 12–27–10; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 101221628–0628–01]

RIN 0648–BA40

Fisheries Off West Coast States; Pacific Coast Groundfish Fishery Management Plan; Amendments 20 and 21; Trawl Rationalization Program; Allocations for the Start of the 2011 Fishery

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

ACTION: Temporary rule; emergency action; request for comments.

SUMMARY: NMFS issues this rule to implement an interim reduction to the 2010 harvest level for sablefish, issue revised quota pounds for individual fishing quota (IFQ) species, revise the calculation for the Pacific halibut trawl bycatch mortality limit for the trawl rationalization program; and adjust the trawl Rockfish Conservation Areas (RCAs) and landing allowances for non-IFQ species and Pacific whiting for the start of the 2011 groundfish fishery.

DATES: This rule is effective January 1, 2011. Comments must be received no later than 5 p.m. local time on January 31, 2011.

ADDRESSES: You may submit comments, identified by 0648–BA40, by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal, at *http://www.regulations.gov.*
- *Fax:* 206–526–6736, Attn: Kevin Duffy.
- *Mail:* William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way, NE., Seattle, WA 98115–0070, Attn: Kevin Duffy.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (if submitting comments via the Federal e-Rulemaking portal, enter "N/A" in the relevant required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

Background information and documents, including the environmental assessment for this action, are available from William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way, NE., Seattle, WA 98115–0070; or by phone at 206–526–6150.

FOR FURTHER INFORMATION CONTACT: Kevin C. Duffy, 206–526–4743; (fax) 206–526–6736; *Kevin.Duffy@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

In this emergency action, NMFS is implementing interim measures for the Pacific coast groundfish fisheries beginning in January, 2011. The interim measures include: interim reductions to the 2010 harvest level for sablefish; issuance of quota pounds (QP) for IFQ species; revisions to the calculation for the Pacific halibut trawl bycatch mortality limit; and adjustment of the trawl Rockfish Conservation Areas (RCAs) and landing allowances for non-IFQ species and Pacific whiting. These interim measures are necessary due to a delay in the finalization of the 2011–2012 harvest specifications and management measures, and are needed to meet the scheduled implementation of the trawl rationalization program in January 2011. These measures are intended to manage the early part of the 2011 groundfish fishery in a manner that prevents any conservation concerns until the 2011–2012 harvest specifications and management measures are implemented, currently anticipated in April 2011, and to accommodate the transition to a rationalized trawl fishery. For more background on the trawl rationalization program, *see* the preamble to the June 10, 2010, proposed rule (75 FR 32994), the August 31, 2010, proposed rule (75 FR 53380), the October 1, 2010, final rule (74 FR 60868), and the December 15, 2010, final rule (75 FR 78344).

The 2011–2012 harvest specifications and management measures final rule was scheduled to publish late in 2010 so that the trawl rationalization program and the 2011–2012 harvest specifications and management measures (2011–2012 specifications) would be implemented simultaneously. However, the 2011–2012 specifications, including several pieces necessary to sustainably manage the entire fishery and to begin the rationalized trawl fishery, have been delayed and will not be in place for the start of the 2011 groundfish fisheries. As a result of this delay, the harvest specifications and management measures that were implemented during 2010 will remain in place for the start of 2011, until NMFS takes action through a rulemaking to revise them. This may be problematic in some instances, as discussed below. Therefore, NMFS is taking action in this interim, emergency rulemaking to revise some harvest specifications and management measures.

Interim 2011 Harvest Specifications

Because the 2011–2012 harvest specifications and management measures rulemaking is delayed, if NMFS does not take any action, the harvest specifications and management measures that were implemented during 2010 will remain in place in 2011 until they are revised through a subsequent rulemaking. If the 2010 harvest specifications are allowed to remain in place and if catch early in 2011 is too high, both the biological resource and communities may be subject to overfishing and early fishery closure, respectively. This concern is highest for species that are caught by fisheries early in the year and where there may be limited ability to manage the fishery inseason to reduce catch later in the year. NMFS raised these issues to the Pacific Fishery Management Council at its November 2–9, 2010 meeting in Costa Mesa, California, and received recommendations from the Council regarding this interim rule to address these concerns.

The proposed rule for the 2011–2012 Biennial Harvest Specifications and Management Measures; Amendment 16–5; and Amendment 23 published on November 3, 2010 (75 FR 67810). As part of that rulemaking, in August 2010, the Council published a draft Environmental Impact Statement for Proposed Harvest Specifications and Management Measures for the 2011–2012 Pacific Coast Groundfish Fishery (DEIS), which included a range of 2011–2012 harvest levels. When the proposed 2011 harvest levels are compared with the levels that were in place for 2010, there are many species of groundfish for which the proposed 2011 harvest levels are lower than those that were in place for 2010. However, for many of those species, there is a low level of concern

that starting the year with the same harvest specifications as those in place for 2010 would result in a conservation issues.

Therefore, in this action, NMFS is making no changes to the 2010 harvest levels for species other than sablefish north of 36° N. lat. (*i.e.,* the 2010 harvest levels will remain in place at the start of the 2011 fishing year, except for sablefish north of 36° N. lat.). For sablefish, NMFS proposed harvest levels for 2011 based on the best available scientific information and management policy, as described in detail in the November 3, 2010 proposed rule for the 2011–2012 harvest specifications and management measures (75 FR 67810). In this action, NMFS is reducing the sablefish harvest level for the area north of 36° N. lat. consistent with the proposed harvest specifications for 2011, from 6,471 mt to 5,515 mt for the start of 2011. This interim measure is necessary to prevent conservation concerns with issuance of trawl fishery QP. Also, this interim reduction to the harvest level will allow NMFS to calculate the fixed gear primary sablefish fishery tier limits for 2011 at a level that will reduce concerns for overfishing, and will allow NMFS to take routine inseason actions to control catch of sablefish in the limited entry fixed gear and open access daily trip limit fisheries in early 2011, if necessary.

Issuance of QPs for the Shorebased IFQ Fishery

As a result of the delay in implementing 2011–2012 harvest specifications and management measures rulemaking, NMFS must determine what value to base the issuance of QP to quota share (QS) accounts. The shorebased trawl allocation for IFQ species is used to calculate how many QP to issue to QS accounts at the start of the fishing year (QS percent for a species multiplied by the shorebased trawl allocation equals QP for that species). NMFS calculated what the shorebased trawl allocation would be under the 2010 OYs and what it would be under Council-recommended amounts for 2011. To avoid the risk of over-issuing QP, which would then require reductions in April when the 2011 harvest specifications become finalized, NMFS is adopting the lower of these calculated amounts in this rule. These shorebased trawl allocations announced in this interim rule may be revised once the 2011 harvest specifications are finalized, and QP will be adjusted as appropriate.

NMFS determined the shorebased trawl allocations for IFQ species based on either the 2010 OY or proposed 2011 annual catch limits (ACLs) by taking the following steps. As specified at § 660.55(b), the OY (or ACL) was reduced by a specific amount for: the Pacific Coast treaty Indian Tribal harvest; projected scientific research catch of all groundfish species; estimates of fishing mortality in non-groundfish fisheries; and, as necessary, set-asides for EFPs. In order to retain the greatest flexibility when the final 2011 harvest specifications become available, NMFS used the larger of these amounts from 2010 and 2011, which resulted in a greater deduction from the OY (or ACL), and thus a more conservative amount for the calculation of the allocations. The remaining amount of available harvest after these deductions are made is called the fishery harvest guideline, which is then further divided into allocations for groundfish trawl (shorebased and at-sea) and non-trawl (limited entry fixed gear, open access, and recreational) fisheries. For most species, this was done according to the allocation percentages specified at § 660.55(c); however, IFQ species not listed in the table at § 660.55(c) are allocated between the trawl and nontrawl fisheries through the biennial harvest specifications process. Due to the delay of final 2011 harvest specifications and management measures, NMFS calculated the trawl allocation for species not listed in the table at § 660.55(c) by using either the proposed trawl allocation (in metric tons) from the proposed 2011 harvest specifications and management measures (75 FR 67810, November 3, 2010) or a proportional amount of the 2010 OY. The trawl allocation is further subdivided among the trawl sectors (mothership (MS), catcher/processor (C/P), and shorebased trawl (or IFQ)). The resulting shorebased trawl allocation (mt) is then used to calculate individual QPs. NMFS calculated the shorebased trawl allocation under both the 2010 OYs and under proposed 2011 ACLs, and is adopting the lower of the two for each IFQ species on an interim basis, so that quota pounds may be issued for the start of the 2011 fishery.

In some cases, NMFS is adopting a more conservative shorebased trawl allocation based upon current regulations, recommendations provided by the Council at its November 2010 meeting, or to provide NMFS flexibility in order to be consistent with the court order when the 2011 harvest specifications are finalized. In particular, this rule adopts a shorebased trawl allocation for Pacific whiting based on the lower end of the range of potential ACLs analyzed in the DEIS for the 2011 harvest specifications, consistent with current regulations at § 660.140(d)(1)(ii)(B)(2). This rule also adopts an interim shorebased trawl allocation for calculation of yelloweye rockfish QP based on the Council's November 2010 recommendation that the shorebased trawl allocation be set at 0.3 mt, as opposed to the 0.6 mt allocation that was recommended in June 2010 under a proposed 2011 yelloweye rockfish ACL of 20 mt. NMFS also applied the Council's November 2010 recommended increased set asides in the calculation of yellowtail rockfish QP. NMFS declined to apply the Council's November 2010 recommendation to temporarily suspend the petrale sole trawl/non-trawl split, because doing so would result in a larger issuance of petrale sole QP. This rule also adopts a shorebased trawl allocation for calculation of cowcod QP based on a more conservative harvest level of 3 mt, to provide flexibility in order to be consistent within the April 22, 2010 court order in *NRDC* v. *Locke,* Case 3:01–cv–00421–JLI, when the 2011 harvest specifications are finalized.

NMFS is adopting the lower shorebased trawl allocations in this rule in order to avoid the risk of over-issuing QP; these shorebased trawl allocations may change once the 2011 harvest specifications are finalized. NMFS will recalculate QP for IFQ species, other than Pacific halibut, once final 2011 harvest specifications are put in place, and will make adjustments in QS accounts as appropriate. If the final 2011 harvest specifications are greater than those used for the issuance of QP in this interim rule for the start of the fishing year, NMFS will issue additional QP later in 2011 for the difference.

Calculation of the Pacific Halibut Trawl Bycatch Mortality Limit

Under the trawl rationalization program, individual bycatch quota (IBQ) pounds for Pacific halibut north of 40°10′ N. lat. are issued based on a calculation where a QS permit owner's IBQ (expressed as a percent) is multiplied by the trawl mortality bycatch limit for halibut after any set-asides have been deducted. As specified in current regulations at § 660.55(m), the FMP sets a trawl mortality bycatch limit for legal and sublegal halibut at 15 percent of the Area 2A constant exploitation yield (CEY) for legal size halibut, not to exceed 130,000 pounds for the first four years of trawl rationalization and not to exceed 100,000 pounds starting in the fifth year. This total bycatch limit may be adjusted downward or upward through

the biennial specifications and management measures process. Part of the overall total catch limit is a set-aside of 10 mt of Pacific halibut to accommodate bycatch in the at-sea Pacific whiting fishery and in the shoreside trawl fishery south of 40°10′ N. lat. (estimated to be approximately 5 mt each). The intent of the Council for this approach was to reduce halibut mortality that has been observed in recent years in the trawl fishery by approximately 50 percent.

At the November 2010 Council meeting, the Council and NMFS received the most recent total mortality information from the Northwest Fishery Science Center (NWFSC), in a report titled "Pacific Halibut Bycatch in the U.S. West Coast Groundfish Fishery from 2002 through 2009", published in October 2010. This report indicated that the proportion of sublegal sized halibut (under 32 inches) to legal sized halibut (length 32 inches and over) was higher than the Council had realized when the IBQ pound provisions were adopted. The method of calculating halibut IBQ pounds specified in current regulations at § 660.55(m), which was developed prior to the October 2010 NWFSC report, would result in issuance of fewer individual bycatch quota pounds than the target set by the Council, and could create a chokehold species that would threaten successful implementation of the rationalization program.

The calculation of the trawl mortality bycatch limit, as specified at § 660.55(m) and in the FMP, would include both legal (length 32 inches and over) and sublegal (under 32 inches) halibut. At its November 2010 Council meeting, the Council discussed an alternate approach for calculation of the total trawl mortality bycatch limit, which includes legal-sized halibut only and is greater than 15 percent of the 2010 total CEY of Pacific halibut. This approach more closely reflects the Council's intent of a 50-percent reduction in halibut mortality.

Consistent with the Council's recommendation at its November 2010 meeting, NMFS is revising §§ 660.55(m) and 660.140(d)(1)(ii)(C) in this rule to modify the calculation of the trawl mortality bycatch limit so that it is based on "130,000 pounds of legal sized halibut, net weight." Because halibut IBQ pounds are expressed in round weight, this limit, expressed in net weight, is converted to round weight by dividing by 0.75 (a conversion factor used by the International Pacific Halibut Commission (IPHC)), resulting in 173,333 pounds. In addition, because halibut IBQ pounds cover both legal and sublegal sized halibut, the calculation is further divided by 0.62 to determine the total number of both legal and sublegal sized halibut, in round pounds. The conversion factor of 0.62 to convert legal sized halibut into both legal and sublegal sized halibut is based on the Council's November 2010 recommendation, which was derived from the October 2011 NWFSC report. The resulting 2011 trawl bycatch mortality limit is 279,570 pounds. In order to calculate IBQ pounds, this amount is reduced by the 10 mt (22,046 pounds) set aside to accommodate bycatch in the at-sea Pacific whiting fishery and in the shoreside trawl fishery south of 40°10′ N. lat. NMFS will issue Pacific halibut IBQ pounds to QS permit owners based on their halibut IBQ percent multiplied by 257,524 pounds.

Trawl Rockfish Conservation Areas (RCAs) and Landing Allowances for Non-IFQ Species

Because the 2011–2012 harvest specifications and management measures rulemaking is delayed, if NMFS does not take any action, the harvest specifications and management measures that were in place and implemented during 2010 will remain in place in 2011 until they are revised through rulemaking. Also, the trawl rationalization program is scheduled to begin in January 2011. Because of this circumstance, management measures for the 2010 limited entry trawl fishery, which would have been amended for the 2011–2012 biennium, will remain in place. However, some of these measures are not appropriate for managing a rationalized fishery. In particular, trip limits would remain in place for the limited entry trawl fishery, including trip limits for IFQ species. Also, the trawl RCA boundaries that were in place in 2010 would be repeated for 2011, and those also may not be appropriate for a fishery that is operating under the trawl rationalization program. NMFS requested guidance from the Council on what the appropriate trip limits for non-IFQ species might be and what the appropriate RCA boundaries might be for the rationalized trawl fishery at its November 2010 meeting.

In June 2010, the Council recommended landing allowances for non-IFQ species and Pacific whiting (outside the primary whiting season) for implementation in the 2011–2012 harvest specifications and management measures, with the intent that they would be implemented with similar timing of the trawl rationalization program, in January 2011. However, with the delay in implementation of the 2011 harvest specifications and management measures, the Council, at its November 2010 meeting, re-considered appropriate landing allowances for non-IFQ species and whiting and RCA boundaries to be implemented via interim emergency rule for the start of the 2011 fishery.

The Council's Groundfish Management Team considered whether the landing allowances for non-IFQ species and whiting that were adopted by the Council in June 2010 would still be appropriate for the start of 2011, given the most recent fishery information and a NWFSC report on total groundfish mortality from 2009 fisheries that was released in November 2010. Considering the most recent fishery information, the landing allowances that were recommended by the Council in June 2010 were deemed appropriate by the Council and were recommended for implementation for the interim period until the 2011–2012 harvest specification and management measures are finalized later in 2011. The Council did, however, consider changes to the longnose skate landing allowances for the beginning of 2011, but did not recommend changes, based on the reasons described below.

The 2009 total mortality report indicated that the total mortality of longnose skate exceeded the 2009 OY of 1,349 mt by 106 mt, or 8 percent. 2009 was the first year that longnose skate was managed with a species-specific harvest specification and was therefore required to be sorted by species for catch accounting against the OY. Until 2009, the best available catch information indicated that catch of longnose skate was only about 800 mt per year. The trip limit that the Council recommended in June 2010 for longnose skate, a non-IFQ species, for 2011 was "Not limited," based on the information on catch and discards that was available at the time, which indicated that a trip limit was unnecessary with a proposed harvest level of 1,349 mt. In 2009, only about 800 mt of longnose skate were landed, so much of the additional mortality was from discarding, bringing the total mortality above the 2009 OY. Trip limits, or landing allowances have a limited ability to control total mortality; they directly affect the amount of fish that may be landed, and may have indirect effects on whether vessels will target a species if the trip limit is low. However, with much of the mortality of longnose skate coming from discards at sea, trip limits may be less effective at keeping total mortality of longnose skate below the OY. Additional analysis of available observer data may provide additional information on the management

measures that may be necessary to keep total mortality of longnose skate within the harvest specifications; however there was not sufficient time between receiving the 2009 total mortality report in November 2010 to develop and implement those measures in this interim emergency rulemaking. The total mortality of longnose skate in 2009 was well below the ABC (only 48 percent of the ABC), therefore the risk of overfishing in 2011 if no action were taken is very low. Therefore, the Council recommended keeping an interim landing allowance for longnose skate at "Not limited" for the start of 2011 and continuing analysis of potential management measures for longnose skate that can be implemented inseason during 2011 to keep the total mortality within the 2011 harvest specifications.

The Council also considered adjustments to the boundaries of the trawl RCA for the start of 2011. In June 2010, the Council recommended that the trawl RCA boundaries that were scheduled for the 2010 calendar year, as of June 2010, be in place for 2011 as well. The Council considered extending the seaward boundary of the trawl RCA seaward to close some deeper areas where darkblotched rockfish are encountered, given concerns with higher than anticipated darkblotched rockfish mortality in 2010. However, given the personal accountability features offered by a rationalized fishery, the Council did not recommend additional restrictions for the trawl RCA implemented by this rule.

No changes to management measures are being made for non-trawl commercial fisheries or recreational fisheries; however, the titles for the trip limit tables that are not otherwise revised by this interim rule are re-titled to reflect their ongoing effectiveness.

Therefore, the Council recommended and NMFS is implementing changes to the trip limits and RCA boundaries in Table 1 (North) and Table 1 (South) to subpart D. These changes will establish landing allowances for non-IFQ species and Pacific whiting outside the primary season and will adjust the trawl RCA boundaries. NMFS is also implementing changes to §§ 660.60 and 660.130 to remove obsolete language about trip limits in the trawl fishery, which are being removed for IFQ species in this interim rule. NMFS acknowledges that some obsolete language regarding trip limits, crossover provisions, and varying trip limits based on the gear type that is used will remain in regulations. NMFS intends to issue a follow-up rulemaking that will remove or revise outdated language that is outside of the scope of this interim rule. Also, NMFS is implementing revisions to the titles of Tables 2 (North) and 2 (South) to Part 660, subpart E and to Tables 3 (North) and 3 (South) to Part 660, subpart F, to reflect the ongoing effectiveness of the trip limits contained therein.

Classification

These interim measures are issued under the authority of, and are consistent with section 305(c)(1) of, the Magnuson-Stevens Fishery Conservation and Management Act and regulations at 50 CFR part 660, subparts C through G (the groundfish regulations implementing the FMP).

The Assistant Administrator Fisheries, NOAA (AA) finds good cause under 5 U.S.C. 553(b)(B) to waive the requirement for prior notice and opportunity for public comment, as such procedures are impracticable and contrary to the public interest.

In June 2010, the Council recommended, and NMFS is working to implement, specifications and management measures for the 2011–2012 biennium. Given the complexity of the biennial specifications and management measures, the need for adequate NEPA-related documents and public review periods, and competing workloads, NMFS did not have enough time to implement a final rule by January 1, 2011. In light of the delay in availability of the 2011–2012 harvest specifications and management measures rulemaking, the interim measures set out in this rule are necessary to implement the trawl rationalization program in January 2011 without causing risk of overfishing or the need for potentially severe restrictions to fishery management measures later in the year to prevent the final harvest specifications or allocations for 2011 from being exceeded.

It is in the public interest to reduce the harvest level for sablefish for the beginning of 2011. Failure to implement an interim harvest level reduction by January 1, 2011 would prevent NMFS from having the ability to take routine inseason action, if necessary, to keep projected mortality below the sablefish harvest level during the interim period (between January 1, 2011 and when the final 2011 harvest specifications are implemented) and would risk premature closure of fisheries that are important to coastal communities, which would fail to meet the objectives of the Pacific Coast Groundfish FMP to allow for year round fishing opportunities to provide community stability. This is contradictory to one of the goals of the FMP to keep year round fishing opportunities for target stocks.

It is also in the public interest to issue QP for IFQ species as described in this interim emergency rule by January 1, 2011. For some species for which the final 2011 harvest level may be lower than in 2010, without this rule, the rationalized trawl fishery would receive total QP that could: (1) Preclude fishing for such species in other non-trawl sectors (*e.g.*, sablefish); or (2) exceed the final 2011 harvest specifications when they are implemented later in the year (*e.g.*, petrale sole). Failure to implement interim QP for IFQ species would keep harvest levels for the trawl fishery in place that are not based on the best available data and would risk premature closure of fisheries that are important to coastal communities, which would fail to meet the objectives of the Pacific Coast Groundfish FMP to allow for year round fishing opportunities to provide community stability.

It is also in the public interest to revise the calculation method for Pacific halibut IBQ pounds. New information was received by the Council at its November 2010 meeting indicating that the proportion of sublegal sized halibut to legal sized halibut in bycatch of the limited entry trawl fishery was higher than the Council had realized when the IBQ pound provisions were adopted. There was not sufficient time after that meeting to draft this document and undergo proposed and final rulemaking before these actions need to be in effect. It would be contrary to the public interest to wait to implement these changes until after public notice and comment, because making this regulatory change quickly allows additional harvest in fisheries that are important to coastal communities. Failure to implement an interim calculation method for Pacific halibut IBQ would keep regulations in place that are not based on the best available data and could lead to early closures of the fishery because such regulations would result in issuance of fewer IBQ pounds than the target set by the Council. Premature closure of fisheries that are important to coastal communities would fail to meet the objectives of the Pacific Coast Groundfish FMP to allow for year round fishing opportunities to provide community stability.

It is also in the public interest to adjust RCAs and landing allowances for non-IFQ species. RCAs are important to facilitate rebuilding of overfished species. Failure to adjust interim trawl RCAs would keep regulations in place that are not based on the best available data, as they were not specifically

developed for use in a rationalized trawl fishery. This would be contrary to the public interest and with the Pacific Coast Groundfish FMP to rebuild overfished species while allowing for harvest opportunities to support local communities. Failure to remove trip limits for IFQ species would cause duplicative regulations, where vessels would be fishing for their QP for IFQ species and would then also be restricted by trip limits. This would be very confusing to the regulated public. Removal of trip limits for IFQ species relieves an unnecessary restriction and allows flexibility for vessels fishing IFQ species.

For the same reasons, NMFS finds good cause to waive the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d)(3), so that this final rule may become effective on January 1, 2011.

Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

This interim rule has been determined to be not significant for purposes of Executive Order 12866.

A Regulatory Impact Review was completed and is available upon request from the NMFS, Northwest Region (*see* **ADDRESSES**).

NMFS issued Biological Opinions under the Endangered Species Act (ESA) on August 10, 1990, November 26, 1991, August 28, 1992, September 27, 1993, May 14, 1996, and December 15, 1999 pertaining to the effects of the Pacific Coast groundfish FMP fisheries on Chinook salmon (Puget Sound, Snake River spring/summer, Snake River fall, upper Columbia River spring, lower Columbia River, upper Willamette River, Sacramento River winter, Central Valley spring, California coastal), coho salmon (Central California coastal, southern Oregon/northern California coastal), chum salmon (Hood Canal summer, Columbia River), sockeye salmon (Snake River, Ozette Lake), and steelhead (upper, middle and lower Columbia River, Snake River Basin, upper Willamette River, central California coast, California Central Valley, south/central California, northern California, southern California). These biological opinions have concluded that implementation of the FMP for the Pacific Coast groundfish fishery was not expected to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS, or result in the destruction or adverse modification of critical habitat.

NMFS reinitiated a formal section 7 consultation under the ESA in 2005 for both the Pacific whiting midwater trawl fishery and the groundfish bottom trawl fishery. The December 19, 1999, Biological Opinion had defined an 11,000 Chinook incidental take threshold for the Pacific whiting fishery. During the 2005 Pacific whiting season, the 11,000 fish Chinook incidental take threshold was exceeded, triggering reinitiation. Also in 2005, new data from the West Coast Groundfish Observer Program became available, allowing NMFS to complete an analysis of salmon take in the bottom trawl fishery.

NMFS prepared a Supplemental Biological Opinion dated March 11, 2006, which addressed salmon take in both the Pacific whiting midwater trawl and groundfish bottom trawl fisheries. In its 2006 Supplemental Biological Opinion, NMFS concluded that catch rates of salmon in the 2005 whiting fishery were consistent with expectations considered during prior consultations. Chinook bycatch has averaged about 7,300 fish over the last 15 years and has only occasionally exceeded the reinitiation trigger of 11,000 fish.

Since 1999, annual Chinook bycatch has averaged about 8,450 fish. The Chinook ESUs most likely affected by the whiting fishery has generally improved in status since the 1999 section 7 consultation. Although these species remain at risk, as indicated by their ESA listing, NMFS concluded that the higher observed bycatch in 2005 does not require a reconsideration of its prior "no jeopardy" conclusion with respect to the fishery. For the groundfish bottom trawl fishery, NMFS concluded that incidental take in the groundfish fisheries is within the overall limits articulated in the Incidental Take Statement of the 1999 Biological Opinion. The groundfish bottom trawl limit from that opinion was 9,000 fish annually. NMFS will continue to monitor and collect data to analyze take levels. NMFS also reaffirmed its prior determination that implementation of the Groundfish FMP is not likely to jeopardize the continued existence of any of the affected ESUs.

Lower Columbia River coho (70 FR 37160, June 28, 2005) were recently listed and Oregon Coastal coho (73 FR 7816, February 11, 2008) were recently relisted as threatened under the ESA. The 1999 biological opinion concluded that the bycatch of salmonids in the Pacific whiting fishery were almost entirely Chinook salmon, with little or no bycatch of coho, chum, sockeye, and steelhead.

The Southern Distinct Population Segment (DPS) of green sturgeon was listed as threatened under the ESA (71 FR 17757, April 7, 2006). The southern DPS of Pacific eulachon was listed as threatened on March 18, 2010, under the ESA (75 FR 13012). NMFS has reinitiated consultation on the fishery, including impacts on green sturgeon, eulachon, marine mammals, and turtles. After reviewing the available information, NMFS has concluded that, consistent with Sections 7(a)(2) and 7(d) of the ESA, the proposed action would not jeopardize any listed species, would not adversely modify any designated critical habitat, and would not result in any irreversible or irretrievable commitment of resources that would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, and Indian fisheries.

Dated: December 22, 2010.

Samuel D. Rauch III,

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

■ For the reasons set out in the preamble, 50 CFR Chapter VI is amended as follows:

50 CFR Chapter VI

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.* and 16 U.S.C. 7001 *et seq.*

Subpart C—West Coast Groundfish Fisheries

■ 2. In § 660.50, paragraph (f)(2)(ii) is revised to read as follows:

§ 660.50 Pacific Coast treaty Indian fisheries.

* * * * *

(f) * * *

(2) * * *

(ii) The Tribal allocation is set at 543 mt as an interim measure until the 2011 harvest specifications are finalized. This allocation is 10 percent of the Monterey through Vancouver area (North of 36° N. lat.) OY, less 1.6 percent estimated discard mortality.

* * * * *

■ 3. In § 660.55, paragraph (m) is revised to read as follows:

§ 660.55 Allocations.

* * * * *

(m) *Pacific halibut bycatch allocation.* The Pacific halibut fishery off Washington, Oregon and California (Area 2A in the halibut regulations) is managed under regulations at 50 CFR part 300, subpart E. Beginning with the 2011–2012 biennial specifications process, the PCGFMP sets a trawl mortality bycatch limit for legal size halibut of 130,000 pounds, net weight, for the first four years of trawl rationalization and not to exceed 100,000 pounds starting in the fifth year. This total bycatch limit may be adjusted downward or upward through the biennial specifications and management measures process. Part of the overall total catch limit is a set-aside of 10 mt of Pacific halibut (legal and sublegal, round weight), to accommodate bycatch in the at-sea Pacific whiting fishery and in the shorebased trawl fishery south of 40°10′ N. lat. (estimated to be approximately 5 mt each).

■ 4. In § 660.60, paragraphs (h)(7) introductory text and (h)(7)(i) are revised to read as follows:

§ 660.60 Specifications and management measures.

* * * * *

(h) * * *

(7) *Crossover provisions.* NMFS uses different types of management areas for West Coast groundfish management. One type of management area is the north-south management area, a large ocean area with northern and southern boundary lines wherein trip limits, seasons, and conservation areas follow a single theme. Within each north-south management area, there may be one or more conservation areas, defined at § 660.11 and §§ 660.60 through 660.74, subpart C. The provisions within this paragraph apply to vessels operating in different north-south management areas. Crossover provisions also apply to vessels that fish in both the limited entry and open access fisheries, or that use open access non-trawl gear while registered to limited entry fixed gear permits. Fishery specific crossover provisions can be found in subparts D through F of this part.

(i) *Operating in north-south management areas with different trip limits.* Trip limits for a species or a species group may differ in different north-south management areas along the coast. The following crossover provisions apply to vessels operating in different geographical areas that have different cumulative or "per trip" trip limits for the same species or species group. Such crossover provisions do not apply to: IFQ species defined at § 660.140(c), subpart D, for vessels that are declared into the shorebased IFQ sector (*see* 660.13 (d)(5)(iv)(A) for valid shorebased IFQ declaration reports), species that are subject only to daily trip limits, or to the trip limits for black rockfish off Washington, as described at § 660.230(d), subpart E and § 660.330(e), subpart F.

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■ 5a. Table 2a to part 660, subpart C is revised to read as follows:

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Table 2a. To Part 660, Subpart C - 2010, and beyond, Specifications of ABCs, OYs, and HGs, by Management Area (weights in metric tons).

Species	ABC Specifications						OY	HG b/	
	ABC Contributions by Area					ABC			
	Vancouver a/	Columbia	Eureka	Monterey	Conception			Commercial	Recreational
ROUNDFISH:									
Lingcod c/									
N of 42 N. lat.	4,058		771			4,829	4,829		
S of 42 N. lat.									
Pacific Cod e/	3,200		d/			3,200	1,600		
Pacific Whiting f/	336,560					336,560	193,935		
Sablefish g/									
N of 36 N. lat.	9,217					9,217	5,515		
S of 36 N. lat.							1,258		
Cabezon h/									
S of 42 N. lat.	d/		86		25	111	79		
FLATFISH:									
Dover sole	28,582					28,582	16,500		
English sole j/	9,745					9,745	9,745	-	
Petrale sole k/	1,514		1,237			2,751	1,200	-	
Arrowtooth flounder l/	10,112					10,112	10,112	-	
Starry Flounder m/	1,578					1,578	1,077		
Other flatfish n/	6,731					6,731	4,884	-	
ROCKFISH:									
Pacific Ocean Perch o/	1,173					1,173	200	198	

Species	ABC Specifications								
	ABC Contributions by Area							HG b/	
	Vancouver a/	Columbia	Eureka	Monterey	Conception	ABC	OY	Commercial	Recreational
Shortbelly p/	6,950					6,950	6,950		
Widow q/	6,937					6,937	509	447.4	7.2
Canary r/	940					940	105		
Chilipepper s/	d/			2,576		2,576	2,447	2,447	
Bocaccio t/	d/			793		793	288	206.4	67.3
Splitnose u/	d/			615		615	461		
Yellowtail v/	4,562			d/		4,562	4,562		
Shortspine thornyhead w/ N of 34 27' N. lat.	2,411					2,411	1,591	1,591	
S of 34 27' N. lat.							410		
Longspine thornyhead x/ N of 34 27' N. lat.	3,671					3,671	2,175		
S of 34 27' N. lat.							385		
Cowcod y/	d/			14		14	4		
Darkblotched z/	440					440	330	288.05	
Yelloweye aa/						32	14	1.9	7.6
California Scorpionfish bb/					155	155	155		
Black cc/									
N of 46 16' N. lat.	464					464	464		
S of 46 16' N. lat.			1,317			1,317	1,000		

Species	ABC Specifications								
	ABC Contributions by Area							HG b/	
	Vancouver a/	Columbia	Eureka	Monterey	Conception	ABC	OY	Commercial	Recreational
Minor Rockfish dd/									
N of 40 10' N. lat.	3,678			--		3,678	2,283		
Minor Rockfish ee/									
S of 40 10' N. lat.	--			3,382		3,382	1,990		
Remaining	1,640			1,318					
bank ff/	d/			350					
blackgill gg/	d/			292					
blue	28			211					
bocaccio north	318			--					
chilipepper north	32			--					
redstripe	576			d/					
sharpchin	307			45					
silvergrey	38			d/					
splitnose north	242			--					
yellowmouth	99			d/					
yellowtail	--			116					
gopher	d/			302					
Other rockfish hh/	2,038			2,066					
SHARKS/SKATES/RATFISH/MORIDS/GRENADIERS/KELP GREENLING:									
Longnose Skate ii/	3,269					3,269	1,349		
Other fish jj/	11,200					11,200	5,600		

■ 5b. Table 2c to part 660, subpart C and footnotes a through ll to Table 2c are revised to read as follows:

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Table 2c. To Part 660, Subpart C - 2010, and beyond, Open Access and Limited Entry Allocations by Species or Species Group. (Weights in Metric Tons)

Species	Commercial Total Catch HGs	Commercial Total Catch HGs			
		Limited Entry		Open Access	
		Mt	%	Mt	%
Lingcod	--	--	81.0	--	19.0
N of 42° N. lat.					
S of 42° N. lat.					
Sablefish kk/	6,471	5,863	90.6	608	9.4
N of 36° N. lat.					
Widow ll/	--	--	97.0	--	3.0
Canary ll/	--	--	87.7	--	12.3
Chilipepper	2,447	1,363	55.7	1,084	44.3
Bocaccio ll/	206.4	--	55.7	--	44.3
Yellowtail	--	--	91.7	--	8.3
Shortspine thornyhead	1,591	1,586	99.7	5	0.27
N of 34°27' N. lat.					
Minor Rockfish	--	--	91.7	--	8.3
N of 40°10' N. lat.					
S of 40°10' N. lat.	--	--	55.7	--	44.3

a/ ABCs apply only to the U.S. portion of the Vancouver area.

b/ Optimum Yields (OYs) and Harvest Guidelines (HGs) are specified as total catch values. A harvest guideline is a specified harvest target and not a quota. The use of this term may differ from the use of similar terms in State regulation.

c/ Lingcod—A coastwide lingcod stock assessment was prepared in 2005. The lingcod biomass was estimated to be at 64 percent of its unfished biomass coastwide in 2005. The ABC of 4,829 mt was calculated using an FMSY proxy of F45%. Because the stock is above B40% coastwide, the coastwide OY was set equal to the ABC. The Tribal harvest guideline is 250 mt.

d/ "Other species"—These species are neither common nor important to the commercial and recreational fisheries in the areas footnoted. Accordingly, these species are included in the harvest guidelines of "other fish", "other rockfish" or "remaining rockfish".

e/ Pacific Cod—The 3,200 mt ABC for the Vancouver-Columbia area is based on historical landings data. The 1,600 mt OY is the ABC reduced by 50 percent as a precautionary adjustment. A Tribal harvest guideline of 400 mt is deducted from the OY resulting in a commercial OY of 1,200 mt.

f/ Pacific whiting—The most recent stock assessment was prepared in January 2010. The stock assessment base model estimated the Pacific whiting biomass to be at 31 percent (50th percentile estimate of depletion) of its unfished biomass in 2010. The U.S.-Canada coastwide ABC is 455,550 mt, the U.S. share of the ABC is 336,560 mt (73.88 percent of the coastwide ABC). The U.S.-Canada coastwide Pacific whiting OY is 262,500 mt, with a corresponding U.S. OY of 193,935 mt. The Tribal allocation is 49,939 mt. The amount estimated to be taken as research catch and in non-groundfish fisheries is 3,000 mt. The commercial OY is 140,996 mt. Each sector receives a portion of the commercial OY, with the catcher/processors getting 34 percent (47,939 mt), motherships getting 24 percent (33,839 mt), and the shore-based sector getting 42 percent (59,218 mt). No more than 2,961 mt (5 percent of the shore-based allocation) may be taken in the fishery south of 42° N. lat. prior to the start of the primary season for the shorebased fishery north of 42° N. lat.

g/ Sablefish—A coastwide sablefish stock assessment was prepared in 2007. The coastwide sablefish biomass was estimated to be at 38.3 percent of its unfished biomass in 2007. The 2010 coastwide ABC of 9,217 mt was based on the new stock assessment with a FMSY proxy of F45%. The 40–10 harvest policy was applied to the ABC, then apportioned between the northern and southern areas with 28 percent going to the area south of 36° N. lat. The OY for the area north of 36° N. lat. is set at 5,515 mt as an interim measure until the 2011 harvest specifications are finalized. When establishing the OY for the area south of 36° N. lat. a 50 percent reduction was made resulting in a Conception area OY of 1,258 mt. The Tribal allocation for the area north of 36° N. lat. is set at 552 mt (10 percent of the OY north of 36° N. lat.) as an interim measure until the 2011 harvest specifications are finalized, which is further reduced by 1.6 percent to account for discard mortality. The Tribal landed catch value is set at 543 mt as an interim measure until the 2011 harvest specifications are finalized.

h/ Cabezon south of 42° N. lat. was assessed in 2005. The Cabezon stock was estimated to be at 40 percent of its unfished biomass north of 34° 27′ N. lat. and 28 percent of its unfished biomass south of 34° 27′ N. lat. in 2005. The ABC of 111 mt is based on the 2005 stock assessment with a harvest rate proxy of F45%. The OY of 79 mt is consistent with the application of a 60–20 harvest rate policy specified in the California Nearshore Fishery Management Plan.

i/ Dover sole north of 34° 27′ N. lat. was assessed in 2005. The Dover sole biomass

was estimated to be at 59.8 percent of its unfished biomass in 2005 and was projected to be increasing. The ABC of 28,582 mt is based on the results of the 2005 assessment with an FMSY proxy of F40%. Because the stock is above B40% coastwide, the OY could be set equal to the ABC. The OY of 16,500 mt is less than the ABC. The OY is set at the MSY harvest level which is considerably larger than the coastwide catches in any recent years.

j/ A coastwide English sole stock assessment was prepared in 2005 and updated in 2007. The stock was estimated to be at 116 percent of its unfished biomass in 2007. The stock biomass is believed to be declining. The ABC of 9,745 mt is based on the results of the 2007 assessment update with an FMSY proxy of F40%. Because the stock is above B40%, the OY was set equal to the ABC.

k/ A petrale sole stock assessment was prepared for 2005. In 2005 the petrale sole stock was estimated to be at 32 percent of its unfished biomass coastwide (34 percent in the northern assessment area and 29 percent in the southern assessment area). The 2010 ABC of 2,751 mt is based on the 2005 assessment with a F40% FMSY proxy. To derive the 2010 OY, the 40–10 harvest policy was applied to the ABC for both the northern and southern assessment areas. As a precautionary measure, an additional 25 percent reduction was made in the OY contribution for the southern area due to assessment uncertainty. As another precautionary measure, an additional 1,193 mt reduction was made in the coastwide OY due to preliminary results of the more pessimistic 2009 stock assessment. The coastwide OY is 1,200 mt in 2010.

l/ Arrowtooth flounder was assessed in 2007 and was estimated to be at 79 percent of its unfished biomass in 2007. Because the stock is above B40%, the OY is set equal to the ABC.

m/ Starry Flounder was assessed for the first time in 2005 and was estimated to be above 40 percent of its unfished biomass in 2005. However, the stock was projected to decline below 40 percent in both the northern and southern areas after 2008. For 2010, the coastwide ABC of 1,578 mt is based on the 2005 assessment with a FMSY proxy of F40%. To derive the OY of 1,077 mt, the 40–10 harvest policy was applied to the ABC for both the northern and southern assessment areas then an additional 25 percent reduction was made due to assessment uncertainty.

n/ "Other flatfish" are those flatfish species that do not have individual ABC/OYs and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole. The other flatfish ABC is based on historical catch levels. The ABC of 6,731 mt is based on the highest landings for sanddabs (1995) and rex sole (1982) for the 1981–2003 period and on the average landings from the 1994–1998 period for the remaining other flatfish species. The OY of 4,884 mt is based on the ABC with a 25 percent precautionary adjustment for sanddabs and rex sole and a 50 percent precautionary adjustment for the remaining species.

o/ A POP stock assessment was prepared in 2005 and was updated in 2007. The stock assessment update estimated the stock to be at 27.5 percent of its unfished biomass in 2007. The ABC of 1,173 mt for the Vancouver and Columbia areas is based on the 2007 stock assessment update with an FMSY proxy of F50%. The OY of 200 mt is based on a rebuilding plan with a target year to rebuild of 2017 and an SPR harvest rate of 86.4 percent. The OY is reduced by 2.0 mt for the amount anticipated to be taken during research activity and 0.14 mt for the amount expected to be taken during EFP fishing.

p/ Shortbelly rockfish remains an unexploited stock and is difficult to assess quantitatively. To understand the potential environmental determinants of fluctuations in the recruitment and abundance of an unexploited rockfish population in the California Current ecosystem, a non-quantitative assessment was conducted in 2007. The results of the assessment indicated the shortbelly stock was healthy with an estimated spawning stock biomass at 67 percent of its unfished biomass in 2005. The ABC and OY are being set at 6,950 mt which is 50 percent of the 2008 ABC and OY values. The stock is expected to remain at its current equilibrium with these harvest specifications.

q/ Widow rockfish was assessed in 2005, and an update was prepared in 2007. The stock assessment update estimated the stock to be at 36.2 percent of its unfished biomass in 2006. The ABC of 6,937 mt is based on the stock assessment update with an F50% FMSY proxy. The OY of 509 mt is based on a rebuilding plan with a target year to rebuild of 2015 and an SPR harvest rate of 95 percent. To derive the commercial harvest guideline of 447.4 mt, the OY is reduced by 1.1 mt for the amount anticipated to be taken during research activity, 45.5 mt for the Tribal set-aside, 7.2 mt the amount estimated to be taken in the recreational fisheries, 0.4 mt for the amount expected to be taken incidentally in non-groundfish fisheries, and 7.4 mt for EFP fishing activities.

r/ Canary rockfish—A canary rockfish stock assessment was completed in 2007 and the stock was estimated to be at 32.7 percent of its unfished biomass coastwide in 2007. The coastwide ABC of 940 mt is based on a FMSY proxy of F50%. The OY of 105 mt is based on a rebuilding plan with a target year to rebuild of 2021 and a SPR harvest rate of 88.7 percent. To derive the commercial harvest guideline of 42.3 mt, the OY is reduced by 8.0 mt for the amount anticipated to be taken during research activity, 7.3 mt the Tribal set-aside, 43.8 mt the amount estimated to be taken in the recreational fisheries, 0.9 mt for the amount expected to be taken incidentally in non-groundfish fisheries, and 2.7 mt for the amount expected to be taken during EFP fishing. The following harvest guidelines are being specified for catch sharing in 2009: 19.7 mt for limited entry Non-Whiting Trawl, 18.0 mt for limited entry Whiting Trawl, 2.2 mt for limited entry fixed gear, 2.5 mt for directed open access, 4.9 mt for Washington recreational, 16.0 mt for Oregon recreational, and 22.9 mt for California recreational.

s/ Chilipepper rockfish was assessed in 2007 and the stock was estimated to be at 71 percent of its unfished biomass coastwide in 2007. The ABC of 2,576 mt is based on the new assessment with an FMSY proxy of F50%. Because the unfished biomass is estimated to be above 40 percent of the unfished biomass, the default OY could be set equal to the ABC. However, the OY of 2,447 mt was the ABC reduced by 5 percent as a precautionary measure. Open access is allocated 44.3 percent (1,084 mt) of the commercial HG and limited entry is allocated 55.7 percent (1,363 mt) of the commercial HG.

t/ A bocaccio stock assessment and a rebuilding analysis were prepared in 2007. The bocaccio stock was estimated to be at 13.8 percent of its unfished biomass in 2007. The ABC of 793 mt for the Monterey-Conception area is based on the new stock assessment with an FMSY proxy of F50%. The OY of 288 is based on a rebuilding plan with a target year to rebuild of 2026 and a SPR harvest rate of 77.7 percent. To derive the commercial harvest guideline of 206.4 mt, the OY is reduced by 2.0 mt for the amount anticipated to be taken during research activity, 67.3 mt for the amount estimated to be taken in the recreational fisheries, 1.3 mt for the amount expected to be taken incidentally in non-groundfish fisheries, and 11.0 mt for the amount expected to be taken during EFP fishing.

u/ Splitnose rockfish—The ABC is 615 mt in the Monterey-Conception area. The 461 mt OY for the area reflects a 25 percent precautionary adjustment because of the less rigorous stock assessment for this stock. In the north (Vancouver, Columbia and Eureka areas), splitnose is included within the minor slope rockfish OY. Because the harvest assumptions used to forecast future harvest were likely overestimates, carrying the previously used ABCs and OYs forward into 2010 was considered to be conservative and based on the best available data.

v/ Yellowtail rockfish—A yellowtail rockfish stock assessment was prepared in 2005 for the Vancouver, Columbia, Eureka areas. Yellowtail rockfish was estimated to be above 40 percent of its unfished biomass in 2005. The ABC of 4,562 mt is based on the 2005 stock assessment with the FMSY proxy of F50%. The OY of 4,562 mt was set equal to the ABC, because the stock is above the precautionary threshold of B40%.

w/ Shortspine thornyhead was assessed in 2005 and the stock was estimated to be at 63 percent of its unfished biomass in 2005. The ABC of 2,411 mt is based on a F50%FMSYproxy. For that portion of the stock (66 percent of the biomass) north of Point Conception (34° 27′ N. lat.), the OY of 1,591 mt was set at equal to the ABC because the stock is estimated to be above the precautionary threshold. For that portion of the stock south of 34° 27′ N. lat. (34 percent of the biomass), the OY of 410 mt was the portion of the ABC for the area reduced by 50 percent as a precautionary adjustment due to the short duration and amount of survey data for that area.

x/ Longspine thornyhead was assessed coastwide in 2005 and the stock was estimated to be at 71 percent of its unfished biomass in 2005. The coastwide ABC of 3,671 mt is based on a F50%FMSYproxy. The OY is set equal to the ABC because the stock is above the precautionary threshold. Separate

OYs are being established for the areas north and south of 34° 27′ N. lat. (Point Conception). The OY of 2,175 mt for that portion of the stock in the northern area (79 percent) was the ABC reduced by 25 percent as a precautionary adjustment. For that portion of the stock in the southern area (21 percent), the OY of 385 mt was the portion of the ABC for the area reduced by 50 percent as a precautionary adjustment due to the short duration and amount of survey data for that area.

y/ Cowcod in the Conception area was assessed in 2007 and the stock was estimated to be between 3.4 to 16.3 percent of its unfished biomass. The ABC for the Monterey and Conception areas is 14 mt and is based on the 2007 rebuilding analysis in which the Conception area stock assessment projection was doubled to account for both areas. A single OY of 4 mt is being set for both areas. The OY of 4 mt is based on the need to conform the 2010 cowcod harvest specifications to the Court's Order in Natural Resources Defense Council v. Locke, Civil Action No. C 01–0421 JL. The amount anticipated to be taken during scientific research activity is 0.2 mt and the amount expected to be taken during EFP activity is 0.24 mt.

z/ Darkblotched rockfish was assessed in 2007 and a rebuilding analysis was prepared. The new stock assessment estimated the stock to be at 22.4 percent of its unfished biomass in 2007. The ABC is projected to be 440 mt and is based on the 2007 stock assessment with an FMSY proxy of F50%. The OY of 330 mt is based on the need to conform the 2010 darkblotched rockfish harvest specifications to the Court's Order in Natural Resources Defense Council v. Locke, Civil Action No. C 01–0421 JL. The amount anticipated to be taken during scientific research activity is 2.0 mt and the amount anticipated to be taken during EFP activity is 0.95 mt.

aa/ Yelloweye rockfish was fully assessed in 2006 and an assessment update was completed in 2007. The 2007 stock assessment update estimated the spawning stock biomass in 2006 to be at 14 percent of its unfished biomass coastwide. The 32 mt coastwide ABC was derived from the base model in the new stock assessment with an FMSY proxy of F50%. The 14 mt OY is based on the need to conform the 2010 yelloweye rockfish harvest specifications to the Court's Order in Natural Resources Defense Council v. Locke, Civil Action No. C 01–0421 JL. The amount anticipated to be taken during scientific research activity is 1.3 mt, the amount anticipated to be taken in the Tribal fisheries is 2.3 mt, and the amount anticipated to be taken incidentally in non-groundfish fisheries is 0.3 mt. The catch sharing harvest guidelines for yelloweye rockfish in 2010 are: Limited entry non-whiting trawl 0.3 mt, limited entry whiting 0.0 mt, limited entry fixed gear 0.8 mt, directed open access 1.2 mt, Washington recreational 2.6 mt, Oregon recreational 2.3 mt, California recreational 2.7 mt, and 0.2 mt for exempted fishing.

bb/ California Scorpionfish south of 34° 27′ N. lat. (point Conception) was assessed in 2005 and was estimated to be above 40 percent of its unfished biomass in 2005. The ABC of 155 mt is based on the new assessment with a harvest rate proxy of F50%. Because the stock is above B40%coastwide, the OY is set equal to the ABC.

cc/ New assessments were prepared for black rockfish south of 45° 56.00 N. lat. (Cape Falcon, Oregon) and for black rockfish north of Cape Falcon. The ABC for the area north of 46° 16′ N. lat. (Washington) is 464 mt (97 percent) of the 478 mt ABC contribution from the northern assessment area. The ABC for the area south of 46° 16′ N. lat. (Oregon and California) is 1,317 mt which is the sum of a contribution of 14 mt (3 percent) from the northern area assessment, and 1,303 mt from the southern area assessment. The ABCs were derived using an FMSY proxy of F50%. Because both portions of the stock are above 40 percent, the OYs could be set equal to the ABCs. For the area north of 46°16′ N. lat., the OY of 490 mt is set equal to the ABC. The following Tribal harvest guidelines are being set: 30,000 lb (13.6 mt) north of Cape Alava, WA (48° 09.50′ N. lat.) and 10,000 lb (4.5 mt) between Destruction Island, WA (47° 40′ N. lat.) and Leadbetter Point, WA (46° 38.17′ N. lat.) For the area south of 46° 16′ N. lat., the OY of 1,000 mt is a constant harvest level. The black rockfish OY in the area south of 46° 16′ N. lat., is subdivided with separate HGs being set for the area north of 42° N. lat. (580 mt/58 percent) and for the area south of 42° N. lat. (420 mt/42 percent).

dd/ Minor rockfish north includes the "remaining rockfish" and "other rockfish" categories in the Vancouver, Columbia, and Eureka areas combined. These species include "remaining rockfish", which generally includes species that have been assessed by less rigorous methods than stock assessments, and "other rockfish", which includes species that do not have quantifiable stock assessments. Blue rockfish has been removed from the "other rockfish" and added to the remaining rockfish. The ABC of 3,678 mt is the sum of the individual "remaining rockfish" ABCs plus the "other rockfish" ABCs. The remaining rockfish ABCs continue to be reduced by 25 percent (F = 0.75M) as a precautionary adjustment. To obtain the total catch OY of 2,283 mt, the remaining rockfish ABCs were further reduced by 25 percent and other rockfish ABCs were reduced by 50 percent. This was a precautionary measure to address limited stock assessment information.

ee/ Minor rockfish south includes the "remaining rockfish" and "other rockfish" categories in the Monterey and Conception areas combined. These species include "remaining rockfish" which generally includes species that have been assessed by less rigorous methods than stock assessment, and "other rockfish" which includes species that do not have quantifiable stock assessments. Blue rockfish has been removed from the "other rockfish" and added to the remaining rockfish. The ABC of 3,382 mt is the sum of the individual "remaining rockfish" ABCs plus the "other rockfish" ABCs. The remaining rockfish ABCs continue to be reduced by 25 percent (F = 0.75M) as a precautionary adjustment. The remaining rockfish ABCs are further reduced by 25 percent, with the exception of blackgill rockfish (*see* footnote gg). The other rockfish ABCs were reduced by 50 percent. This was a precautionary measure due to limited stock assessment information. The resulting minor rockfish OY is 1,990 mt.

ff/ Bank rockfish—The ABC is 350 mt which is based on a 2000 stock assessment for the Monterey and Conception areas. This stock contributes 263 mt towards the minor rockfish OY in the south.

gg/ Blackgill rockfish in the Monterey and Conception areas was assessed in 2005 and is estimated to be at 49.9 percent of its unfished biomass in 2008. The ABC of 292 mt for the Monterey and Conception areas is based on the 2005 stock assessment with an FMSY proxy of F50% and is the two year average ABC for the 2007 and 2008 periods. This stock contributes 292 mt towards minor rockfish south.

hh/ "Other rockfish" includes rockfish species listed in 50 CFR 660.302. A new stock assessment was conducted for blue rockfish in 2007. As a result of the new stock assessment, the blue rockfish contribution to the other rockfish group, of 30 mt in the north and 232 mt in the south, are removed. A new contribution of 28 mt contribution in the north and 202 mt contribution in the south is added to the remaining rockfish. The ABC for the remaining species is based on historical data from a 1996 review landings and includes an estimate of recreational landings. Most of these species have never been assessed quantitatively.

ii/ Longnose skate was fully assessed in 2006 and an assessment update was completed in 2007. The ABC of 3,428 is based on the 2007 with an FMSY proxy of F45%. Longnose skate was previously managed as part of the Other Fish complex. The 2009 OY of 1,349 mt is a precautionary OY based on historical total catch increased by 50 percent.

jj/ "Other fish" includes sharks, skates, rays, ratfish, morids, grenadiers, kelp greenling, and other groundfish species noted above in footnote d/. The longnose skate contribution is being removed from this complex.

kk/ Sablefish allocation north of 36° N. lat.—The limited entry allocation is further divided with 58 percent allocated to the trawl fishery and 42 percent allocated to the fixed-gear fishery.

ll/ Specific open access/limited entry allocations specified in the FMP have been suspended during the rebuilding period as necessary to meet the overall rebuilding target while allowing harvest of healthy stocks.

Subpart D—West Coast Groundfish—Limited Entry Trawl Fisheries

■ 6. In § 660.130, paragraphs (c) introductory text and (c)(4)(ii)(B) are revised to read as follows:

§ 660.130 Trawl fishery—management measures.

* * * * *

(c) *Prohibitions by limited entry trawl gear type.* Management measures may vary depending on the type of trawl gear

(*i.e.,* large footrope, small footrope, selective flatfish, or midwater trawl gear) used and/or on board a vessel during a fishing trip, cumulative limit period, and the area fished. Trawl nets may be used on and off the seabed. For some species or species groups, Table 1 (North) and Table 1 (South) of this subpart provide trip limits that are specific to different types of trawl gear: large footrope, small footrope (including selective flatfish), selective flatfish, midwater, and multiple types. If Table 1 (North) and Table 1 (South) of this subpart provide gear specific limits for a particular species or species group, it is unlawful to take and retain, possess or land that species or species group with limited entry trawl gears other than those listed.

* * * * *

(4) * * *

(ii) * * *

(B) For vessels using more than one type of trawl gear during a cumulative limit period, limits are additive up to the largest limit for the type of gear used during that period.

* * * * *

■ 7. Section 660.140, as amended at 75 FR 78391, December 15, 2010, is further amended by revising paragraph (d)(1)(ii)(C) and adding paragraph (d)(1)(ii)(D) to read as follows:

§ 660.140 Shorebased IFQ Program.

* * * * *

(d) * * *

(1) * * *

(ii) * * *

(C) *Pacific halibut IBQ pounds annual allocation.* NMFS will issue IBQ pounds for Pacific halibut annually by multiplying the QS permit owner's IBQ percent by the Shorebased IFQ Program component of the trawl mortality limit for that year (expressed in net weight), dividing by 0.75 to convert to round weight pounds, and dividing by 0.62 to convert from legal sized to legal and non-legal sized halibut. Consistent with § 660.55(m), the Shorebased IFQ Program component of the trawl mortality limit will be 130,000 pounds of legal size halibut, net weight in the first four years of the Shorebased IFQ Program and not to exceed 100,000 pounds starting in the fifth year of the Shorebased IFQ Program, less the set-aside amount of Pacific halibut to accommodate the incidental catch in the trawl fishery south of 40°10′ N. lat. and in the at-sea whiting fishery. Deposits to QS accounts for Pacific halibut IBQ pounds will be made on or about January 1 each year.

(D) For the start of the 2011 trawl fishery, NMFS will issue QP based on the following shorebased trawl allocations:

IFQ species	Management area	Shorebased trawl allocation (mt)
Lingcod		1,863.30
Pacific cod		1,135.00
Pacific Whiting		18,467.00
Sablefish	North of 36° N. lat.	2,546.34
Sablefish	South of 36° N. lat.	514.08
Dover sole		14,159.50
English sole		9,157.75
PETRALE SOLE		860.07
Arrowtooth flounder		7,622.30
Starry flounder		530.00
Other flatfish		4,197.40
PACIFIC OCEAN PERCH	North of 40°10′ N. lat.	119.36
WIDOW ROCKFISH		282.55
CANARY ROCKFISH		25.90
Chilipepper rockfish	South of 40°10′ N. lat.	1,475.25
BOCACCIO ROCKFISH	South of 40°10′ N. lat.	60.00
Splitnose rockfish	South of 40°10′ N. lat.	431.30
Yellowtail rockfish	North of 40°10′ N. lat.	3,094.16
Shortspine thornyhead	North of 34°27′ N. lat.	1,431.60
Shortspine thornyhead	South of 34°27′ N. lat.	50.00
Longspine thornyhead	North of 34°27′ N. lat.	1,966.25
COWCOD	South of 40°10′ N. lat.	1.35
DARKBLOTCHED ROCKFISH		250.84
YELLOWEYE ROCKFISH		0.30
Minor shelf rockfish complex	North of 40°10′ N. lat.	522.00
Minor shelf rockfish complex	South of 40°10′ N. lat.	86.00
Minor slope rockfish complex	North of 40°10′ N. lat.	829.52
Minor slope rockfish complex	South of 40°10′ N. lat.	377.37

■ 8. Table 1 (North) and Table 1 (South) to part 660, subpart D are revised to read as follows:

BILLING CODE 3510–22–P

Table 1 (North) to Part 660, Subpart D -- Limited Entry Trawl Rockfish Conservation Areas and Landing Allowances for non-IFQ Species and Pacific Whiting North of 40°10' N. Lat.

This table describes Rockfish Conservation Areas and incidental landing allowances for vessels registered to a Federal limited entry trawl permit and using groundfish trawl or groundfish non-trawl gears to harvest individual fishing quota (IFQ) species.

Other Limits and Requirements Apply -- Read § 660.10 - § 660.399 before using this table 01012011

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area (RCA)[1/]:						
1	North of 48°10' N. lat.	shore - modified[2/] 200 fm line[1/]	shore - 200 fm line[1/]	shore - 150 fm line[1/]		shore - 200 fm line[1/]	shore - modified[2/] 200 fm line[1/]
2	48°10' N. lat. - 45°46' N. lat.	75 fm line[1/] - modified[2/] 200 fm line[1/]	75 fm line[1/] - 200 fm line[1/]	75 fm line[1/] - 150 fm line[1/]	100 fm line[1/] - 150 fm line[1/]	75 fm line[1/] - 200 fm line[1/]	75 fm line[1/] - modified[2/] 200 fm line[1/]
3	45°46' N. lat. - 40°10' N. lat.			75 fm line[1/] - 200 fm line[1/]	100 fm line[1/] - 200 fm line[1/]		

Selective flatfish trawl gear is required shoreward of the RCA; all bottom trawl gear (large footrope, selective flatfish trawl, and small footrope trawl gear) is permitted seaward of the RCA. Large footrope and small footrope trawl gears (except for selective flatfish trawl gear) are prohibited shoreward of the RCA. Midwater trawl gear is permitted only for vessels participating in the primary whiting season. **Vessels fishing groundfish trawl quota pounds with groundfish non-trawl gears, under gear switching provisions at § 660.140, are subject to the limited entry groundfish trawl fishery limits in this table, regardless of the type of fishing gear used.**

See § 660.60, § 660.130, and § 660.140 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).

State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.

5	**Minor nearshore rockfish & Black rockfish**	300 lb/ month
6	**Whiting**	
7	midwater trawl	Before the primary whiting season: CLOSED. -- During the primary season: mid-water trawl permitted in the RCA. See §660.131 for season and trip limit details. -- After the primary whiting season: CLOSED.
8	large & small footrope gear	Before the primary whiting season: 20,000 lb/trip. -- During the primary season: 10,000 lb/trip. -- After the primary whiting season: 10,000 lb/trip.
9	**Cabezon**	
10	North of 46°16' N. lat.	Unlimited
11	46°16' N. lat. - 40°10' N. lat.	50 lb/ month
12	**Shortbelly**	Unlimited
13	**Spiny dogfish**	60,000 lb/ month
14	**Longnose skate**	Unlimited
15	**Other Fish [3/]**	Unlimited

TABLE 1 (North)

1/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours, and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to the RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.

2/ The "modified" fathom lines are modified to exclude certain petrale sole areas from the RCA.

3/ "Other fish" are defined at § 660.11 and include sharks (except spiny dogfish), skates (except longnose skate), ratfish, morids, grenadiers, and kelp greenling.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 1 (South) to Part 660, Subpart D -- Limited Entry Trawl Rockfish Conservation Areas and Landing Allowances for non-IFQ Species and Pacific Whiting South of 40°10' N. Lat.

This table describes Rockfish Conservation Areas and incidental landing allowances for vessels registered to a Federal limited entry trawl permit and using groundfish trawl or groundfish non-trawl gears to harvest individual fishing quota (IFQ) species.

Other Limits and Requirements Apply -- Read § 660.10 - § 660.399 before using this table

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		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area (RCA)[1/]:						
1	South of 40°10' N. lat.	100 fm line[1/] - 150 fm line [1/ 2/]					
	Small footrope trawl gear is required shoreward of the RCA; all trawl gear (large footrope, selective flatfish trawl, midwater trawl, and small footrope trawl gear) is permitted seaward of the RCA. Large footrope trawl gear and midwater trawl gear are prohibited shoreward of the RCA. **Vessels fishing groundfish trawl quota pounds with groundfish non-trawl gears, under gear switching provisions at § 660.140, are subject to the limited entry groundfish trawl fishery limits in this table, regardless of the type of fishing gear used.**						
	See § 660.60, § 660.130, and § 660.140 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).						
	State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.						
2	**Longspine thornyhead**						
3	South of 34°27' N. lat.	24,000 lb/ 2 months					
4	**Minor nearshore rockfish & Black rockfish**	300 lb/ month					
	Whiting						
	midwater trawl	Before the primary whiting season: CLOSED. -- During the primary season: mid-water trawl permitted in the RCA. See §660.131 for season and trip limit details. -- After the primary whiting season: CLOSED.					
	large & small footrope gear	Before the primary whiting season: 20,000 lb/trip. -- During the primary season: 10,000 lb/trip. -- After the primary whiting season: 10,000 lb/trip.					
5	**Cabezon**	50 lb/ month					
6	**Shortbelly**	Unlimited					
7	**Spiny dogfish**	60,000 lb/ month					
8	**Longnose skate**	Unlimited					
9	**California scorpionfish**	Unlimited					
10	**Other Fish [3/]**	Unlimited					

TABLE 1 (South)

1/ The Rockfish Conservation Area is an area closed to fishing by particulary gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours, and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to the RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.

2/ South of 34°27' N. lat., the RCA is 100 fm line - 150 fm line along the mainland coast; shoreline - 150 fm line around islands.

3/ "Other fish" are defined at § 660.11 and include sharks (except spiny dogfish), skates (excluding longnose skate), ratfish, morids, grenadiers, and kelp greenling.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

■ 9. Table 2 (North) and Table 2 (South) to part 660, subpart E are revised to read as follows:

Table 2 (North) to Part 660, Subpart E -- Trip Limits for Limited Entry Fixed Gear North of 40°10' N. Lat.

Other Limits and Requirements Apply -- Read §§ 660.10 - 660.65 and §§ 660.210 - 660.232 before using this table 01012011

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
Rockfish Conservation Area (RCA)[6/]:							
1	North of 46°16' N. lat.	shoreline - 100 fm line[6/]					
2	46°16' N. lat. - 45°03.83' N. lat.	30 fm line[6/] - 100 fm line[6/]					
3	45°03.83' N. lat. - 43°00' N. lat.	30 fm line[6/] - 125 fm line[6/ 7/]					
4	43°00' N. lat. - 42°00' N. lat.	20 fm line[6/] - 100 fm line[6/]					
5	42°00' N. lat. - 40°10' N. lat.	20 fm depth contour - 100 fm line[6/]					
See § 660.60 and § 660.230 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).							
State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.							
6	**Minor slope rockfish [2/] & Darkblotched rockfish**	4,000 lb/ 2 months					
7	**Pacific ocean perch**	1,800 lb/ 2 months					
8	**Sablefish**	1,750 lb per week, not to exceed 7,000 lb/ 2 months			1,750 lb per week, not to exceed 8,500 lb/ 2 months		1,750 lb per week in November; 2,000 lb per week in December. Not to exceed 8,000 lb per two month period
9	**Longspine thornyhead**	10,000 lb/ 2 months					
10	**Shortspine thornyhead**	2,000 lb/ 2 months					
11	**Dover sole**	5,000 lb/ month South of 42° N. lat., when fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to two 1 lb (0.45 kg) weights per line are not subject to the RCAs.					
12	**Arrowtooth flounder**						
13	**Petrale sole**						
14	**English sole**						
15	**Starry flounder**						
16	**Other flatfish[1/]**						
17	**Whiting**	10,000 lb/ trip					
18	**Minor shelf rockfish[2/], Shortbelly, Widow, & Yellowtail rockfish**	200 lb/ month					
19	**Canary rockfish**	CLOSED					
20	**Yelloweye rockfish**	CLOSED					
21	**Minor nearshore rockfish & Black rockfish**						
22	North of 42° N. lat.	5,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish [3/]					
23	42° - 40°10' N. lat.	6,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish [3/]	7,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black rockfish [3/]				
24	**Lingcod[4/]**	CLOSED		800 lb/ 2 months		400 lb/ month	CLOSED
25	**Pacific cod**	1,000 lb/ 2 months					
26	**Spiny dogfish**	200,000 lb/ 2 months		150,000 lb/ 2 months	100,000 lb/ 2 months		
27	**Other fish[5/]**	Not limited					

TABLE 2 (North)

1/ "Other flatfish" are defined at § 660.11 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.
2/ Bocaccio, chilipepper and cowcod are included in the trip limits for minor shelf rockfish and splitnose rockfish is included in the trip limits for minor slope rockfish.
3/ For black rockfish north of Cape Alava (48°09.50' N. lat.), and between Destruction Is. (47°40' N. lat.) and Leadbetter Pnt. (46°38.17' N. lat.), there is an additional limit of 100 lb or 30 percent by weight of all fish on board, whichever is greater, per vessel, per fishing trip.
4/ The minimum size limit for lingcod is 22 inches (56 cm) total length North of 42° N. lat. and 24 inches (61 cm) total length South of 42° N. lat.
5/ "Other fish" are defined at § 660.11 and include sharks, skates (including longnose skates), ratfish, morids, grenadiers, and kelp greenling. Cabezon is included in the trip limits for "other fish."
6/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.
7/ The 125 fm line restriction is in place all year, except on days when the directed halibut fishery is open. On those days the 100 fm line restriction is in effect.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 2 (South) to Part 660, Subpart E -- Trip Limits for Limited Entry Fixed Gear South of 40°10' N. Lat.

Other Limits and Requirements Apply -- Read §§ 660.10 - 660.65 and §§ 660.210 - 660.232 before using this table 01012011

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area (RCA)[5/]:						
1	40°10' - 34°27' N. lat.	30 fm line[5/] - 150 fm line[5/]					
2	South of 34°27' N. lat.	60 fm line[5/] - 150 fm line[5/] (also applies around islands)					
	See § 660.60 and § 660.230 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).						
	State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.						
3	**Minor slope rockfish[2/] & Darkblotched rockfish**	40,000 lb/ 2 months					
4	**Splitnose**	40,000 lb/ 2 months					
5	**Sablefish**						
6	40°10' - 36° N. lat.	1,750 lb per week, not to exceed 7,000 lb/ 2 months			1,750 lb per week, not to exceed 8,500 lb/ 2 months		1,750 lb per week in November; 2,000 lb per week in December. Not to exceed 8,000 lb per two month period
7	South of 36° N. lat.	400 lb/ day, or 1 landing per week of up to 1,500 lb				3,000 lb/ week	2,800 lb/ week / 1,800 lb/ week
8	**Longspine thornyhead**	10,000 lb / 2 months					
9	**Shortspine thornyhead**						
10	40°10' - 34°27' N. lat.	2,000 lb/ 2 months					
11	South of 34°27' N. lat.	3,000 lb/ 2 months					
12	**Dover sole**	5,000 lb/ month South of 42° N. lat., when fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to two 1 lb (0.45 kg) weights per line are not subject to the RCAs.					
13	**Arrowtooth flounder**						
14	**Petrale sole**						
15	**English sole**						
16	**Starry flounder**						
17	**Other flatfish[1/]**						
18	**Whiting**	10,000 lb/ trip					
19	**Minor shelf rockfish[2/], Shortbelly, Widow rockfish, and Bocaccio (including Chilipepper between 40°10' - 34°27' N. lat.)**						
20	40°10' - 34°27' N. lat.	Minor shelf rockfish, shortbelly, widow rockfish, bocaccio & chilipepper: 2,500 lb/ 2 months, of which no more than 500 lb/ 2 months may be any species other than chilipepper.					
21	South of 34°27' N. lat.	3,000 lb/ 2 months	CLOSED	3,000 lb/ 2 months			
22	**Chilipepper rockfish**						
23	40°10' - 34°27' N. lat.	Chilipepper included under minor shelf rockfish, shortbelly, widow and bocaccio limits - - See above					
24	South of 34°27' N. lat.	2,000 lb/ 2 months, this opportunity only available seaward of the nontrawl RCA					
25	**Canary rockfish**	CLOSED					
26	**Yelloweye rockfish**	CLOSED					
27	**Cowcod**	CLOSED					
28	**Bronzespotted rockfish**	CLOSED					
29	**Bocaccio**						
30	40°10' - 34°27' N. lat.	Bocaccio included under Minor shelf rockfish, shortbelly, widow & chilipepper limits -- See above					
31	South of 34°27' N. lat.	300 lb/ 2 months	CLOSED	300 lb/ 2 months			

TABLE 2 (South)

Table 2 (South). Continued

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC	
32	**Minor nearshore rockfish & Black rockfish**							TABLE 2 (South)
33	Shallow nearshore	600 lb/ 2 months	CLOSED	800 lb/ 2 months	900 lb/ 2 months	800 lb/ 2 months	600 lb/ 2 months	
34	Deeper nearshore							
35	40°10' - 34°27' N. lat.	700 lb/ 2 months	CLOSED	700 lb/ 2 months		800 lb/ 2 months		
36	South of 34°27' N. lat.	500 lb/ 2 months		600 lb/ 2 months				
37	California scorpionfish	600 lb/ 2 months	CLOSED	600 lb/ 2 months	1,200 lb/ 2 months			
38	**Lingcod**[3/]	CLOSED		800 lb/ 2 months			400 lb/ month	CLOSED
39	**Pacific cod**	1,000 lb/ 2 months						
40	**Spiny dogfish**	200,000 lb/ 2 months		150,000 lb/ 2 months	100,000 lb/ 2 months			
41	**Other fish**[4/] **& Cabezon**	Not limited						

1/ "Other flatfish" are defined at § 660.11 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.

2/ POP is included in the trip limits for minor slope rockfish. Yellowtail is included in the trip limits for minor shelf rockfish. Bronzespotted rockfish have a species specific trip limit.

3/ The minimum size limit for lingcod is 24 inches (61 cm) total length South of 42° N. lat.

4/ "Other fish" are defined at § 660.11 and include sharks, skates (including longnose skates), ratfish, morids, grenadiers, and kelp greenling.

5/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

■ 10. Table 3 (North) and Table 3 (South) to part 660, subpart F are revised to read as follows:

Table 3 (North) to Part 660, Subpart F -- Trip Limits for Open Access Gears North of 40°10' N. Lat.

Other Limits and Requirements Apply -- Read §§ 660.10 - 660.65 and §§ 660.310 - 660.333 before using this table 01012011

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
Rockfish Conservation Area (RCA)[6/]:							
1	North of 46°16' N. lat.	shoreline - 100 fm line[6/]					
2	46°16' N. lat. - 45°03.83' N. lat.	30 fm line[6/] - 100 fm line[6/]					
3	45°03.83' N. lat. - 43°00' N. lat.	30 fm line[6/] - 125 fm line[6/ 7/]					
4	43°00' N. lat. - 42°00' N. lat.	20 fm line[6/] - 100 fm line[6/]					
5	42°00' N. lat. - 40°10' N. lat.	20 fm depth contour - 100 fm line[6/]					
See § 660.60, § 660.330, and § 660.333 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).							
State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.							
6	**Minor slope rockfish[1/] & Darkblotched rockfish**	Per trip, no more than 25% of weight of the sablefish landed					
7	**Pacific ocean perch**	100 lb/ month					
8	**Sablefish**	300 lb/ day, or 1 landing per week of up to 800 lb, not to exceed 2,400 lb/ 2 months			300 lb/ day, or 1 landing per week of up to 950 lb, not to exceed 2,750 lb/ 2 months		300 lb/ day, or 1 landing per week of up to 950 lb, in November; 400 lb/ day, or 1 landing per week of up to 1,500 lb, in December. Not to exceed 4,500 lb per two month period
9	**Thornyheads**	CLOSED					
10	**Dover sole**	3,000 lb/month, no more than 300 lb of which may be species other than Pacific sanddabs. South of 42° N. lat., when fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to two 1 lb (0.45 kg) weights per line are not subject to the RCAs.					
11	**Arrowtooth flounder**						
12	**Petrale sole**						
13	**English sole**						
14	**Starry flounder**						
15	**Other flatfish[2/]**						
16	**Whiting**	300 lb/ month					
17	**Minor shelf rockfish[1/], Shortbelly, Widow, & Yellowtail rockfish**	200 lb/ month					
18	**Canary rockfish**	CLOSED					
19	**Yelloweye rockfish**	CLOSED					
20	**Minor nearshore rockfish & Black rockfish**						
21	North of 42° N. lat.	5,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish[3/]					
22	42° - 40°10' N. lat.	6,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish[3/]	7,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black rockfish[3/]				
23	**Lingcod[4/]**	CLOSED		400 lb/ month			CLOSED
24	**Pacific cod**	1,000 lb/ 2 months					
25	**Spiny dogfish**	200,000 lb/ 2 months		150,000 lb/ 2 months	100,000 lb/ 2 months		
26	**Other Fish[5/]**	Not limited					

TABLE 3 (North)

Table 3 (North). Continued

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
27	**SALMON TROLL** *(subject to RCAs when retaining any species of groundfish except for yellowtail rockfish and lingcod, as described below)*						
28	North	Salmon trollers may retain and land up to 1 lb of yellowtail rockfish for every 2 lbs of salmon landed, with a cumulative limit of 200 lb/month, both within and outside of the RCA. This limit is within the 200 lb per month combined limit for minor shelf rockfish, widow rockfish and yellowtail rockfish, and not in addition to that limit. Salmon trollers may retain and land up to 1 lingcod per 15 Chinook per trip, plus 1 lingcod per trip, up to a trip limit of 10 lingcod, on a trip where any fishing occurs within the RCA. This limit only applies during times when lingcod retention is allowed, and is not "CLOSED." This limit is within the per month limit for lingcod described in the table above, and not in addition to that limit. All groundfish species are subject to the open access limits, seasons, size limits and RCA restrictions listed in the table above, unless otherwise stated here.					
29	**PINK SHRIMP NON-GROUNDFISH TRAWL** *(not subject to RCAs)*						
30	North	**Effective April 1 - October 31:** Groundfish: 500 lb/day, multiplied by the number of days of the trip, not to exceed 1,500 lb/trip. The following sublimits also apply and are counted toward the overall 500 lb/day and 1,500 lb/trip groundfish limits: lingcod 300 lb/month (minimum 24 inch size limit); sablefish 2,000 lb/month; canary, thornyheads and yelloweye rockfish are PROHIBITED. All other groundfish species taken are managed under the overall 500 lb/day and 1,500 lb/trip groundfish limits. Landings of these species count toward the per day and per trip groundfish limits and do not have species-specific limits. The amount of groundfish landed may not exceed the amount of pink shrimp landed.					

TABLE 3 (North) con't

1/ Bocaccio, chilipepper and cowcod rockfishes are included in the trip limits for minor shelf rockfish. Splitnose rockfish is included in the trip limits for minor slope rockfish.

2/ "Other flatfish" are defined at § 660.11 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.

3/ For black rockfish north of Cape Alava (48°09.50' N. lat.), and between Destruction Is. (47°40' N. lat.) and Leadbetter Pnt. (46°38.17' N. lat.), there is an additional limit of 100 lbs or 30 percent by weight of all fish on board, whichever is greater, per vessel, per fishing trip.

4/ The minimum size limit for lingcod is 22 inches (56 cm) total length North of 42° N. lat. and 24 inches (61 cm) total length South of 42° N. lat.

5/ "Other fish" are defined at § 660.11 and include sharks, skates (including longnose skates), ratfish, morids, grenadiers, and kelp greenling. Cabezon is included in the trip limits for "other fish."

6/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.

7/ The 125 fm line restriction is in place all year, except on days when the directed halibut fishery is open. On those days the 100 fm line restriction is in effect.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 3 (South) to Part 660, Subpart F -- Trip Limits for Open Access Gears South of 40°10' N. Lat.

Other Limits and Requirements Apply -- Read §§ 660.10 - 660.65 and §§ 660.310 - 660.333 before using this table 1012011

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area (RCA)[5/]:						
1	40°10' - 34°27' N. lat.	30 fm line[5/] - 150 fm line[5/]					
2	South of 34°27' N. lat.	60 fm line[5/] - 150 fm line[5/] (also applies around islands)					
	See § 660.60, § 660.330, and § 660.333 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).						
	State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.						
3	**Minor slope rockfish[1/] & Darkblotched rockfish**						
4	40°10' - 38° N. lat.	Per trip, no more than 25% of weight of the sablefish landed					
5	South of 38° N. lat.	10,000 lb/ 2 months					
6	**Splitnose**	200 lb/ month					
7	**Sablefish**						
8	40°10' - 36° N. lat.	300 lb/ day, or 1 landing per week of up to 800 lb, not to exceed 2,400 lb/ 2 months			300 lb/ day, or 1 landing per week of up to 950 lb, not to exceed 2,750 lb/ 2 months		300 lb/ day, or 1 landing per week of up to 950 lb, in November; 400 lb/ day, or 1 landing per week of up to 1,500 lb, in December. Not to exceed 4,500 lb per two month period
9	South of 36° N. lat.	400 lb/ day, or 1 landing per week of up to 1,500 lb, not to exceed 8,000 lb/ 2 months				400 lb/ day, or 1 landing per week of up to 2,500 lb	800 lb/ week, not to exceed 1,600 lb/ month / CLOSED
10	**Thornyheads**						
11	40°10' - 34°27' N. lat.	CLOSED					
12	South of 34°27' N. lat.	50 lb/ day, no more than 1,000 lb/ 2 months					
13	**Dover sole**	3,000 lb/month, no more than 300 lb of which may be species other than Pacific sanddabs. South of 42° N. lat., when fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to two 1 lb (0.45 kg) weights per line are not subject to the RCAs.					
14	**Arrowtooth flounder**						
15	**Petrale sole**						
16	**English sole**						
17	**Starry flounder**						
18	**Other flatfish[2/]**						
19	**Whiting**	300 lb/ month					
20	**Minor shelf rockfish[1/], Shortbelly, Widow & Chilipepper rockfish**						
21	40°10' - 34°27' N. lat.	300 lb/ 2 months	CLOSED		200 lb/ 2 months		300 lb/ 2 months
22	South of 34°27' N. lat.	750 lb/ 2 months			750 lb/ 2 months		
23	**Canary rockfish**	CLOSED					
24	**Yelloweye rockfish**	CLOSED					
25	**Cowcod**	CLOSED					
26	**Bronzespotted rockfish**	CLOSED					
27	**Bocaccio**						
28	40°10' - 34°27' N. lat.	200 lb/ 2 months	CLOSED		100 lb/ 2 months		200 lb/ 2 months
29	South of 34°27' N. lat.	100 lb/ 2 months			100 lb/ 2 months		

TABLE 3 (South)

Table 3 (South). Continued

TABLE 3 (South) con't

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
30	**Minor nearshore rockfish & Black rockfish**						
31	Shallow nearshore	600 lb/ 2 months	CLOSED	800 lb/ 2 months	900 lb/ 2 months	800 lb/ 2 months	600 lb/ 2 months
32	Deeper nearshore						
33	40°10' - 34°27' N. lat.	700 lb/ 2 months	CLOSED	700 lb/ 2 months		800 lb/ 2 months	
34	South of 34°27' N. lat.	500 lb/ 2 months		600 lb/ 2 months			
35	California scorpionfish	600 lb/ 2 months	CLOSED	600 lb/ 2 months	1,200 lb/ 2 months		
36	**Lingcod**[3/]	CLOSED		400 lb/ month			CLOSED
37	**Pacific cod**	1,000 lb/ 2 months					
38	**Spiny dogfish**	200,000 lb/ 2 months		150,000 lb/ 2 months	100,000 lb/ 2 months		
39	**Other Fish**[4/] **& Cabezon**	Not limited					
40	**RIDGEBACK PRAWN AND, SOUTH OF 38°57.50' N. LAT., CA HALIBUT AND SEA CUCUMBER NON-GROUNDFISH TRAWL**						
41	**NON-GROUNDFISH TRAWL Rockfish Conservation Area (RCA) for CA Halibut, Sea Cucumber & Ridgeback Prawn:**						
42	40°10' - 38° N. lat.	100 fm - modified 200 fm [6/]	100 fm - 150 fm				100 fm - modified 200 fm [6/]
43	38° - 34°27' N. lat.	100 fm - 150 fm					
44	South of 34°27' N. lat.	100 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands					
45		Groundfish: 300 lb/trip. Trip limits in this table also apply and are counted toward the 300 lb groundfish per trip limit. The amount of groundfish landed may not exceed the amount of the target species landed, except that the amount of spiny dogfish landed may exceed the amount of target species landed. Spiny dogfish are limited by the 300 lb/trip overall groundfish limit. The daily trip limits for sablefish coastwide and thornyheads south of Pt. Conception and the overall groundfish "per trip" limit may not be multiplied by the number of days of the trip. Vessels participating in the California halibut fishery south of 38°57.50' N. lat. are allowed to (1) land up to 100 lb/day of groundfish without the ratio requirement, provided that at least one California halibut is landed and (2) land up to 3,000 lb/month of flatfish, no more than 300 lb of which may be species other than Pacific sanddabs, sand sole, starry flounder, rock sole, curlfin sole, or California scorpionfish (California scorpionfish is also subject to the trip limits and closures in line 31).					
46	**PINK SHRIMP NON-GROUNDFISH TRAWL GEAR** *(not subject to RCAs)*						
47	South	**Effective April 1 - October 31:** Groundfish: 500 lb/day, multiplied by the number of days of the trip, not to exceed 1,500 lb/trip. The following sublimits also apply and are counted toward the overall 500 lb/day and 1,500 lb/trip groundfish limits: lingcod 300 lb/ month (minimum 24 inch size limit); sablefish 2,000 lb/ month; canary, thornyheads and yelloweye rockfish are PROHIBITED. All other groundfish species taken are managed under the overall 500 lb/day and 1,500 lb/trip groundfish limits. Landings of these species count toward the per day and per trip groundfish limits and do not have species-specific limits. The amount of groundfish landed may not exceed the amount of pink shrimp landed.					

1/ Yellowtail rockfish is included in the trip limits for minor shelf rockfish. POP is included in the trip limits for minor slope rockfish. Bronzespotted rockfish have a species specific trip limit.
2/ "Other flatfish" are defined at § 660.11 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.
3/ The size limit for lingcod is 24 inches (61 cm) total length South of 42° N. lat.
4/ "Other fish" are defined at § 660.11 and include sharks, skates (including longnose skates), ratfish, morids, grenadiers, and kelp greenling.
5/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.
6/ The "modified 200 fm" line is modified to exclude certain petrale sole areas from the RCA.
To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

[FR Doc. 2010–32833 Filed 12–29–10; 8:45 am]

BILLING CODE 3510–22–C

Proposed Rules

Federal Register
Vol. 75, No. 250
Thursday, December 30, 2010

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

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 3

[Docket No. OCC–2010–0009]

RIN 1557–AD33

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 225

[Regulations H and Y; Docket No. R–1402]

RIN 7100–AD62

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 325

RIN 3064–AD58

Risk-Based Capital Standards: Advanced Capital Adequacy Framework—Basel II; Establishment of a Risk-Based Capital Floor

AGENCY: Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; and the Federal Deposit Insurance Corporation.

ACTION: Joint notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC) (collectively, the agencies) propose to: Amend the advanced risk-based capital adequacy standards (advanced approaches rules) [1] to be consistent with certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act) [2] and amend the general risk-based capital rules [3] to provide limited flexibility consistent with section 171(b) of the Act for recognizing the relative risk of certain assets generally not held by depository institutions.

DATES: Comments on this notice of proposed rulemaking must be received by February 28, 2011.

ADDRESSES: Comments should be directed to:

OCC: Because paper mail in the Washington, DC area and at the Agencies is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or e-mail, if possible. Please use the title "Advanced Capital Adequacy Framework—Basel II; Establishment of a Risk-Based Capital Floor" to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—"regulations.gov":* Go to *http://www.regulations.gov.* Select "Document Type" of "Proposed Rules," and in "Enter Keyword or ID Box," enter Docket ID "OCC–2010–0009," and click "Search." On "View By Relevance" tab at bottom of screen, in the "Agency" column, locate the proposed rule for OCC, in the "Action" column, click on "Submit a Comment" or "Open Docket Folder" to submit or view public comments and to view supporting and related materials for this rulemaking action.
- Click on the "Help" tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.
- *E-mail: regs.comments@occ.treas.gov.*
- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.
- *Fax:* (202) 874–5274.
- *Hand Delivery/Courier:* 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.

Instructions: You must include "OCC" as the agency name and "Docket ID OCC–2010–0009" in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this proposed rule by any of the following methods:

- *Viewing Comments Electronically:* Go to *http://www.regulations.gov.* Select "Document Type" of "Public Submissions," in "Enter Keyword or ID Box," enter Docket ID "OCC–2010–0009," and click "Search." Comments will be listed under "View By Relevance" tab at bottom of screen. If comments from more than one agency are listed, the "Agency" column will indicate which comments were received by the OCC.
- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.
- *Docket:* You may also view or request available background documents and project summaries using the methods described above.

Board: You may submit comments, identified by Docket No. R–1402 and RIN No. 7100–AD62, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.

[1] 12 CFR part 3, Appendix C (OCC); 12 CFR part 208, Appendix F and 12 CFR part 225, Appendix G (Board); and 12 CFR part 325 Appendix D (FDIC).

[2] Public Law 111–203, § 171, 124 Stat. 1376, 1435–38 (2010).

[3] 12 CFR part 3, Appendix A (OCC); 12 CFR parts 208 and 225, Appendix A (Board); 12 CFR part 325, Appendix A (FDIC).

• *FAX:* (202) 452–3819 or (202) 452–3102.

• *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FDIC: You may submit by any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

• *Agency Web site: http://www.FDIC.gov/regulations/laws/federal/propose.html*.

• *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments/Legal ESS, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

• *Hand Delivered/Courier:* The guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

• *E-mail: comments@FDIC.gov*.

Instructions: Submissions received must include "FDIC" and "PIN XXXX–XXXX." Comments received will be posted without change to *http://www.FDIC.gov/regulations/laws/federal/propose.html*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

OCC: Mark Ginsberg, Risk Expert, (202) 874–5070, Capital Policy Division; or Carl Kaminski, Senior Attorney, or Stuart Feldstein, Director, Legislative and Regulatory Activities, (202) 874–5090.

Board: Anna Lee Hewko, (202) 530–6260, Assistant Director, or Brendan Burke, (202) 452–2987 Supervisory Financial Analyst, Division of Banking Supervision and Regulation, or April C. Snyder, (202) 452–3099, Counsel, or Benjamin W. McDonough, (202) 452–2036, Counsel, Legal Division. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (202) 263–4869.

FDIC: George French, Deputy Director, Policy, (202) 898–3929, Nancy Hunt, Associate Director, Capital Markets Branch, (202) 898–6643, or Bobby Bean, Chief, Policy Section (202) 898–6705, Division of Supervision and Consumer Protection; or Mark Handzlik, Counsel (202) 898–3990, or Michael Phillips, Counsel (202) 898–3581, Supervision and Legislation Branch, Legal Division.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Dodd-Frank Wall Street Reform and Consumer Protection Act

Section 171(b)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act)[4] states that the agencies[5] shall establish minimum risk-based capital requirements applicable to insured depository institutions, depository institution holding companies, and nonbank financial companies supervised by the Federal Reserve (covered institutions). In particular, and as described in more detail below, sections 171(b)(1) and (2) specify that the minimum leverage and risk-based capital requirements established under section 171 shall not be less than "generally applicable" capital requirements, which shall serve as a floor for any capital requirements the agencies may require. Moreover, sections 171(b)(1) and (2) specify that the Federal banking agencies may not establish leverage or risk-based capital requirements for covered institutions that are quantitatively lower than the generally applicable leverage or risk-based capital requirements in effect for insured depository institutions as of the date of enactment of the Act.

B. Advanced Approaches Rules

On December 7, 2007, the agencies implemented the advanced approaches rules, which are mandatory for U.S. depository institutions and bank holding companies (collectively, banking organizations) meeting certain thresholds for total consolidated assets or foreign exposure.[6] The advanced approaches rules incorporate a series of proposals released by the Basel Committee on Banking Supervision (Basel Committee or BCBS), including the Basel Committee's comprehensive June 2006 release entitled "International Convergence of Capital Measurement and Capital Standards: A Revised Framework" (New Accord).[7]

The advanced approaches rules establish a series of transitional floors to provide a smooth transition to the advanced approaches rules and to limit temporarily the amount by which a banking organization's risk-based capital requirements could decline relative to the general risk-based capital rules over a period of at least three years following completion of a satisfactory parallel run. The advanced approaches rules place limits on the amount by which a banking organization's risk-based capital requirements may decline. Under the advanced approaches rules, the banking organization must take the risk-based capital ratios equal to the lesser of (i) the organization's ratios calculated under the advanced approaches rules and (ii) its ratios calculated under the general risk-based capital rules,[8] with risk-weighted assets multiplied by 95 percent, 90 percent, and 85 percent during the first, second, and third transitional floor periods, respectively and compare these ratios to its minimum risk-based capital ratio requirements under section 3 of the advanced approaches rules.[9] Under this approach, banking organizations that use the advanced approaches rule could operate with lower minimum risk-based capital requirements during a transitional floor period, and potentially thereafter, than would be required under the general risk-based capital rules. At this time, no banking organization has entered a transitional floor period and all organizations are required to compute their risk-based capital requirements using the general risk-based capital rules.

C. Requirements of Section 171 of the Act

Section 171(a)(2) of the Act defines the term "generally applicable risk-based capital requirements" to mean:

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[4] Public Law 111–203, § 171, 124 Stat. 1376, 1435–38 (2010).

[5] Even though the Office of Thrift Supervision (OTS) is not issuing this notice of proposed rulemaking (NPR), OTS plans to issue an NPR that parallels the substance of this notice to amend its capital regulations at 12 CFR part 567. OTS's parallel notice is subject to review by the Office of Management and Budget pursuant to Executive Order 12866.

[6] 72 FR 69288 (December 7, 2007). Subject to prior supervisory approval, other banking organizations can opt to use the advanced approaches rules. *See* 72 FR 69397 (December 7, 2007).

[7] The BCBS is a committee of banking supervisory authorities established by the central bank governors of the G–10 countries in 1975. The BCBS issued the New Accord to modernize its first capital Accord, which was endorsed by the BCBS members in 1988 and implemented by the agencies in 1989. The New Accord, the 1988 Accord, and other documents issued by the BCBS are available through the Bank for International Settlements' Web site at *http://www.bis.org*.

[8] 12 CFR part 3, Appendix A (OCC); 12 CFR parts 208 and 225, Appendix A (Board); and 12 CFR part 325, appendix A (FDIC).

[9] Under the advanced approaches rules, the minimum tier 1 risk-based capital requirement is 4 percent and the total risk-based capital requirement is 8 percent. *See* 12 CFR part 3, Appendix C (OCC); 12 CFR part 208, Appendix F and 12 CFR part 225, Appendix G (Board); and 12 CFR part 325 Appendix D (FDIC).

"(A) the risk-based capital requirements, as established by the appropriate Federal banking agencies to apply to insured depository institutions under the prompt corrective action regulations implementing section 38 of the Federal Deposit Insurance Act, regardless of total consolidated asset size or foreign financial exposure; and (B) includes the regulatory capital components in the numerator of those capital requirements, the risk-weighted assets in the denominator of those capital requirements, and the required ratio of the numerator to the denominator." Section 171(b)(2) of the Act further provides that "[t]he appropriate Federal banking agencies shall establish minimum risk-based capital requirements on a consolidated basis for insured depository institutions, depository institution holding companies, and nonbank financial companies supervised by the Board of Governors. The minimum risk-based capital requirements established under this paragraph shall not be less than the generally applicable risk-based capital requirements, which shall serve as a floor for any capital requirements that the agency may require, nor quantitatively lower than the generally applicable risk-based capital requirements that were in effect for insured depository institutions as of the date of enactment of this Act."

In accordance with section 38 of the Federal Deposit Insurance Act,[10] the Federal banking agencies established minimum leverage and risk-based capital requirements for insured depository institutions for prompt corrective action (PCA rules). All insured institutions, regardless of their total consolidated assets or foreign exposure, must compute their minimum risk-based capital requirements for PCA purposes using the general risk-based capital rules, which currently are the "generally applicable risk-based capital requirements" defined by Section 171(a)(2) of the Act.

D. Effect on Applications by Foreign Banking Organizations

In approving an application by a foreign bank to establish a branch or agency in the United States or to make a bank or nonbank acquisition, the Board considers, among other factors, whether the capital of the foreign bank is equivalent to the capital that would be required of a U.S. banking organization.[11] Similarly, in order to make effective a foreign bank's declaration under the BHC Act to be treated as an FHC, the Board must apply comparable capital and management standards to the foreign bank "giving due regard to the principle of national treatment and equality of competitive opportunity."[12] National treatment generally means treatment that is no less favorable than that provided to domestic institutions that are in like circumstances. The Board has broad discretion to take any relevant factors into account in determining standards that are both comparable and provide national treatment.

The Board has been making capital equivalency findings for foreign banks under the International Banking Act and the Bank Holding Company Act since 1992 pursuant to guidelines developed as part of a joint study by the Board and Treasury on capital equivalency.[13] The study acknowledged the Basel Committee on Banking Supervision's 1988 capital accord (Basel I)[14] as the prevailing capital standard for internationally active banks and found that implementation of Basel I was broadly equivalent across countries. Until 2007, the Board generally accepted as equivalent the capital of foreign banks from countries adhering to Basel I within the bounds of national discretion allowed under the Basel I framework. For foreign banks that have begun operating under the New Accord's capital standards in making capital equivalency determinations, the Board has evaluated the capital of the foreign bank as reported in compliance with the New Accord, while also taking into account a range of factors including compliance with the New Accord's capital requirement floors linked to Basel I, where applicable.

At this time, many foreign bank applicants are operating under Basel II advanced approaches that have been implemented by their home country authorities. In many cases, home country authorities have adopted floors based on Basel I standards using discretion and flexibility as provided in the Accord. However, in some cases, Basel I floors are no longer in effect, or are expected to be phased out in the near term.

Question 1. How should the proposed rule be applied to foreign banks in evaluating capital equivalency in the context of applications to establish branches or make bank or nonbank acquisitions in the United States, and in evaluating capital comparability in the context of foreign bank FHC declarations?

E. Effect of Section 171 of the Act on Certain Institutions and Their Assets

Certain covered institutions may not previously have been subject to consolidated risk-based capital requirements. Some of these companies are likely to be similar in nature to most depository institutions and bank holding companies subject to the general risk-based capital rules. Others, may be different, with exposure types and risks that were not contemplated when the general risk-based capital rules were developed. The Financial Stability Oversight Council has not yet designated any nonbank financial companies to be supervised by the Board; over time it is conceivable that it will designate one or more companies whose activities are quite different than those addressed in the general risk-based capital rules. The Board will be supervising these institutions for the first time and expects that there will be cases when it needs to evaluate the risk-based capital treatment of specific exposures not typically held by depository institutions, and that do not have a specific risk weight under the generally applicable risk-based capital requirements.

Under the general risk-based capital rules, exposures are generally assigned to five risk weight categories, that is, 0 percent, 20 percent, 50 percent, 100 percent, and 200 percent, according to their relative riskiness. Assets not explicitly included in a lower risk weight category are assigned to the 100 percent risk weight category. Going forward, there may be situations where exposures of a depository institution holding company or a nonbank financial company supervised by the Board not only do not wholly fit within the terms of a risk weight category, but also impose risks that are not commensurate with the risk weight otherwise specified in the generally applicable risk-based capital requirements.

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[10] *See* Public Law 102–242; 105 Stat. 2242 (1991).

[11] *See* 12 U.S.C. 1842(c); 1843(j); and 3105(d)(3)(B), (j)(2). In addition, in approving an application to establish an interstate branch, the OCC must make a similar capital equivalency determination. *See* 12 U.S.C. 3103(a)(3)(B)(i).

[12] 12 U.S.C. 1843(l)(3). A foreign bank that operates a branch, agency or commercial lending company in the United States and any company that owns such a foreign bank, is subject to the BHC Act as if it were a bank holding company. The BHC Act, as amended by the Gramm-Leach Bliley Act, provides that a bank holding company may become a FHC if its depository institutions meet certain capital and management standards. *See* 12 U.S.C. 1843(l)(1); 12 CFR 225. Under § 606 of the Act, this requirement will be modified to require the bank holding company to be well capitalized and well managed. *See* the Act § 606.

[13] "Capital Equivalency Report," Board of Governors of the Federal Reserve System and Secretary of the U.S. Department of the Treasury (June 19, 1992). *See* 12 U.S.C. § 3105(j).

[14] International Convergence of Capital Measurement and Capital Standard, 1988.

For example, there are some material exposures of insurance companies that, while not riskless, would be assigned to a 100 percent risk weight category because they are not explicitly assigned to a lower risk weight category. An automatic assignment to the 100 percent risk weight category without consideration of an exposure's economic substance could overstate the risk of the exposure and produce uneconomic capital requirements for a covered institution.

II. Proposed Rule

A. Generally Applicable Risk-Based Capital Requirement Floor

The OCC, Board, and FDIC are proposing to modify their respective advanced approaches rules consistent with section 171(b)(2). In particular, the agencies are proposing to revise the advanced approaches rules by replacing the transitional floors in section 21(e) of the advanced approaches rule with a permanent floor equal to the tier 1 and total risk-based capital requirements under the current generally applicable risk-based capital rules. Thus, the agencies are proposing to require each banking organization subject to the advanced approaches rules to maintain the systems and records necessary to calculate its required minimum risk-based capital requirements under both the general risk-based capital rules and the advanced approaches rules. Each quarter, each banking organization subject to the advanced approaches rules must calculate and compare its minimum tier 1 and total risk-based capital ratios as calculated under the general risk-based capital rules and the advanced approaches risk-based capital rules. The banking organization would then compare the lower of the two tier 1 risk-based capital ratios and the lower of the two total risk-based capital ratios to the minimum tier 1 ratio requirement of 4 percent and total risk-based capital ratio requirement of 8 percent in section 3 of the advanced approaches rules [15] to determine if it met its minimum capital requirements. For bank holding companies, the proposal also incorporates the phase-in of restrictions on the regulatory capital treatment of debt or equity instruments issued before May 19, 2010 as described in section 171(b)(4)(B) of the Act.

The agencies are also proposing to eliminate the paragraphs of the advanced approaches rules dealing with the transitional floor periods, and the interagency study. These parts of the advanced approaches rules no longer serve a purpose.

Question 2: The agencies seek comment generally on the impact of a permanent floor on the minimum risk-based capital requirements for banking organizations subject to the advanced approaches rules, and on the manner in which the agencies are proposing to implement the provisions of section 171(b) of the Act.

B. Change to Generally Applicable Risk-Based Capital Requirements

The proposed floor, consistent with the requirements of section 171(b)(2), is based on the generally applicable risk-based capital requirements for depository institutions. To address the appropriate capital requirement for low risk assets that non-depository institutions may hold and for which there is no explicit capital treatment in the general risk-based capital rules, the agencies propose that such exposures receive the capital treatment applicable under the capital guidelines for bank holding companies under limited circumstances. The circumstances are intended to allow for an appropriate capital requirement for low risk nonbanking exposures without creating unintended new opportunities for depository institutions to engage in capital arbitrage. The agencies therefore propose to limit this treatment to cases in which a depository institution is not authorized to hold the asset under applicable law other than under debt previously contracted or similar authority, and the risks associated with the asset are substantially similar to the risks of assets that receive a lower risk weight. The agencies therefore propose a change to the general risk-based capital rules for depository institutions to permit this limited flexibility to appropriately address exposures of depository institution holding companies and nonbank financial companies supervised by the Board. The agencies request comment on this change to the general risk-based capital rules.

Question 3. For what specific types of exposures do commenters believe this treatment is appropriate? Does the proposal provide sufficient flexibility to address the exposures of depository institution holding companies and nonbank financial companies supervised by the Federal Reserve? If not, how should the proposal be changed to recognize the considerations outlined in this section?

Consistent with the joint efforts of the U.S. banking agencies and the Basel Committee to enhance the regulatory capital rules, the agencies anticipate that the generally applicable risk-based capital requirements and advanced approaches rule will be amended from time to time. These amendments would reflect advances in risk sensitivity and other potentially substantive changes to fundamental aspects of the New Accord such as the definition of capital, treatment of counterparty credit risk, and new regulatory capital elements such as an international leverage ratio and prudential capital buffers.

The agencies will consider each proposed change to the risk-based capital rules and determine whether it is appropriate to implement the change by rulemaking based on the implications of each proposal for the capital adequacy of banking organizations, the implementation costs of such proposals, and the nature of any unintended consequences or competitive issues. The generally applicable risk-based capital requirements and generally applicable leverage capital requirements that the agencies may establish in the future would, as required under the Act, become the minimum leverage and risk-based capital requirements for all banking organizations. Furthermore, as provided under the Act, any future amendments to the leverage requirements or risk-based capital requirements established by the agencies may not result in capital requirements that are "quantitatively lower" than the generally applicable leverage requirements or risk-based capital requirements in effect as of the date of enactment of the Act.

To comply with this provision of the Act, the agencies propose to perform a quantitative analysis of the likely effect on capital requirements as part of developing future amendments to the capital rules to ensure that any new capital framework is not quantitatively lower than the requirements in effect as of the date of enactment of the Act. The agencies therefore would not anticipate proposing to require banking organizations to compute two sets of generally applicable capital requirements from current and historic frameworks as the generally applicable requirements are amended over time. The agencies have not yet determined the quantitative method for measuring the equivalence of current, historic, and proposed future capital frameworks.

Question 4: The agencies request comment on the most appropriate method of conducting the aforementioned analysis. What are potential quantitative methods for comparing future capital requirements to ensure that any new capital

[15] 12 CFR part 3, Appendix C, § 3 (OCC); 12 CFR part 208, Appendix F, § 3 and 12 CFR part 225, Appendix G, § 3 (Board); and 12 CFR part 325, § 3 Appendix D (FDIC).

framework is not quantitatively lower than the requirements in effect as of the date of the enactment of the Act?

The agencies anticipate addressing aspects of Section 171 not addressed in this proposed rule in a subsequent rulemaking.

Question 5: The agencies seek comment on all other aspects of this proposed rule, including the costs and benefits. What, if any, changes should the agencies make to the proposed rule or the risk-based capital framework to better balance costs and benefits?

Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act,[16] (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include banks with assets less than or equal to $175 million) and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

This proposal would affect bank holding companies, national banks, State member banks, and State nonmember banks, that use the advanced approaches rules to calculate their risk-based capital requirements according to certain internal ratings-based and internal model approaches. A bank holding company or bank must use the advanced approaches rules only if: (i) It has consolidated total assets (as reported on its most recent year-end regulatory report) equal to $250 billion or more; (ii) it has consolidated total on-balance sheet foreign exposures at the most recent year-end equal to $10 billion or more; or (iii) it is a subsidiary of a bank holding company or bank that would be required to use the advanced approaches rules to calculate its risk-based capital requirements.

With respect to the proposed changes to the general risk-based capital rules, the proposal has the potential to affect the risk weights applicable only to assets that generally are impermissible for banks to hold. These proposed changes are accordingly unlikely to have a significant impact on banking organizations. The agencies also note that the changes to the general risk-based capital rules would not impose any additional obligations, restrictions, burdens, or reporting, recordkeeping or compliance requirements on banks including small banking organizations, nor do they duplicate, overlap or conflict with other Federal rules.

[16] 5 U.S.C. 605(b).

The agencies estimate that zero small bank holding companies (out of a total of approximately 2,561 small bank holding companies), one small national bank (out of a total of approximately 678 small national banks), one small State member bank (out of a total of approximately 400 small State member banks), and one small State nonmember bank (out of a total of approximately 2,708 small State nonmember banks) are required to use the advanced approaches rules.[17] In addition, each of the small banks that is required to use the advanced approaches rules is a subsidiary of a bank holding company with over $250 billion in consolidated total assets or over $10 billion in consolidated total on-balance sheet foreign exposures. Therefore, the agencies believe that the proposed rule will not result in a significant economic impact on a substantial number of small entities.

OCC Unfunded Mandates Reform Act of 1995 Determinations

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (UMRA) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any one year. If a budgetary impact statement is required, section 205 of the UMRA also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that its proposed rule will not result in expenditures by State, local, and Tribal governments, or by the private sector, of $100 million or more. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995,[18] the agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. Each of the agencies has an established information collection for the paperwork burden imposed by the advanced approaches rule.[19] This notice of proposed rulemaking would replace the transitional floors in section 21(e) of the advanced approaches rule with a permanent floor equal to the tier 1 and total risk-based capital requirements under the current generally applicable risk-based capital rules. The proposed change to transitional floors would change the basis for calculating a data element that must be reported to the agencies under an existing requirement. However, it would have no impact on the frequency or response time for the reporting requirement and, therefore, does not constitute a substantive or material change subject to OMB review.

[17] All totals are as of June 30, 2010.

[18] 44 U.S.C. 3501–3521.

Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the agencies to use plain language in all proposed and final rules published after January 1, 2000. In light of this requirement, the agencies have sought to present the proposed rule in a simple and straightforward manner. The agencies invite comment on whether the agencies could take additional steps to make the proposed rule easier to understand.

List of Subjects

12 CFR Part 3

Administrative practice and procedure, Banks, Banking, Capital, National banks, Reporting and recordkeeping requirements, Risk.

12 CFR Part 208

Confidential business information, Crime, Currency, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Risk.

12 CFR Part 225

Administrative practice and procedure, Banks, banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

12 CFR Part 325

Administrative practice and procedure, Banks, banking, Capital Adequacy, Reporting and recordkeeping requirements, Savings associations, State nonmember banks.

[19] *See* Risk-Based Capital Reporting for Institutions Subject to the Advanced Capital Adequacy Framework, FFIEC 101, OCC OMB Number 1557–0239, Federal Reserve OMB Number 7100–0319, FDIC OMB Number 3064–0159.

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For the reasons stated in the common preamble, the Office of the Comptroller of the Currency proposes to amend part 3 of chapter I of Title 12, Code of Federal Regulations as follows:

PART 3—MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES

1. The authority citation for part 3 continues to read as follows:

Authority: 12 U.S.C. 93a, 161, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, and 3909.

2. In Appendix A to part 3, in section 3, add new paragraph (a)(4)(xi) as follows:

Appendix A to Part 3—Risk-Based Capital Guidelines

* * * * *

Section 3. Risk Categories/Weights for On-Balance Sheet Assets and Off-Balance Sheet Items

* * * * *

(xi) Subject to the requirements below, a bank may assign an asset not included in the categories above to the risk weight category applicable under the capital guidelines for bank holding companies,[12b] provided that all of the following conditions apply:

(A) The bank is not authorized to hold the asset under applicable law other than debt previously contracted or similar authority; and

(B) The risks associated with the asset are substantially similar to the risks of assets that are otherwise assigned to a risk weight category less than 100 percent under this appendix.

3. In Appendix C to part 3:

a. Revise Part I, section 3 to read as set forth below.

b. Remove section 21(e).

Appendix C to Part 3—Capital Adequacy Guidelines for Banks: Internal Ratings-Based and Advanced Measurement Approaches

Part I. General Provisions

* * * * *

Section 3. Minimum Risk-Based Capital Requirements

(a)(1) Except as modified by paragraph (c) of this section or by section 23 of this appendix, each bank must meet a minimum:

(i) Total risk-based capital ratio of 8.0 percent; and

(ii) Tier 1 risk-based capital ratio of 4.0 percent.

(2) A bank's total risk-based capital ratio is the lower of:

(i) Its total qualifying capital to total risk-weighted assets; and

(ii) Its total risk-based capital ratio as calculated under Appendix A of this part.

(3) A bank's tier 1 risk-based capital ratio is the lower of:

(i) Its tier 1 capital to total risk-weighted assets; and

(ii) Its tier 1 risk-based capital ratio as calculated under Appendix A of this part.

(b) Each bank must hold capital commensurate with the level and nature of all risks to which the bank is exposed.

(c) When a bank subject to 12 CFR part 3, Appendix B, calculates its risk-based capital requirements under this appendix, the bank must also refer to 12 CFR part 3, Appendix B, for supplemental rules to calculate risk-based capital requirements adjusted for market risk.

* * * * *

Federal Reserve System

12 CFR Chapter II

Authority and Issuance

For the reasons set forth in the common preamble, parts 208 and 225 of chapter II of title 12 of the Code of Federal Regulations are proposed to be amended as follows:

PART 208—MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES

4. The authority citation for part 208 continues to read as follows:

Authority: Subpart A of Regulation H (12 CFR part 208, Subpart A) is issued by the Board of Governors of the Federal Reserve System (Board) under 12 U.S.C. 24, 36; sections 9, 11,21,25 and 25A of the Federal Reserve Act (12 U.S.C. 321–338a, 248(a), 248(c), 481–486, 601 and 611); sections 1814, 1816, 1818, 1831o, 1831p–l, 1831r–l and 1835a of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1814, 1816, 1818, 1831o, 1831p–l, 1831r–l and 1835); and 12 U.S.C. 3906–3909.

5. In Appendix A to part 208, revise section III.C. 4.a and add section III.C. 4.e to read as follows:

Appendix A to Part 208—Capital Adequacy Guidelines for State Member Banks: Risk-Based Measure

* * * * *

III. Procedures for Computing Weighted Risk Assets and Off-Balance Sheet Items

* * * * *

C. Risk Weights

* * * * *

4. *Category 4: 100 percent.* a. Except as provided in section III.C. 4.e, all assets not included in the categories above are assigned to this category, which comprises standard risk assets. The bulk of the assets typically found in a loan portfolio would be assigned to the 100 percent category.

* * * * *

e. Subject to the requirements below, a bank, may assign an asset not included in the categories above to the risk weight category applicable under the capital guidelines for bank holding companies,[45] provided that all of the following conditions apply:

i. The bank is not authorized to hold the asset under applicable law other than under debt previously contracted or other similar authority; and

ii. The risks associated with the asset are substantially similar to the risks of assets that are otherwise assigned to a risk weight category of less than 100 percent under this appendix.

* * * * *

6. In Appendix F to part 208:

a. Revise section 3 to read as set forth below; and

b. Remove section 21(e).

Appendix F to Part 208—Capital Adequacy Guidelines for Banks: Internal Ratings-Based and Advanced Measurement Approaches

Part I. General Provisions

* * * * *

Section 3. Minimum Risk-Based Capital Requirements

(a)(1) Except as modified by paragraph (c) of this section or by section 23 of this appendix, each bank must meet a minimum:

(i) Total risk-based capital ratio of 8.0 percent; and

(ii) Tier 1 risk-based capital ratio of 4.0 percent.

(2) A bank's total risk-based capital ratio is the lower of:

(i) Its total qualifying capital to total risk-weighted assets, and

(ii) Its total risk-based capital ratio as calculated under Appendix A of this part.

(3) A bank's tier 1 risk-based capital ratio is the lower of:

(i) Its tier 1 capital to total risk-weighted assets, and

(ii) Its tier 1 risk-based capital ratio as calculated under Appendix A of this part.

(b) Each bank must hold capital commensurate with the level and nature of all risks to which the bank is exposed.

(c) When a bank subject to [the market risk rule] calculates its risk-based capital requirements under this appendix, the bank must also refer to [the market risk rule] for supplemental rules to calculate risk-based capital requirements adjusted for market risk.

* * * * *

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

7. The authority citation for part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3907, and 3909; 15 U.S.C. 6801 and 6805.

8. In Appendix G to part 225:

a. Revise section 3 to read as set forth below; and

[12b] *See* 12 CFR part 225, appendix A.

[45] *See* 12 CFR part 225, appendix A.

b. Remove section 21(e).

Appendix G to Part 225—Capital Adequacy Guidelines for Bank Holding Companies: Internal Ratings-Based and Advanced Measurement Approaches

Part I. General Provisions

* * * * *

Section 3. Minimum Risk-Based Capital Requirements

(a)(1) Except as modified by paragraph (c) of this section or by section 23 of this appendix, each bank holding company must meet a minimum:

(i) Total risk-based capital ratio of 8.0 percent; and

(ii) Tier 1 risk-based capital ratio of 4.0 percent.

(2) A bank holding company's total risk-based capital ratio is the lower of:

(i) Its total qualifying capital to total risk-weighted assets, and

(ii) Its total risk-based capital ratio as calculated under 12 CFR part 208, appendix A, as adjusted to include certain debt or equity instruments issued before May 19, 2010 as described in section 171(b)(4)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

(3) A bank holding company's tier 1 risk-based capital ratio is the lower of:

(i) Its tier 1 capital to total risk-weighted assets, and

(ii) Its tier 1 risk-based capital ratio as calculated under 12 CFR part 208, appendix A, as adjusted to include certain debt or equity instruments issued before May 19, 2010 as described in section 171(b)(4)(B) of the Dodd-Frank Act.

(b) Each bank holding company must hold capital commensurate with the level and nature of all risks to which the bank holding company is exposed.

(c) When a bank holding company subject to [the market risk rule] calculates its risk-based capital requirements under this appendix, the bank holding company must also refer to [the market risk rule] for supplemental rules to calculate risk-based capital requirements adjusted for market risk.

* * * * *

Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority for Issuance

For the reasons stated in the common preamble, the Federal Deposit Insurance Corporation proposes to amend Part 325 of Chapter III of Title 12, Code of the Federal Regulations as follows:

PART 325—CAPITAL MAINTENANCE

9. The authority citation for part 325 continues to read as follows:

Authority: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790, (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, as amended by Pub. L. 103–325, 108 Stat. 2160, 2233 (12 U.S.C. 1828 note); Pub. L. 102–242, 105 Stat. 2236, 2386, as amended by Pub. L. 102–550, 106 Stat. 3672, 4089 (12 U.S.C. 1828 note).

10. Amend Appendix A to part 325 as follows:

a. In section II.C, revise the first sentence of the introductory text;

b. In sections II.D, and II.E, redesignate footnotes 45 through 50 as footnotes 46 through 51.

c. In section II.C, Category 4, add new paragraph (d) and a new footnote 45.

Appendix A to Part 325—Statement of Policy on Risk-Based Capital

* * * * *

II. Procedures for Computing Risk-Weighted Assets

* * * * *

C. Risk Weights for Balance Sheet Assets (see Table II)

The risk based capital framework contains five risk weight categories—0 percent, 20 percent, 50 percent, 100 percent, and 200 percent. * * *

* * * * *

Category 4—100 Percent Risk Weight.

* * *

(d) Subject to the requirements below, a bank may assign an asset not included in the categories above to the risk weight category applicable under the capital guidelines for bank holding companies,[45] provided that all of the following conditions apply:

(1) The bank is not authorized to hold the asset under applicable law other than debt previously contracted or similar authority; and

(2) The risks associated with the asset are substantially similar to the risks of assets that are otherwise assigned to a risk weight category less than 100 percent under this appendix.

* * * * *

11. In Appendix D to part 325:

a. Revise section 3 to read as set forth below; and

b. Remove section 21(e).

Appendix D to Part 325—Capital Adequacy Guidelines for Banks: Internal Ratings-Based and Advanced Measurement Approaches

Part I. General Provisions

* * * * *

Section 3. Minimum Risk-Based Capital Requirements

(a) (1) Except as modified by paragraph (c) of this section or by section 23 of this appendix, each bank must meet a minimum:

(i) Total risk-based capital ratio of 8.0 percent; and

(ii) Tier 1 risk-based capital ratio of 4.0 percent.

(2) A bank's total risk-based capital ratio is the lower of:

(i) Its total qualifying capital to total risk-weighted assets, and

(ii) Its total risk-based capital ratio as calculated under appendix A of this part.

(3) A bank's tier 1 risk-based capital ratio is the lower of:

(i) Its tier 1 capital to total risk-weighted assets, and

(ii) Its tier 1 risk-based capital ratio as calculated under appendix A of this part.

(b) Each bank must hold capital commensurate with the level and nature of all risks to which the bank is exposed.

(c) When a bank subject to appendix C of this part calculates its risk-based capital requirements under this appendix, the bank must also refer to appendix C of this part for supplemental rules to calculate risk-based capital requirements adjusted for market risk.

* * * * *

Dated: December 15, 2010.

John Walsh,

Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, December 14, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

Dated at Washington, DC, this 14th day of December 2010.

By order of the Board of Directors.

Robert E. Feldman,

Executive Secretary, Federal Deposit Insurance Corporation.

[FR Doc. 2010–32190 Filed 12–29–10; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P; 6720–01–P

[45] *See* 12 CFR part 225, appendix A.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 740

RIN 3133–AD83

Accuracy of Advertising and Notice of Insured Status

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule with request for comments.

SUMMARY: The NCUA Board proposes to revise certain provisions of NCUA's official advertising statement rule. Specifically, insured credit unions will be required to include the statement in all radio and television advertisements, annual reports, and statements of condition required to be published by law. The NCUA Board also proposes to define the term "advertisement" and clarify size requirements for the official advertising statement in print materials.

DATES: Comments must be received on or before February 28, 2011.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

- *NCUA Web Site: http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html.* Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov*. Include "[Your name] Comments on Proposed Rule 740, Accuracy of Advertising and Notice of Insured Status" in the e-mail subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

Public Inspection: All public comments are available on the agency's Web site at *http://www.ncua.gov/RegulationsOpinionsLaws/comments* as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6546 or send an e-mail to *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Frank Kressman, Senior Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518–6540.

SUPPLEMENTARY INFORMATION: Section 740.5 of NCUA's regulations requires each insured credit union to include NCUA's official advertising statement in all of its advertisements, including on its main internet page. 12 CFR 740.5(a). The official advertising statement is in substance as follows: "This credit union is federally insured by the National Credit Union Administration." Insured credit unions, at their option, may use the short title "Federally insured by NCUA" or a reproduction of NCUA's official sign, as depicted in § 740.4(b), as the official advertising statement. 12 CFR 740.4(b); 12 CFR 740.5(b).

The official advertising statement must be in a size and print that is clearly legible. 12 CFR 740.5(b). If the official sign is used as the official advertising statement, an insured credit union may alter the font size to ensure its legibility as provided in § 740.4(b)(2). 12 CFR 740.4(b)(2); 12 CFR 740.5(b).

A number of advertisements in the current rule, however, need not include the official advertising statement.[1] Among those currently exempted advertisements are radio and television advertisements that do not exceed 30 seconds in time. The NCUA Board proposes to rescind these exemptions. NCUA believes that it is important for consumers of these kinds of advertisements to know that the share accounts in the advertising credit union are federally insured by NCUA. The NCUA Board believes that the benefits of this action to consumers and credit unions, namely, enhanced consumer confidence and NCUA name recognition, will far outweigh the minor inconvenience associated with requiring the inclusion of the official advertising statement in this context. The NCUA Board intends for this proposal also to apply to television display advertisements.

With respect to print advertisements, the NCUA Board proposes to clarify the requirement that the official advertising statement must be in a size and print that is clearly legible. 12 CFR 740.5(b). NCUA's regulations do not dictate a specific font size be used for the official advertising statement, and NCUA continues to believe this makes sense considering advertisements can range from small magazine advertisements to very large billboard advertisements. The NCUA Board requires, however, that in any particular advertisement, in addition to legibility, the font size for the official advertising statement may be no smaller than the smallest font size used in other portions of the advertisement intended to convey information to the consumer.

Also, the NCUA Board believes that an insured credit union's annual report and other statements of condition required to be published by law are significant and a form of advertisement and must include the official advertising statement in a prominent position. Accordingly, the NCUA Board proposes to amend § 740.5 in this regard.

In summary, the proposal rescinds three exemptions from the general rule requiring the use of the official advertising statement. Those three include radio and television advertisements that do not exceed 30 seconds in time and annual reports and other statements of condition required to be published by law. All other exemptions in § 740.5(c) remain in place. Finally, the current rule does not define the term "advertisement." The NCUA Board proposes to clarify the rule by proposing such a definition. The proposed definition is consistent with that used by the Federal Deposit Insurance Corporation in its official advertising statement rule. 12 CFR part 328.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any proposed regulation may have on a substantial number of small credit unions (those under $10 million in assets). The proposed amendments enhance consumer confidence and do not impose a significant burden on credit unions. Accordingly, the NCUA has determined and certifies that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small credit unions within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612.

Paperwork Reduction Act

The proposed rule does not contain a "collection of information" within the meaning of section 3502(3) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3502(3)) and would not increase paperwork requirements under the Paperwork Reduction Act of 1995 or regulations of the Office of Management and Budget.

[1] Exempted advertisements in the current rule include: (1) Statements of condition and reports of condition of an insured credit union which are required to be published by state or federal law or regulation; (2) Credit union supplies such as stationery (except when used for circular letters), envelopes, deposit slips, checks, drafts, signature cards, account passbooks, and noninsurable certificates; (3) Signs or plates in the credit union office or attached to the building or buildings in which the offices are located; (4) Listings in directories; (5) Advertisements not setting forth the name of the insured credit union; (6) Display advertisements in credit union directories, provided the name of the credit union is listed on any page in the directory with a symbol or other descriptive matter indicating it is insured; (7) Joint or group advertisements of credit union services where the names of insured credit unions and noninsured credit unions are listed and form a part of such advertisement; (8) Advertisements by radio that do not exceed thirty (30) seconds in time; (9) Advertisements by television, other than display advertisements, that do not exceed thirty (30) seconds in time; (10) Advertisements that because of their type or character would be impractical to include the official advertising statement, including but not limited to, promotional items such as calendars, matchbooks, pens, pencils, and key chains; (11) Advertisements that contain a statement to the effect that the credit union is insured by the National Credit Union Administration, or that its accounts and shares or members are insured by the Administration to the maximum insurance amount for each member or shareholder; (12) Advertisements that do not relate to member accounts, including but not limited to advertisements relating to loans by the credit union, safekeeping box business or services, traveler's checks on which the credit union is not primarily liable, and credit life or disability insurance. 12 CFR § 740.5(c).

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The proposed rule would not have substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

NCUA has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (1998).

Agency Regulatory Goal

NCUA's goal is to promulgate clear and understandable regulations that impose minimal regulatory burden. We request your comments on whether the proposed amendments are understandable and minimally intrusive if implemented as proposed.

List of Subjects in 12 CFR Part 740

Advertisements, Credit unions, Signs and symbols.

By the National Credit Union Administration Board on December 16, 2010.

Mary F. Rupp,

Secretary of the Board.

For the reasons discussed above, the NCUA Board proposes to amend 12 CFR part 740 as follows:

PART 740—ACCURACY OF ADVERTISING AND NOTICE OF INSURED STATUS

1. The authority citation for part 740 continues to read as follows:

Authority: 12 U.S.C. 1766, 1781, 1785, and 1789.

2. Revise Section 740.1 by redesignating paragraphs (b) and (c) as paragraphs (c) and (d) and by adding a new paragraph (b) to read as follows:

§ 740.1 Definitions.

* * * * *

(b) *Advertisement* as used in this part means a commercial message, in any medium, that is designed to attract public attention or patronage to a product or business.

* * * * *

3. Amend § 740.5 by revising paragraph (a) to read as follows:

§ 740.5 Requirements for the official advertising statement.

(a) Each insured credit union must include the official advertising statement, prescribed in paragraph (b) of this section, in all of its advertisements including, but not limited to, annual reports, statements of condition required to be published by law, radio and television advertisements, and on its main Internet page, except as provided in paragraph (c) of this section.

* * * * *

4. Amend § 740.5 by:

a. Revising the third sentence of paragraph (b);

b. Removing and paragraphs (c)(1), (c)(8) and (c)(9); and

c. Redesignating paragraphs (c)(2), (c)(3), (c)(4), (c)(5), (c)(6), (c)(7), (c)(10), (c)(11), and (c)(12), as paragraphs (c)(1) through (c)(9) respectively.

The revised text reads as follows:

§ 740.5 Requirements for the official advertising statement.

(b) * * * The official advertising statement must be in a size and print that is clearly legible and may be no smaller than the smallest font size used in other portions of the advertisement intended to convey information to the consumer. * * *

* * * * *

[FR Doc. 2010–32127 Filed 12–29–10; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1277; Directorate Identifier 2010–NM–218–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330–200 and –300 Series Airplanes, and Model A340–200 and –300 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Proposed rule; rescission.

SUMMARY: We propose to rescind airworthiness directive (AD) 2009–18–19. This proposed AD results from mandatory continuing airworthiness information (MCAI) issued by EASA, to rescind EASA AD 2010–0083. The MCAI specifies the following:

It has been assessed that multiple NRV [non return valve] failures in combination with certain trapped fuel cases could potentially increase the quantity of unusable fuel on the aeroplane, possibly leading to fuel starvation which could result in engines in-flight shut down and would constitute an unsafe condition. To prevent and detect this condition, EASA issued EASA AD 2010–0083.

Based on in service experience, mainly on the results of the operational test required by EASA AD 2010–0083, Airbus has performed a safety analysis on the NRV to check if the safety objectives are met.

This analysis of the Collector Cell motive flow line NRV, taking into account all failure scenarios, concludes that the previous non compliance can be alleviated. Consequently, no unsafe condition exists any more on the affected NRV.

For the reasons described above, EASA AD 2010–0083 is cancelled.

The proposed AD would rescind the parallel FAA AD 2009–18–19.

DATES: We must receive comments on this proposed AD by February 14, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this 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, Washington 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–2010–1277; Directorate Identifier 2010–NM–218–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

On August 26, 2009, we issued AD 2009–18–19, Amendment 39–16016 (74 FR 46322, September 9, 2009). That AD was intended to address an unsafe condition on the products listed above. That AD requires a periodic operational test to check the operation of the non-return valve, and corrective actions if necessary. That AD corresponds to AD 2008–0209, dated November 27, 2008, issued by the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community. EASA AD 2008–0209 was superseded by EASA AD 2010–0083, dated May 3, 2010.

Since we issued AD 2009–18–19, EASA issued Airworthiness Directive 2010–0083–CN, dated September 20, 2010, to cancel EASA AD 2010–0083, dated May 3, 2010, for the specified products. EASA AD 2010–0083–CN states:

> It has been assessed that multiple NRV [non return valve] failures in combination with certain trapped fuel cases could potentially increase the quantity of unusable fuel on the aeroplane, possibly leading to fuel starvation which could result in engines in-flight shut down and would constitute an unsafe condition. To prevent and detect this condition, EASA issued EASA AD 2010–0083.
>
> Based on in service experience, mainly on the results of the operational test required by EASA AD 2010–0083, Airbus has performed a safety analysis on the NRV to check if the safety objectives are met.
>
> This analysis of the Collector Cell motive flow line NRV, taking into account all failure scenarios, concludes that the previous non compliance can be alleviated. Consequently, no unsafe condition exists any more on the affected NRV.

For the reasons described above, EASA AD 2010–0083 is cancelled.

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

FAA's Conclusions

Upon further consideration, we have determined that the unsafe condition identified in AD 2009–18–19 does not exist. The safety analysis conducted by Airbus verified that the safety objectives (failure rate) for the NRV are met, and the NRV complies with regulatory standards. Since the unsafe condition identified in the AD has been eliminated, AD 2009–18–19 is no longer necessary.

Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the rescission described in the MCAI. Accordingly, this proposed AD would rescind AD 2009–18–19. Rescission of AD 2009–18–19 would not preclude the FAA from issuing another related action or commit the FAA to any course of action in the future.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and, in general, agree with the substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI.

Costs of Compliance

AD 2009–18–19 affects about 50 airplanes of U.S. registry. The estimated cost of the currently required actions for U.S. operators is $20,000, or $400 per airplane. Rescinding AD 2009–18–19 would eliminate those costs.

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 an airworthiness directive (AD) that removes AD 2009–18–19, Amendment 39–16016 (74 FR 46322, September 9, 2009), to read as follows:

Airbus: Docket No. FAA–2010–1277; Directorate Identifier 2010–NM–218–AD.

Comments Due Date

(a) We must receive comments by February 14, 2011.

Affected ADs

(b) This AD rescinds AD 2009–18–19, Amendment 39–16016.

Applicability

(c) This AD applies to the airplanes, certificated in any category, identified in paragraphs (c)(1) and (c)(2) of the AD.

(1) Airbus Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 series airplanes, all serial numbers.

(2) Airbus Model A340–211, –212, –213, –311, –312, and –313 series airplanes, all serial numbers.

Related Information

(d) Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2010–0083–CN, dated September 20, 2010, for related information.

Issued in Renton, Washington, on December 17, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–32997 Filed 12–29–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1207; Directorate Identifier 2010–NM–140–AD]

RIN 2120–AA64

Airworthiness Directives; Dassault-Aviation Model FALCON 7X Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Following investigation of an in service event, it has been determined that in case a short circuit occurs on a weight-on-wheels (WOW) proximity sensor wiring, both circuit breakers that supply power to that wiring will trip, causing simultaneous de-power of all WOW proximity sensors of that part of the system. The loss of the corresponding WOW information would lead to untimely inhibition of warnings that could compromise the pilot capacity to react to abnormal or failure landing conditions.

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by February 14, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 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 Dassault Falcon Jet, P.O. Box 2000, South Hackensack, New Jersey 07606; telephone 201–440–6700; Internet *http://www.dassaultfalcon.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket 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: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; 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–2010–1207; Directorate Identifier 2010–NM–140–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 2010–0031, dated March 3, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

Following investigation of an in service event, it has been determined that in case a short circuit occurs on a weight-on-wheels (WOW) proximity sensor wiring, both circuit breakers that supply power to that wiring will trip, causing simultaneous de-power of all WOW proximity sensors of that part of the system. The loss of the corresponding WOW information would lead to untimely inhibition of warnings that could compromise the pilot capacity to react to abnormal or failure landing conditions.

This AD requires the modification of the WOW System to improve its robustness against short circuit of the proximity sensors wiring by adding dedicated fuses to each WOW proximity sensor, in accordance with Dassault Aviation Service Bulletin (SB) F7X–065.

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

Relevant Service Information

Dassault-Aviation has issued Mandatory Service Bulletin 7X–065, dated July 24, 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.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 21 products of U.S. registry. We also estimate that it would take about 9 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. 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 $16,065, or $765 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this 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:

Dassault-Aviation: Docket No. FAA–2010–1207; Directorate Identifier 2010–NM–140–AD.

Comments Due Date

(a) We must receive comments by February 14, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Dassault-Aviation Model FALCON 7X airplanes, certificated in any category; except those having incorporated modification M1031.

Subject

(d) Air Transport Association (ATA) of America Code 32: Landing Gear.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

Following investigation of an in service event, it has been determined that in case a short circuit occurs on a weight-on-wheels (WOW) proximity sensor wiring, both circuit breakers that supply power to that wiring will trip, causing simultaneous de-power of all WOW proximity sensors of that part of the system. The loss of the corresponding WOW information would lead to untimely inhibition of warnings that could compromise the pilot capacity to react to abnormal or failure landing conditions.

* * * * *

Compliance

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

Installation

(g) Within 27 months after the effective date of this AD, or within 1,800 flight hours after the effective date of this AD, whichever occurs first, install dedicated fuses on WOW proximity sensors, in accordance with the Accomplishment Instructions of Dassault Mandatory Service Bulletin 7X–065, dated July 24, 2009.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(h) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards 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.

(3) *Reporting Requirements:* A Federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of

the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave., SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

Related Information

(i) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2010–0031, dated March 3, 2010; and Dassault Mandatory Service Bulletin 7X–065, dated July 24, 2009; for related information.

Issued in Renton, Washington, on December 17, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–32999 Filed 12–29–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1295; Directorate Identifier 2010–CE–060–AD]

RIN 2120–AA64

Airworthiness Directives; Piper Aircraft, Inc. (Type Certificate Previously Held by The New Piper Aircraft, Inc.) Models PA–46–310P, PA–46–350P, and PA–46R–350T Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to certain Piper Aircraft, Inc. Models PA–46–310P and PA–46–350P airplanes that are equipped with a Lewis or Transicoil turbine inlet temperature (T.I.T.) gauge and associated probe. The existing AD currently requires calibrating the T.I.T. system; replacing any T.I.T. system that fails the calibration test; repetitively replacing the T.I.T. probe on certain Model PA–46–350P airplanes; and inserting a copy of the AD into the pilot's operating handbook (POH) for certain airplanes. Since we issued that AD, the manufacturer has revised related service information and added an airplane model to the list of affected airplanes. This proposed AD would retain the actions required by AD 99–15–04 R1, add certain Model PA–46R–350T airplanes to the Applicability section, expand the applicability to include other T.I.T. systems, and incorporate new service information. We are proposing this AD to prevent improper engine operation caused by improperly calibrated T.I.T. indicators or defective T.I.T. probes, which could result in engine damage/failure with consequent loss of control of the airplane.

DATES: We must receive comments on this proposed AD by February 14, 2011.

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

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

For service information identified in this AD, contact Piper Aircraft, Inc., 2926 Piper Drive, Vero Beach, Florida 32960; telephone: (772) 567–4361; fax: (772) 978–6573; Internet: *http://www.newpiper.com/company/publications.asp.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust St., Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Darby Mirocha, Aerospace Engineer, FAA, Atlanta Aircraft Certification Office, 1701 Columbia Avenue, College Park, Georgia 30337; phone: (404) 474–5573; fax: (404) 474–5605; e-mail: *darby.mirocha@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1295; Directorate Identifier 2010–CE–060–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

On May 17, 2000, we issued AD 99–15–04 R1, Amendment 39–11747 (65 FR 33745, May 25, 2000), for certain Piper Aircraft, Inc. (type certificate previously held by The New Piper Aircraft, Inc.) Models PA–46–310P and PA–46–350P airplanes that are equipped with a Lewis or Transicoil turbine inlet temperature (T.I.T.) gauge and associated probe. That AD required calibrating the T.I.T. system; replacing any T.I.T. system that fails the calibration test; repetitively replacing the T.I.T. probe on Model PA–46–350P airplanes; and inserting a copy of the AD into the Emergency Procedures section of the POH for certain airplanes. That AD resulted from field reports that indicated service accuracy problems with the existing T.I.T. system on certain Piper Aircraft, Inc. Models PA–46–310P and PA–46–350P. We issued that AD to prevent improper engine operation caused by improperly calibrated T.I.T. indicators or defective T.I.T. probes, which could result in engine damage/failure with consequent loss of control of the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 99–15–04 R1, the manufacturer has revised related service information and has added an airplane model to the list of affected airplanes. We have also determined that the scope of this proposed AD goes beyond only airplanes equipped with Lewis or Transicoil gauges and/or probes.

Relevant Service Information

We reviewed Piper Aircraft, Inc. Service Bulletin No. 995C, dated

November 17, 2009. The service information describes procedures for calibrating the T.I.T. system and replacing the probe.

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 retain the requirements of AD 99–15–04 R1. This proposed AD would also add certain Model PA–46R–350T airplanes to the Applicability section, expand the applicability to include other T.I.T. systems, and incorporate new service information.

Costs of Compliance

We estimate that this proposed AD affects 898 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
Clean and inspect the turbine inlet temperature gauge and probe for certain Models PA–46–310P and PA–46–350P airplanes.	1 work-hour × $85 per hour = $85.	Not applicable	$85	$85 × 780 affected airplanes = $66,300.
Calibrate the turbine inlet temperature gauge for certain Models PA–46–310P and PA–46–350P airplanes.	4 work-hours × $85 per hour = $340.	Not applicable	340	$340 × 427 affected airplanes = $145,180.
Incorporate emergency procedures into POH.	1 workhour × $85 per hour = $85.	Not applicable	85	$85 × 898 affected airplanes = $76,330.

The requirements of this proposed AD add no additional economic burden other than the addition of an airplane model to the Applicability section.

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace probe	1 work-hour × $85 per hour = $85.	$384	$469

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

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 removing airworthiness directive (AD) 99–15–04 R1, Amendment 39–11747 (65 FR 33745, May 25, 2000), and adding the following new AD:

Piper Aircraft, Inc. (Type Certificate Previously Held by The New Piper Aircraft, Inc.): Docket No. FAA–2010–1295; Directorate Identifier 2010–CE–060–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by February 14, 2011.

Affected ADs

(b) This AD supersedes AD 99–15–04 R1, Amendment 39–11747.

Applicability

(c) This AD applies to the following Piper Aircraft, Inc. (type certificate previously held by The New Piper Aircraft, Inc.) Models PA–

46–310P, PA–46–350P, and PA–46R–350T airplanes that:

(1) Are certificated in any category; and

(2) Equipped with a turbine inlet temperature (T.I.T.) system identified in table 1 of this AD. Relief from this AD is available only if the gauge and probe are replaced through STC and not if a second turbine inlet temperature gauge was installed while retaining the Lewis or Transicoil T.I.T. gauge and probe.

GROUP 1—AIRPLANES PREVIOUSLY AFFECTED BY AD 99–15–04 R1

Models	Serial Numbers (S/N)
PA–46–310P (Malibu).	46–8408001 through 46–8608067 and 4608001 through 4608140.
PA–46–350P (Malibu Mirage).	4622001 through 4622200 and 4636001 through 4636020.

GROUP 2—AIRPLANES NOT PREVIOUSLY AFFECTED BY AD 99–15–04 R1

Models	Serial Numbers (S/N)
PA–46–350P (Malibu Mirage).	4636021 and subsequent.
PA–46R–350T (Matrix).	4692001 and subsequent.

TABLE 1—AFFECTED AIRPLANE MODELS AND CORRESPONDING AFFECTED LEWIS OR TRANSICOIL PART NUMBERS (P/NS)

Models	S/N	Indication System P/N	Probe P/N
PA–46–310P	46–8408001 through 46–8608067 and 4608001 through 4608140.	Lewis T.I.T. analog indicators P/N 471–008 ..	471–009 or 481–387.
PA–46–350P	4622001 through 4622200 and 4636001 through 4636020.	Lewis T.I.T. analog indicators P/N 471–008 ..	481–389 or 481–392 or 686–216 (preferred).
PA–46–350P	4636021 through 4636374	Lewis T.I.T. digital indicators P/N 548–811	481–389 or 481–392 or 686–216 (preferred).
PA–46–350P	4636375 and subsequent	Avidyne Entegra or other Electronic Flight Information System (EFIS) display.	686–216.
PA–46R–350T	4692001 and subsequent	Avidyne Entegra or other EFIS display	686–216.

Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 77, Engine Indicating.

Unsafe Condition

(e) This AD was prompted by field reports that indicated service accuracy problems with the existing turbine inlet temperature system on certain Models PA–46–310P, PA–46–350P, and PA–46R–350T airplanes. We are issuing this AD to prevent improper engine operation caused by improperly calibrated turbine inlet temperature indicators or defective turbine inlet temperature probes, which could result in engine damage/failure with consequent loss of control of the airplane.

Compliance

(f) For Group 1 airplanes: Comply with this AD within the compliance times specified, unless already done.

TABLE 2—GROUP 1 AIRPLANES

[Airplanes previously affected by AD 99–15–04 R1]

Actions	Compliance	Procedures
(1) Clean and inspect the turbine inlet temperature gauge and probe.	Within the next 100 hours time-in-service (TIS) after August 31, 1999 (the effective date retained from AD 99–15–04).	Follow Piper Airplane Maintenance Manual PA–46–310P/PA–46–350P Part Number 761–783, Chapter 77–20–00, section A.(1)(d), pages 1 and 2; and Piper Airplane Maintenance Manual PA–46–350P Part Number 761–876, Chapter 77–20–00, section 1.C, pages 1 and 2, as applicable.
(2) Calibrate the turbine inlet temperature system.	Within the next 100 hours TIS after August 31, 1999 (the effective date retained from AD 99–15–04).	Follow Piper Airplane Maintenance Manual PA–46–310P/PA–46–350P Part Number 761–783, Chapter 77–20–00, section A.(1)(g), pages 3 and 4; and Piper Airplane Maintenance Manual PA–46–350P Part Number 761–876, Chapter 77–20–00, section 1.F, pages 2 through 4, as applicable; or Piper Service Bulletin No. 995C, dated November 17, 2009.
(3) If the turbine inlet temperature probe fails the inspection required in paragraph (f)(1) of this AD and/or the turbine inlet temperature system indicator cannot be calibrated as required in paragraph (f)(2) of this AD, replace any failed parts with a serviceable part listed in table 1 of this AD as long as it has been inspected and properly calibrated.	Before further flight after the cleaning and inspection required in paragraph (f)(1) and the calibration required in paragraph (f)(2) of this AD.	Follow Piper Airplane Maintenance Manual PA–46–310P/PA–46–350P Part Number 761–783, Chapter 77–20–00, section A.(1)(f), page 2; and Piper Airplane Maintenance Manual PA–46–350P Part Number 761–876, Chapter 77–20–00, section 1.E., page 2, as applicable; or Piper Service Bulletin No. 995C, dated November 17, 2009.

TABLE 2—GROUP 1 AIRPLANES—Continued

[Airplanes previously affected by AD 99–15–04 R1]

Actions	Compliance	Procedures
(4) Incorporate the information from Appendix 1 and Appendix 2, as applicable, of this AD into the Emergency Procedures section of the pilot operating handbook (POH). This may be done by inserting a copy of this AD into the POH.	Within the next 100 hours TIS after August 31, 1999 (the effective date retained from AD 99–15–04).	Not applicable.
(5) Only install a part listed in table 1 of this AD after it has been inspected and properly calibrated.	As of July 28, 2000 (the effective date of AD 99–15–04 R1).	Not applicable.
(6) *Model PA–46–350P airplanes only:* Replace the turbine inlet temperature probe with a new part number 481–389, 481–392, or 686–216 probe preferred). This action is not required for Model PA–46–310P.	Upon accumulating 250 hours TIS on the currently installed turbine inlet temperature probe or within the next 100 hours TIS after August 31, 1999 (the effective date retained from AD 99–15–04), whichever occurs later, and thereafter at intervals not to exceed 250 hours TIS.	*For serial numbers 4622001 through 4622200:* Follow Piper Airplane Maintenance Manual PA–46–310P/PA–46–350P Part Number 761–783, Chapter 77–20–00, section A.(1)(f), page 2; or Piper Service Bulletin No. 995C, dated November 17, 2009. *For serial numbers 4636001 through 4636020:* Follow Piper Airplane Maintenance Manual PA–46–350P Part Number 761–876, Chapter 77–20–00, section 1.E., page 2: or Piper Service Bulletin No. 995C, dated November 17, 2009.

(g) For Group 2 airplanes: Comply with this AD within the compliance times specified, unless already done.

TABLE 3—GROUP 2 AIRPLANES

[Airplanes not previously affected by AD 99–15–04 R1]

Actions	Compliance	Procedures
(1) *Model PA–46–350P airplanes, S/Ns 4636021 through 4636374 only:* Clean and inspect the turbine inlet temperature gauge and probe.	Within the next 100 hours TIS after the effective date of this AD.	Follow Piper Airplane Maintenance Manual PA–46–350P Part Number 761–876, Chapter 77–20–00, section 1.C, pages 1 and 2, as applicable.
(2) *Model PA–46–350P airplanes, S/Ns 4636021 through 4636374 only:* If the turbine inlet temperature probe fails the inspection required in paragraph (g)(1) of this AD and/or the turbine inlet temperature system indicator cannot be calibrated as required in paragraph (g)(2) of this AD, replace any failed parts with a serviceable part listed in table 1 of this AD as long as it has been inspected and properly calibrated.	Before further flight after the cleaning and inspection required in paragraph (g)(1) and the calibration required in paragraph (g)(2) of this AD.	Follow Piper Service Bulletin No. 995C, dated November 17, 2009.
(3) *All Group 2 airplanes:* Replace the turbine inlet temperature probe with a new part number 686–216 probe.	Upon accumulating 250 hours TIS on the currently installed turbine inlet temperature probe or within the next 100 hours TIS after the effective date of this AD, whichever occurs later, and thereafter at intervals not to exceed 250 hours TIS.	Piper Service Bulletin No. 995C, dated November 17, 2009.
(4) *All Group 2 airplanes:* Incorporate the information from Appendix 2 of this AD into the Emergency Procedures section of the POH. This may be done by inserting a copy of this AD into the POH.	Within the next 100 hours TIS after the effective date of this AD.	Not applicable.
(5) *All Group 2 airplanes:* Only install a part listed in table 1 of this AD after it has been inspected and properly calibrated.	As of the effective date of this AD	Not applicable.

Alternative Methods of Compliance (AMOCs)

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

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

(3) AMOCs approved for AD 99–15–04 R1 are approved as AMOCs for this AD.

Related Information

(i) For more information about this AD, contact Darby Mirocha, Aerospace Engineer, FAA, Atlanta Aircraft Certification Office, 1701 Columbia Avenue, College Park, Georgia 30337; phone: (404) 474–5573; fax: (404) 474–5605; e-mail: *darby.mirocha@faa.gov.*

(j) For service information identified in this AD, contact Piper Aircraft, Inc., 2926 Piper Drive, Vero Beach, Florida 32960; telephone: (772) 567–4361; fax: (772) 978–6573; Internet: *http://www.piper.com/home/pages/publications.cfm.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust St., Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Appendix 1 to Docket No. FAA–2010–1295

Model PA–46–310P (Mailbu)—Emergency Procedures for the Pilot's Operating Handbook (POH)

(1) If the turbine inlet temperature indication fails or is suspected of failure during takeoff, climb, descent, or landing, maintain FULL RICH mixture to assure adequate fuel flow for engine cooling.

(2) If the turbine inlet temperature indication fails or is suspected of failure after cruise power has been set, maintain cruise power setting and lean to 6 gallons per hour (GPH) fuel flow above that specified in the Power Setting Table in Section 5 of the AFM/POH. Continually monitor engine cylinder head and oil temperatures to avoid exceeding temperature limits.

Appendix 2 to Docket No. FAA–2010–1295

Model PA–46–350P (Malibu Mirage) and Model PA–46R–350T (Matrix)—Emergency Procedures for the Pilot's Operating Handbook (POH)

(1) If the turbine inlet temperature indication fails or is suspected of failure during takeoff, climb, descent or landing, set power per the POH Section 5 Power Setting Table and then lean to the approximate POH Power Setting Table fuel flow plus 4 GPH.

(2) If the turbine inlet temperature indication fails or is suspected of failure after cruise power has been set, maintain the power setting and increase indicated fuel flow by 1 GPH. Continually monitor engine cylinder head and oil temperatures to avoid exceeding temperature limits.

Issued in Kansas City, Missouri on December 22, 2010.

Earl Lawrence,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–32959 Filed 12–29–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1206; Directorate Identifier 2009–NM–216–AD]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Corporation Model DC–10–10, DC–10–10F, and MD–10–10F Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Model DC–10–10, DC–10–10F, and MD–10–10F airplanes. This proposed AD would require repetitive inspections for cracking on the lower cap of the rear spar of the left and right wings between stations Xors=417 and the outboard edge of the lower cap splice of the wing rear spar at station Xors=400; temporary and permanent repairs if necessary; and repetitive inspections of repaired areas and corrective actions if necessary. This proposed AD results from reports of three instances of fuel leaks in the lower cap splice of the wing rear spar at station Xors=409. We are proposing this AD to detect and correct cracking on the lower cap of the rear spar of the left and right wings between stations Xors=417 and the outboard edge of the lower cap splice of the wing rear spar at station Xors=400, which could result in fuel leaks or cracking of the lower wing skin and structure, causing possible inability of the structure to sustain the limit load adversely affecting the structural integrity of the airplane.

DATES: We must receive comments on this proposed AD by February 14, 2011.

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

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; telephone 206–544–5000, extension 2; fax 206–766–5683; e-mail *dse.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Nenita Odesa, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; phone: (562) 627–5234; fax: (562) 627–5210; e-mail: *nenita.odesa@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1206; Directorate Identifier 2009–NM–216–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 have received reports of three instances of Model DC–10–10F and MD–10–10F airplanes having a fuel leak in the lower cap of the wing rear spar at station Xors=409. Affected airplanes had the gross weight doublers installed, and operators had previously accomplished Boeing Service Bulletin DC10–57–138. Investigation revealed the fuel leak was due to a crack in the lower cap. This crack extended into all three legs (aft, forward, and vertical) of the spar cap. Metallurgical analysis of the cracked portion of the spar cap determined that the crack was due to fatigue and began at a fastener hole in the aft leg of the spar cap. An undetected crack in a spar cap, if not corrected, could lead to fuel leaks or cracking of the lower wing skin and structure causing the possible inability of the structure to sustain the limit load, and adversely affect the structural integrity of the airplane.

The design of the spar caps on Model DC–10–10 airplanes is the same as that on Model DC–10–10F and MD–10–10F airplanes in the area of cracking; therefore, Model DC–10–10 airplanes are also subject to the identified unsafe condition.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin DC10–57A156, Revision 1, dated March 10, 2010. The service bulletin describes procedures for repetitive eddy current test high frequency (ETHF) inspections for cracking on the lower cap of the rear spar of the left and right wings between stations Xors=417 and the outboard edge of the lower cap splice of the wing rear spar at station Xors=400, and temporary and permanent repairs, if necessary. The temporary repair may only be done on airplanes on which a crack that extends into the vertical leg of the spar cap is found and includes stop drilling the crack and installing an external doubler. The service bulletin describes procedures for repetitive ETHF and ultrasonic inspections for cracking of the repaired area.

We have also reviewed Boeing DC–10–10 Service Rework Drawings SR10570048, Revision J, dated July 16, 2009; which describe procedures for permanent and temporary repairs. The type of permanent repair depends on the extent of the cracking and includes crack removal or stop drill end of the crack and structural reinforcement. For permanently and temporarily repaired areas, the service rework drawing describes procedures for repetitive ETHF and ultrasonic inspections for cracking (depending on the type of repair that is accomplished).

We have also reviewed Boeing DC–10–10 Service Rework Drawings SR10570019, Revision K, dated April 17, 2009, which describe procedures for permanent repairs. The type of permanent repair depends on the extent of the cracking and includes crack removal or stop drill end of the crack and structural reinforcement. For permanently repaired areas, the service rework drawing describes procedures for repetitive ETHF and ultrasonic inspections for cracking (depending on the type of repair that is accomplished).

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. This proposed AD would require accomplishing the actions specified in the service information described previously except as discussed under "Differences Between the Proposed AD and the Service Information."

Differences Between the Proposed AD and the Service Information

Because the service bulletin provides no corrective action for the post repair inspections, this AD would require contacting the FAA.

Costs of Compliance

We estimate that this proposed AD would affect 68 airplanes of U.S. registry. We also estimate that it would take 2 work-hours per product to comply with this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this proposed AD to the U.S. operators to be $11,560, or $170 per product, per inspection cycle.

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), and

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

You can find our regulatory evaluation and the estimated costs of compliance 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:

McDonnell Douglas Corporation: Docket No. FAA–2010–1206; Directorate Identifier 2009–NM–216–AD.

Comments Due Date

(a) We must receive comments by February 14, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to McDonnell Douglas Corporation Model DC–10–10, DC–10–10F, and MD–10–10F airplanes; certificated in any category; as identified in Boeing Alert Service Bulletin DC10–57A156, Revision 1, dated March 10, 2010.

Subject

(d) Air Transport Association (ATA) of America Code 57: Wings.

Unsafe Condition

(e) This AD results from reports of three instances of fuel leaks in the lower cap splice of the wing rear spar at station Xors=409. The Federal Aviation Administration is issuing this AD to detect and correct cracking on the lower cap of the rear spar of the left and right wings between stations Xors=417 and the outboard edge of the lower cap splice of the wing rear spar at station Xors=400, which could result in fuel leaks or cracking of the lower wing skin and structure, causing possible inability to sustain the limit load and adversely affecting the structural integrity of the airplane.

Compliance

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

Inspection

(g) Within 1,750 flight cycles after the effective date of this AD, do an eddy current test high frequency (ETHF) inspection for cracking on the lower cap of the rear spar of the left and right wings between stations Xors=417 and the outboard edge of the lower cap splice of the wing rear spar at station Xors=400, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin DC10–57A156, Revision 1, dated March 10, 2010.

(1) If no cracking is found, repeat the inspection required by paragraph (g) of this AD thereafter at intervals not to exceed 1,750 flight cycles.

(2) If any cracking is found in the spar cap aft leg at the fastener holes, and that cracking can be removed by hole enlargement, before further flight, do a permanent repair, in accordance with Boeing DC–10–10 Service Rework Drawing SR10570048, Revision J, dated July 16, 2009. Within 1,750 flight cycles after doing the applicable permanent repair, and thereafter at intervals not to exceed 1,750 flight cycles, do an ETHF inspection for cracking in accordance with Boeing DC–10–10 Service Rework Drawing SR10570048, Revision J, dated July 16, 2009. If any cracking is found during any inspection required by this paragraph, before further flight, repair the cracking, in accordance with the procedures specified in paragraph (i) of this AD.

(3) If any cracking is found in the spar cap aft leg at the fastener holes, and that cracking cannot be removed by hole enlargement but it does not extend into the vertical leg, before further flight, do a permanent repair, in accordance with Boeing DC–10–10 Service Rework Drawing SR10570048, Revision J, dated July 16, 2009. Within 4,550 flight cycles after doing a permanent repair, and thereafter at intervals not to exceed 4,550 flight cycles, do ETHF and ultrasonic inspections for cracking, in accordance with Boeing DC–10–10 Service Rework Drawing SR10570048, Revision J, dated July 16, 2009. If any cracking is found during any inspection required by this paragraph, before further flight, repair the cracking, in accordance with the procedures specified in paragraph (i) of this AD.

(4) If any cracking is found in the spar cap aft leg at fastener holes and that cracking extends into the vertical leg of the spar cap, do the actions specified in paragraph (g)(4)(i) or (g)(4)(ii) of this AD.

(i) Do the actions in paragraphs (g)(4)(i)(A) and (g)(4)(i)(B) of this AD.

(A) Before further flight, do a temporary repair in accordance with Boeing DC–10–10 Service Rework Drawing SR10570048, Revision J, dated July 16, 2009. Within 1,650 flight cycles after doing the temporary repair; and thereafter at intervals not to exceed 1,650 flight cycles, do ETHF and ultrasonic inspections for cracking of the repaired area, in accordance with Boeing DC–10–10 Service Rework Drawing SR10570048, Revision J, dated July 16, 2009, until the permanent repair required by paragraph (g)(4)(i)(B) of this AD is done. If any cracking is found during any inspection required by this paragraph, before further flight, repair the cracking, in accordance with the procedures specified in paragraph (i) of this AD.

(B) Within 7,000 flight cycles after the temporary repair has been done, do the applicable permanent repair, in accordance with Boeing DC–10–10 Service Rework Drawing SR10570019, Revision K, dated April 17, 2009. Within 4,550 flight cycles after doing the permanent repair; and thereafter at intervals not to exceed 4,550 flight cycles; do ETHF and ultrasonic inspections for cracking of the repaired area, in accordance with Boeing DC–10–10 Service Rework Drawing SR10570019, Revision K, dated April 17, 2009. If any cracking is found during any inspection required by this paragraph, before further flight, repair the cracking, in accordance with the procedures specified in paragraph (i) of this AD.

(ii) Before further flight do the applicable permanent repair, in accordance with Boeing DC–10–10 Service Rework Drawing SR10570019, Revision K, dated April 17, 2009. Within 4,550 flight cycles after doing the permanent repair; and thereafter at intervals not to exceed 4,550 flight cycles, do ETHF and ultrasonic inspections for cracking of the repaired area, in accordance with Boeing DC–10–10 Service Rework Drawing SR10570019, Revision K, dated April 17, 2009. If any cracking is found during any inspection required by this paragraph, before further flight, repair the cracking, in accordance with the procedures specified in paragraph (i) of this AD.

Credit for Actions Accomplished in Accordance With Previous Service Information

(h) Actions accomplished before the effective date of this AD according to Boeing Alert Service Bulletin DC10–57A156, dated September 16, 2009, are considered acceptable for compliance with the corresponding actions specified in this AD.

Alternative Methods of Compliance (AMOCs)

(i)(1) The Manager, Los Angeles 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. Send information to ATTN: Nenita Odesa, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles ACO, 3960 Paramount Boulevard, Lakewood, California 90712–4137; phone: (562) 627–5234; fax: (562) 627–5210; e-mail: *nenita.odessa@faa.gov.*

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(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, Los Angeles ACO to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane and 14 CFR 25.571, Amendment 45, and the approval must specifically refer to this AD.

Issued in Renton, Washington, on December 17, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–33001 Filed 12–29–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1296; Directorate Identifier 2010–CE–063–AD]

RIN 2120–AA64

Airworthiness Directives; APEX Aircraft Model CAP 10 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI)

originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

> A fatal accident occurred to a CAP 10C, in which the pilot lost control of the aeroplane.
>
> The following investigation has revealed that the probable cause of the accident was the improper locking of a turnbuckle (locking clip missing) of the flight control cables, and the subsequent inadvertent release of the pitchup control cable from the turnbuckle.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by February 14, 2011.

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

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

For service information identified in this proposed AD, contact Apex Aircraft, Bureau de Navigabilité, 1 route de Troyes, 21121 DAROIS–France, telephone: (33) 380 35 65 10; fax: (33) 380 35 65 15; e-mail: *apex-aircraft.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Sarjapur Nagarajan, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4145; fax: (816) 329–4090.

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–2010–1296; Directorate Identifier 2010–CE–063–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

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued AD No.: 2010–0233, dated November 26, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> A fatal accident occurred to a CAP 10C, in which the pilot lost control of the aeroplane.
>
> The following investigation has revealed that the probable cause of the accident was the improper locking of a turnbuckle (locking clip missing) of the flight control cables, and the subsequent inadvertent release of the pitchup control cable from the turnbuckle.
>
> For the above described reasons, this AD requires repetitive inspections to verify the correct installation of the turnbuckles of the flight control cables and, if foreseen by the applicable design configuration of the turnbuckles and found to be missing, to restore the locking clip and the safety wire.

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

FAA's Determination and Requirements of the Proposed AD

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

Differences Between This Proposed AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the proposed AD.

Costs of Compliance

We estimate that this proposed AD will affect 28 products of U.S. registry. We also estimate that it would take about 3 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $100 per product.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $9,940, or $355 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This

proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this 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:

APEX Aircraft: Docket No. FAA–2010–1296; Directorate Identifier 2010–CE–063–AD.

Comments Due Date

(a) We must receive comments by February 14, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to APEX Aircraft Model CAP 10 airplanes, all serial numbers, certificated in any category.

Subject

(d) Air Transport Association of America (ATA) Code 27: Flight Controls.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

A fatal accident occurred to a CAP 10C, in which the pilot lost control of the aeroplane.

The following investigation has revealed that the probable cause of the accident was the improper locking of a turnbuckle (locking clip missing) of the flight control cables, and the subsequent inadvertent release of the pitchup control cable from the turnbuckle.

For the above described reasons, this AD requires repetitive inspections to verify the correct installation of the turnbuckles of the flight control cables and, if foreseen by the applicable design configuration of the turnbuckles and found to be missing, to restore the locking clip and the safety wire.

Actions and Compliance

(f) Unless already done, do the following actions:

(1) Within the next 2 months after the effective date of this AD:

(i) If the turnbuckles are designed to be locked with locking clips and safety wire, verify that the locking clips are properly installed in the corresponding groove, that the safety wire of a minimum diameter of 0.8 millimeter (mm) is correctly installed, and that there is no damage to the whole turnbuckle installation.

(ii) For all other designs of turnbuckles, verify the correct installation of the safety locking devices.

(iii) If any discrepancy is found during the inspection required by paragraph (f)(1)(i) or (f)(1)(ii) of this AD, before further flight, restore the correct turnbuckle installation in accordance with standard maintenance practice.

(2) Repeat the inspection required by paragraph (f)(1)(i) or (f)(1)(ii) of this AD, as applicable to the turnbuckles design, and the associated corrective actions required by paragraph (f)(1)(iii) of this AD at intervals not to exceed 110 hours time-in-service or 13 months since the last inspection, whichever occurs first.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Sarjapur Nagarajan, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4145; fax: (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave., SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) AD No.: 2010–0233, dated November 26, 2010, for related information. For service information related to this AD, contact Apex Aircraft, Bureau de Navigabilité, 1 route de Troyes, 21121 DAROIS–France, telephone: (33) 380 35 65 10; fax: (33) 380 35 65 15; email: apex-aircraft.com. You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

Issued in Kansas City, Missouri, on December 22, 2010.

Earl Lawrence,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–32966 Filed 12–29–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1271; Directorate Identifier 2010–NM–187–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 777–200, –300, and –300ER Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD would require installing an auto shutoff feature for the center override/jettison fuel pumps, and installing power control circuitry for the center

override/jettison and main jettison fuel pumps. This proposed AD would also require installing new software in the electrical load management system (ELMS) electronics units in certain power management panels; installing airplane information management system 2 (AIMS–2) software in the AIMS–2 hardware; and making certain wiring changes. This proposed AD was prompted by results from fuel system reviews conducted by the manufacturer. We are proposing this AD to prevent the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by February 14, 2011.

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

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

For Boeing service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* For GE Aviation service information identified in this proposed AD, contact GE Aviation, Customer Services—Clearwater, P.O. Box 9013, Clearwater, Florida 33758; telephone 727–539–1631; fax 727–539–0680; e-mail *cs.support@ge.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this 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: Georgios Roussos, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6482; fax (425) 917–6590; e-mail: *Georgios.Roussos@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–2010–1271; Directorate Identifier 2010–NM–187–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

The FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled "Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements" (66 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 ("SFAR 88," Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 requires certain type design (*i.e.,* type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: Single failures, single failures in combination with a latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

We have determined that the actions identified in this AD are necessary to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

Results of a safety assessment revealed that there is a small risk of an ignition source in a fuel tank if a center override/jettison fuel pump or a main jettison fuel pump continues to run when there is no fuel at the pump inlet, or when the pumps are commanded to stop running (commanded off) and they remain on. When a pump runs after the fuel level goes below the pump inlet, there is a small risk that the pump can cause an ignition source in the fuel tank from an overheat condition, electrical arcs, or frictional sparks. This condition, if not corrected, could result in a fuel tank explosion and consequent loss of the airplane.

Relevant Service Information

We reviewed Boeing Service Bulletin 777–28A0047, Revision 5, dated September 20, 2010. That service information describes procedures for installing a new P301 panel on the left side of the airplane, installing a new P302 panel on the right side of the airplane, and changing the wiring; and performing certain bonding resistance measurements and reworking the airplane installation to verify that

certain bonding requirements are met if necessary.

Boeing Service Bulletin 777–28A0047, Revision 5, dated September 20, 2010, specifies prior or concurrent accomplishment of the following service bulletins:

- Boeing Service Bulletin 777–28A0040, Revision 1, dated March 18, 2010, which describes procedures for installing new software in the ELMS electronics units in the P110, P210, and P310 power management panels.
- Boeing Special Attention Service Bulletin 777–31–0097, Revision 3, dated February 22, 2007, which describes procedures for installing AIMS–2 software in the AIMS–2 hardware.
- GE Aviation Service Bulletin 5000ELM–28–456, Revision 1, dated January 7, 2010, which describes procedures for changing the wiring of the ELMS P110 left power management panel.
- GE Aviation Service Bulletin 6000ELM–28–457, Revision 1, dated January 7, 2010, which describes procedures for changing the wiring of the ELMS P210 right power management panel.

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 these same type designs.

Proposed AD Requirements

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

Differences Between the Proposed AD and the Service Information

Boeing Special Attention Service Bulletin 777–31–0097, Revision 3, dated February 22, 2007, specifies a compliance time of 60 months. This AD requires a 36-month compliance time to install the AIMS–2 software upgrade. This difference has been coordinated with the manufacturer.

Costs of Compliance

We estimate that this proposed AD will affect 2 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Installation: Groups 1 and 2, Configuration 2	149 work-hours × $85 per hour = $12,665	$15,719	$28,384	$56,768.
Installation: Groups 1 and 2, Configuration 1	2 work-hours × $85 per hour = $170	15,719	$15,889	$31,778.
Concurrent requirement: Install ELMS software.	3 work-hours × $85 per hour = $255	0	$255	$510.
Concurrent requirement: Upgrade AIMS2 software.	Up to 2 work-hours × $85 per hour = Up to $170.	0	Up to $170	Up to $340.
Concurrent requirement: P110 wiring changes.	3 work-hours × $85 per hour = $255	1,164	$1,419	$2,838.
Concurrent requirement: P210 wiring changes.	3 work-hours × $85 per hour = $255	1,164	$1,419	$2,838.

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–2010–1271; Directorate Identifier 2010–NM–187–AD.

Comments Due Date

(a) We must receive comments by February 14, 2011.

Affected ADs

(b) None.

Applicability

(c) The Boeing Company Model 777–200, –300, and –300ER series airplanes; certificated in any category; as identified in Boeing Service Bulletin 777–28A0047, Revision 5, dated September 20, 2010.

Subject

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

Unsafe Condition

(e) This AD was prompted by results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

Compliance

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

Installation

(g) For airplanes in Groups 1 and 2, Configuration 2, as identified in Boeing Service Bulletin 777–28A0047, Revision 5, dated September 20, 2010: Within 36 months after the effective date of this AD, install a new P301 panel on the left side of the airplane, install a new P302 panel on the right side of the airplane, and change the wiring, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 777–28A0047, Revision 5, dated September 20, 2010.

(h) For airplanes in Groups 1 and 2, Configuration 1, as identified in Boeing Service Bulletin 777–28A0047, Revision 5, dated September 20, 2010: Within 36 months after the effective date of this AD, perform bonding resistance measurements and rework the airplane installation if necessary, depending on airplane configuration, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 777–28A0047, Revision 5, dated September 20, 2010.

Concurrent Requirements

(i) Prior to or concurrently with accomplishing the requirements of paragraph (g) of this AD, do the actions in paragraphs (i)(1), (i)(2), (i)(3), and (i)(4) of this AD.

(1) Install new software in the electrical load management system (ELMS) electronics units in the P110, P210, and P310 power management panels, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 777–28A0040, Revision 1, dated March 18, 2010.

(2) Install airplane information management system 2 (AIMS–2) software in the AIMS–2 hardware, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777–31–0097, Revision 3, dated February 22, 2007.

(3) Modify the P110 left power management panel by incorporating wiring changes, in accordance with the Accomplishment Instructions of GE Aviation Service Bulletin 5000ELM–28–456, Revision 1, dated January 7, 2010.

(4) Modify the P210 right power management panel by incorporating wiring changes, in accordance with the Accomplishment Instructions of GE Aviation Service Bulletin 6000ELM–28–457, Revision 1, dated January 7, 2010.

Credit for Actions Accomplished in Accordance With Previous Service Information

(j) Installations done before the effective date of this AD in accordance with Boeing Alert Service Bulletin 777–28A0040, dated April 13, 2007, are acceptable for compliance with the requirements of paragraph (i)(1) of this AD.

(k) Installations done before the effective date of this AD in accordance with Boeing Service Bulletin 777–28A0047, Revision 3, dated June 11, 2009; or Revision 4, dated May 20, 2010; are acceptable for compliance with the requirements of paragraphs (g) and (h) of this AD.

(l) Installations done before the effective date of this AD in accordance with Boeing Special Attention Service Bulletin 777–31–0097, dated March 30, 2006; Revision 1, dated August 10, 2006; or Revision 2, dated October 26, 2006; are acceptable for compliance with the requirements of paragraph (i)(2) of this AD.

Paperwork Reduction Act Burden Statement

(m) A Federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave., SW, Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

Alternative Methods of Compliance (AMOCs)

(n)(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 e-mailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

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

Related Information

(o) For more information about this AD, contact Georgios Roussos, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6482; fax (425) 917–6590; e-mail: *Georgios.Roussos@faa.gov.*

(p) For Boeing service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* For GE Aviation service information identified in this AD, contact GE Aviation, Customer Services—Clearwater, P.O. Box 9013, Clearwater, Florida 33758; telephone 727–539–1631; fax 727–539–0680; e-mail *cs.support@ge.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, the FAA, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 17, 2010.

Ali Bahrami,

Manager,Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–33000 Filed 12–29–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

15 CFR Part 400

[Docket No. 090210156–0416–01]

RIN 0625–AA81

Foreign-Trade Zones in the United States

AGENCY: Foreign-Trade Zones Board, International Trade Administration, Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: The Foreign-Trade Zones Board (the Board) proposes to amend its regulations, and invites public comment on these proposed amendments. Through this action, the Board proposes to amend the substantive and procedural rules for the authorization of Foreign-Trade Zones (FTZs or zones) and the regulation of zone activity. The purpose of zones as stated in the Foreign-Trade Zones Act (FTZ Act or the Act) is to "expedite and encourage foreign commerce, and other purposes." The regulations proposed here provide the legal framework for accomplishing this purpose in the context of evolving U.S. economic and trade policy, and economic factors relating to international competition. The changes are comprehensive and the proposed action constitutes a major revision. These revisions encompass changes related to manufacturing and value-added activity, as well as new rules designed to address compliance with the Act's requirement for a grantee to

provide uniform treatment for the users of a zone. The new rules should improve flexibility for U.S.-based operations, particularly for most circumstances involving exports; enhance clarity; and strengthen compliance and enforcement. The revisions would also reorganize the regulations in the interest of ease-of-use and transparency.

DATES: Comments on the proposed rule must be received on or before April 8, 2011.

ADDRESSES: All comments must be submitted through the Federal eRulemaking Portal at *http://www.Regulations.gov,* Docket No. ITA–2010–0012, unless the commenter does not have access to the internet. Commenters that do not have access to the internet may submit their comments by mail or hand delivery/courier. All comments should be addressed to Andrew McGilvray, Executive Secretary, Foreign-Trade Zones Board, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Room 2111, Washington, DC 20230.

All comments received are a part of the public record and will generally be posted to *http://www.Regulations.gov* without change. All Personal Identifying Information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information, as such information may become part of the public record.

The FTZ Board will accept anonymous comments (enter N/A in required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only. All comments to Regulations.gov must be submitted into Docket Number ITA–2010–0012, and comments should refer to RIN 0625–AA81. The public record concerning these regulations will be maintained in the Office of the Executive Secretary, Foreign-Trade Zones Board, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Room 2111, Washington, DC 20230. Written public comments will be available at the facility in accordance with 15 CFR part 4 and may also be available electronically over the internet via *http://www.trade.gov/ftz* or *http://www.Regulations.gov.* Questions may be directed to the Foreign-Trade Zones Board staff by calling (202) 482–2862 or via e-mail to *ftz@trade.gov.*

FOR FURTHER INFORMATION CONTACT: Andrew McGilvray, Executive Secretary, Foreign Trade Zones Board, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Room 2111, Washington, DC 20230, (202) 482–2862 or Matthew Walden, Senior Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Room 4610, Washington, DC 20230, (202) 482–2963.

SUPPLEMENTARY INFORMATION:

Background

Foreign-Trade Zones (FTZs or zones) are restricted-access sites in or near U.S. Customs and Border Protection (CBP) ports of entry. The zones are licensed by the Board and operated under the supervision of CBP (*see* 19 CFR part 146). Specifically, zones are physical areas into which foreign and domestic merchandise may be moved for operations involving storage, exhibition, assembly, manufacture or other processing not otherwise prohibited by law. Zone areas "activated" by CBP are considered outside of U.S. customs territory for purposes of CBP entry procedures. Therefore, the usual formal CBP entry procedure and payment of duties is not required on the foreign merchandise in FTZs unless and until it enters U.S. customs territory for U.S. domestic consumption. In fact, U.S. duties can be avoided on foreign merchandise re-exported from a FTZ, including after incorporation into a downstream product through activity in the FTZ. Zones have as their public policy objective the creation and maintenance of employment through the encouragement of operations in the United States which, for customs reasons, might otherwise have been carried on abroad.

Domestic goods moved into a zone for export may be considered exported upon entering the zone for purposes of excise tax rebates and drawback. "Subzones," a special-purpose type of ancillary zone, are authorized by the Board, through grantees of general-purpose zones, in situations such as when the "adjacency" requirement (distance/driving time) for general-purpose zones cannot be met. Goods that are in a zone for a *bona fide* customs reason are exempt from State and local *ad valorem* taxes. Zones and subzones are operated by corporations that have met certain regulatory criteria for submitting applications to the Board to operate zones. Under the FTZ Act, zones must be operated under public utility principles, and provide uniform treatment to all that apply to use the zone. The Board reviews and approves applications for authority to establish zone locations and to conduct certain activity within zones, and oversees zone grantees' compliance with zone regulations. The Board can limit or deny zone use on a case-by-case basis on public interest grounds. In response to applications, the Board can also provide the applicant with specific authority to choose whether to pay duties either on the original foreign material or on a downstream product incorporating the foreign material.

To receive approval to operate a zone, an applicant must demonstrate the need for zone services, a workable plan that includes suitable physical facilities for zone operations, and financing for the operation. Successful applicants are granted licenses to operate zones. License grantees' sponsorship of specific sites for proposed FTZ designation is based on the grantees' determinations regarding the sites' appropriateness and potential for FTZ use, and a grantee may subsequently request removal of FTZ designation from a site based on factors such as the grantee's determination that projected FTZ use has not occurred.

Through this proposed action, the Board intends to update and modify the rules for FTZs. Continued interest in zones, on the part of both communities providing zone access as part of their economic development efforts and firms using zone procedures to help improve their international competitiveness, demonstrates zones' importance to international trade and to investment in the domestic economy. Since the issuance of the Board's current regulations (last revised substantively in 1991), several issues or trends have emerged which necessitate fresh approaches in the regulations, as detailed below. Key revisions in the proposed regulations pertain to activity in zones in which an imported component is combined with one or more other components to create a different finished product. The current regulations divide such activity into two categories—"manufacturing" or "processing," depending on whether the activity involves "substantial transformation" of the component—and apply procedures that can differ between the two categories. The proposed regulations would simplify use of the FTZ program through application of a unified concept—"production" as defined in § 400.2(l)—and provide a single set of procedures pertaining to that type of activity. All changes to rules pertaining to production activity have been carefully

balanced, including through adoption of certain additional constraints and safeguards such as enhanced authority to conduct reviews and restrict activity that is determined not to be in the public interest.

The proposed regulations would eliminate the general requirement for advance approval from the FTZ Board for all manufacturing (*i.e.,* substantial transformation) activity. The proposed regulations would only require advance approval for production activity under specific circumstances (*e.g.,* if a lower U.S. duty rate will be applied to the component through its incorporation into a downstream product in the FTZ) (see § 400.14(a)). This and other changes related to production activity respond to trends such as dramatically shorter timeframes for companies' decision-making on production locations (U.S. versus offshore), and the growth in contract manufacturing in which U.S. manufacturers compete with foreign-based alternatives for contracts under deadlines that are often incompatible with existing regulatory timeframes for obtaining authority from the FTZ Board.

In circumstances where advance approval is required for specific production activity, the proposed rule would delegate authority to the Commerce Department's Assistant Secretary for Import Administration to approve the activity on an interim basis pending completion of the full FTZ Board's review of the request, which would significantly decrease the time a company must wait for approval (see § 400.14(d)(3)). This new provision would replace and is significantly more flexible than the temporary/interim manufacturing (T/IM) procedure adopted by the FTZ Board in 2004 (and modified in 2006), and which had not yet been the subject of specific regulations. The T/IM procedure was limited to activity similar to that approved by the FTZ Board in the preceding five years. The new provision for interim approvals contains no requirement for similarity to recently approved activity.

The proposed regulations also provide improved flexibility to accommodate changes in production at previously approved FTZ operations through retrospective notifications to the FTZ Board (see §§ 400.14(e)(1) and 400.37). The current regulations allow grantees or zone operators to notify the FTZ Board of new components but require advance approval for any new finished products. The proposed regulations would allow grantees or zone operators to notify the Board of new finished products as well as new components. However, in order to preserve the public process long associated with FTZ Board evaluation of new "manufacturing" activity, the proposed regulations would also require that a production operation obtain advance FTZ Board approval—after a public comment period on the proposal—for the list of broad categories of components or finished products within which specific new components or finished products would be notified. In addition, the proposed regulations would provide for a public comment period on all notifications submitted to the FTZ Board, as well as procedures to review any such notifications and to impose restrictions on notified changes when warranted.

Two other significant areas of change in the proposed regulations pertain to the statutory requirements that each zone be operated as a public utility and provide uniform treatment to all that apply to use the zone. The current regulations do not provide grantees guidance on the practical implementation of these requirements. The proposed regulations would provide such guidance and would establish specific standards for compliance with those requirements (see §§ 400.42 and 400.43). For example, regarding the public utility requirement, they would tie the fees that a grantee charges zone users to the costs that the grantee incurs. With respect to the uniform treatment requirement, they would preclude certain conflicts of interest that could otherwise lead to non-uniform treatment of actual or potential zone users by private firms that assist zone grantees in zone management. Explicit standards regarding uniform treatment would help to ensure that the broadest range of U.S.-based operations can use zones to maximize their global competitiveness.

Additionally, the proposed regulations would implement the statutory authority to issue fines for violations of the FTZ Act or the Board's regulations through specific provisions targeting certain types of violations (see § 400.62). The current regulations contain no provisions pertaining to the statutory fining authority. The fining provisions are supplemented by provisions through which the Board or the Commerce Department's Assistant Secretary for Import Administration may order the suspension of the activated status of a zone operation in response to a violation. The proposed regulations' fining and suspension-of-activation provisions would help to ensure compliance with the statutory or regulatory requirements that zones submit annual reports to the FTZ Board, obtain advance approval (or submit notification) for certain production activity, and avoid certain conflicts of interest inconsistent with the statutory uniform treatment requirement.

Finally, the proposed regulations contain a new provision allowing for the "prior disclosure" of violations of the FTZ Act or the Board's regulations (*see* § 400.63). Disclosure of a violation to the FTZ Board prior to its discovery by the Board would generally result in the potential total fine for the violation (or series of offenses stemming from a continuing violation) being reduced to 1,000 dollars.

Thus, the proposed regulations would generally simplify and clarify requirements pertaining to FTZ use, while also helping to ensure compliance with specific statutory and regulatory requirements. The proposed regulations are intended to improve access and flexibility for U.S. manufacturing and value-added operations—particularly in most circumstances related to exports—and to enhance safeguards in order to avoid negative economic consequences from certain zone activity.

Proposed changes are described in the following summary:

1. Section 400.1. This section on the "scope" of the regulations contains a summary statement of zone benefits to users and is essentially unaltered.

2. Section 400.2. A small number of new terms or refinements to existing terms have been added to this definitions section. The definitions of "manufacturing" and "processing" have been eliminated in favor of a new definition of "production" activity, for which advance approval (or notification) under specific circumstances and reporting to the Board would be required.

3. Section 400.3. This section adopts with minimal alterations the contents of current § 400.11. The section contains a statement of the Board's authority, the roles of the Chairman and Alternates, and the procedure for decision making (determinations).

4. Section 400.4. This section on the Executive Secretary's role is modified from current § 400.12 to reflect responsibilities involving application formats, termination of reviews under certain circumstances, production changes, fining, suspension of activated status, and retail trade.

5. Section 400.5. This section is unchanged in substance from current § 400.43.

6. Section 400.6. This section is unchanged in substance from current § 400.13.

7. Section 400.11. This section closely parallels current § 400.21.

8. Section 400.12. This section closely parallels current § 400.22.

9. Section 400.13. This section primarily incorporates existing restrictions and conditions from § 400.28. Specifically, §§ 400.13(a)(1) through (a)(5) plus (a)(7) mirror current §§ 400.28(a)(1) and 400.28(a)(4)-(a)(7) and the first sentence of current § 400.28(a)(8) regarding preconditions for actual use of FTZ designated sites, the lapse of authority for unused zones, authority to construct buildings in the zone, allowing federal and local officials to have access to the zone, and the sale or transfer of a grant of authority. In combination with § 400.14(a), § 400.13(a)(6) parallels the general effect of current § 400.28(a)(2) regarding requirements specific to manufacturing. Section 400.13(a)(8) incorporates the language of all but the first sentence of current § 400.28(a)(8), and also adds a statutorily-derived sentence regarding no vested right to zone designation approved for privately owned land or facilities. Section 400.13(b) parallels existing §§ 400.31(a) and 400.33(a) regarding the authority to prohibit or restrict zone activity. Section 400.13(c) is unchanged from current § 400.28(b) regarding authority to impose additional conditions or restrictions on grants of authority.

10. Section 400.14. This section addresses a series of general provisions and restrictions that relate to production activity in FTZs. Section 400.14(a) parallels the general effect of current § 400.28(a)(2), but focuses on the types of production activity that have raised public interest concerns in certain circumstances in the past, or that appear to have significant potential to raise such concerns in the future (e.g., duty reduction on foreign components, avoidance of antidumping or countervailing duties, avoidance of orders of the International Trade Commission under 19 U.S.C. 1337). Section 400.14(b) is new and makes explicit in regulation an existing practice of requiring all activity involving production in zones to be reported annually to the Board. Section 400.14(c) addresses the limits associated with the scope of approved production authority, and parallels to some degree a portion of current § 400.28(a)(2). Section 400.14(d)(1) is the same in substance as current § 400.32(b)(1)(iv), while §§ 400.14(d)(2) and (d)(3) are new. Section 400.14(d)(2) delegates authority to the Commerce Department's Assistant Secretary for Import Administration to approve production authority where the sole zone benefit requiring advance approval from the Board is for scrap or waste resulting from the production activity. The new interim authority in § 400.14(d)(3) replaces the temporary/interim manufacturing (T/IM) authority adopted by the Board in 2004, but is potentially applicable to many applications involving production authority, while eliminating the complex comparison(s) to previously approved authority that had been required to establish eligibility for T/IM. Section 400.14(e)(1) parallels to some degree current §§ 400.28(a)(3)(ii) and (iii), but broadens the current notification provision for changes in "sourcing" to encompass "production" changes (now defined as new finished products or new foreign components/inputs), and it also imposes certain key limitations on the production change procedure. Section 400.14(e)(2) is new and defines a procedure for notification of increases in production capacity. Section 400.14(e)(3) to some degree parallels current § 400.28(a)(3)(iii)(B), and delineates authority to impose prohibitions or restrictions in response to production-change and capacity-increase notifications. Section 400.14(f) on "scope determinations" largely mirrors the content of current § 400.32(c). Section 400.14(g) mirrors current § 400.33(b).

11. Section 400.15 is new, and reflects a statutory change (Pub. L. 104–295, Sec. 31(a), 110 Stat. 3536 (1996), codified at 19 U.S.C. 81c(e)) regarding "production equipment." Specifically, this statutory change allows the reduction and deferral of duty payment on equipment assembled in a zone for use in production activity. The language of this section reflects the statute, the legislative history and Board practice.

12. Section 400.16 relates to state and local *ad valorem* taxes and expands upon existing § 400.1(c) by adopting language regarding this topic from the conference report on the 1984 legislation (Pub. L. 98–573, title II, Sec. 231(a)(2), 98 Stat. 2990 (1984), codified at 19 U.S.C. 81o(e)).

13. Section 400.21 is very similar in substance to current § 400.24, but eliminates the current format of five "exhibits," and instead provides for the requirements of the section to be addressed in guidelines/formats or related documents established by the Executive Secretary and published in the **Federal Register**.

14. Section 400.22 indicates the requirements for production and subzone applications. The section is similar in many ways to current § 400.25, but makes a clearer distinction between production requirements and subzone requirements to reflect the increasing prevalence of production activity in non-subzone environments and the increasing number of subzone applications involving only distribution-related activity.

15. Section 400.23 is very similar in substance to current § 400.26, with the exception of the elimination of § 400.26(b)(1), which allowed reference to information in applications already on file with the Board, and which has proven problematic in practice.

16. Section 400.24 is generally similar to current § 400.23, but replaces one existing criterion encompassing the adequacy of operational and financial plans and the suitability and justification for a new zone site with a new criterion specific to the suitability of a new zone site and a new criterion specific to the justification for a new zone site.

17. Section 400.25 sets forth criteria for evaluating production and subzone applications. The first paragraph of the section parallels current § 400.27(d)(3)(v))(B). Sections 400.25(a)(1) and (2) are substantively unaltered from current §§ 400.31(b)(1) and (2). Sections 400.25(b) and (c) essentially parallel current § 400.23(b), but distinguish more clearly between production authority and subzone designation, and require all applications for production authority to meet the significant public benefit standard because of the increasing incidence of production activity in general-purpose zone environments rather than in subzones.

18. Section 400.26 parallels current § 400.31(c)(3), but includes standards for all applications.

19. Section 400.27 is substantively identical to current § 400.29.

20. Sections 400.31 through 400.36 delineate the procedural steps for processing applications, and are generally the same in content as current § 400.27, but also incorporate the content of current § 400.31(c). However, the new sections provide greater ease-of-use for the applicants by limiting each section to a particular case-processing stage. Section 400.31 parallels current §§ 400.27(a) and 400.27(b)(1). Section 400.32 parallels current §§ 400.27(b)(2), 400.27(c), and 400.27(d)(1). Section 400.33 parallels current § 400.27(d)(2). Section 400.34(a) parallels current § 400.27(d)(3) while § 400.34(b) parallels current § 400.31(c). Section 400.35 parallels current § 400.27(e). Section 400.36 parallels current § 400.27(f).

21. Section 400.37, which establishes procedures for authority and notification related to production changes, parallels to some degree current §§ 400.28(a)(3)(ii) and (iii). However, the section is significantly expanded, with additional elements intended to make the procedure more

useful and also ensure the proper balance between flexibility and program oversight.

22. Section 400.38 generally parallels current § 400.31(d) in both substance and structure.

23. Section 400.41 is substantively unchanged from the current section of the same number.

24. Section 400.42 provides new guidance and requirements related to the statutory mandate for operation of a zone as a public utility (referred to in current § 400.2(e)). This section also contains a provision allowing a delayed compliance date.

25. Section 400.43 provides new guidance and requirements to implement the statutory mandate for a grantee's uniform treatment of zone users (referred to in current § 400.42(b)(2)(v)). This section also contains a provision allowing a delayed compliance date.

26. Section 400.44 groups together requirements from current §§ 400.42(a)(1), 400.28(a)(4) and 400.42(b)(1).

27. Section 400.45 generally parallels current § 400.42 regarding requirements for a grantee's zone schedule, but adds specificity to the documentation requirements for a zone's policies and the standard contractual provisions the zone offers. This section also contains a provision allowing a delayed compliance date.

28. Section 400.46 substantially modifies current § 400.42(b)(5), which dealt with complaints about fees, by adding in § 400.46(a) general procedures for complaints by zone participants regarding compliance with the uniform treatment requirement of the FTZ Act. Section 400.46(b), which addresses complaints about fees, adds new specificity.

29. Section 400.47 is based on current § 400.28(a)(9) regarding ordinary limitations on grantee liability, and provides further explanation concerning the bases for those limitations by adding language largely derived from the Board position in response to comments on § 400.41 in the October 1991 final rule document for the current regulations. This section also adds a final sentence stating specific circumstances in which a grantee's actions could undermine the limitations on its liability.

30. Section 400.48 parallels current § 400.45, but shifts responsibility for determinations from the Port Director (with the Executive Secretary's concurrence) to the Executive Secretary (with the Port Director's concurrence).

31. Section 400.49 is substantively unchanged from current § 400.44.

32. Section 400.51 is largely unchanged from current § 400.46, with minimal non-substantive additional language.

33. Section 400.52 parallels current § 400.51.

34. Section 400.53 is unchanged in substance from current § 400.52.

35. Section 400.54 is largely unchanged from current § 400.53, with the exception of an added sentence on the public nature of information submitted pursuant to certain regulatory sections.

36. Section 400.61 closely parallels current § 400.28(c), with language added regarding the subzone operator.

37. Section 400.62 is new and establishes procedures related to the imposition, mitigation, and assessment of fines as authorized by the FTZ Act (this authority is reflected in current § 400.11(a)(10)), as well as for instructing CBP to suspend activated status in certain circumstances.

38. Section 400.63 is new and establishes procedures for "prior disclosure" of information to the Board regarding violations of the FTZ Act or the Board's regulations.

39. Section 400.64 is unchanged in substance from current § 400.47.

Classification

This revision is proposed under the authority of section 8 of the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81h).

Executive Order 12866

This proposed rule has been determined to be significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

The Acting Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. (5 U.S.C. 605(b)). In this rule, which is consistent with 19 USC 81a–1u, the Foreign Trade Zones Board proposes to simplify and expedite access to FTZ benefits for U.S. manufacturers, particularly for export-oriented activity. In addition, the revised regulations would provide increased transparency, guidance and enforcement of the public utility and uniform treatment aspects of the program.

The FTZ Board's current regulations date to 1991. The proposed rule would eliminate the general advance approval requirement for most export manufacturing. This approval process generally took between 6 and 12 months. Instead, the proposed rule would require advance approval for export manufacturing only in certain relatively rare circumstances (such as when an imported component used in the manufacturing process is subject to an antidumping or countervailing duty). For manufacturing in FTZs for goods that are destined for the U.S. market, which generally is conducted in competition with factories overseas, the proposed rule would eliminate the FTZ Board's general advance approval requirement and instead limit the advance approval process to the specific types of FTZ benefits that could potentially impact other domestic manufacturers. These amendments should dramatically reduce the economic burden on large and small businesses involved in FTZ export manufacturing by reducing and streamlining the regulatory process for such manufacturing.

The second area of focus for the proposed rule involves circumstances in which the organization licensed by the FTZ Board to serve a particular region is not complying with the FTZ Act's requirements to operate the zone as a public utility and provide uniform treatment to all users. Use of the FTZ program provides certain cost savings that are designed to enhance the competitiveness of U.S. facilities in competition with sites abroad. Improved access to FTZs and simplification of the rules and procedures regarding FTZ activity should therefore generally have a net positive effect for all potential users of the program regardless of size.

To determine which entities using the FTZ program qualify as "small" entities, pursuant to 13 CFR 121.201, the FTZ staff used the Small Business Administration (SBA) size standards identified by North American Industry Classification System (NAICS) codes. Major users of the FTZ program include ocean freight companies and manufacturers of various products. Under the SBA size standards, ocean freight companies are considered small entities if they have fewer than 500 employees. The size standards for manufacturing operations vary by the NAICS code of the product manufactured. Manufacturing in FTZs involves a wide variety of industries and products, and the NAICS codes for all zone users are not always known by the FTZ staff. Therefore, to assess the potential impact from this rule, FTZ manufacturing operations were categorized as "miscellaneous manufacturing" which, under the SBA size standards, are considered small entities if they have fewer than 500

employees. With these size standards, potentially impacted companies operating in FTZs were considered small entities if they had fewer than 500 employees. Use of the 500 employee standard also appears consistent with what has been done in other circumstances that involve a large variety of industries. For example, under the Small Business Size Regulations, entities are considered small for the purpose of reduced patent fees if the number of employees does not exceed 500 (13 CFR 121.802), and a similar standard applies for entities to qualify for small business set-asides or 8(a) contracts under 13 CFR 121.406.

To determine the number of small entities involved, the FTZ Board staff analyzed data on activity within the zones in 2009 from annual reports submitted by each FTZ. The information submitted included the number and types of companies using each FTZ. Research was then conducted to determine whether each company would be considered a small entity. Based on the research and analysis conducted, it is anticipated that the rule would impact approximately 200 business entities that have fewer than 500 employees, i.e., small entities under 13 CFR 121.201. The proposed revisions would apply equally to all companies and organizations involved in the FTZ program. However, simplified procedures for zone applicants and for access to zone use are expected to provide the greatest benefit to small entities, particularly those with more limited resources, because they would reduce administrative and application costs for these companies. These changes would allow program use by more small entities that are currently underserved in the program. The changes proposed in this rule also could increase the number of small entities using the program. Such an increase would result from the simplified procedures proposed and would extend the cost savings achieved through the program to additional small entities that had been unable to access those benefits in the past.

The proposed rule would also reduce the number of applications for FTZ authority that need to be submitted for export manufacturing, thereby reducing the submission and recordkeeping burden on companies using the program for such activity. The reduction in burden is expected to increase the use of the program for this activity. In the past, the FTZ staff has received informal comments from companies that the application required was difficult to prepare, and that the process itself was burdensome and time consuming. The proposed rule is intended to address those concerns to the extent possible. Moreover, many changes in non-export related FTZ activity that currently require advance approval (through a 6 to 12 month application process) would be eligible under the proposed rule for a dramatically simpler process that allows a company to notify the FTZ Board that a change has occurred in activity. This proposed change is in addition to the general elimination of advance approval for export manufacturing. As a result of this significantly reduced burden, use of the FTZ program should be much more accessible to all companies and, in particular, to small entities.

The proposal to simplify procedures and reduce the number of applications submitted was the result of analysis and extensive discussion concerning the most effective means of improving the program while maintaining the appropriate balance and safeguards. The application structure for manufacturing in the current regulations is intended to ensure that other domestic companies are not negatively impacted if a company benefits from the savings available in the FTZ program. As a result, certain information and procedures are necessary in the review process, and the application process cannot be completely eliminated. At the same time, the FTZ Board recognizes that certain activity, such as manufacturing for export markets, generally does not have such an impact on other domestic companies.

The preparation of the proposed rule involved an assessment of the areas where procedures could be simplified or reduced to decrease the burden on companies while maintaining those procedures that are necessary to ensure that the program is not misused. One alternative analyzed was to simplify the procedures pertaining to FTZ manufacturing, without eliminating the requirement for the submission of applications for certain manufacturing (particularly for most export activity). While this option would reduce the burden on all companies using the program, the net positive impact would be less than what is being proposed. In addition, the elimination of advance approval for most export manufacturing is expected to provide the greatest benefit to small entities using or seeking to use the program. The second alternative was to maintain the current application procedures. Under this alternative, there would be no impact on small entities using the program, but it would continue to discourage certain export activity as well as new companies, particularly small entities, from entering the program. This proposed rule would both eliminate the need for certain applications and simplify manufacturing-related procedures as a whole, resulting in the largest possible reduction in burden of the options considered.

The FTZ Act and current regulations require the submission of an annual report from each zone to the FTZ Board. This reporting would not be impacted by the revised rule, and no increased burden would result.

Most fundamentally, all businesses and organizations, whether small or not, have access to the use of FTZs. The proposed rule simply lays out the procedures that the FTZ Board would follow when businesses or organizations apply to establish FTZs or engage in certain activities in FTZs, and they delineate certain rights and responsibilities of zone grantees, operators and users that have decided to make use of the FTZ program. The procedures, rights and responsibilities apply equally, whether the affected party is a small or large entity. The FTZ Act of 1934 and the FTZ program are tools of economic development, and when entities use the FTZ program, it can be assumed they do so because it is in their economic interest. Accordingly, this proposed rule, which is designed to improve access to the FTZ program, should only further the economic interests of current and future zone users, including small entities.

Because this rule results in reduced burden for many types of FTZ activity, with a net positive impact to entities involved in the FTZ program, this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, an IRFA is not required, and none has been prepared.

Executive Order 13132

This proposed rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 13132.

Paperwork Reduction Act

This rule contains information collection activities subject to the Paperwork Reduction Act. It would impose no additional reporting or record keeping burden on the public and there would be no impact on the collection that falls under the Office of Management and Budget (OMB) Control No. 0625–0109 (Annual Report to Foreign-Trade Zones Board). This proposed rule would amend the collection under OMB Control No. 0625–0139 (Application to Foreign-Trade Zones Board). Under this proposed rule, the application

requirements associated with the latter collection for zone applicants, grantees, operators, and users would be simplified, and there is an overall reduction of the burden on those parties. The amended requirement would be submitted to OMB for approval.

The changes proposed in this rule are expected to decrease the annual number of future production (manufacturing) applications submitted to the FTZ Board from 27 to 20. The reduction in the total number of applications would result, in part, from the elimination of the requirement for advance approval for certain export production activity. Moreover, many changes in non-export related FTZ activity that currently require advance approval (through a 6 to 12 month application process) would be eligible under the proposed rule for a dramatically simpler process that allows a company to notify the FTZ Board that a change has occurred in activity. These changes are expected to reduce the total annual burden associated with applications for production authority from 1,026 to 680 hours. As a result of this significantly reduced burden, use of the FTZ program should be much more accessible to all companies involved in production activity.

In addition to changes pertaining directly to production activity, the rule also specifically adopts the alternative site framework (ASF) authorized by the FTZ Board in December 2008. The ASF procedures reduce the time and complexity involved in designating FTZ sites for many companies. As use of the ASF becomes more widespread, the need for expansion and subzone applications will be reduced. As a result, with increased use of the ASF by zones, there is expected to be a decline in the number of expansion applications as well as a shift from the submission of more complex subzone applications to applications for production authority. The combined effect of the changes pertaining to production activity and to the ASF is expected to result in an even more significant reduction in application burden. The annual number of expansion applications should decline by half, from 20 to 10, reducing the annual burden from 2,100 to 1,050 hours. While the overall number of production applications is anticipated to increase (from 27 to 29 per year) despite the elimination of the need for advance approval in certain circumstances, this largely reflects the shift from subzone to production applications, and the number of complex subzone applications is expected to decline. The application for production authority is a simpler process and involves notably fewer burden hours than a subzone application. As a result, the combined annual burden for subzone and production requests is expected to decline from 4,098 to 2,681 hours. In total, the annual FTZ application burden through the provisions proposed in this rule would be reduced from 6,651 to 4,184 hours.

Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to the contact listed in **ADDRESSES** above, and e-mail to Wendy Liberante (*Wendy_L._Liberante@omb.eop.gov*).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

List of Subjects in 15 CFR Part 400

Administrative practice and procedure, Confidential business information, Customs duties and inspection, Foreign-trade zones, Harbors, Imports, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, it is proposed to revise 15 CFR part 400 as follows:

PART 400—REGULATIONS OF THE FOREIGN-TRADE ZONES BOARD

Subpart A—Scope, Definitions and Authority

Subpart B—Ability To Establish Zone; Limitations and Restrictions on Authority Granted

Subpart C—Applications To Establish and Modify Authority

Subpart D—Procedures for Application Evaluation and Reviews

Subpart E—Operation of Zones and Administrative Requirements

Subpart F—Records, Reports, Notice, Hearings and Information

Subpart G—Penalties, Prior Disclosure and Appeals to the Board

Authority: Foreign-Trade Zones Act of June 18, 1934, as amended (Pub. L. 397, 73rd

Congress, 48 Stat. 998–1003 (19 U.S.C. 81a–81u)).

Subpart A—Scope, Definitions and Authority

§ 400.1 Scope.

(a) This part sets forth the regulations, including the rules of practice and procedure, of the Foreign-Trade Zones Board with regard to foreign-trade zones (FTZs or zones) in the United States pursuant to the Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81a–81u). It includes the substantive and procedural rules for the authorization of zones and the regulation of zone activity. The purpose of zones as stated in the Act is to "expedite and encourage foreign commerce, and other purposes." The regulations provide the legal framework for accomplishing this purpose in the context of evolving U.S. economic and trade policy, and economic factors relating to international competition.

(b) Part 146 of the customs regulations (19 CFR part 146) governs zone operations, including the admission of merchandise into zones, zone activity involving such merchandise, and the transfer of merchandise from zones.

(c) To the extent "activated" under U.S. Customs and Border Protection (CBP) procedures in 19 CFR part 146, and only for the purposes specified in the Act (19 U.S.C. 81c), zones are treated for purposes of the tariff laws and customs entry procedures as being outside the customs territory of the United States. Under zone procedures, foreign and domestic merchandise may be admitted into zones for operations such as storage, exhibition, assembly, manufacture and processing, without being subject to formal customs entry procedures and payment of duties, unless and until the foreign merchandise enters customs territory for domestic consumption. At that time, the importer ordinarily has a choice of paying duties either at the rate applicable to the foreign material in its condition as admitted into a zone, or if used in production activity, to the emerging product. Quota restrictions do not normally apply to foreign goods in zones. The Board can deny or limit the use of zone procedures in specific cases on public interest grounds. Merchandise moved into zones for export (zone-restricted status) may be considered exported for purposes such as federal excise tax rebates and customs drawback. Foreign merchandise (tangible personal property) admitted to a zone and domestic merchandise held in a zone for exportation are exempt from certain state and local *ad valorem* taxes (19 U.S.C. 81o(e)). Articles admitted into zones for purposes not specified in the Act shall be subject to the tariff laws and regular entry procedures, including the payment of applicable duties, taxes, and fees.

§ 400.2 Definitions.

(a) Act means the Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81a–81u).

(b) Agent means a person (as defined in § 400.2(h)) acting on behalf of or under agreement with the zone grantee in zone-related matters.

(c) Board means the Foreign-Trade Zones Board, which consists of the Secretary of the Department of Commerce (chairman) and the Secretary of the Treasury, or their designated alternates.

(d) CBP means U.S. Customs and Border Protection.

(e) Executive Secretary is the Executive Secretary of the Foreign-Trade Zones Board.

(f) Foreign-trade zone (FTZ or zone) is a restricted-access site, in or adjacent (as defined by § 400.11(b)(2)) to a CBP port of entry, operated pursuant to public utility principles under the sponsorship of a corporation granted authority by the Board and under the supervision of CBP.

(g) Grant of authority is a document issued by the Board that authorizes a zone grantee to establish, operate and maintain a zone project or a subzone, subject to limitations and conditions specified in this part and in 19 CFR part 146. The authority to establish a zone includes the authority to operate and the responsibility to maintain it.

(h) Person includes any individual, enterprise, or entity.

(i) Port Director is normally the director of CBP for the CBP jurisdictional area in which the zone is located.

(j) Port of entry means a port of entry in the United States, as defined by part 101 of the customs regulations (19 CFR part 101), or a user fee airport authorized under 19 U.S.C. 58b and listed in part 122 of the customs regulations (19 CFR part 122).

(k) Private corporation means any corporation, other than a public corporation, which is organized for the purpose of establishing a zone project and which is chartered for this purpose under a law of the state in which the zone is located.

(l) Production, as used in this part, means any activity which results in a change in the customs classification of an article or in its eligibility for entry for consumption, regardless of whether U.S. customs entry actually is ultimately made on the article resulting from the production activity.

(m) Public corporation means a state, a political subdivision (including a municipality) or public agency thereof, or a corporate municipal instrumentality of one or more states.

(n) Site is one or more parcels of land organized as an entity, such as all or part of an industrial park or airport facility.

(o) State includes any state of the United States, the District of Columbia, and Puerto Rico.

(p) Subzone means a special-purpose zone established as an adjunct to a zone project for a limited purpose.

(q) Zone means a foreign-trade zone established under the provisions of the Act and these regulations. Where used in this part, the term also includes subzones, unless the context indicates otherwise.

(r) Zone grantee is the corporate recipient of a grant of authority for a zone project. Where used in this part, the term "grantee" means "zone grantee" unless otherwise indicated.

(s) Zone operator is a person that operates within a zone or subzone under the terms of an agreement with the zone grantee, with the concurrence of the Port Director.

(t) Zone participant is a zone operator, zone user, property owner, or other person participating or seeking to participate in some manner in, or to make use of, the zone project.

(u) Zone project means the zone plan, including all of the zone and subzone sites that the Board authorizes a single grantee to establish.

(v) Zone site means a physical location of a zone or subzone.

(w) Zone user is a party using a zone under agreement with the zone grantee or a zone operator.

§ 400.3 Authority of the Board.

(a) *In general.* In accordance with the Act and procedures of this part, the Board has authority to:

(1) Prescribe rules and regulations concerning zones;

(2) Issue grants of authority for zones and subzones, and approve modifications to the original zone project;

(3) Approve production activity in zones and subzones as described in this part;

(4) Make determinations on matters requiring Board decisions under this part;

(5) Decide appeals in regard to certain decisions of the Commerce Department's Assistant Secretary for Import Administration or the Executive Secretary;

(6) Inspect the premises, operations and accounts of zone grantees and operators;

(7) Require zone grantees to report on zone operations;

(8) Report annually to the Congress on zone operations;

(9) Restrict or prohibit zone operations;

(10) Terminate reviews of applications under certain circumstances pursuant to § 400.35(d);

(11) Authorize under certain circumstances the return of "zone-restricted merchandise" for entry into customs territory under § 400.49;

(12) Impose fines for violations of the Act and this part;

(13) Instruct CBP to suspend activated status pursuant to § 400.62(i);

(14) Revoke grants of authority for cause; and,

(15) Determine, as appropriate, whether zone activity is or would be in the public interest or detrimental to the public interest.

(b) *Authority of the Chairman of the Board.* The Chairman of the Board (Secretary of the Department of Commerce) has the authority to:

(1) Appoint the Executive Secretary of the Board;

(2) Call meetings of the Board, with reasonable notice given to each member; and,

(3) Submit to the Congress the Board's annual report as prepared by the Executive Secretary.

(c) *Alternates.* Each member of the Board will designate an alternate with authority to act in an official capacity for that member.

(d) *Authority of the Assistant Secretary for Import Administration (Alternate Chairman).* The Commerce Department's Assistant Secretary for Import Administration has the authority to:

(1) Make determinations pursuant to § 400.14(d);

(2) Terminate reviews of applications under certain circumstances pursuant to § 400.35(d);

(3) Mitigate and assess fines pursuant to §§ 400.62(f) and (g) and instruct CBP to suspend activated status pursuant to § 400.62(i); and,

(4) Restrict the use of zone procedures under certain circumstances pursuant to §§ 400.14(e) and 400.38(c).

(e) *Determinations of the Board.* (1) The determination of the Board will be based on the unanimous vote of the members (or alternate members) of the Board.

(2) All votes will be recorded.

(3) The Board will issue its determination in proceedings under the regulations in the form of a Board order.

§ 400.4 Authority and responsibilities of the Executive Secretary.

The Executive Secretary has the following responsibilities and authority:

(a) Represent the Board in administrative, regulatory, operational, and public affairs matters;

(b) Serve as director of the Commerce Department's Foreign-Trade Zones staff;

(c) Execute and implement orders of the Board;

(d) Arrange meetings and direct circulation of action documents for the Board;

(e) Arrange with other sections of the Department of Commerce and other governmental agencies for studies and comments on zone issues and proposals;

(f) Maintain custody of the seal, records, files and correspondence of the Board, with disposition subject to the regulations of the Department of Commerce;

(g) Issue notices on zone matters for publication in the **Federal Register**;

(h) Direct processing of applications and reviews, including designation of examiners and scheduling of hearings, under various sections of this part;

(i) Determine subzone sponsorship questions as provided in § 400.12(d);

(j) Make recommendations in cases involving questions as to whether zone activity should be prohibited or restricted for public interest reasons, including reviews under § 400.5;

(k) Determine questions of scope under § 400.14(f);

(l) Determine whether additional information is needed for evaluation of applications and other requests for decisions under this part, as provided for in various sections of this part, including §§ 400.21, 400.22, and 400.23;

(m) Issue instructions, guidelines, forms and related documents specifying time, place, manner and formats for applications as provided in § 400.21(b);

(n) Determine whether proposed modifications involve major changes under § 400.23(a)(2);

(o) Determine whether applications meet pre-docketing requirements under § 400.31(b);

(p) Terminate reviews of applications under certain circumstances pursuant to § 400.35(d);

(q) Authorize minor modifications to zone projects under § 400.36;

(r) Review production changes under § 400.37;

(s) Direct monitoring and reviews of zone operations and activity under § 400.38;

(t) Accept rate schedules and determine their sufficiency under § 400.45(e);

(u) Assess potential issues and make determinations pertaining to uniform treatment under § 400.43 and review and decide complaint cases under § 400.46;

(v) Make certain determinations and authorizations pertaining to retail trade under § 400.48;

(w) Authorize under certain circumstances the return of "zone-restricted merchandise" for entry into customs territory under § 400.49;

(x) Determine the format and deadlines for the annual reports of zone grantees to the Board and direct preparation of an annual report to Congress from the Board under § 400.51(d);

(y) Make recommendations and certain determinations regarding violations and fines, and undertake certain procedures related to the suspension of activated status, as provided in § 400.62; and,

(z) Designate an acting Executive Secretary.

§ 400.5 Authority to restrict or prohibit certain zone operations.

(a) *In general.* After review, the Board may restrict or prohibit any admission of merchandise into a zone project or any operation in a zone project when it determines that such activity is detrimental to the public interest, health or safety.

(b) *Initiation of review.* The Board may conduct a proceeding, or the Executive Secretary a review, to consider a restriction or prohibition under paragraph (a) of this section either self-initiated, or in response to a complaint made to the Board by a party directly affected by the activity in question and showing good cause.

§ 400.6 Board headquarters.

The headquarters of the Board is located within the U.S. Department of Commerce (Herbert C. Hoover Building), 1401 Constitution Avenue, NW., Washington, DC 20230, within the office of the Foreign-Trade Zones staff.

Subpart B—Ability To Establish Zone; Limitations and Restrictions on Authority Granted

§ 400.11 Number and location of zones and subzones.

(a) *Number of zone projects-port of entry entitlement.*

(1) Provided that the other requirements of this part are met:

(i) Each port of entry is entitled to at least one zone project;

(ii) If a port of entry is located in more than one state, each of the states in which the port of entry is located is entitled to a zone project; and,

(iii) If a port of entry is defined to include more than one city separated by

a navigable waterway, each of the cities is entitled to a zone project.

(2) Applications pertaining to zone projects in addition to those approved under the entitlement provision of paragraph (a)(1) of this section may be approved by the Board if it determines that the existing project(s) will not adequately serve the convenience of commerce.

(b) *Location of zones and subzones-port of entry adjacency requirements.*

(1) The Act provides that the Board may approve "zones in or adjacent to ports of entry" (19 U.S.C. 81b).

(2) The "adjacency" requirement is satisfied if:

(i) A general-purpose zone site is located within 60 statute miles or 90 minutes' driving time (as measured by the Port Director) from the outer limits of a port of entry.

(ii) A subzone meets the following requirements relating to CBP supervision:

(A) Proper CBP oversight can be accomplished with physical and electronic means; and,

(B) All electronically produced records are maintained in a format compatible with the requirements of CBP for the duration of the record period; and,

(C) The grantee/operator agrees to present merchandise for examination at a CBP site selected by CBP when requested, and further agrees to present all necessary documents directly to the CBP oversight office.

§ 400.12 Eligible applicants.

(a) *In general.* Subject to the other provisions of this section, public or private corporations may apply for a grant of authority to establish a zone project. The Board will give preference to public corporations.

(b) *Public corporations and private non-profit corporations.* The eligibility of public corporations and private non-profit corporations to apply for a grant of authority shall be supported by enabling legislation of the legislature of the state in which the zone is to be located, indicating that the corporation, individually or as part of a class, is authorized to so apply. Any application must also be consistent with the charter or organizational papers of the applying entity.

(c) *Private for-profit corporations.* The eligibility of private for-profit corporations to apply for a grant of authority shall be supported by a special act of the state legislature naming the applicant corporation and by evidence indicating that the corporation is chartered for the purpose of establishing a zone.

(d) *Applicants for subzones-*

(1) *Eligibility.* The following entities are eligible to apply for a grant of authority to establish a subzone:

(i) The zone grantee of the closest zone project in the same state;

(ii) The zone grantee of another zone in the same state, which is a public corporation (or a non-public corporation if no such other public corporation exists), if the Board, or the Executive Secretary, finds that such sponsorship better serves the public interest; or,

(iii) A state agency specifically authorized to submit such an application by an act of the state legislature.

(2) *Notification of closest grantee.* If an application is submitted under paragraph (d)(1)(ii) or (iii) of this section, the Executive Secretary will:

(i) Notify, in writing, the grantee specified in paragraph (d)(1)(i) of this section, who may, within 30 days, object to such sponsorship, in writing, with supporting information as to why the public interest would be better served by its acting as sponsor;

(ii) Review such objections prior to docketing the application to determine whether the proposed sponsorship is in the public interest, taking into account:

(A) The complaining zone's structure and operation;

(B) The views of State and local public agencies; and,

(C) The views of the proposed subzone operator;

(iii) Notify the applicant and complainants in writing of the Executive Secretary's determination;

(iv) If the Executive Secretary determines that the proposed sponsorship is in the public interest, docket the application (*see* § 400.64 regarding appeals of decisions of the Executive Secretary).

§ 400.13 General conditions, prohibitions and restrictions applicable to grants of authority.

(a) *In general.* Grants of authority issued by the Board for the establishment of zones or subzones, including those already issued, are subject to the Act and this part and the following general conditions or limitations:

(1) Approvals from the grantee and the Port Director, pursuant to 19 CFR part 146, are required prior to the activation of any portion of an approved zone project.

(2) Prior to activation of a zone, the zone grantee or operator shall obtain all necessary permits from federal, state and local authorities, and except as otherwise specified in the Act or this part, shall comply with the requirements of those authorities.

(3) A grant of authority for a zone or a subzone shall lapse unless the zone project (in case of subzones, the subzone facility) is activated, pursuant to 19 CFR part 146, and in operation not later than five years from the Board order authorizing the zone or subzone.

(4) A grant of authority approved under this part includes authority for the grantee to permit the erection of buildings necessary to carry out the approved zone project subject to concurrence of the Port Director.

(5) Zone grantees, operators, and users shall permit federal government officials acting in an official capacity to have access to the zone project and records during normal business hours and under other reasonable circumstances.

(6) Activity involving production is subject to the specific provisions in § 400.14.

(7) A grant of authority may not be sold, conveyed, transferred, set over, or assigned (FTZ Act, section 17; 19 U.S.C. 81q).

(8) Private ownership of zone land and facilities is permitted provided the zone grantee retains the control necessary to implement the approved zone project. Such permission shall not constitute a vested right to zone designation, nor interfere with the Board's regulation of the grantee or the permittee, nor interfere with or complicate the revocation of the grant by the Board. Should title to land or facilities be transferred after a grant of authority is issued, the zone grantee must retain, by agreement with the new owner, a level of control which allows the grantee to carry out its responsibilities as grantee. The sale of a zone site or facility for more than its fair market value without zone status could, depending on the circumstances, be subject to the prohibitions set forth in section 17 of the Act.

(b) *Board authority to restrict or prohibit activity.* Pursuant to section 15(c) of the Act (19 U.S.C. 81o(c)), the Board has authority to restrict or prohibit zone activity "that in its judgment is detrimental to the public interest." In approvals of the applications for zone or subzone production authority required by § 400.14(a), the Board may adopt restrictions to protect the public interest, health, or safety. The Commerce Department's Assistant Secretary for Import Administration may similarly adopt restrictions in exercising authority under §§ 400.14(d) and (e). When evaluating zone or subzone production activity, either as proposed in an application or as part of a review of an ongoing operation, the Board shall determine whether the

activity is in the public interest by reviewing it in relation to the evaluation criteria contained in § 400.25.

(c) *Additional conditions, prohibitions and restrictions.* Other conditions/requirements, prohibitions and restrictions under Federal, State or local law may apply to the zone or subzone authorized by the grant of authority.

§ 400.14 Production—activity requiring approval or reporting; restrictions.

(a) *Activity requiring advance approval.* Approval in advance by the Board (or notification to the Board under the circumstances described in § 400.37) is required for all production activity in zones or subzones which involves:

(1) A foreign article for which the actual or effective duty rate for U.S. entries will be reduced through incorporation into a different product or article (inverted tariff);

(2) A foreign article that would be subject (if it were to enter U.S. customs territory) to an antidumping duty (AD) or countervailing duty (CVD) order or which would be otherwise subject to suspension of liquidation under AD/CVD procedures, to an order of the International Trade Commission pursuant to 19 U.S.C. 1337 (Section 337), or to a quantitative import control (quota);

(3) Duty avoidance on scrap or waste resulting from the production activity (except for production activity that is for export only); or,

(4) For a production operation that had been the subject of prior Board consideration and approval (including delegated authority), a foreign article:

(i) For which there is a new (or increased) inverted tariff due to a new (or increased rate of) general or special duty relative to the circumstances in effect at the time of the Board's prior consideration of the foreign article's use in the production operation;

(ii) Which is subject (were it to enter U.S. customs territory) to an AD/CVD duty or suspension of liquidation under AD/CVD orders that were not in effect at the time of the Board's prior consideration of the foreign article's use in the production operation; or,

(iii) Which is subject (were it to enter U.S. customs territory) to a Section 337 order that was not in effect at the time of the Board's prior consideration of the foreign article's use in the production operation.

(b) *Activity requiring reporting.* All production activity in zones or subzones must be reported to the Board annually in accordance with any instructions, guidelines, forms and related documents specifying time, place, manner and format(s) established by the Executive Secretary pursuant to § 400.51(d)(1).

(c) *Scope of approved authority.* The Board's approval of production authority for a particular operation is limited to the inputs, finished products, and production capacity presented in the approved application pursuant to § 400.22(a) (or for which notification has been made to the Board pursuant to § 400.14(e)). If a grantee, operator or user is uncertain of whether activity falls within the scope of activity approved by the Board, the grantee, operator or user may request a scope determination pursuant to § 400.14(f). Applications for expanded production authority shall meet the requirements of § 400.22 and shall be processed pursuant to §§ 400.31–32 and 400.34–35 (or § 400.14(d), where applicable). Activity conducted without required authority from the Board could be subject to penalties pursuant to § 400.62.

(d) *Delegation to Assistant Secretary for Import Administration.* The Commerce Department's Assistant Secretary for Import Administration may make determinations in cases requiring production authority, based upon a review by the Board staff and the recommendation of the Executive Secretary, when:

(1) The Port Director determines that the proposed production activity could otherwise be conducted under CBP bonded procedures;

(2) The sole zone benefit requiring advance approval from the Board is for scrap or waste resulting from the production activity; or,

(3) The Assistant Secretary for Import Administration's determination will only be on an interim basis, in response to a request from the applicant, to enable some or all of the activity in question to commence until the Board is able to complete action pursuant to § 400.35. Interim authority may only be approved after the close of the period for public comment for the application in question based on a recommendation from the Executive Secretary, which will take into account the factors in § 400.25, any public comments received, and any other relevant considerations. Any request for interim authority must provide a public interest-based justification and a full explanation of the need for such interim authority, and must include both a realistic projected timeframe for commencement of the proposed activity and written concurrence from the CBP port director that specifically addresses the applicant's projected timeframe. Interim authority, once approved, will remain at the discretion of the Assistant Secretary for Import Administration until the Board has acted and is subject to modification or rescission for cause during the interim period.

(e) *Production changes and capacity increases.*

(1) *Production changes.* Where advance approval is required under § 400.14(a), an applicant requesting production authority from the Board (or with existing production authority from the Board) may also request authority to notify the Board on a quarterly retrospective basis of production changes involving new finished products or foreign components/inputs resulting in inverted tariff or scrap benefits. Foreign articles subject (were they to enter U.S. customs territory) to AD or CVD orders or which would be otherwise subject to suspension of liquidation under AD/CVD procedures, to an order of the International Trade Commission pursuant to Section 337, to any ongoing AD/CVD or Section 337 proceeding, or to quantitative import controls (quotas) are not eligible for the production change notification procedure. § 400.37 delineates applicable criteria and procedures for requests for authority to utilize the production change notification provision and, where such authority has been approved, for subsequent notifications to the Board.

(2) *Capacity increases.* For a production operation approved by the FTZ Board, the operator shall notify the Board of any increases in production capacity (§ 400.22(a)(3)(vii)) relative to the capacity level approved by the Board (or for which notification was previously submitted to the Board pursuant to this paragraph) no later than the end of the calendar quarter during which the capacity increase becomes effective. The notification shall name the zone or subzone operation for which the notification is occurring and address the impact of the notified change(s) on the elements in §§ 400.22(a)(3)(v), (vi) and (vii) relative to the most recent prior Board approval (or notification pursuant to this paragraph) for the production operation in question. The Executive Secretary shall establish any guideline or format necessary to implement this paragraph, and may request additional information as needed. Upon notification of an increase in capacity pursuant to this paragraph, the Executive Secretary within 45 days will conduct a preliminary analysis of the increase in relation to the approved (or previously notified) capacity level for the production operation in question, taking into account the factors

enumerated in § 400.25(a)(2) as appropriate, and determine whether further review is necessary to ensure that activity involved in these situations continues to be in the public interest. The procedures of §§ 400.32 and 400.34 shall be used in these situations when appropriate.

(3) The Commerce Department's Assistant Secretary for Import Administration may, based on public interest grounds, order the prohibition or restriction of the use of zone procedures in regard to a production change or capacity increase notified pursuant to §§ 400.14(e)(1) and (2), including requiring that items be placed in privileged foreign status (19 CFR 146.41) upon admission to a zone or subzone. Any party so ordered shall comply or potentially be subject to actions that could include penalties pursuant to § 400.62(b). Such a prohibition or restriction on the use of zone procedures in regard to the production change or capacity increase may occur, depending on the circumstances, either after further review of the production change or capacity increase or, where warranted by the circumstances, prior to the conduct of further review in order to avoid or mitigate potential or ongoing negative effects during the pendency of the further review.

(f) *Scope determinations.* Determinations may be made by the Executive Secretary as to whether changes in activity are within the scope of related activity already approved for the facility involved under this part. When warranted, the procedures of §§ 400.32 and 400.34 will be followed.

(g) *Restrictions on items subject to antidumping and countervailing duty actions.*

(1) *Board policy.* Zone procedures shall not be used to circumvent antidumping duty (AD) and countervailing duty (CVD) actions under 19 CFR part 351.

(2) *Admission of items subject to AD/CVD actions.* Items subject to AD/CVD orders or items which would be otherwise subject to suspension of liquidation under AD/CVD procedures if they entered U.S. customs territory, shall be placed in privileged foreign status (19 CFR 146.41) upon admission to a zone or subzone. Upon entry for consumption, such items shall be subject to duties under AD/CVD orders or to suspension of liquidation, as appropriate, under 19 CFR part 351.

§ 400.15 Production equipment.

(a) *In general.* Pursuant to § 81c(e) of the FTZ Act, merchandise that is admitted into a foreign-trade zone for use within such zone as production equipment or as parts for such equipment, shall not be subject to duty until such merchandise is completely assembled, installed, tested, and used in the production for which it was admitted. Payment of duty may be deferred until such equipment goes into use as production equipment as part of zone production activity, at which time the equipment shall be entered for consumption as completed equipment.

(b) *Definition of production equipment.* Eligibility for this section is limited to equipment and parts of equipment destined for use in zone production activity as defined in § 400.2(l) of this part. Ineligible for treatment as production equipment under this section are general materials (that are used in the installation of production equipment or in the assembly of equipment) and materials used in the construction or modification of the plant that houses the production equipment.

(c) *Production equipment not destined for zone activity.* Production equipment or parts that are not destined for use in zone production activity shall be treated as normal merchandise eligible for standard zone-related benefits (*i.e.,* benefits not subject to the requirements of § 400.14(a)), provided the equipment is entered for consumption or exported prior to its use.

§ 400.16 Exemption from state and local ad valorem taxation of tangible personal property.

Foreign merchandise (tangible personal property) admitted to a zone and domestic merchandise held in a zone for exportation are exempt from state and local ad valorem taxation while such merchandise remains in the zone in zone status (19 U.S.C. 81o(e)). The exemption from such taxation is limited to tangible personal property imported from outside the United States and held in a zone for the purposes stated in 19 U.S.C. 81o(e), and tangible personal property produced in the United States and held in a zone for exportation, either in its original form or as altered by any of the processes stated in 19 U.S.C. 81o(e).

Subpart C—Applications To Establish and Modify Authority

§ 400.21 Application for zone.

(a) *In general.* An application for a grant of authority to establish a zone project (including pursuant to the Alternative Site Framework procedures adopted by the Board; see 74 FR 1170, Jan. 12, 2009, 74 FR 3987, Jan. 22, 2009, and 75 FR 71069–71070, Nov. 22, 2010) shall consist of an application letter and contents to meet the requirements of this part.

(b) *Application format.* Applications shall comply with any instructions, guidelines, and forms or related documents, published in the **Federal Register** and made available on the Board's Internet site, as established by the Executive Secretary specific to the type of application in question.

(c) *Application letter.* The application letter shall be currently dated and signed by an officer of the corporation authorized in the resolution for the application (see § 400.21(d)(1)(iii)). The application letter shall also describe:

(1) How the proposal is consistent with the state enabling legislation and the grantee's charter;

(2) The type of authority requested from the Board;

(3) The proposed zone site(s) and facility(ies) and the larger project of which the zone is a part;

(4) The project background;

(5) The relationship of the project to the community's and state's international trade-related goals and objectives;

(6) Any production authority requested, where applicable; and,

(7) Any additional pertinent information needed for a complete summary description of the proposal.

(d) *Detailed contents.*

(1) Legal Authority for the Application shall be documented with:

(i) A current copy of the state enabling legislation described in §§ 400.12(b) and (c);

(ii) A copy of the sections of the applicant's charter or organization papers pertinent to foreign-trade zones; and,

(iii) A certified copy of a recent resolution of the governing body of the corporation specific to the application authorizing the official signing the application letter.

(2) Site Descriptions (including a table with site designations when more than one site is involved) shall be documented with:

(i) A detailed description of the zone site, including size, location, and address (and legal description or its equivalent in instances where the Executive Secretary determines it is needed to supplement the maps in the application), as well as dimensions and types of existing and proposed structures, master planning, and timelines for construction of roads, utilities and planned buildings;

(ii) Where applicable, a summary description of the larger project of which the site is a part, including type, size, location and address;

(iii) A statement as to whether the site is within or adjacent to a CBP port of entry (including distance from the limits of the port of entry and, if the distance exceeds 60 miles, driving time from the limits of the port of entry);

(iv) A description of existing or proposed site qualifications, including appropriate land-use zoning (with environmentally sensitive areas avoided) and physical security;

(v) A description of current and planned activities associated with the site;

(vi) A summary description of transportation systems, facilities, and services, including connections from local and regional points of arrival to the zone;

(vii) A statement regarding the environmental aspects of the proposal;

(viii) The estimated time schedules for construction and activation; and,

(ix) A statement as to the possibilities and plans for future expansion of the proposed zone site.

(3) Operation and financing shall be documented with:

(i) A statement as to site ownership (if not owned by the applicant or proposed operator, evidence as to their legal right to use the site);

(ii) A discussion of plans for operations at the proposed site(s);

(iii) A commitment to satisfy the requirements for CBP automated systems; and,

(iv) A summary of the plans for financing the project.

(4) Economic justification shall be documented with:

(i) A statement of the community's overall economic and trade-related goals and strategies in relation to those of the region and state, including a reference to the plan or plans on which the goals are based and how they relate to the zone project;

(ii) An economic profile of the community including discussion of:

(A) Dominant sectors in terms of percentage of employment or income;

(B) Area strengths and weaknesses;

(C) Unemployment rates; and,

(D) Area foreign trade statistics;

(iii) A statement as to the role and objective of the zone project and a discussion of the anticipated economic impact, direct and indirect, of the zone project, including references to public costs and benefits, employment, and U.S. international trade;

(iv) A separate justification for each proposed site, including specific explanation addressing the degree to which each proposed site may be duplicative of types of facilities at other proposed or existing sites in the zone project;

(v) A statement as to the need for zone services in the community, with specific expressions of interest from proposed zone users and letters of intent from those firms that are considered prime prospects for each specific proposed site; and,

(vi) A description of proposed production operations, if applicable, with the information required in § 400.22.

(5) Maps and Blueprints shall be documented with:

(i) State and county maps showing the general location of the proposed site(s) in terms of the area's transportation network;

(ii) For any proposed site, a local community map showing in red the location of the site;

(iii) For any proposed site, a legible, detailed blueprint of the zone or subzone area showing zone boundaries in red, with dimensions, and showing existing and proposed structures; and,

(iv) For proposals involving existing zones, one or more maps showing the relationship between existing zone sites and the proposed changes.

(e) *Additional information.* The Board or the Executive Secretary may require additional information needed to adequately evaluate proposals.

(f) *Amendment of application.* The Board or the Executive Secretary may allow amendment of the application. Amendments which substantively expand the scope of a request shall be subject to comment period requirements such as those of § 400.32(c)(2) with a minimum comment period of 30 days.

(g) *Drafts.* Applicants are encouraged to submit a draft application to the Executive Secretary for review. A draft application must be complete with the possible exception of the application letter and/or resolution from the grantee.

(h) *Format and number of copies.* Unless the Executive Secretary alters the requirements of this paragraph, submit an original (including original documents to meet the requirements of paragraphs (c) and (d)(1)(iii) of this section) and one copy of the application on 8½″ x 11″ (216 x 279 mm) paper and one electronic copy.

(i) *Where to submit an application.* Mailing address is: Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230. Options for submission of electronic copies are described on the FTZ Board's Internet site.

§ 400.22 Application for production or subzone authority.

(a) *In general.* In addition to any applicable requirements of § 400.21, an application involving proposed production authority under § 400.14(a) shall include:

(1) A summary as to the reasons for the application and an explanation of its anticipated economic effects;

(2) Identity of the user and its corporate affiliation;

(3) A description of the proposed activity, including:

(i) Products;

(ii) Materials and components;

(iii) For each product or material/component, the tariff schedule category, tariff rate, other import requirements or restrictions, and whether the material/component is subject to any antidumping or countervailing duty proceeding, a proceeding pursuant to 19 U.S.C. 1337 (Section 337), or other trade-related proceeding(s) or issue(s);

(iv) Domestic materials, foreign materials, and plant value added (as percentages of finished product value);

(v) Projected shipments to domestic market and export market (percentages);

(vi) Estimated total or range of annual value of benefits to proposed user (broken down by category), including as a percent of finished product value;

(vii) Annual production capacity (current and planned) for the proposed FTZ activity, in units;

viii) Information to assist the Board in making a determination under §§ 400.25(a)(1)(iii) and 400.25(a)(2);

(ix) Information as to whether alternative procedures have been considered as a means of obtaining the benefits sought;

(x) Information on the industry involved and extent of international competition; and,

(xi) Economic impact of the operation on the area.

(4) Information regarding any request for authority to submit notifications of future production changes pursuant to § 400.37; and,

(5) Any additional information requested by the Board or the Executive Secretary in order to conduct the review.

(b) An application to establish a subzone as part of a proposed or existing zone shall be submitted in accordance with the requirements in § 400.21, except that the focus of the information pursuant to § 400.21(d)(4) (Economic Justification) shall be on the specific activity involved and shall include:

(1) A summary as to the reasons for the subzone and a detailed explanation of its anticipated economic effects;

(2) Identity of the subzone user and its corporate affiliation;

(3) A description of the proposed activity, including the information

required in §§ 400.22(a)(3)(i), (iv), (v), (vi), (x), (xi), and tariff schedule headings and duty rates for products;

(4) For subzone applications involving requests for production authority, the information required in § 400.22(a);

(5) Reason operation cannot be conducted within a general-purpose zone; and,

(6) Statement as to environmental impact.

§ 400.23 Application for expansion or other modification to zone project.

(a) *In general.* (1) A grantee may apply to the Board for authority to expand or otherwise modify its zone project (including pursuant to the Alternative Site Framework procedures adopted by the Board; see 74 FR 1170, Jan. 12, 2009, 74 FR 3987, Jan. 22, 2009, and 75 FR 71069–71070, Nov. 22, 2010).

(2) The Executive Secretary, in consultation with the Port Director, will determine whether the proposed modification involves a major change in the zone plan and is thus subject to paragraph (b) of this section, or is minor and subject to paragraph (c) of this section. In making this determination the Executive Secretary will consider the extent to which the proposed modification would:

(i) Substantially modify the plan originally approved by the Board; or,

(ii) Expand the physical dimensions of the approved zone area as related to the scope of operations envisioned in the original plan.

(b) *Major modification to zone project.* An application for a major modification to an approved zone project shall be submitted in accordance with the requirements of § 400.21, except that the content submitted pursuant to § 400.21(d)(4) (Economic Justification) shall relate specifically to the proposed change.

(c) *Minor modification to zone project.* Other applications or requests under this subpart, including those for minor revisions of general-purpose zone boundaries based on immediate need for zone use and of subzone boundaries where the scope of authorized production activity is not affected, shall be submitted in letter form with information and documentation necessary for analysis, as determined by the Executive Secretary, who shall determine whether the proposed change is a minor one subject to this paragraph (c) instead of paragraph (b) of this section (*see,* § 400.36).

(d) *Applications for other revisions to grants of authority.* Applications or requests for revisions to grants of authority, such as modification of a restriction or reissuance of a grant of authority, shall be submitted in letter form with information and documentation necessary for analysis, as determined by the Executive Secretary. If the change involves removal or significant modification of a restriction included by the Board in a grant of authority or reissuance of a grant of authority, the review procedures of §§ 400.31–400.35 shall be followed, where relevant. If not, the procedure set forth in § 400.36 shall generally apply (although the Executive Secretary may elect to follow the procedures of §§ 400.31–400.35 when warranted).

§ 400.24 Criteria for evaluation of zone proposals or expansion or other modifications to zone projects.

The Board will consider the following factors in determining whether to issue a grant of authority for a zone project:

(a) The need for zone services in the port of entry area, taking into account existing as well as projected international trade-related activities and employment impact;

(b) The suitability of each proposed site and its facilities based on the plans presented for the site, including existing and planned buildings, zone-related activities, and the timeframe for development of the site;

(c) The specific need and justification for each proposed site, taking into account existing sites and/or other proposed sites;

(d) The extent of state and local government support, as indicated by the compatibility of the zone project with the community's master plan or stated goals for economic development and the views of state and local public officials involved in economic development. Such officials shall avoid commitments that anticipate the outcome of Board decisions;

(e) The views of persons likely to be affected by proposed zone activity; and,

(f) If the proposal involves production activity, the criteria in § 400.25.

§ 400.25 Criteria for evaluation of production and subzone proposals.

(a) *Production.* The Board will apply the criteria delineated in § 400.25(a) in determining whether to authorize proposed production activity. The Board's evaluation will take into account such factors as market conditions, price sensitivity, degree and nature of foreign competition, intra-industry and intra-firm trade, effect on exports and imports, and net effect on U.S. employment:

(1) *Threshold factors.* It is the policy of the Board to authorize zone activity only when it is consistent with public policy and, in regard to activity involving foreign merchandise subject to quotas or inverted tariffs, when zone procedures are not the sole determining cause of imports. Thus, without undertaking a review of the economic factors enumerated in § 400.25(a)(2), the Board shall deny or restrict authority for proposed or ongoing activity if it determines that:

(i) The activity is inconsistent with U.S. trade and tariff law, or policy which has been formally adopted by the Executive branch;

(ii) Board approval of the activity under review would seriously prejudice U.S. tariff and trade negotiations or other initiatives; or,

(iii) The activity involves items subject to quantitative import controls or inverted tariffs, and the use of zone procedures would be the direct and sole cause of imports that, but for such procedures, would not likely otherwise have occurred, taking into account imports both as individual items and as components of imported products.

(2) *Economic factors.* After its review of threshold factors, if there is a basis for further consideration, the Board shall consider the following factors in determining the net economic effect of the proposed activity:

(i) Overall employment impact;

(ii) Exports and re-exports;

(iii) Retention or creation of value-added activity;

(iv) Extent of value-added activity;

(v) Overall effect on import levels of relevant products;

(vi) Extent and nature of foreign competition in relevant products;

(vii) Impact on related domestic industry, taking into account market conditions; and

(viii) Other relevant information relating to the public interest and net economic impact considerations, including technology transfers and investment effects.

(3) The significant public benefit(s) that would result from the production activity, taking into account the factors in paragraphs (a)(1) and (a)(2) of this section.

(b) *Subzones.* In reviewing proposals for subzones, in addition to application of the factors delineated in § 400.25(a) where production activity is involved, the Board will also consider:

(1) Whether the operation could be located in or otherwise accommodated by the multi-purpose facilities of the zone project serving the area; and,

(2) The specific zone benefits sought and whether the proposed activity is in the public interest supported by evidence pursuant to §§ 400.22(b)(1) and (3).

(c) *Contributory effect.* In assessing the significance of the economic effect of the zone activity as part of the consideration of economic factors, and in consideration of whether there is a significant public benefit, the Board may consider the contributory effect zone savings have as an incremental part of cost effectiveness programs adopted by companies to improve their international competitiveness.

§ 400.26 Burden of proof.

(a) *In general.* An applicant must demonstrate to the Board that the proposal meets the criteria delineated in these regulations. Applicants seeking production-related authority shall submit evidence regarding the positive economic effect(s) and significant public benefit(s) that would result from the activity and may submit evidence and comments as to policy considerations.

(b) *Responses to evidence of negative effects.* Applicants making submissions in response to comments received during the public comment period or pursuant to § 400.33(e)(1) or § 400.34(a)(5)(iv)(A) should submit evidence that is probative and substantial in addressing the matter in issue.

§ 400.27 Application fees.

(a) *In general.* This section sets forth a uniform system of charges in the form of fees to recover some costs incurred by the Foreign-Trade Zones staff of the Department of Commerce in processing the applications listed in paragraph (b) of this section. The legal authority for the fees is 31 U.S.C. 9701, which provides for the collection of user fees by agencies of the Federal Government.

(b) *Uniform system of user fee charges.* The following graduated fee schedule establishes fees for certain types of applications and requests for authority based on their average processing time. Applications combining requests for more than one type of approval are subject to the fee for each category.

(1) Additional general-purpose zones (§ 400.21; § 400.11(a)(2))—$3,200

(2) Special-purpose subzones (§ 400.22(b)):

(i) Not involving production activity or less than three products—$4,000

(ii) Production activity with three or more products—$6,500

(3) Expansions (§ 400.23(b))—$1,600

(c) Applications submitted to the Board shall include a currently dated check drawn on a national or state bank or trust company of the United States or Puerto Rico in the amount called for in paragraph (b) of this section. Uncertified checks must be acceptable for deposit by a Federal Reserve bank or branch.

(d) Applicants shall make their checks payable to the U.S. Department of Commerce ITA. The checks will be deposited by ITA into the Treasury receipts account. If applications are found deficient under § 400.31(b), or withdrawn by applicants prior to formal docketing, refunds will be made.

Subpart D—Procedures for Application Evaluation and Reviews

§ 400.31 General application provisions and pre-docketing review.

(a) *In general.* Sections 400.31–400.36 outline the procedures followed in docketing and processing applications submitted under §§ 400.21–400.23. In addition, these sections set forth the time schedules which will normally be applied in processing applications. The schedules will provide guidance to applicants with respect to the time frames for each of the procedural steps involved in the Board's review. Under these schedules, applications involving production activity would be processed within 1 year, and those not involving such activity, within 10 months. While the schedules set forth a standard time frame, the Board may determine that it requires additional time based on special circumstances, such as when the public comment period must be reopened pursuant to §§ 400.33(e)(2) and 400.34(a)(5)(iv)(B).

(b) *Pre-docketing review.* The grantee shall submit a single complete copy of an application for pre-docketing review. (For requests relating to production in already approved zone or subzone space, the request may be submitted by the operator, provided a copy of the request is furnished at the same time to the grantee.) The Executive Secretary will determine whether the application satisfies the requirements of §§ 400.12, 400.21, 400.22, 400.23, and other applicable provisions of this part such that the application is sufficient for docketing. If the pre-docketing copy of the application is deficient, the Executive Secretary will notify the applicant within 30 days of receipt of the pre-docketing copy, specifying the deficiencies. An affected zone participant may also be contacted regarding relevant application elements requiring additional information or clarification. If the applicant does not correct the deficiencies and submit a corrected pre-docketing application copy within 30 days of notification, the pre-docketing application (single copy) will be discarded.

§ 400.32 Procedures for docketing application and case review.

(a) Once the pre-docketing copy of the application is determined to be sufficient, the Executive Secretary will notify the applicant within 15 days so that the applicant may then submit the original and requisite number of copies (which shall be dated upon receipt at the headquarters of the Board) for docketing by the Board. For applications subject to § 400.27, the original shall be accompanied with a check in accordance with that section.

(b) After the procedures described in paragraph (a) of this section, the Executive Secretary shall within 15 days of receipt of the original and required number of copies of the application:

(1) Formally docket the application, thereby initiating the proceeding or review;

(2) Assign a case docket number in cases requiring a Board order; and,

(3) Notify the applicant of the formal docketing action.

(c) After initiating a proceeding based on an application under §§ 400.21–400.22, or § 400.23(b), the Executive Secretary will:

(1) Designate an examiner to conduct a review and prepare a report with recommendations for the Board;

(2) Publish in the **Federal Register** a notice of the formal docketing of the application and initiation of the review which includes the name of the applicant, a description of the zone project, information as to any hearing scheduled at the outset, and an invitation for public comment. Normally, the comment period will close 60 days after the date the notice appears, except that, if a hearing is held (see § 400.52), the period will not close prior to 15 days after the date of the hearing. The closing date for general comment will ordinarily be followed by an additional 15-day period for rebuttal comments. All submissions of evidence, factual information, and written arguments by parties other than the applicant must be made during the comment period. A comment period may be opened or reopened for cause (for example, as a result of submission by the applicant of new factual information for which an opportunity for comment is warranted);

(3) Transmit or otherwise make available copies of the docketing and initiation notice and the application to the Commissioner of CBP and the Port Director, or a designee of either;

(4) Arrange for hearings, as appropriate;

(5) Transmit the reports and recommendations of the examiner and

of the Port Director to the Board for appropriate action; and,

(6) Notify the applicant in writing and publish notice in the **Federal Register** of the Board's determination.

(d) *CBP review.* The Port Director, or a designee, in accordance with CBP regulations and directives, will submit a report to the Executive Secretary within 45 days of the conclusion of the public comment period described in paragraph (c)(2) of this section.

§ 400.33 Examiner's review—case not involving production activity.

An examiner assigned to a case not involving production activity shall conduct a review taking into account the factors enumerated in § 400.24 and other appropriate sections of this part, which shall include:

(a) Conducting or participating in necessary hearings scheduled by the Executive Secretary;

(b) Reviewing case records, including public comments;

(c) Requesting information and evidence from parties of record;

(d) Developing information and evidence necessary for evaluation and analysis of the application in accordance with the criteria of the Act and this part; and,

(e) Developing recommendations to the Board (and submitting a report to the Executive Secretary), generally within 120 days of the close of the period for public comment (*see* § 400.32):

(1) If the recommendations are unfavorable to the applicant, they shall be considered preliminary and the applicant shall be notified in writing (via electronic transmission where appropriate) of the preliminary recommendations and the factors considered in their development. The applicant shall be given 30 days from the date of notification in which to respond to the recommendations and submit additional evidence pertinent to the factors considered in the development of the preliminary recommendations. Public comment may be invited on preliminary recommendations when warranted.

(2) If the response contains new evidence on which there has not been an opportunity for public comment, the Executive Secretary will publish notice in the **Federal Register** after completion of the review of the response. The new material will be made available for public inspection and the **Federal Register** notice will invite further public comment for a period of not less than 30 days, with an additional 15-day period for rebuttal comments.

(3) If the bases for an examiner's recommendation(s) change based on new evidence, the procedures of §§ 400.33(e)(1) and (2) shall be followed, where applicable.

(4) The CBP adviser shall be requested, when necessary, to provide further comments, which shall be submitted within 45 days after the request.

§ 400.34 Examiner's review—case involving production activity.

(a) The examiner shall conduct a review taking into account the factors enumerated in this section, § 400.25, and other appropriate sections of this part, which shall include:

(1) Conducting or participating in hearings scheduled by the Executive Secretary;

(2) Reviewing case records, including public comments;

(3) Requesting information and evidence from parties of record;

(4) Developing information and evidence necessary for analysis of the threshold factors and the economic factors enumerated in § 400.25; and,

(5) Conducting an analysis to include:

(i) An evaluation of policy considerations pursuant to §§ 400.25(a)(1)(i) and (ii);

(ii) An evaluation of the economic factors enumerated in §§ 400.25(a)(1)(iii) and 400.25(a)(2), which shall include an evaluation of the economic impact on domestic industry, considering both producers of like products and producers of components/materials used in the production activity;

(iii) Conducting appropriate industry surveys when necessary; and

(iv) Developing recommendations to the Board (and submitting a report to the Executive Secretary), generally within 150 days of the close of the period for public comment:

(A) If the recommendations are unfavorable to the applicant, they shall be considered preliminary and the applicant shall be notified in writing (via electronic transmission where appropriate) of the preliminary recommendations and the factors considered in their development. The applicant shall be given 45 days from the date of notification in which to respond to the recommendations and submit additional evidence pertinent to the factors considered in the development of the preliminary recommendations. Public comment may be invited on preliminary recommendations when warranted.

(B) If the response contains new evidence on which there has not been an opportunity for public comment, the Executive Secretary will publish notice in the **Federal Register** after completion of the review of the response. The new material will be made available for public inspection and the **Federal Register** notice will invite further public comment for a period of not less than 30 days, with an additional 15-day period for rebuttal comments.

(C) If the bases for an examiner's recommendation(s) change based on new evidence, the procedures of §§ 400.34(a)(5)(iv)(A) and (B) shall be followed, where applicable.

(b) *Methodology and evidence.* The evaluation of any proposal for production authority shall include the following steps:

(1) The first phase (§ 400.25(a)(1)) involves consideration of threshold factors. If an examiner or reviewer makes a negative finding on any of the factors in § 400.25(a)(1) in the course of a review, the applicant shall be informed pursuant to § 400.34(a)(5)(iv)(A). When threshold factors are the basis for a negative recommendation in a review of ongoing activity, the zone grantee and directly affected party shall be notified and given an opportunity to submit evidence pursuant to § 400.34(a)(5)(iv)(A). If the Board determines in the negative regarding any of the factors in § 400.25(a)(1), it shall deny or restrict authority for the proposed or ongoing activity.

(2) The process for § 400.25(a)(2) involves consideration of the enumerated economic factors, taking into account their relative weight and significance under the circumstances. Previous evaluations in similar cases will be considered.

§ 400.35 Completion of case review.

(a) The Executive Secretary will circulate the examiner's report with recommendations to the Treasury Board member for its review and vote (by resolution).

(b) The Treasury Board member will return its vote to the Executive Secretary within 30 days, unless a formal meeting is requested (*see,* § 400.3(b)).

(c) The Commerce Department will complete the decision process within 15 days of receiving the vote of the Treasury Board member, and the Executive Secretary will publish the Board decision.

(d) The Board or the Commerce Department's Assistant Secretary for Import Administration may opt to terminate review of an application with no further action if the applicant has failed to provide in a timely manner information needed for evaluation of the application, or if the Board is unable to reach a unanimous decision regarding

the disposition of the application. The Executive Secretary may terminate review of an application where the circumstances presented in the application are no longer applicable as a result of a material change, and will generally notify the applicant of the intent to terminate review and allow 30 days for a response prior to completion of any termination action.

§ 400.36 Procedure for application for minor modification of zone project.

(a) The Executive Secretary, with the concurrence of the Port Director, will make a determination in cases under § 400.23(c) involving minor changes to zone projects that do not require a Board order, such as boundary modifications, including certain relocations, and will notify the applicant in writing of the decision within 30 days of the determination that the application or request can be processed under § 400.23(c).

(b) Evidence of concurrence from the Port Director and all other documentation required for the request or application shall be provided by the applicant to the Board as part of the applicant's submission of the request or application for minor modification.

§ 400.37 Procedure for notification and review of production changes.

(a) *Requests for authority to use notification procedure.* Pursuant to § 400.14(e)(1), an applicant for FTZ production authority (or a grantee or operator with existing FTZ production authority) may request authority from the Board to notify the Board of future production changes involving new finished products or foreign status components/inputs.

(1) *Format for request for authority.* A request for authority to use the notification procedure shall include a list of the tariff schedule headings (4-digit HTSUS) within which such notifications are projected to occur (separated into headings that relate to finished products and headings that relate to components), to which such notifications shall then be limited, and shall explain the relevance of each heading to current or projected activity and provide an economic justification for the request based on the elements in § 400.22. The Executive Secretary shall establish any guidelines or format necessary to implement this section.

(2) *Review and decision on request for authority.* The review of a request submitted pursuant to § 400.37(a) shall be conducted in accordance with the procedures delineated in §§ 400.31–32 and 400.34–35. A Board approval of authority to use the production change notification provision may be subject to specific restrictions on a case-by-case basis, as warranted.

(b) *Procedure for notification of production change.*

(1) *Deadline for notification.* For any production change subject to this provision, the grantee or operator shall notify the Board no later than 45 days after the end of the calendar quarter during which the production change took place.

(2) *Format for notification.* The notification shall name the zone or subzone operation for which the notification is occurring and delineate new finished products or foreign components associated with the change, including tariff schedule numbers and duty rates, as well as provide information addressing the impact of the notified change(s) on the elements in §§ 400.22(a)(3)(iv) and (vi) relative to prior approvals and notifications pursuant to § 400.14(e)(1). The Executive Secretary may modify the requirements of this paragraph and shall establish any guideline or format necessary to implement this section.

(c) *Review of notifications.* Upon notification of a production change, the Executive Secretary will conduct a preliminary review of the change:

(1) *Public comment period.* Within 30 days after the deadline for receipt of notifications pursuant to § 400.37(b)(1), the Executive Secretary shall transmit for publication in the **Federal Register** a notice describing any production change for which such notification was received. The notice shall identify the zone or subzone operator/user associated with a change, the specific finished products or components notified for the operator/user, and the tariff schedule categories and tariff rates for the notified products or components. Such notice may be done in combination with notices for any other production changes notified for the same quarter. A public comment period of not less than 30 days shall be allowed.

(2) *Analysis and recommendation.* The Executive Secretary's preliminary review will examine the notified production change in relation to the operation's previously approved activity to determine whether it could have significant adverse effects (individually or cumulatively with other notified changes under this section associated with the same production operation), taking into account the factors enumerated in § 400.25 and any comments received in response to the **Federal Register** notice announcing the notified change. Based on the review, the Executive Secretary shall make a recommendation to the Commerce Department's Assistant Secretary for Import Administration regarding whether further review is warranted for the notified production change. The Executive Secretary's recommendation shall be made within 90 days of the deadline for receipt of notifications pursuant to § 400.37(b)(1), except where a notified production change was the subject of negative public comment or of a hearing pursuant to § 400.52.

(3) *Decision on further review.* Based upon the Executive Secretary's recommendation, the Commerce Department's Assistant Secretary for Import Administration shall determine whether further review is necessary. When warranted, further review shall be conducted in accordance with the procedures delineated in §§ 400.31–32 and 400.34–35, as appropriate. The Assistant Secretary for Import Administration may terminate any further review based upon a recommendation by the Executive Secretary.

(d) *Limitations on use of notification provision.* Pursuant to § 400.14(e)(1), the notification procedure described in this section does not apply to changes involving foreign status components/inputs subject to antidumping duty (AD) or countervailing duty (CVD) orders or which would be otherwise subject to suspension of liquidation under AD/CVD procedures (if they were to enter U.S. customs territory), subject to an order of the International Trade Commission pursuant to 19 U.S.C. 1337 (Section 337) (if they were to enter U.S. customs territory), subject to any ongoing AD/CVD or Section 337 proceeding, or subject to quantitative import controls (quotas).

§ 400.38 Monitoring and reviews of zone operations and activity.

(a) Ongoing zone operation(s) and activity may be reviewed at any time to determine whether they are in the public interest and in compliance and conformity with the Act and regulations, as well as the authority granted by the Board. Reviews involving production activity may also be conducted to determine whether there are changed circumstances that raise questions as to whether the activity is detrimental to the public interest, taking into account the factors enumerated in § 400.25. The Board may prescribe special monitoring requirements in its decisions when appropriate.

(b) Reviews may be initiated by the Board, the Commerce Department's Assistant Secretary for Import Administration, or the Executive Secretary; or, they may be undertaken in

response to requests from parties directly affected by the activity in question showing good cause. After initiation of a review, any affected party shall provide in a timely manner any information requested as part of the conduct of the review. If a party fails to timely provide information requested as part of such a review, a presumption unfavorable to that party may be made.

(c) Upon review, if a finding is made that zone activity is no longer in the public interest (taking into account the provisions of § 400.25 where production activity is involved), the Board or the Commerce Department's Assistant Secretary for Import Administration may order the prohibition or restriction of the activity in question. Such prohibitions or restrictions may be put in place after a preliminary review (*e.g.,* prior to potential steps such as a public comment period) if circumstances warrant such action until further review can be completed. The appropriateness of a delayed effective date will be considered.

Subpart E—Operation of Zones and Administrative Requirements

§ 400.41 Operation of zones; general.

Zones shall be operated by or under the contractual oversight of zone grantees, subject to the requirements of the FTZ Act and this part, as well as those of other federal, state and local agencies having jurisdiction over the site and operation. Zone grantees shall ensure that the reasonable zone needs of the business community are served by their zone projects. The Port Director represents the Board with regard to the zone projects adjacent to the port of entry in question and is responsible for enforcement, including physical security and access requirements, as provided in 19 CFR part 146.

§ 400.42 Operation as public utility.

(a) *In general.* Pursuant to Section 14 of the FTZ Act (19 U.S.C. 81n), each zone shall be operated as a public utility, in that all rates and charges for all services or privileges within the zone shall be fair and reasonable. Any rate or charge (fee) imposed on zone participants shall be based on costs incurred by the grantee and shall be directly related to the service provided by the grantee (for which the rate or charge recovers costs incurred) to the zone participants. Rates or charges may incorporate a reasonable return on investment. Rates or charges may not be tied to the level of benefits derived by zone participants. For any functions that a grantee contracts to third parties for which costs are passed on (wholly or in part) through charges to zone participants, costs must reflect going rates for the performance of such contracted functions. Any rates, charges or penalties paid by zone participants related to grantee functions shall be paid directly to the grantee (or, where applicable, to another public entity pursuant to a legal or contractual relationship with the grantee).

(b) *Delayed compliance date.* Recognizing that some grantees' existing business arrangements may not comply with the requirements detailed in this section, the effective date for compliance with the requirements of § 400.42 shall be no later than two years after the date of publication of the final rule.

§ 400.43 Uniform treatment.

Pursuant to Section 14 of the FTZ Act (19 U.S.C. 81n), a grantee shall afford to all who may apply to make use of or participate in the zone project uniform treatment under like conditions.

(a) *Standard contractual provisions.* Uniform treatment shall be ensured through the grantee's offer of standard contractual provisions for agreements for zone participants. The standard provisions proposed by the grantee must be included in the grantee's zone schedule (see § 400.45).

(b) *Agreements to be made in writing directly with grantee.* Any agreement or contract related to one or more grantee function(s) and involving a zone participant (*e.g.,* agreements with property owners, agreements with zone operators) must be in writing between the zone participant and the grantee.

(c) *Neutral evaluation criteria.* Uniform treatment shall be ensured in the grantee's evaluation of proposals from potential zone participants through the grantee's application of evaluation criteria that are neutral and public interest-based. Uniform treatment does not require a grantee to accept all proposals by zone participants, but the bases for a grantee's decision on a particular proposal must be consistent with the grantee's evaluation criteria.

(d) *Justification for differing treatment.* Given the requirement for uniform treatment under like conditions, for any instance of divergence from uniform treatment a grantee must be able to document upon request by the Executive Secretary the specific dissimilarity of conditions that justifies any difference in treatment.

(e) *Preclusion of conflicts of interest.* To avoid non-uniform treatment of zone participants, this section seeks to preclude certain conflicts of interest in agents' performance of the following zone-related grantee functions: Reviewing, making recommendations regarding or concurring on proposals/requests by zone participants pertaining to FTZ authority or activation by CBP; any oversight of zone participants' operations within the zone project; or collecting/evaluating annual report data from zone participants. None of those zone-related grantee functions shall be undertaken by:

(1) A third party (or person on behalf of a third party) that currently engages in, or which has during the prior two years engaged in, offering/providing a zone-related product/service to or representing a zone participant in the grantee's zone project;

(2) Any person that stands to gain from a specific third party's offer/provision of a zone-related product/service to or representation of a zone participant in the zone project; or,

(3) Any person related, as defined in paragraph (f) of this section, to the third party/person identified in paragraphs (e)(1) and (2) of this section.

(f) *Definition of related parties.* For purposes of this section, persons that are related would include:

(1) Members of a family;

(2) Organizations that are wholly or majority-owned by members of the same family;

(3) An officer or director of an organization and that organization;

(4) Partners;

(5) Employers and their employees;

(6) An organization and any person directly or indirectly owning, controlling, or holding with power to vote, 20 percent or more of the outstanding voting stock or shares of that organization;

(7) Any person who controls any other person and that other person (the term control means the power, direct or indirect, whether or not exercised, through any means, to determine, direct, or decide important matters affecting an entity); or,

(8) Any two or more persons who directly control, are controlled by, or are under common control with, any person (*see* definition of control in paragraph (f)(7) of this section).

(g) *Requests for determinations.* A grantee or other party may request a determination by the Executive Secretary regarding the consistency of the grantee's or other party's actual or potential provision or arrangement with the requirements of this section.

(h) *Identification of agent.* The Board, the Commerce Department's Assistant Secretary for Import Administration, or the Executive Secretary may require a zone grantee to identify any agent that has performed one or more of the zone-related grantee functions cited in

§ 400.43(e) in the zone project during a specified period of time.

(i) *Delayed compliance date.* Recognizing that some grantees' existing business arrangements may not comply with the requirements detailed in this section, the effective date for compliance with the requirements of § 400.43 shall be no later than two years after the date of publication of the final rule.

§ 400.44 Requirements for commencement of operations in a zone project.

The following actions are required before operations in a zone may commence:

(a) Approvals from the grantee and the Port Director, pursuant to 19 CFR part 146, are required prior to the activation of any portion of an approved zone project;

(b) Prior to activation of a zone, the zone grantee or operator shall obtain all necessary permits from federal, state and local authorities, and except as otherwise specified in the Act or this part, shall comply with the requirements of those authorities;

(c) The grantee shall submit the zone schedule to the Executive Secretary and to the Port Director, as provided in § 400.45.

§ 400.45 Zone schedule.

(a) *In general.* The zone grantee shall submit to the Executive Secretary (in both paper and electronic copies) and to the Port Director a zone schedule which sets forth the elements required in this section. No element of a zone schedule may be considered to be in effect until such submission has occurred. If warranted, the Board may subsequently amend the requirements of this section by Board Order.

(b) Each zone schedule shall contain:

(1) A title page, with information to include:

(i) The name of the zone grantee;

(ii) The date of the original schedule; and,

(iii) The name of the preparer;

(2) A table of contents;

(3) One or more sections with internal rules and regulations and policies for the zone, including a clear presentation of the standard contractual provisions offered to the various categories of zone participants. Inclusion of the standard contractual provisions in the zone schedule may take the form of one or more sample contracts or agreements presented in one or more appendices to the zone schedule;

(4) All rates or charges assessed by or on behalf of the grantee;

(5) Information regarding any operator(s) offering services to the user community, including the operator(s)'s rates or charges for all services offered; and,

(6) An appendix with definitions of any FTZ-related terms used in the zone schedule (as needed).

(c) The Executive Secretary may review the zone schedule (or any amendment to the zone schedule) to determine whether it contains sufficient information for zone participants concerning the operation of the zone and the grantee's rates and charges as provided in paragraphs (b)(3) and (b)(4) of this section. If the Executive Secretary determines that the zone schedule (or amendment) does not satisfy these requirements, the Executive Secretary will notify the zone grantee. The Executive Secretary may also conduct a review under 400.46(b).

(d) Amendments to the zone schedule shall be prepared and submitted in the manner described in paragraph (b) of this section, and listed in the concluding section of the zone schedule, with dates. A grantee may not apply rates/charges or other provisions required for the zone schedule unless those specific fees or provisions are included in the most recent zone schedule submitted to the Board and made available to the public in compliance with paragraph (e) of this section.

(e) *Availability of zone schedule.* A complete copy of the zone schedule shall be freely available for public inspection at the offices of the zone grantee and any operator offering FTZ services to the user community. For any such grantee or operator that maintains a site on the internet, the current complete zone schedule shall also be made available via that internet site. The Board may make copies of zone schedules available via its own Internet site. The zone grantee shall send a copy to the Port Director, who may submit comments to the Executive Secretary.

(f) *Delayed compliance date.* Recognizing that some grantees may need additional time to comply with the requirements detailed in this section, the effective date for compliance with the requirements of § 400.45 shall be no later than two years after the date of publication of the final rule.

§ 400.46 Complaints related to public utility and uniform treatment.

(a) *In general.* A zone participant may submit to the Executive Secretary a complaint regarding conditions or treatment that the complaining party believes are inconsistent with the public utility and uniform treatment requirements of the FTZ Act and these regulations. Complaints may be made on a confidential basis, if necessary. Grantees shall not enter into or enforce contractual provisions for agreements or contracts with zone participants that would require zone participants to disclose to other parties, including the grantee, any confidential communication with the Board under this section.

(b) *Objections to rates and charges.* A current or prospective zone participant showing good cause may object to any rate or charge related to the zone project on the basis that it is not fair and reasonable by submitting to the Executive Secretary a complaint in writing with supporting information. The Executive Secretary will review the complaint and issue a report and decision, which will be final unless appealed to the Board within 30 days. The Board or the Executive Secretary may otherwise initiate a review for cause. The factors considered in reviewing fairness and reasonableness will include:

(1) The actual costs of the specific services rendered by the zone grantee or operator, taking into account any extra costs incurred relative to non-zone operations and including return on investment, and reasonable out-of-pocket expenses; and,

(2) The going-rates and charges for like zone operations (including based on other like operations at other similarly situated zones, taking into account any specific factors that may lead to differing underlying costs).

§ 400.47 Grantee liability.

A grant of authority will not ordinarily be construed to make the zone grantee automatically liable for violations by zone participants because grantees generally provide for operators/users a framework of general authority within which individual parties may operate under the detailed supervision of CBP. In such circumstances, it would not be in the public interest to discourage public entities from zone sponsorship because of concern about liability without fault. Grantees should not be liable for the acts or violations of operators or users in which they share no fault. However, this section will not necessarily apply to a grantee that undertakes detailed operational oversight or direction to operators/users within its zone.

§ 400.48 Retail trade.

(a) *In general.* Retail trade is prohibited in zones, except that sales or other commercial activity involving domestic, duty-paid, and duty-free goods may be conducted within an activated zone project under permits

issued by the zone grantee and approved by the Board, with the further exception that no permits shall be necessary for sales involving domestic, duty-paid or duty-free food and non-alcoholic beverage products sold within the zone or subzone for consumption on premises by individuals working therein. The Executive Secretary will determine whether an activity is retail trade, subject to review by the Board when the zone grantee requests such a review with a good cause.

(b) *Procedure.* Requests for Board approval under this section shall be submitted in letter form, with supporting documentation, to the Executive Secretary, who is authorized to act for the Board in these cases, subject to the concurrence of the Port Director.

(c) *Criteria.* In evaluating requests under this section, the Executive Secretary and the Port Director will consider:

(1) Whether any public benefits would result from approval; and,

(2) The economic effect such activity would have on the retail trade outside the zone in the port of entry area.

§ 400.49 Zone-restricted merchandise.

(a) *In general.* Merchandise which has been given export status by CBP officials ("zone-restricted merchandise"—19 CFR 146.44) may be returned to the customs territory of the United States only when the Board determines that the return would be in the public interest. Such returns are subject to the customs laws and the payment of applicable duties and excise taxes (19 U.S.C. 81c(a), 4th proviso).

(b) *Criteria.* In making the determination described in paragraph (a) of this section, the Board will consider:

(1) The intent of the parties;

(2) Why the goods cannot be exported;

(3) The public benefit involved in allowing their return; and,

(4) The recommendation of the Port Director.

(c) *Procedure.* (1) A request for authority to return "zone-restricted" merchandise into U.S. customs territory shall be made to the Executive Secretary in letter form by the zone grantee or operator (with copy to the grantee) of the zone in which the merchandise is located, with supporting information and documentation.

(2) The Executive Secretary will investigate the request and prepare a report for the Board.

(3) The Executive Secretary may act for the Board under this section with respect to requests that involve merchandise valued at 500,000 dollars or less and that are accompanied by a letter of concurrence from the Port Director.

Subpart F—Records, Reports, Notice, Hearings and Information

§ 400.51 Accounts, records and reports.

(a) *Zone accounts.* Zone accounts shall be maintained in accordance with generally accepted accounting principles, and in compliance with the requirements of Federal, State or local agencies having jurisdiction over the site or operation.

(b) *Records and forms.* Zone records and forms shall be prepared and maintained in accordance with the requirements of CBP and the Board, consistent with documents issued by the Board specific to the zone in question, and the zone grantee shall retain copies of applications it submits to the Board.

(c) *Maps and drawings.* Zone grantees or operators, and Port Directors, shall keep current layout drawings of approved sites as described in § 400.21(d)(5), showing activated portions, and a file showing required approvals. The zone grantee shall furnish necessary maps to the Port Director.

(d) *Annual reports.* (1) Each zone grantee shall submit a complete and accurate annual report to the Board within 90 days of the end of the reporting period, in accordance with any instructions, guidelines, forms and related documents specifying place, manner and format(s) prescribed by the Executive Secretary, for use by the Executive Secretary in the preparation of the Board's annual report to the Congress. Each zone operator shall submit to the grantee a complete and accurate annual report, in accordance with any instructions, guidelines, forms and related documents specifying place, manner and format(s) prescribed by the Executive Secretary, in a timeframe that will enable the grantee's timely submission of a complete and accurate annual report to the Board.

(2) The Board shall submit an annual report to the Congress.

§ 400.52 Notice and hearings.

(a) *In general.* The Executive Secretary will publish notice in the **Federal Register** inviting public comment on applications docketed for Board action (*see,* § 400.32), and with regard to other reviews or matters considered under this part when public comment is necessary. Applicants shall give appropriate notice of their proposals in local general-circulation newspapers allowing at least 30 days for submission of comments regarding the proposal in question. The Board, the Secretary, the Commerce Department's Assistant Secretary for Import Administration, or the Executive Secretary, as appropriate, may schedule and/or hold hearings during any proceedings or reviews conducted under this part whenever necessary or appropriate.

(b) *Requests for hearings.* (1) A directly affected party showing good cause may request a hearing during a proceeding or review.

(2) The request must be made within 30 days of the beginning of the period for public comment (see § 400.32) and must be accompanied by information establishing the need for the hearing and the basis for the requesting party's interest in the matter.

(3) A determination as to the need for the hearing will be made by the Commerce Department's Assistant Secretary for Import Administration within 15 days after the receipt of such a request.

(c) *Procedure for public hearings.* The Board will publish notice in the **Federal Register** of the date, time and location of a hearing. All participants shall have the opportunity to make a presentation. Applicants and their witnesses shall ordinarily appear first. The presiding officer may adopt time limits for individual presentations.

§ 400.53 Official record; public access.

(a) *Content.* The Executive Secretary will maintain at the location stated in § 400.54(e) an official record of each proceeding within the Board's jurisdiction. The Executive Secretary will include in the official record all timely factual information, written argument, and other material developed by, presented to, or obtained by the Board in connection with the proceeding. The official record will contain material that is public, business proprietary, privileged, and classified. While there is no requirement that a *verbatim* record shall be kept of public hearings, the proceedings of such hearings shall ordinarily be recorded and transcribed when significant opposition is involved.

(b) *Opening and closing of official record.* The official record opens on the date the Executive Secretary dockets an application or receives a request that satisfies the applicable requirements of this part and closes on the date of the final determination in the proceeding or review, as applicable.

(c) *Protection of the official record.* Unless otherwise ordered in a particular case by the Executive Secretary, the official record will not be removed from

the Department of Commerce. A certified copy of the record will be made available to any court before which any aspect of a proceeding is under review, with appropriate safeguards to prevent disclosure of proprietary or privileged information.

§ 400.54 Information.

(a) *Request for information.* The Board may request submission of any information, including business proprietary information, and written argument necessary or appropriate to the proceeding.

(b) *Public information.* Except as provided in paragraph (c) of this section, the Board will consider all information submitted in a proceeding to be public information, and if the person submitting the information does not agree to its public disclosure, the Board will return the information and not consider it in the proceeding. Information to meet the basic requirements of §§ 400.21 through 400.23 and 400.37 is inherently public information to allow meaningful public evaluation pursuant to those sections and § 400.32.

(c) *Business proprietary information.* Persons submitting business proprietary information and requesting protection from public disclosure shall mark the cover page "business proprietary," as well as the top of each page on which such information appears. Any business proprietary document submitted for a proceeding other than pursuant to § 400.46 shall contain brackets at the beginning and end of each specific piece of business proprietary information contained in the submission. Any such business proprietary submission shall also be accompanied by a public version that contains all of the document's contents except the information bracketed in the business proprietary version, with the cover page and the top of each additional page marked "public version." Any data for which business proprietary treatment is claimed must be ranged or summarized in the public version. If a submitting party maintains that certain pieces of data are not susceptible to summarization or ranging, the public version must provide a full explanation specific to each piece of data regarding why summarization or ranging is not feasible.

(d) *Disclosure of information.* Disclosure of public information will be governed by 15 CFR part 4.

(e) *Availability of information.* Public information in the official record will be available at the Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce Building, 1401 Constitution Avenue, NW., Washington, DC 20230 and may also be available electronically over the internet via *http://www.trade.gov/ftz* (or a successor internet address).

Subpart G—Penalties, Prior Disclosure and Appeals to the Board

§ 400.61 Revocation of grants of authority.

(a) *In general.* As provided in this section, the Board can revoke in whole or in part a grant of authority for a zone or subzone whenever it determines that the zone grantee or, in the case of subzones, the subzone operator, has violated, repeatedly and willfully, the provisions of the Act.

(b) *Procedure.* When the Board has reason to believe that the conditions for revocation, as described in paragraph (a) of this section, are met, the Board will:

(1) Notify the grantee of the zone or subzone operator in question in writing stating the nature of the alleged violations, and provide the grantee or subzone operator an opportunity to request a hearing on the proposed revocation;

(2) Conduct a hearing, if requested or otherwise if appropriate;

(3) Make a determination on the record of the proceeding not earlier than 4 months after providing notice to the zone grantee under paragraph (b)(1) of this section; and,

(4) If the Board's determination is affirmative, publish notice of revocation of the grant of authority in the **Federal Register**.

(c) As provided in section 18 of the Act (19 U.S.C. 81r(c)), the grantee of the zone or subzone in question may appeal an order of the Board revoking the grant of authority.

§ 400.62 Fines, penalties and instructions to suspend activated status.

(a) *In general.* This section authorizes fines for certain specific violations of the FTZ Act or the Board's regulations. Each instance of those specific violations is subject to a fine of not more than 1,000 dollars (as adjusted for inflation pursuant to § 400.62(k)), with each day during which a violation continues constituting a separate offense subject to imposition of such a fine (FTZ Act, section 19; 19 U.S.C. 81s). This section also establishes the party subject to the fine which, depending on the type of violation, would be the zone operator, grantee or agent of the grantee. In certain circumstances, the Board or the Assistant Secretary for Import Administration could instruct CBP to suspend the activated status of all or part of a zone or subzone. Violations of the FTZ Act or the Board's regulations (including the sections pertaining to production activity and submission of annual reports), failure to pay fines or failure to comply with an order prohibiting or restricting activity may also result in the Executive Secretary suspending the processing of any requests to the Board and staff relating to the zone or subzone in question. Suspensions of activated status and suspensions of the processing of requests will generally be targeted to the specific non-compliant operation(s).

(b) *Violations involving production activity.*

(1) For purposes of § 400.62(b), each of the following constitutes a separate offense, with the operator subject to a fine of not more than 1,000 dollars (as adjusted for inflation pursuant to § 400.62(k)) for each such separate offense:

(i) Each finished product or foreign component or combination thereof for which the operator had failed to obtain the required advance approval pursuant to § 400.14(a) or to submit notification pursuant to § 400.14(e)(1);

(ii) Production involving any finished product, foreign component, or combination thereof authorized by the FTZ Board (or properly notified under § 400.14(e)(1)) at a level exceeding the plant's capacity authorized by the Board (or properly notified under § 400.14(e)(2)); and,

(iii) Each day during which an offense cited in § 400.62(b)(1)(i) or (ii) continues.

(2) Consistent with § 400.47, in instances where a grantee or agent of the grantee has undertaken detailed operational oversight or direction of an operator engaged in production within a zone project, the grantee or agent may also be subject to a fine of not more than 1,000 dollars (as adjusted for inflation pursuant to § 400.62(k))for each offense of the operator that is subject to § 400.62(b)(1)(i), (ii) or (iii).

(c) *Violations involving requirement to submit annual report.* Each day during which a grantee fails to submit a complete and accurate annual report pursuant to section 16 of the FTZ Act (19 U.S.C. 81p(b)) and § 400.51(d)(1) of these regulations constitutes a separate offense subject to a fine of not more than 1,000 dollars (as adjusted for inflation pursuant to § 400.62(k)). Further, each day during which a zone operator fails to submit to the zone's grantee the information required for the grantee's timely submission of a complete and accurate annual report to the Board may constitute a separate offense subject to a fine of not more than 1,000 dollars (as adjusted for inflation pursuant to § 400.62(k)). Consistent with § 400.47, in

circumstances where the violation demonstrably results from a zone operator's failure to submit a complete and accurate report to the zone grantee, the responsible operator would be the focus of any fine-assessment action by or on behalf of the Board.

(d) *Violations involving conflicts of interest.* Each day during which an agent of the grantee violates the provisions of § 400.43(e) of these regulations constitutes a separate offense for which the agent would be subject to a fine of not more than 1,000 dollars (as adjusted for inflation pursuant to § 400.62(k)).

(e) *Procedures for determination of violations and imposition of fines.* When the Board or the Executive Secretary has reason to believe that a violation of the FTZ Act, or any regulation under the FTZ Act, has occurred and that the violation warrants the imposition of a fine (such as situations where a party has previously been notified of action required to comply with the FTZ Act or the Board's regulations and has failed to take such action within a reasonable period of time), the following steps will be taken:

(1) The Executive Secretary will notify the party or parties responsible for the violation in writing stating the nature of the alleged violation, and provide the party(ies) a specified period (normally 30 days, with consideration given to any requests for an extension) to respond in writing;

(2) The Executive Secretary will conduct a hearing, if requested or otherwise if appropriate;

(3) The Executive Secretary will make a recommendation on the record of the proceeding not earlier than 15 days after the deadline for the party(ies)'s response under paragraph (e)(1) of this section. If the recommendation is for an affirmative determination of a violation, the Executive Secretary will also recommend a level of fine to be imposed; and,

(4) The Board will make a determination regarding the finding of a violation and imposition of a fine based on the Executive Secretary's recommendation under paragraph (e)(3) of this section. For related actions where the total sum of recommended fines is no more than 10,000 dollars (50,000 dollars in the case of violations pursuant to paragraph (c) of this section), the Board delegates to the Executive Secretary the authority to make a determination.

(f) *Mitigation.* (1) *In general.* The Commerce Department's Assistant Secretary for Import Administration may approve the mitigation (reduction or elimination) of an imposed fine based on specific evidence presented by the affected party. Authority is delegated to the Executive Secretary to mitigate a fine where the total sum of fines imposed on a party for related actions does not exceed 10,000 dollars (50,000 dollars in the case of violations pursuant to paragraph (c) of this section). Mitigating evidence and argument pertaining to mitigating factors must be submitted within 30 days of the determination described in paragraph (e)(4) of this section.

(2) *Mitigating factors.* Factors to be taken into account in evaluation of potential mitigation include:

(i) The prior good record of a violator over the preceding five years with regard to the type of violation(s) at issue;

(ii) A violator's inexperience in the type of foreign-trade zone activity at issue;

(iii) Violation due to the action of another party despite violator's adherence to the requirements of the FTZ Act and the Board's regulations;

(iv) Immediate remedial action by the violator to avoid future violations;

(v) A violator's cooperation with the Board (beyond the degree of cooperation expected from a person under investigation for a violation) in ascertaining the facts establishing the violation;

(vi) A violation resulting from a clerical error or similar unintentional negligence;

(vii) Contributory Board error such as the violation resulting, at least in significant part, from the violator having relied on inaccurate written advice provided by a Board staff member; and,

(viii) Other such factors as the Board, or the Executive Secretary, deems appropriate to consider in the specific circumstances presented.

(g) *Assessment of imposed fines.* After evaluation of submitted mitigating evidence and argument, where applicable, the Commerce Department's Assistant Secretary for Import Administration may assess an imposed fine (in whole or in part). Authority is delegated to the Executive Secretary to assess a fine where the total sum of the imposed fines for related actions does not exceed 10,000 dollars (50,000 dollars in the case of violations pursuant to paragraph (c) of this section).

(h) *Time for payment.* Full payment of an assessed fine must be made within 30 days of the effective date of the assessment or within such longer period of time as may be specified. Payment shall be made in the manner specified by the Commerce Department's Assistant Secretary for Import Administration or the Executive Secretary.

(i) *Procedures for instruction to suspend activated status.* When a fine assessed pursuant to §§ 400.62(e) through (h) has not been paid within 90 days of the specified time period, or there is a repeated and willful failure to comply with a prohibition or restriction on activity imposed by a Board Order or an order of the Commerce Department's Assistant Secretary for Import Administration pursuant to §§ 400.14(e)(3) or 400.38(c), the Board or the Commerce Department's Assistant Secretary for Import Administration may instruct CBP to suspend the activated status of the zone operation(s) in question (or, if appropriate, the suspension may be limited to a particular activity of an operator, such as suspension of the privilege to admit merchandise), and the suspension may remain in place until the failure to pay a fine or to comply with an order's prohibition or restriction on activity has been remedied. In determining whether to instruct CBP to suspend the activated status of a zone operation in the circumstances noted, the following steps shall be taken:

(1) *Notification of party(ies).* The Executive Secretary will notify the responsible party(ies) in writing stating the nature of the failure to timely pay a fine or to comply with a prohibition or restriction on activity imposed by a Board Order or an order of the Commerce Department's Assistant Secretary for Import Administration. If the grantee is not one of the responsible parties notified, the Executive Secretary will also provide a copy of the notification to the grantee. The responsible party(ies) will be provided a specified period (of not less than 15 days) to respond in writing to the notification;

(2) *Hearing.* If the notified responsible party(ies) requests a hearing (or if a hearing is determined to be warranted by the Board, the Commerce Department's Assistant Secretary for Import Administration or the Executive Secretary), it will be held before the Executive Secretary (or a member of the Board staff designated by the Executive Secretary) within 30 days following the party(ies)'s request for a hearing (or the determination by the Board, the Commerce Department's Assistant Secretary for Import Administration or the Executive Secretary). The party(ies) may be represented by counsel at the hearing, and any evidence and testimony of witnesses in the proceeding will be presented. A transcript of the hearing will be

produced and a copy will be made available to the responsible party(ies);

(3) The Executive Secretary shall make a recommendation on the record of the proceeding not earlier than 15 days after the later of:

(i) The deadline for the party(ies)'s response under paragraph (i)(1) of this section; or,

(ii) The date of a hearing held under paragraph (i)(2) of this section; and,

(4) The Board or the Commerce Department's Assistant Secretary for Import Administration shall make a determination regarding the recommendation on whether to instruct CBP to suspend activated status. If the determination is affirmative, the Executive Secretary shall convey the instruction to CBP.

(j) *Enforcement of assessment.* Upon any failure to pay an assessed fine, the Board may request the U.S. Department of Justice to recover the amount assessed in any appropriate district court of the United States or may commence any other lawful action.

(k) *Adjustment for inflation.* The maximum dollar value of a fine for a violation of the FTZ Act or the Board's regulations is subject to adjustment for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996.

§ 400.63 Prior disclosure.

(a) A party subject to a fine pursuant to § 400.62 may provide a written disclosure of a violation of the FTZ Act or the Board's regulations to the Board prior to the commencement of an investigation by the Board of the violation.

(b) The disclosure should fully describe the circumstances surrounding the violation including:

(1) The zone(s) or subzone(s) involved;

(2) The CBP port(s) of entry involved;

(3) The legal or regulatory provisions violated;

(4) The circumstances of the act(s) constituting the violation;

(5) The corrective measures undertaken to resolve the violation;

(6) An assurance that the violation will not reoccur; and,

(7) Copies of sufficient documentation for the Board to identify the act(s) constituting the violation.

(c) Upon receipt of a written disclosure of a violation, the Executive Secretary will first determine the validity of the disclosure and provide written notice of the determination to the disclosing party.

(d) The disclosure should be addressed to the Executive Secretary at the address in 400.54(e). Disclosures may also be submitted via electronic transmission as long as an identical, original copy is also mailed within two business days.

(e) If a party subject to a fine pursuant to § 400.62 submits a valid written prior disclosure, it shall be the general policy of the Board (except in cases involving fraudulent intent) to reduce to a maximum of 1,000 dollars the total sum of potential fines for a single violation or series of offenses stemming from a continuing violation.

(f) A prior disclosure pursuant to this section shall not involve the loss of revenue and is only applicable to those fines imposed pursuant to this section. Any prior disclosure involving a loss of revenue must be addressed through the procedures established by 19 U.S.C. 1592(c)(4).

§ 400.64 Appeals to the Board of decisions of the Assistant Secretary for Import Administration and the Executive Secretary.

(a) *In general.* Decisions of the Commerce Department's Assistant Secretary for Import Administration and the Executive Secretary made pursuant to §§ 400.12(d)(2), 400.14(d)–400.14(f), 400.35(d), 400.46, 400.48, 400.49, 400.62 and 400.63(c) may be appealed to the Board by adversely affected parties showing good cause.

(b) *Procedures.* Parties appealing a decision under paragraph (a) of this section shall submit a request for review to the Board in writing, stating the basis for the request, and attaching a copy of the decision in question, as well as supporting information and documentation. After a review, the Board will notify the complaining party of its decision in writing.

Dated: December 27, 2010.

Christian Marsh,

Acting Deputy Assistant Secretary for Import Administration, Chairman, Committee of Alternates, Foreign-Trade Zones Board.

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DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 9

[2310–0062–422]

Nonfederal Oil and Gas Development Within the Boundaries of Units of the National Park System; Intent To Prepare an Environmental Impact Statement for a Proposed Revision

AGENCY: National Park Service, Interior.

ACTION: Proposed rule; intent to prepare an environmental impact statement.

SUMMARY: Notice is hereby given in accordance with the National Environmental Policy Act of 1969 (NEPA) and Council on Environmental Quality regulations that the U.S. Department of the Interior, National Park Service (NPS), will prepare a programmatic environmental impact statement (EIS) on proposed revisions to existing regulations governing the exercise of nonfederal oil and gas rights within the boundaries of units of the National Park System. The current regulations have been in effect for over thirty years and have not been substantively updated during that period. The EIS will analyze a range of reasonable alternatives for regulating nonfederal oil and gas development and the potential environmental impacts on park resources such as threatened and endangered species, water resources, soils, vegetation, wetlands, air resources, night skies, wildlife, cultural resources, and soundscapes. Effects on oil and gas operators, visitor experience and public safety, adjacent lands, and park operations will also be analyzed.

DATES: Comments must be received by February 28, 2011.

ADDRESSES: Written comments or requests for information should be addressed to Sandy Hamilton, Environmental Quality Division, National Park Service, Academy Place, P.O. Box 25287, Denver, CO 80225. If you wish to comment electronically, you may submit your comments online in the NPS Planning, Environment and Public Comment (PEPC) Web site at *http://parkplanning.nps.gov/WASO.* Faxed or e-mailed comments will not be accepted. Comments should be received by the NPS within 60 days of the date of the publication of this notice in the **Federal Register**. Please be aware that your entire comment—including personal identifying information—may be made publicly available at any time. While you can ask us in your comments to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

FOR FURTHER INFORMATION CONTACT: Sandy Hamilton, Environmental Protection Specialist, at 303–969–2068, or by mail at Sandy Hamilton, Environmental Quality Division, National Park Service, Academy Place, P.O. Box 25287, Denver, CO 80225. Further information about this project, including the Advanced Notice of Public Rulemaking and "Frequently Asked Questions" about the difference

between the NEPA planning process and the rulemaking process, may also be found on the PEPC Web site for this project *http://parkplanning.nps.gov/WASO.*

SUPPLEMENTARY INFORMATION: To determine the scope of issues to be addressed in the EIS and to identify significant issues related to the proposed regulations revision, the NPS is seeking public comment on the draft purpose and need, objectives, and issues and concerns related to revisions of the NPS regulations governing nonfederal oil and gas development on units of the National Park System. The NPS also seeks comment on possible alternatives it should consider for revising the regulations. The NPS invites the public to submit comments electronically on the NPS Planning, Environment and Public Comment (PEPC) Web site at *http://parkplanning.nps.gov/WASO* or by mail to the address cited in the **ADDRESSES** section during the 60-day comment period following the publication of this notice of intent in the **Federal Register.**

The NPS does not plan to hold national public scoping meetings for this DEIS due to the programmatic nature of the regulations and the widely dispersed locations of the 45 parks that could be affected by the revisions. However, some individual parks may choose to hold public scoping meetings in their locality. Such meetings would be advertised by those parks using their normal media and mailing list contacts. At present, 12 park units contain existing nonfederal oil and gas development within their boundaries.

The NPS promulgated regulations at 36 CFR part 9, subpart B ("9B regulations") governing nonfederal oil and gas development in units of the National Park System in December 1978, with a January 1979 effective date. The regulations control all activities associated with nonfederal oil and gas development inside park boundaries where access is on, across, or through federally owned or controlled lands or waters. At this time 693 nonfederal oil and gas operations exist in a total of 12 units of the National Park System.

The purpose of the 9B regulations is to avoid or minimize the adverse effects of nonfederal oil and gas operations on natural and cultural resources, visitor uses and experiences, provide for public safety, and minimize adverse effects on park infrastructure and management.

Revisions to the 9B regulations are needed because:

- The NPS has limited ability to address 53% of nonfederal oil and gas operations (grandfathered operations and operations that do not require access across federally owned lands) that are currently exempt from the 9B regulatory requirements.
- The existing regulations do not incorporate industry advances in technology and practices developed over the last 30 years.
- The existing regulations limit the NPS ability to require adequate financial assurance from operators to ensure that funds are available to reclaim operation sites in the event operators fail to fulfill their obligations under an approved plan of operations.
- There is an opportunity to have more understandable, comprehensive, and enforceable operating standards.
- The NPS has limited means under the existing regulations to address minor violations of an approved plan of operations or the 9B regulations that would not justify a suspension.
- The existing regulations do not clearly state the scope of NPS jurisdiction for directional drilling operations sited on lands outside park boundaries.
- The existing regulations are not consistent with practices of other Federal agencies and private landowners by requiring compensation for privileged access across federally owned lands for operators accessing their leaseholds.
- The existing regulations do not provide a means for the NPS, as appropriate, to recover the costs for processing and monitoring nonfederal oil and gas operations in parks.

The NPS has identified the following draft objectives for revising the 9B regulations:

- All operations within the boundary of NPS units are regulated under the 9B regulations.
- Operating standards are updated to incorporate new scientific findings, technologies, and methods least damaging to park resources and values.
- The public and park staff are protected from health and safety hazards associated with nonfederal oil and gas operations.
- Financial assurance is adequate to ensure that park resources and values are protected.
- The regulations provide a practical means for dealing with minor acts of noncompliance or with illegal operations (unauthorized operations).
- Fair compensation for an operator's use of federal land outside of its leasehold is obtained.
- Regulations are more understandable to the regulated operating community, public, and park staff.
- Directional drilling operations are regulated to retain incentives for operators to site operations outside of parks but still retain the NPS' ability to protect park resources and values to the fullest extent practical.

The draft and final 9B Regulations Revision EIS will be made available to all known interested parties and appropriate agencies. Full public participation by Federal, State, and local agencies as well as other concerned organizations and private citizens is invited throughout the preparation process of this document.

The responsible official for this 9B Regulations Revision EIS is Herbert Frost, Associate Director for Natural Resources Stewardship and Science, 1849 C Street, NW., Room 3130, Washington, DC 20240–0001.

Dated: December 10, 2010.

Herbert C. Frost,

Associate Director, Natural Resource Stewardship and Science.

[FR Doc. 2010–32545 Filed 12–29–10; 8:45 am]

BILLING CODE 4310–EH–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0259; FRL–9245–8]

Approval and Promulgation of Implementation Plans; Ohio; Volatile Organic Compound Emission Control Measures for Lithographic and Letterpress Printing in Cleveland

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On March 9, 2010, the Ohio Environmental Protection Agency (Ohio EPA) submitted revisions to its previously approved offset lithographic and letterpress printing volatile organic compound (VOC) rule for approval into the Ohio State Implementation Plan (SIP). This submittal revises certain compliance date and recordkeeping requirements of this rule, which was previously approved as satisfying the VOC reasonably available control technology (RACT) requirement for Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Medina, Portage and Summit Counties. These rule revisions are approvable because they satisfy the requirements of RACT and the Clean Air Act (CAA).

DATES: Comments must be received on or before January 31, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2010–0259, by one of the following methods:

• *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

• *E-mail: mooney.john@epa.gov.*

• *Fax:* (312) 692–2551.

• *Mail:* John M. Mooney, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

• *Hand Delivery:* John M. Mooney, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, 18th floor, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office's normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2010–0259. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Steven Rosenthal at (312) 886–6052 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Steven Rosenthal, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6052.

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

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

When submitting comments, remember to:

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

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

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

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

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

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

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

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

II. What action is EPA taking today?

EPA is proposing to approve Ohio's revised offset lithographic and letterpress printing rule (OAC 3745–21–22), submitted to EPA on March 9, 2010, into the Ohio SIP. This VOC rule applies to offset lithographic and letterpress printing operations in Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Medina, Portage and Summit Counties.

III. What is the purpose of this action?

The primary purpose of this action is to allow an alternative for demonstrating compliance with add-on control requirements, and to specify recordkeeping requirements, when a recipe log is maintained for each batch of fountain solution or cleaning solution.

IV. What is EPA's analysis of Ohio's submitted VOC rule?

General discussion of rule—This rule applies to offset lithographic and letterpress printing facilities in Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Medina, Portage and Summit Counties, the former Cleveland-Akron 8-hour ozone nonattainment area whose actual VOC emissions, before the application of control systems, are equal to or greater than three tons of VOCs per rolling twelve-month period. Under this rule, a heatset web offset lithographic printing press, or a heatset web letterpress printing press, with potential VOC ink oil emissions from the press dryer that are greater than 25 tons per year before control must maintain dryer air pressure lower than the pressroom air pressure and have a control system that achieves 90 percent control (or 95 percent control for a control system installed after the effective date of this rule) or maintain a maximum VOC outlet concentration of 20 ppmv. This rule restricts the VOC content of fountain solutions used by offset lithographic presses, based on the type of offset lithographic press in use at a facility. Cleaning solutions used on subject lithographic or letterpress printing presses must either be at or below 70 percent by weight VOC, or be at or below ten millimeters of mercury at 20 degrees Celsius. This rule also contains the appropriate test methods

for determining the VOC concentration of the exhaust stream and the VOC content of the fountain solution and cleaning solution. This rule includes methods to determine the vapor pressure of the cleaning solution. The rule also includes monitoring and recordkeeping requirements to ensure that the control systems are operating properly, to establish whether the VOC content of the cleaning solution and fountain solution are in compliance with the applicable limits, and to establish whether an offset lithographic or letterpress printing facility is subject to one or more of the control requirements of the rule. This rule is consistent with the VOC control requirements in the September 2006 EPA guidance document "Control Techniques Guidelines for Offset Lithographic Printing and Letterpress Printing." The Control Technique Guideline documents were required to be established by the CAA and establish RACT for their respective source categories. In addition, the recordkeeping and other provisions result in enforceable control requirements.

Discussion of Rule Revisions

The rule at 3745–21–22(E)(2)(a) specifies compliance dates for offset lithographic or letterpress printing facilities that are achieving compliance by using an add-on control device. These facilities are allowed to demonstrate compliance with an emission test conducted prior to the effective date of the rule if an approved EPA test method was used, the operation of the press(es) was consistent with their current operating conditions and, if requested, the test was witnessed by the Ohio EPA. This is a reasonable alternative which allows a printing facility to take advantage of a well documented test to demonstrate compliance and is therefore approvable.

The rule at 3745–21–22(G)(3) specifies recordkeeping requirements for owners or operators maintaining a recipe log for each batch of fountain solution prepared for use in their press. This recipe log must identify all recipes used to prepare the as-applied fountain solution and clearly identify the VOC content of each concentrated alcohol substitute added to make the fountain solution as well as the proportions in which the fountain solution is mixed and the calculated VOC content of the final, mixed recipe.

The rule at 3745–21–22(G)(4) specifies recordkeeping requirements for owners or operators maintaining a recipe log for each batch of cleaning solution prepared. This recipe log must identify all recipes used to prepare the as-applied cleaning solution and clearly identify the VOC content of each cleaning solution or the VOC composite partial vapor pressure. The revisions to the recordkeeping requirements in 3745–21–22(G)(3) and 3745–21–22(G)(4) are approvable because the resulting records are sufficient to determine whether complying fountain and cleaning solutions have been used.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR Part 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.

List of Subjects in 40 CFR Part 52

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

Dated: December 17, 2010.

Bharat Mathur,

Acting Regional Administrator, Region 5.

[FR Doc. 2010–32928 Filed 12–29–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2010–1033; FRL–9244–8]

RIN–2060–AQ66

Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program; Proposed Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to correct its previous full approval of Texas's Clean Air Act (CAA) Prevention of Significant Deterioration (PSD) program to be a partial approval and partial disapproval and is proposing a Federal Implementation Plan (FIP) for Texas. This action is based on EPA's determination that Texas's PSD program is flawed because the state did not address how the program would apply to all pollutants that would become newly subject to regulation in the future, including non-National Ambient Air Quality Standard (NAAQS) pollutants, among them greenhouse gases (GHGs). The partial disapproval requires EPA to promulgate a FIP and so EPA is also proposing a FIP in order to assure that GHG-emitting sources in Texas are able to proceed with plans to construct or expand. In the "Rules" section of this **Federal Register**, we are taking this action including the FIP

through an interim final rule that is effective immediately.

DATES: *Comments.* Comments must be received on or before February 12, 2011.

Public Hearing: A public hearing will be held on January 14, 2011. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the comment period and public hearing.

ADDRESSES: *Comments.* Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–1033, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* Attention Docket ID No. EPA–HQ–OAR–2010–1033, U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Avenue, NW., Mail code: 6102T, Washington, DC 20460. Please include a total of 2 copies.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), 1301 Constitution Avenue, Northwest, Room 3334, Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2010–1033. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2010–1033. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, avoid any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, Air Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

Public Hearing. The January 14, 2011, public hearing will be held at Crowne Plaza Hotel Dallas Downtown, 1015 Elm Street, Dallas, Texas, *phone:* (214) 742–5678. The public hearing will convene at 10 a.m. and will end at 7 p.m. or until the last registered speaker has spoken. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the public hearing.

FOR FURTHER INFORMATION CONTACT: For information on this proposed rule, contact Ms. Cheryl Vetter, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, NC 27711; *telephone number:* (919) 541–4391; *fax number:* (919) 541–5509; *e-mail address: vetter.cheryl@mailto:epa.gov.*

If you would like to present oral testimony at the public hearing, please contact Ms. Pamela Long, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Planning Division, (C504–03), Research Triangle Park, NC 27711, telephone (919) 541–0641, fax number (919) 541–5509, *e-mail address: long.pam@epa.gov* (preferred method for registering), no later than January 12, 2011. If using e-mail, please provide the following information: Time you wish to speak (morning, afternoon, evening), name, affiliation, address, e-mail address, and telephone and fax numbers.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

The only governmental entity potentially affected by this rule is the State of Texas. Other entities potentially affected by this rule also include sources in all industry groups within the State of Texas, which have a direct obligation under the CAA to obtain a PSD permit for GHGs for projects that meet the applicability thresholds set forth in the Tailoring Rule.[1] This independent obligation on sources is specific to PSD and derives from CAA section 165(a). The majority of entities potentially affected by this action are expected to be in the following groups:

Industry group	NAICS [a]
Utilities (electric, natural gas, other systems)	2211, 2212, 2213
Manufacturing (food, beverages, tobacco, textiles, leather)	311, 312, 313, 314, 315, 316
Wood product, paper manufacturing	321, 322
Petroleum and coal products manufacturing	32411, 32412, 32419
Chemical manufacturing	3251, 3252, 3253, 3254, 3255, 3256, 3259
Rubber product manufacturing	3261, 3262
Miscellaneous chemical products	32552, 32592, 32591, 325182, 32551

[1] "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule;" Final Rule. 75 FR 31514 (June 3, 2010).

Industry group	NAICS [a]
Nonmetallic mineral product manufacturing	3271, 3272, 3273, 3274, 3279
Primary and fabricated metal manufacturing	3311, 3312, 3313, 3314, 3315, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329
Machinery manufacturing	3331, 3332, 3333, 3334, 3335, 3336, 3339
Computer and electronic products manufacturing	3341, 3342, 3343, 3344, 3345, 4446
Electrical equipment, appliance, and component manufacturing	3351, 3352, 3353, 3359
Transportation equipment manufacturing	3361, 3362, 3363, 3364, 3365, 3366, 3366, 3369
Furniture and related product manufacturing	3371, 3372, 3379
Miscellaneous manufacturing	3391, 3399
Waste management and remediation	5622, 5629
Hospitals/nursing and residential care facilities	6221, 6231, 6232, 6233, 6239
Personal and laundry services	8122, 8123
Residential/private households	8141
Non-residential (commercial)	Not available. Codes only exist for private households, construction and leasing/sales industries.

[a] North American Industry Classification System.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this proposal will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this notice will be posted on the EPA's NSR Web site, under Regulations & Standards, at *http://www.epa.gov/nsr*.

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

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2010–1033.

2. *Tips for preparing your comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

D. What information should I be aware of if I plan to attend the public hearing?

The January 14, 2011, public hearing will provide interested parties the opportunity to present data, views, or arguments concerning this proposal. The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing. Written comments on the proposed rule must be postmarked by February 12, 2011, 30 days after the January 14, 2011 hearing. Commenters should notify Ms. Long if they will need specific equipment, or if there are other special needs related to providing comments at the hearing. The EPA will provide equipment for commenters to show overhead slides or make computerized slide presentations if we receive special requests in advance. Oral testimony will be limited to 5 minutes for each commenter. The EPA encourages commenters to provide EPA with a copy of their oral testimony electronically (via e-mail or CD) or in hard copy form. The hearing schedule, including lists of speakers, will be posted on EPA's Web site *http://www.epa.gov/nsr*. Verbatim transcripts of the hearing and written statements will be included in the docket for the rulemaking. EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing to run either ahead of schedule or behind schedule.

D. How is the preamble organized?

The information presented in this preamble is organized as follows:

II. Proposed Action

We have published an interim final rule in the "Rules" section of this **Federal Register** to revise our previous full approval of Texas's PSD state implementation plan (SIP) to a partial approval and partial disapproval (the "Interim Final Rule"), and to implement a FIP to apply the PSD program to those non-NAAQS pollutants to which the Texas PSD program does not already apply. We have explained our reasons for this action in the preamble to that rule. The reader is referred to the Interim Final Rule for detailed information on this proposed action.

We solicit comment on all aspects of the rationale and legal basis for our determination that the Texas PSD program was flawed at the time we approved and therefore that we erred in approving it; and our approach to correcting our error, i.e., converting our previous full approval of the Texas PSD SIP to a partial approval and partial disapproval using the error correction mechanism under CAA section 110(k)(6). This includes our finding that the Texas PSD SIP's failure to address, or provide assurances of having adequate legal authority, concerning the application of PSD to all pollutants newly subject to regulation, including non-NAAQS pollutants, constitutes a flaw that existed at the time that EPA granted full approval of that program in 1992. This also includes our legal authority and approach for correcting our error in previously granting full approval of the Texas PSD SIP, including relying on the error correction provisions under CAA section 110(k)(6) and our general authority to reconsider our actions under CAA sections 110 and 301(a). We also solicit comment on our justification for proceeding with this rulemaking, including promulgating and implementing the FIP, as soon as possible in order to provide a permitting authority and thereby allow Texas sources to avoid delays in construction and modification. Finally, EPA specifically requests comments on the regulatory language included in the interim final rule. We are not soliciting comment on, and will not address, comments on issues addressed in what we call the Endangerment Finding,[2] the Light-Duty Vehicle Rule,[3] the Johnson Memo Reconsideration[4] and the Tailoring Rule,[5] or the 1978, 1980, or 2002 PSD rules.[6] These issues include, but are not limited to, (i) EPA's interpretation of the CAA as directly applying PSD requirements to major emitting facilities independent of any SIP requirements, and (ii) the applicability of PSD to non-NAAQS pollutants.

III. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The OMB has previously approved the information collection requirements contained in the existing regulations for PSD (*see, e.g.,* 40 CFR 52.21) under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0003. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

[2] "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66,496 (December 15, 2009).

[3] "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25,324 (May 7, 2010).

[4] "Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 FR 17004 (April 2, 2010). This action finalizes EPA's response to a petition for reconsideration of "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program" (commonly referred to as the "Johnson Memo"), December 18, 2008.

[5] "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule." 75 FR 31514 (June 3, 2010).

[6] 67 FR 80186 (Dec. 31, 2002); 45 FR 52676 (Aug. 7, 1980); 43 FR 26380 (June 19, 1978); and 43 FR 26388 (June 19, 1978).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this notice on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (*see* 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Although this rule could lead to federal permitting requirements for certain sources in Texas, those sources are large emitters of GHGs and tend to be large sources. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. The action may impose a duty on Texas to meet their existing obligation for PSD SIP submittal, but with lesser expenditures. Thus, this proposed rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action applies only to Texas.

E. Executive Order 13132—Federalism

This action does not have federalism implications. It will not have substantial direct effects on Texas, on the relationship between the national

government and Texas, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. With this action, EPA is only proposing to revise its previous full approval of the Texas PSD SIP to be a partial approval and partial disapproval to correct an error made in granting full approval, and to put a FIP in place in order to assure that GHG-emitting sources in Texas are able to proceed with plans to construct or expand until Texas revises its SIP. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicits comment on this proposed rule from state and local officials.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). In this action, EPA is not addressing any tribal implementation plans. This action is limited to Texas's PSD SIP. Thus, Executive Order 13175 does not apply to this action.

Although Executive Order 13175 does not apply to this proposed rule, EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because EPA is only proposing to revise its previous full approval of the Texas PSD SIP to be a partial approval and partial disapproval to correct an error made in granting full approval, and to put a FIP in place in order to assure that GHG-emitting sources in Texas are able to proceed with plans to construct or expand.

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. With this action, EPA is only proposing to revise its previous full approval of the Texas PSD SIP to be a partial approval and partial disapproval to correct an error made in granting full approval, and to put a FIP in place in order to assure that GHG-emitting sources in Texas are able to proceed with plans to construct or expand.

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 EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, 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 U.S.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. With this action, EPA is only proposing to revise its previous full approval of the Texas PSD SIP to be a partial approval and partial disapproval to correct an error made in granting full approval.

K. CAA section 307(d)(1)

Pursuant to section 307(d)(1)(B) and (V) of the CAA, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(B) provides that the provisions of section 307(d) apply to the promulgation or a FIP by the Administrator under CAA section 110(c) and section 307(d)(1)(V) provides that the provisions of section 307(d) apply to "such other actions as the Administrator may determine."

IV. Statutory Authority

The statutory authority for this action is provided by sections 101, 110, 114, 116, and 301 of the CAA as amended (42 U.S.C. 7401, 7410, 7414, 7416, and 7601).

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Carbon monoxide, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Incorporation by reference, Intergovernmental relations, Lead, Methane, Nitrogen dioxide, Nitrous oxide, Ozone, Particulate matter, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride, Sulfur oxides, Volatile organic compounds.

Dated: December 23, 2010.

Lisa P. Jackson,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be 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. Section 52.2305 is added to read as follows:

§ 52.2305 What are the requirements of the Federal Implementation Plan (FIP) to issue permits under the Prevention of Significant Deterioration requirements to sources that emit greenhouse gases?

(a) The requirements of sections 160 through 165 of the Clean Air Act are not met to the extent the plan, as approved, for Texas does not apply with respect to emissions of the pollutant GHGs from certain stationary sources. Therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby made a part of the plan for Texas for:

(1) Beginning on [THE EFFECTIVE DATE OF THE FINAL RULE], the pollutant GHGs from stationary sources described in § 52.21(b)(49)(iv), and

(2) Beginning July 1, 2011, in addition to the pollutant GHGs from sources described under paragraph (a)(1) of this section, stationary sources described in § 52.21(b)(49)(v).

(b) For purposes of this section, the "pollutant GHGs" refers to the pollutant GHGs, as described in § 52.21(b)(49)(i).

(c) In addition, the United States Environmental Protection Agency shall take such action as is appropriate to assure the application of PSD requirements to sources in Texas for any other pollutants that become subject to regulation under the federal Clean Air Act for the first time after January 2, 2011.

[FR Doc. 2010–32785 Filed 12–29–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R04–OAR–2010–0392(b); FRL–9246–5]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants; State of Florida; Control of Large Municipal Waste Combustor (LMWC) Emissions From Existing Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of administrative change.

SUMMARY: EPA is proposing to approve the Clean Air Act (CAA) section 111(d)/129 State Plan submitted by the Florida Department of Environmental Protection (FDEP) for the State of Florida on July 12, 2007, for implementing and enforcing the Emissions Guidelines (EGs) applicable to existing Large Municipal Waste Combustors (LMWCs). These EGs apply to municipal waste combustors with a capacity to combust more than 250 tons per day of municipal solid waste (MSW). See 40 CFR part 60, subpart Cb. In the Final Rules section of this **Federal Register**, EPA is approving the State's 111(d)/129 plan revision submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments.

DATES: Comments must be received in writing by January 31, 2011.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R04–OAR–2010–0392 by one of the following methods:

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

2. *E-mail:* garver.daniel@epa.gov.

3. *Fax:* (404) 562–9095.

4. *Mail:* EPA–R04 OAR–2010–0392, Daniel Garver, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303.

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

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Daniel Garver, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9839. Mr. Garver can also be reached via electronic mail at *garver.daniel@epa.gov.*

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule which is published in the Rules Section of this **Federal Register**. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

Dated: November 8, 2010.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2010–32973 Filed 12–29–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

RIN 0648–XJ00 and RIN 0648–XN50

Endangered and Threatened Wildlife and Plants; Proposed Listing Determinations for Five Distinct Population Segments of Atlantic Sturgeon; Extension of Public Comment Period

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

ACTION: Proposed rule; extension of public comment period.

SUMMARY: NMFS hereby extends the comment period on the proposed listing of five distinct population segments (DPSs) of Atlantic sturgeon as endangered or threatened until February 3, 2011. The five DPSs were proposed for listing in two separate proposed listing determinations, published on October 6, 2010.

DATES: Comments and information regarding the proposed rules published October 6, 2010 (75 FR 61872; 75 FR 61904) must be received by February 3, 2011.

ADDRESSES: You may submit comments, identified by RIN 0648–XJ00 or RIN 0648–XN50, by any of the following methods:

- *Federal eRulemaking Portal: http//www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* To the attention of Lynn Lankshear at (978) 281–9394 for RIN 0648–XJ00, or to Kelly Shotts at (727) 824–5309 for RIN 0648–XN50.
- *Mail or hand-delivery:* For RIN 0648–XJ00, submit written comments to the Assistant Regional Administrator for Protected Resources, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. For RIN 0648–XN50, submit written comments to the Assistant Regional Administrator for Protected Resources, NMFS, Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

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

We will accept anonymous comments (enter "n/a" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

The proposed rule, status review report, and other reference materials regarding this determination are available electronically at the NMFS Web sites *http://www.nero.noaa.gov/prot_res/CandidateSpeciesProgram/cs.htm,* and *http://www.sero.nmfs.noaa.gov/pr/sturgeon.htm.*

FOR FURTHER INFORMATION CONTACT: Lynn Lankshear, NMFS, Northeast Regional Office (978) 282–8473; Kimberly Damon-Randall, NMFS, Northeast Regional Office (978) 282–8485; Kelly Shotts, NMFS, Southeast Regional Office (727) 824–5312; or Lisa Manning, NMFS, Office of Protected Resources (301) 713–1401.

SUPPLEMENTARY INFORMATION:

On October 6, 2010, we, NMFS, published two proposed rules (75 FR 61872; 75 FR 61904) to list the Gulf of Maine DPS of Atlantic sturgeon as threatened and the New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs as endangered under the Endangered Species Act of 1973 (ESA), as amended.

NMFS subsequently received requests to extend the public comment period for an additional 90 days. NMFS has determined that an extension of 30 days, until February 3, 2011, making the full comment period 120 days, will allow adequate time for the public to thoroughly review and comment on the proposed rules while still providing the agency with sufficient time to meet our statutory deadlines.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: December 23, 2010.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 2010–32967 Filed 12–29–10; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 75, No. 250
Thursday, December 30, 2010

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 70–2010]

Foreign-Trade Zone 158—Vicksburg/Jackson, MS; Application for Expansion

Correction

In notice document 2010–31877 beginning on page 79335 in the issue of Monday, December 20, 2010, make the following correction:

The subject is corrected to read as set forth above.

[FR Doc. C1–2010–31877 Filed 12–29–10; 8:45 am]

BILLING CODE 1505–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before January 19, 2011. Address written comments to Statutory Import Programs Staff, Room 3720, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m.. at the U.S. Department of Commerce in Room 3720.

Docket Number: 10–067. Applicant: University of Chicago, Argonne LLC, 9700 South Cass Ave., Lemont, IL 60439. *Instrument:* Pilatus 100K Pixel Detector System. *Manufacturer:* Dectris Ltd., Switzerland. *Intended Use:* The instrument will be used to study Small-Angle X-ray Scattering (SAXS) for chemical, biological, and materials science, time resolved diffraction, and x-ray surface diffraction for magnetic materials. The instrument is the first and only commercially available pixel array detector for x-ray applications. The instrument's unique capabilities are a high detection efficiency (no readout noise and direct detection scheme), high dynamic range (20-bits), and fast readout speeds. *Justification for Duty-Free Entry:* There are no instruments of the same general category being manufactured in the United States. *Application accepted by Commissioner of Customs:* December 6, 2010.

Docket Number: 10–068. *Applicant:* University of Chicago, Argonne LLC, 9700 South Cass Ave., Lemont, IL 60439. *Instrument:* Pilatus 300K Pixel Detector System. *Manufacturer:* Dectris Ltd., Switzerland. *Intended Use:* The instrument will be used for wide angle SAXS, involving biological systems (proteins, RNA, DNA), catalysis reactions, and soft-condensed matter physics (*e.g.,* ordering of polymers and colloidal suspensions). The instrument's unique capabilities are a high detection efficiency (no readout noise and direct detection scheme), high dynamic range (20-bits), and fast readout speeds. *Justification for Duty-Free Entry:* There are no instruments of the same general category being manufactured in the United States. *Application accepted by Commissioner of Customs:* December 6, 2010.

Docket Number: 10–069. *Applicant:* University of Minnesota School of Dentistry, 6–150 MoosT, 515 Delaware St., S E, Minneapolis, MN 55455. *Instrument:* Dental Imaging System: Cross-Polarization Swept-Source Optical Coherence Tomography with a MEMS Handpiece. *Manufacturer:* Santec Corporation, Japan. *Intended Use:* The main use for the instrument is to study the oral biofilm of dental decay in children. This custom made imaging system will image under resin composite dental fillings. The three crucial aspects of the instrument are size (the hand piece is 16 X 15 X 80 mm), speed (can operate at 30 kHz swept source speed), and image contrast (able to suppress the parallel polarization by 30 dB*). Justification for Duty-Free Entry:* There are no instruments of the same general category being manufactured in the United States. *Application accepted by Commissioner of Customs:* December 8, 2010.

Dated: December 22, 2010.

Gregory Campbell,

Director, IA Subsidies Enforcement Office.

[FR Doc. 2010–32934 Filed 12–29–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Vanderbilt University, et al.; Notice of Consolidated Decision on Applications for Duty-Free Entry of Electron Microscopes

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Room 3720, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 10–065. *Applicant:* Vanderbilt University, Nashville, TN 37235. *Instrument:* Electron Microscope. *Manufacturer:* FEI Company, Czech Republic. *Intended Use: See* notice at 75 FR 73034, November 29, 2010.

Docket Number: 10–066. *Applicant:* Vanderbilt University, Nashville, TN 37235. *Instrument:* Electron Microscope. *Manufacturer:* JEOL Limited, Japan. *Intended Use: See* notice at 75 FR 73034, November 29, 2010.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as these instruments are intended to be used, was being manufactured in the United States at the time the instruments were ordered. *Reasons:* Each foreign instrument is an electron microscope and is intended for research or scientific educational uses requiring an electron microscope. We know of no electron microscope, or any other instrument suited to these purposes, which was being manufactured in the United States at the time of order of each instrument.

Dated: December 22, 2010.

Gregory W. Campbell,

Director, Subsidies Enforcement Office, Import Administration.

[FR Doc. 2010–32936 Filed 12–29–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–890]

Wooden Bedroom Furniture From the People's Republic of China: Continuation of Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* December 30, 2010.

SUMMARY: As a result of the determinations by the Department of Commerce ("Department") and the International Trade Commission ("ITC") that revocation of the antidumping duty order on wooden bedroom furniture from the People's Republic of China ("PRC") would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, the Department is publishing a notice of continuation of the antidumping duty order.

FOR FURTHER INFORMATION CONTACT: Magd Zalok, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4162.

SUPPLEMENTARY INFORMATION: On December 1, 2009, the Department published the notice of initiation of a sunset review of the antidumping duty order on wooden bedroom furniture from the PRC pursuant to section 751(c) of the Tariff Act of 1930, as amended ("the Act"). *See Initiation of Five-Year ("Sunset") Review,* 74 FR 62748 (December 1, 2009). As a result of its review, the Department determined that revocation of the antidumping duty order on wooden bedroom furniture from the PRC would likely lead to a continuation or recurrence of dumping and, therefore, notified the ITC of the magnitude of the margins likely to prevail should the order be revoked. *See Wooden Bedroom Furniture From the People's Republic of China: Final Results of Expedited Sunset Review of Antidumping Duty Order,* 75 FR 19364 (April 14, 2010).

On November 30, 2010, the ITC determined, pursuant to section 751(c) of the Act, that revocation of the antidumping duty order on wooden bedroom furniture from the PRC would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Wooden Bedroom Furniture From China,* 75 FR 80528 (December 22, 2010), and *Wooden Bedroom Furniture from China* (Inv. Nos. 731–TA–1058 (Review), USITC Publication 4203 (December 2010)).

Scope of the Order

The product covered by the order is wooden bedroom furniture. Wooden bedroom furniture is generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups, or bedrooms, in which all of the individual pieces are of approximately the same style and approximately the same material and/or finish. The subject merchandise is made substantially of wood products, including both solid wood and also engineered wood products made from wood particles, fibers, or other wooden materials such as plywood, strand board, particle board, and fiberboard, with or without wood veneers, wood overlays, or laminates, with or without non-wood components or trim such as metal, marble, leather, glass, plastic, or other resins, and whether or not assembled, completed, or finished.

The subject merchandise includes the following items: (1) Wooden beds such as loft beds, bunk beds, and other beds; (2) wooden headboards for beds (whether stand-alone or attached to side rails), wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds; (3) night tables, night stands, dressers, commodes, bureaus, mule chests, gentlemen's chests, bachelor's chests, lingerie chests, wardrobes, vanities, chessers, chifforobes, and wardrobe-type cabinets; (4) dressers with framed glass mirrors that are attached to, incorporated in, sit on, or hang over the dresser; (5) chests-on-chests,[1] highboys,[2] lowboys,[3] chests of drawers,[4] chests,[5] door chests,[6] chiffoniers,[7] hutches,[8] and armoires;[9] (6) desks, computer stands, filing cabinets, book cases, or writing tables that are attached to or incorporated in the subject merchandise; and (7) other bedroom furniture consistent with the above list.

The scope of the order excludes the following items: (1) Seats, chairs, benches, couches, sofas, sofa beds, stools, and other seating furniture; (2) mattresses, mattress supports (including box springs), infant cribs, water beds, and futon frames; (3) office furniture, such as desks, stand-up desks, computer cabinets, filing cabinets, credenzas, and bookcases; (4) dining room or kitchen furniture such as dining tables, chairs, servers, sideboards, buffets, corner cabinets, china cabinets, and china hutches; (5) other non-bedroom furniture, such as television cabinets, cocktail tables, end tables, occasional tables, wall systems, book cases, and entertainment systems; (6) bedroom furniture made primarily of wicker, cane, osier, bamboo or rattan; (7) side rails for beds made of metal if sold separately from the headboard and footboard; (8) bedroom furniture in which bentwood parts predominate;[10] (9) jewelry armoires;[11] (10) cheval

[1] A chest-on-chest is typically a tall chest-of-drawers in two or more sections (or appearing to be in two or more sections), with one or two sections mounted (or appearing to be mounted) on a slightly larger chest; also known as a tallboy.

[2] A highboy is typically a tall chest of drawers usually composed of a base and a top section with drawers, and supported on four legs or a small chest (often 15 inches or more in height).

[3] A lowboy is typically a short chest of drawers, not more than four feet high, normally set on short legs.

[4] A chest of drawers is typically a case containing drawers for storing clothing.

[5] A chest is typically a case piece taller than it is wide featuring a series of drawers and with or without one or more doors for storing clothing. The piece can either include drawers or be designed as a large box incorporating a lid.

[6] A door chest is typically a chest with hinged doors to store clothing, whether or not containing drawers. The piece may also include shelves for televisions and other entertainment electronics.

[7] A chiffonier is typically a tall and narrow chest of drawers normally used for storing undergarments and lingerie, often with mirror(s) attached.

[8] A hutch is typically an open case of furniture with shelves that typically sits on another piece of furniture and provides storage for clothes.

[9] An armoire is typically a tall cabinet or wardrobe (typically 50 inches or taller), with doors, and with one or more drawers (either exterior below or above the doors or interior behind the doors), shelves, and/or garment rods or other apparatus for storing clothes. Bedroom armoires may also be used to hold television receivers and/or other audio-visual entertainment systems.

[10] As used herein, bentwood means solid wood made pliable. Bentwood is wood that is brought to a curved shape by bending it while made pliable with moist heat or other agency and then set by cooling or drying. See Customs' Headquarters' Ruling Letter 043859, dated May 17, 1976.

[11] Any armoire, cabinet or other accent item for the purpose of storing jewelry, not to exceed 24 in width, 18 in depth, and 49 in height, including a minimum of 5 lined drawers lined with felt or felt-like material, at least one side door (whether or not the door is lined with felt or felt-like material), with necklace hangers, and a flip-top lid with inset mirror. See Issues and Decision Memorandum from Laurel LaCivita to Laurie Parkhill, Office Director, Concerning Jewelry Armoires and Cheval Mirrors in

Continued

mirrors;[12] (11) certain metal parts;[13] (12) mirrors that do not attach to, incorporate in, sit on, or hang over a dresser if they are not designed and marketed to be sold in conjunction with a dresser as part of a dresser-mirror set; (13) upholstered beds[14] and (14) toy boxes.[15]

Imports of subject merchandise are classified under subheading 9403.50.9040 of the HTSUS as "wooden * * * beds" and under subheading 9403.50.9080 of the HTSUS as "other * * * wooden furniture of a kind used in the bedroom." In addition, wooden headboards for beds, wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds may also be entered under subheading 9403.50.9040 of the HTSUS as "parts of wood" and framed glass mirrors may also be entered under subheading 7009.92.5000 of the HTSUS as "glass mirrors * * * framed." This order covers all WBF meeting the above description, regardless of tariff classification. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Continuation of the Order

As a result of these determinations by the Department and the ITC that revocation of the antidumping duty order would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping order on wooden bedroom furniture from the PRC. U.S. Customs and Border Protection will continue to collect antidumping duty cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the order will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act, the Department intends to initiate the next five-year review of the order not later than 30 days prior to the fifth anniversary of the effective date of continuation.

This five-year (sunset) review and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act.

Dated: December 22, 2010.

Christian Marsh,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–32937 Filed 12–29–10; 8:45 am]

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the Antidumping Duty Investigation of Wooden Bedroom Furniture from the People's Republic of China, dated August 31, 2004. *See also Wooden Bedroom Furniture From the People's Republic of China: Notice of Final Results of Changed Circumstances Review and Revocation in Part*, 71 FR 38621 (July 7, 2006).

[12] Cheval mirrors are any framed, tiltable mirror with a height in excess of 50 that is mounted on a floor-standing, hinged base. Additionally, the scope of the order excludes combination cheval mirror/jewelry cabinets. The excluded merchandise is an integrated piece consisting of a cheval mirror, *i.e.*, a framed tiltable mirror with a height in excess of 50 inches, mounted on a floor-standing, hinged base, the cheval mirror serving as a door to a cabinet back that is integral to the structure of the mirror and which constitutes a jewelry cabinet line with fabric, having necklace and bracelet hooks, mountings for rings and shelves, with or without a working lock and key to secure the contents of the jewelry cabinet back to the cheval mirror, and no drawers anywhere on the integrated piece. The fully assembled piece must be at least 50 inches in height, 14.5 inches in width, and 3 inches in depth. *See Wooden Bedroom Furniture From the People's Republic of China: Final Results of Changed Circumstances Review and Determination to Revoke Order in Part,* 72 FR 948 (January 9, 2007).

[13] Metal furniture parts and unfinished furniture parts made of wood products (as defined above) that are not otherwise specifically named in this scope (*i.e.*, wooden headboards for beds, wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds) and that do not possess the essential character of wooden bedroom furniture in an unassembled, incomplete, or unfinished form. Such parts are usually classified under the Harmonized Tariff Schedule of the United States ("HTSUS") subheading 9403.90.7000.

[14] Upholstered beds that are completely upholstered, *i.e.*, containing filling material and completely covered in sewn genuine leather, synthetic leather, or natural or synthetic decorative fabric. To be excluded, the entire bed (headboards, footboards, and side rails) must be upholstered except for bed feet, which may be of wood, metal, or any other material and which are no more than nine inches in height from the floor. *See Wooden Bedroom Furniture from the People's Republic of China: Final Results of Changed Circumstances Review and Determination to Revoke Order in Part,* 72 FR 7013 (February 14, 2007).

[15] To be excluded the toy box must: (1) Be wider than it is tall; (2) have dimensions within 16 inches to 27 inches in height, 15 inches to 18 inches in depth, and 21 inches to 30 inches in width; (3) have a hinged lid that encompasses the entire top of the box; (4) not incorporate any doors or drawers; (5) have slow-closing safety hinges; (6) have air vents; (7) have no locking mechanism; and (8) comply with American Society for Testing and Materials (ASTM) standard F963–03. Toy boxes are boxes generally designed for the purpose of storing children's items such as toys, books, and playthings. *See Wooden Bedroom Furniture from the People's Republic of China: Final Results of Changed Circumstances Review and Determination to Revoke Order in Part,* 74 FR 8506 (February 25, 2009). Further, as determined in the scope ruling memorandum "Wooden Bedroom Furniture from the People's Republic of China: Scope Ruling on a White Toy Box," dated July 6, 2009, the dimensional ranges used to identify the toy boxes that are excluded from the wooden bedroom furniture order apply to the box itself rather than the lid.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–805]

Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Circular Welded Non-Alloy Steel Pipe From Mexico

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) has determined that Lamina y Placa Comercial, S.A. de C.V. (Lamina y Placa) is the successor-in-interest to Tuberia Nacional, S.A. de C.V. (TUNA) and, as a result, should be accorded the same treatment previously accorded TUNA in regard to the antidumping duty order on certain circular welded non-alloy steel pipe (circular welded pipe) from Mexico.

DATES: *Effective Date:* December 30, 2010.

FOR FURTHER INFORMATION CONTACT: Mark Flessner or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Room 7866, Washington, DC 20230; *telephone:* (202) 482–6312 or (202) 482–0649, respectively.

Background

The Department published an antidumping duty order on circular welded pipe from Mexico on November 2, 1992. *See Notice of Antidumping Duty Orders: Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela, and Amendment to Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Non-Alloy Steel Pipe from Korea,* 57 FR 49453 (November 2, 1992).

On May 17, 2010, TUNA and Lamina y Placa jointly filed a request for a changed circumstances review of the antidumping duty order on circular welded pipe from Mexico. TUNA and Lamina y Placa claim that Lamina y Placa is the successor-in-interest to TUNA in accordance with section 751(b) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.216. TUNA and Lamina y Placa provided documentation supporting their assertion.

On November 22, 2010, the Department issued the initiation and preliminary results of the changed circumstances review of the antidumping duty order on circular welded pipe from Mexico. *See Notice of*

Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review: Certain Circular Welded Non-Alloy Steel Pipe from Mexico, 75 FR 71072 (November 22, 2010) (*Preliminary Results*). The Department made its preliminary determination that Lamina y Placa is the successor-in-interest to TUNA and should be treated as such for antidumping duty cash deposit purposes. In the Preliminary Results, we stated that interested parties could submit case briefs to the Department no later than 15 days after the publication of the *Preliminary Results* in the **Federal Register,** and submit rebuttal briefs, limited to the issues raised in those case briefs, five days subsequent to the case briefs' due date. No party submitted case briefs or other comments on the *Preliminary Results.*

Scope of the Order

The merchandise covered by this order is circular welded non-alloy steel pipes and tubes, of circular cross-section, not more than 406.4 millimeters (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or end finish (plain end, beveled end, threaded, or threaded and coupled). These pipes and tubes are generally known as standard pipes and tubes and are intended for the low-pressure conveyance of water, steam, natural gas, and other liquids and gases in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses, and generally meet ASTM A–53 specifications. Standard pipe may also be used for light load-bearing applications, such as for fence tubing, and as structural pipe tubing used for framing and support members for reconstruction or load-bearing purposes in the construction, shipbuilding, trucking, farm equipment, and related industries. Unfinished conduit pipe is also included in this order. All carbon steel pipes and tubes within the physical description outlined above are included within the scope of this order, except line pipe, oil country tubular goods, boiler tubing, mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished conduit. Standard pipe that is dual or triple certified/stenciled that enters the United States as line pipe of a kind used for oil or gas pipelines is also not included in this order.

Imports of the products covered by this order are currently classifiable under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive.

Final Results of Changed Circumstances Review

Based on the information provided by Lamina y Placa, the Department's analysis in the Preliminary Results (which we incorporate herein by reference), and in light of the fact that interested parties did not submit any comments during the comment period, the Department hereby determines that Lamina y Placa is the successor-in-interest to TUNA for antidumping duty cash deposit purposes.

Instructions to U.S. Customs and Border Protection

The Department will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all shipments of the subject merchandise produced and exported by Lamina y Placa entered, or withdrawn from warehouse, for consumption, on or after the publication date of this notice in the **Federal Register** at the rate of 2.92 percent (*i.e.,* TUNA's cash deposit rate). *See Circular Welded Non-Alloy Steel Pipe From Mexico: Amended Final Results of Antidumping Duty Administrative Review,* 66 FR 37454 (July 18, 2001). This deposit requirement shall remain in effect until further notice.

Notification

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.306. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This notice is in accordance with sections 751(b) and 777(i)(1) and (2) of the Act and 19 CFR 351.216(e).

Dated: December 23, 2010.

Christian Marsh,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–32939 Filed 12–29–10; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

North American Free Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of requests for Panel Review.

SUMMARY: On December 22, 2010, IUSA, S.A. de C.V. ("IUSA") and Nacional de Cobre, S.A. de C.V. ("Nacobre"), and their U.S. affiliates Cambridge-Lee Industries LLC and Copper and Brass International filed a First Request for Panel Review with the United States Section of the NAFTA Secretariat pursuant to Article 1904 of the North American Free Trade Agreement. Second and Third Requests for Panel Review were filed by GD Affiliates S. de. R.L. de C.V., and its U.S. affiliate GD Copper (U.S.A.), and the Government of Mexico, respectively. Panel review was requested of the final determination by the U.S. International Trade Commission that an industry in the United States is threatened with material injury by reason of imports of Seamless Refined Copper Pipe and Tube from China and Mexico. This determination was published in the **Federal Register** (75 FR 71,146), on November 22, 2010. The NAFTA Secretariat has assigned Case Number USA–MEX–2010–1904–02 to these requests.

FOR FURTHER INFORMATION CONTACT: Valerie Dees, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, NW., Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the North American Free Trade Agreement ("Agreement") established a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from a NAFTA country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1994, the Government of the United States, the Government of Canada, and the Government of Mexico established

Rules of Procedure for Article 1904 Binational Panel Reviews ("Rules"). These Rules were published in the **Federal Register** on February 23, 1994 (59 FR 8686).

Three Requests for Panel Review were filed with the United States Section of the NAFTA Secretariat, pursuant to Article 1904 of the Agreement, on December 22, 2010, requesting a panel review of the determination and order described above.

The Rules provide that:

(a) A Party or interested person may challenge the final determination in whole or in part by filing a Complaint in accordance with Rule 39 within 30 days after the filing of the first Request for Panel Review (the deadline for filing a Complaint is January 21, 2011);

(b) a Party, investigating authority or interested person that does not file a Complaint but that intends to appear in support of any reviewable portion of the final determination may participate in the panel review by filing a Notice of Appearance in accordance with Rule 40 within 45 days after the filing of the first Request for Panel Review (the deadline for filing a Notice of Appearance is February 7, 2011); and

(c) the panel review shall be limited to the allegations of error of fact or law, including the jurisdiction of the investigating authority, that are set out in the Complaints filed in panel review and the procedural and substantive defenses raised in the panel review.

Dated: December 23, 2010.

Valerie Dees,

United States Secretary, NAFTA Secretariat.

[FR Doc. 2010–32881 Filed 12–29–10; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of First Request for Panel Review.

SUMMARY: On December 22, 2010, the Government of Mexico filed a First Request for Panel Review with the United States Section of the NAFTA Secretariat pursuant to Article 1904 of the North American Free Trade Agreement. Panel Review was requested of the final determination by the U.S. Department of Commerce regarding Sales at Less Than Fair Value on Seamless Refined Copper Pipe and Tube from Mexico and the People's Republic of China. This determination was published in the **Federal Register** (75 Fed. Reg. 71070), on November 22, 2010. The NAFTA Secretariat has assigned Case Number USA–MEX–2010–1904–03 to this request.

FOR FURTHER INFORMATION CONTACT: Valerie Dees, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, NW., Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the North American Free Trade Agreement ("Agreement") established a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from a NAFTA country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1994, the Government of the United States, the Government of Canada, and the Government of Mexico established *Rules of Procedure for Article 1904 Binational Panel Reviews* ("Rules"). These Rules were published in the **Federal Register** on February 23, 1994 (59 FR 8686).

A first Request for Panel Review was filed with the United States Section of the NAFTA Secretariat, pursuant to Article 1904 of the Agreement, on December 22, 2010, requesting a panel review of the determination and order described above.

The Rules provide that:

(a) A Party or interested person may challenge the final determination in whole or in part by filing a Complaint in accordance with Rule 39 within 30 days after the filing of the first Request for Panel Review (the deadline for filing a Complaint is January 21, 2011);

(b) a Party, investigating authority or interested person that does not file a Complaint but that intends to appear in support of any reviewable portion of the final determination may participate in the panel review by filing a Notice of Appearance in accordance with Rule 40 within 45 days after the filing of the first Request for Panel Review (the deadline for filing a Notice of Appearance is February 7, 2011); and

(c) the panel review shall be limited to the allegations of error of fact or law, including the jurisdiction of the investigating authority, that are set out in the Complaints filed in panel review and the procedural and substantive defenses raised in the panel review.

Dated: December 23, 2010.

Valerie Dees,

United States Secretary, NAFTA Secretariat.

[FR Doc. 2010–32883 Filed 12–29–10; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–917]

Laminated Woven Sacks From the People's Republic of China: Rescission of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is rescinding the administrative review of the countervailing duty order on laminated woven sacks (sacks) from the People's Republic of China (PRC) for the period January 1, 2009, to December 31, 2009, with respect to Zibo Aifudi Plastic Packaging Co., Ltd. (Zibo Aifudi). Since Zibo Aifudi was the only party that requested a review and is the only producer/exporter subject to review, this notice also serves to rescind the entire administrative review. This rescission is based on Zibo Aifudi's timely withdrawal of its request for review.

DATES: *Effective Date:* December 30, 2010.

FOR FURTHER INFORMATION CONTACT: Justin M. Neuman, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–0486.

SUPPLEMENTARY INFORMATION:

Background

On August 7, 2008, the Department published in the **Federal Register** the countervailing duty order on sacks from the PRC. *See Laminated Woven Sacks From the People's Republic of China: Countervailing Duty Order,* 73 FR 45955 (August 7, 2008). On August 2, 2010, the Department published a notice announcing the opportunity to request an administrative review of the countervailing duty order on sacks from the PRC for the period January 1, 2009,

through December 31, 2009. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 75 FR 45094 (August 2, 2010). On August 26, 2010, in accordance with 19 CFR 351.213(b), the Department received a timely request from Zibo Aifudi, a Chinese producer and exporter to the United States of sacks, to conduct an administrative review of the company under the countervailing duty order on sacks from the PRC for the period January 1, 2009, through December 31, 2009.

In accordance with section 751(a)(1) of the Tariff Act of 1930 (the Act) and 19 CFR 351.221(c)(1)(i), on September 29, 2010, the Department published a notice initiating an administrative review of Zibo Aifudi under the countervailing duty order. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 75 FR 60076 (September 29, 2010). On November 3, 2010, Zibo Aifudi withdrew its request for review.

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if the party that requested the review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. On November 3, 2010, Zibo Aifudi withdrew its request for review within the 90-day period, and no other party requested a review. Therefore, pursuant to 19 CFR 351.213(d)(1), the Department is rescinding this administrative review.

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess countervailing duties at the cash deposit rate in effect on the date of entry, for entries during the period January 1, 2009, through December 31, 2009. The Department intends to issue appropriate assessment instructions to CBP 15 days after publication of this notice of rescission of administrative review.

Notification Regarding Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213(d)(4).

Dated: December 22, 2010.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–32938 Filed 12–29–10; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration (NOAA)

NOAA's Office of Ocean Exploration and Research (OER) Strategic Plan FY 2011–FY 2015

AGENCY: Office of Ocean Exploration and Research (OER), Oceanic and Atmospheric Research (OAR), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability and request for public comment.

SUMMARY: NOAA's Office of Ocean Exploration and Research (OER) is seeking comments on the revised draft OER STRATEGIC PLAN Fiscal Year (FY) 2011–2015, submitted to meet the requirement for program direction under Public Law 111–11, Section 12104(b). The draft OER STRATEGIC PLAN describes the vision, mission, core activities, and organization of the Office of Ocean Exploration and Research.

DATES: Comments on this draft report must be received by 5 p.m., February 3, 2011.

ADDRESSES: You may submit comments, identified by XRIN 0648–XV56, by any one of the following methods:

Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov.*

Fax: (703) 713–1967, Attn: Yvette Jefferson.

Mail: NOAA Office of Ocean Exploration and Research (OER), ATTN: OER Plan Comments, 1315 East-West Highway, R/OER, Silver Spring, Maryland 20910.

Hand Delivery to Silver Spring Metro Center 3: 1315 East-West Highway, Room 10151, Silver Spring, Maryland.

Instructions: No comments will be posted for public viewing until after the comment period has closed. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. OAR will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Electronic copies of the draft OER Strategic Plan and Public Law 111–11 Chapter XII may be obtained from *http://www.regulations.gov* or from the OER Web site at *http://explore.noaa.gov/OERPlan.*

FOR FURTHER INFORMATION OR QUESTIONS CONTACT: *OERPlan.Questions@noaa.gov* or NOAA Office of Ocean Exploration and Research (OER), ATTN: OER Plan Questions, 1315 East-West Highway, R/OER, Silver Spring, Maryland 20910.

SUPPLEMENTARY INFORMATION: NOAA's Office of Ocean Exploration and Research (OER) is seeking comments on the draft OER STRATEGIC PLAN Fiscal Year (FY) 2011–2015, submitted to meet the requirement for program direction under Public Law 111–11, Section 12104(b). The preparation of the report was also directed by the Appropriations Committee in the Joint Explanatory Statement and Senate Report (S. Rept. 110–124) accompanying the Consolidated Fiscal Year 2008 Appropriations (Pub. L. 110–161).

OER seeks to better understand our ocean frontiers through bold and innovative exploration, research and technology development. The Office explores, maps, observes, detects and characterizes ocean areas and phenomena; obtaining archiving, and distributing ocean data in new ways to describe the ocean's living and nonliving resources and physical, chemical and biological characteristics. Data and observations resulting from OER investments will result in new discoveries, insights, knowledge and identification of new frontiers, and will likely lead to new or revised understandings of our largely unknown ocean. The draft OER STRATEGIC PLAN describes how NOAA will implement Chapter XII of Public Law 111–11 through the vision, mission, core activities, and organization of the Office of Ocean Exploration and Research.

NOAA welcomes all comments on the content of the draft report, especially with respect to implementation of the

research aspect of the organization. We also request comments on any inconsistencies perceived within the report, and possible omissions of important topics or issues. This draft report is being issued for comment only and is not intended for interim use. For any shortcoming noted within the report, please propose specific remedies. Suggested changes will be incorporated where appropriate, and a final report will be posted on the OER Web site.

Please follow these instructions for preparing and submitting comments. Overview comments should be provided first and should be numbered. Comments that are specific to particular pages or paragraphs of the section should follow any overview comments and should identify the page numbers to which they apply. Please number each page of your comments. Following these instructions will facilitate the processing of comments and assure that all comments are appropriately considered.

Dated: December 23, 2010.

Mark E. Brown,

Acting Chief Financial Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2010–32886 Filed 12–29–10; 8:45 am]

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DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

[Docket No. PTO–C–2010–0091]

National Medal of Technology and Innovation Call for 2011 Nominations

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice and request for nominations.

SUMMARY: The Department of Commerce (United States Patent and Trademark Office) is accepting nominations for the National Medal of Technology and Innovation (NMTI). Since establishment by Congress in the Stevenson-Wydler Technology Innovation Act of 1980, the President of the United States has awarded the National Medal of Technology and Innovation (initially known as the National Medal of Technology) annually to our nation's leading innovators. If you know of a candidate who has made an outstanding, lasting contribution to the economy through the promotion of technology or technological manpower, you may obtain a nomination form from: *http://go.usa.gov/1dU.*

DATES: The deadline for submission of a nomination is March 31, 2011.

ADDRESSES: The NMTI nomination form for the year 2011 may be obtained by visiting the USPTO Web site at *http://go.usa.gov/1dU.* Nomination applications should be submitted to Richard Maulsby, Program Manager, National Medal of Technology and Innovation Program, by electronic mail to: *NMTI@uspto.gov;* or by mail to Richard Maulsby, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450.

FOR FURTHER INFORMATION CONTACT: Richard Maulsby, Program Manager, National Medal of Technology and Innovation Program, United States Patent and Trademark Office, 600 Dulany Street, Alexandria, VA 22314; telephone (571) 272–8333, or by electronic mail to: *nmti@uspto.gov.*

SUPPLEMENTARY INFORMATION:

Background: Enacted by Congress in the Stevenson-Wydler Technology Innovation Act of 1980, the National Medal of Technology was first awarded in 1985. On August 9, 2007, the President signed the America COMPETES (Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science) Act of 2007. The Act amended Section 16 of the Stevenson-Wydler Technology Innovation Act of 1980, changing the name of the Medal to the "National Medal of Technology and Innovation." The Medal is the highest honor awarded by the President of the United States to America's leading innovators in the field of technology and is given annually to individuals, teams, or companies who have made outstanding contributions to the promotion of technology and technological manpower for the improvement of the economic, environmental or social well-being of the United States.

The primary purpose of the National Medal of Technology and Innovation is to recognize American innovators whose vision, creativity, and brilliance in moving ideas to market has had a profound and lasting impact on our economy and way of life. The Medal highlights the national importance of fostering technological innovation based upon solid science, resulting in commercially successful products and services.

Eligibility and Nomination Criteria: Information on eligibility and nomination criteria is provided on the Nominations Guidelines at *http://go.usa.gov/1dU.*

Dated: December 21, 2010.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2010–32906 Filed 12–29–10; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–52–000]

Tennessee Gas Pipeline Company; Notice of Application

December 22, 2010.

Take notice that on December 15, 2010, Tennessee Gas Pipeline Company (Tennessee), 1001 Louisiana Street, Houston, Texas 77002, filed in Docket No. CP11–52–000 an application pursuant to section 7(b) of the Natural Gas Act (NGA) and the Commission Regulations, for authorization to abandon by sale to Tauber Pipeline L.L.C. (Tauber) three supply laterals and related facilities located in South Texas, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions concerning this application may be directed to James D. Johnston, Associate General Counsel, Tennessee Gas Pipeline Company, 1001 Louisiana Street, Houston, Texas 77002 at (713) 420–4998 or by e-mail at *james.johnston@elpaso.com.*

Specifically, Tennessee filed an application requesting approval for abandonment by sale to Tauber of three supply laterals: Tennessee's Line 5A–100, approximately 5.8 miles of 10-inch pipeline, Line No. 5A–200, approximately 32.2 miles of 12-inch pipeline, and Line No. 5A–300, approximately 6.2 miles of 6-inch pipeline.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or

issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and State agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit an original and 7 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: January 12, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32836 Filed 12–29–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13871–000—Colorado]

Wagon Wheel Associates; Notice of Availability of Environmental Assessment

December 22, 2010.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the application for exemption from licensing for the Humphreys Hydroelectric Project, to be located on Goose Creek (in the Rio Grande River basin), near the town of South Fork, in Mineral County, Colorado, and has prepared an Environmental Assessment (EA). In the EA, Commission staff analyze the potential environmental effects of the proposed project and conclude that issuing an exemption for the proposed project, with appropriate environmental measures, would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the EA is on file with the Commission and is available for public inspection. The EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/esubscribenow.htm* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

Please contact Carolyn Templeton by telephone at (202) 502–8785 or by e-mail at *carolyn.templeton@ferc.gov* if you have any questions.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32842 Filed 12–29–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2424–000]

Pinetree Power—Tamworth, Inc.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 22, 2010.

This is a supplemental notice in the above-referenced proceeding of Pinetree Power-Tamworth, Inc.'s application for market-based rate authority, with an accompanying rate tariff, 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 January 11, 2011.

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 are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32835 Filed 12–29–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2446–000]

Blue Pilot Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 22, 2010.

This is a supplemental notice in the above-referenced proceeding of Blue Pilot Energy, LLC's application for market-based rate authority, with an accompanying rate tariff, 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 January 11, 2011.

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 are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32840 Filed 12–29–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2449–000]

Connecticut Gas & Electric, Inc.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 22, 2010.

This is a supplemental notice in the above-referenced proceeding of Connecticut Gas & Electric, Inc.'s application for market-based rate authority, with an accompanying rate tariff, 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 January 11, 2011.

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 are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32841 Filed 12–29–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2437–000]

ABN Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 22, 2010.

This is a supplemental notice in the above-referenced proceeding of ABN Energy, LLC's application for market-based rate authority, with an accompanying rate tariff, 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 January 11, 2011.

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 are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32838 Filed 12–29–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2438–000]

ASC Energy Services, Inc.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 22, 2010.

This is a supplemental notice in the above-referenced proceeding of ASC Energy Services, Inc.'s application for market-based rate authority, with an accompanying rate tariff, 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 January 11, 2011.

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 are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32839 Filed 12–29–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2436–000]

Oracle Energy Services, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 22, 2010.

This is a supplemental notice in the above-referenced proceeding of Oracle Energy Services, LLC's application for market-based rate authority, with an accompanying rate tariff, 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 January 11, 2011.

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 are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32837 Filed 12–29–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM01–5–000]

Electronic Tariff Filings; Notice of Technical Conference

December 22, 2010.

Take notice that on January 21, 2011, from 9 a.m. to 12 noon (EST), a technical conference will be held to discuss issues relating to the electronic filing of tariff and tariff related materials pursuant to Order No. 714.[1] The technical conference will cover the following areas: (1) The addition to the *Type of Filing* CSV file of the FERC regulatory citation for each filing type as used by the Commission's eLibrary Description for eTariff filings; (2) an explanation and discussion of the eTariff Viewer's Export file format and data elements which is being developed; (3) a change in the description for Type Of Filing Codes 1120 and 1150 from "Market-Based Rate Request and Triennial Review" to "Market-Based Rate Triennial Review", to become effective January 24, 2011, in order to make clear that these filing codes should not be used for initial requests for market based rates; and (4) a discussion with FERC staff of lessons learn since the implementation of eTariff.

The technical conference is open to the public. The conference will be held at the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. In addition, the conference will be accessible via telephone. Staff will post documents it anticipates referencing during the conference on the eTariff Web site to make them accessible to those using the telephone.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice) or (202) 502–8659 (TTY), or send a fax to (202) 208–2106 with the required accommodations.

The telephone number for the conference will be posted on *http://www.ferc.gov/docs-filing/etariff.asp* and an RSS alert of the posting will be issued. No preregistration is required.

For more information, contact Keith Pierce, Office of Energy Market Regulation at (202) 502–8525 or send an e-mail to *ETariff@ferc.gov.*

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32843 Filed 12–29–10; 8:45 am]

BILLING CODE 6717–01–P

[1] *Electronic Tariff Filings,* Order No. 714, 73 FR 57,515 (Oct. 3, 2008), 124 FERC ¶ 61,270, FERC Stats. & Regs [Regulations Preambles] ¶ 31,276 (2008) (Sept. 19, 2008).

ENVIRONMENTAL PROTECTION AGENCY

[OW–FRL–9245–6]

Beaches Environmental Assessment and Coastal Health Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Availability of 2011 BEACH Act Grants.

SUMMARY: Section 406(b) of the Clean Water Act (CWA) as amended by the Beaches Environmental Assessment and Coastal Health (BEACH) Act authorizes EPA to award program development and implementation grants to eligible states, territories, tribes, and local governments to support microbiological monitoring and public notification of the potential for exposure to disease-causing microorganisms in coastal recreation waters, including the Great Lakes. EPA encourages coastal and Great Lakes states and tribes that have received BEACH Act grants in the past to apply for 2011 BEACH Act grants to implement effective coastal recreation water monitoring and public notification programs ("implementation grants"). EPA also encourages eligible tribes that have not previously received BEACH Act grants to apply for 2011 BEACH Act grants to develop effective and comprehensive coastal recreation water monitoring and public notification programs ("development grants").

DATES: States, Erie County, Pennsylvania, and tribes that previously received BEACH Act grants must submit applications on or before February 28, 2011. Other eligible tribes should notify the relevant EPA Regional BEACH Act grant coordinator of their interest in applying for a grant on or before February 14, 2011. Upon receipt of a tribe's notice of interest, EPA will establish an appropriate application deadline.

ADDRESSES: You must send your application to the appropriate EPA Regional grant coordinator listed in this notice under Section VII, Grant Coordinators.

FOR FURTHER INFORMATION CONTACT: Lars Wilcut, 1200 Pennsylvania Ave., NW., (4305T), Washington, DC 20460.

Telephone: (202) 566–0447. E-mail: *wilcut.lars@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

What is the BEACH Act?

The Beaches Environmental Assessment and Coastal Health (BEACH) Act of 2000 amends the Clean Water Act to better protect public health at our nation's beaches through improved water quality standards and beach monitoring and notification programs. The BEACH Act authorizes EPA to award grants to develop and implement monitoring and public notification programs for coastal recreation waters, consistent with EPA's required performance criteria. EPA published the required performance criteria for grants in its *National Beach Guidance and Required Performance Criteria for Grants* (EPA–823–B–02–004), on July 19, 2002. Currently, all 37 eligible states and tribes operate beach monitoring and notification programs using BEACH Act grant funds.

What is the statutory authority for BEACH Act grants?

The general statutory authority for BEACH Act grants is section 406(b) of the Clean Water Act, as amended by the BEACH Act, Public Law 106–284, 114 Stat. 970 (2000). It provides that, "(T)he Administrator may make grants to States and local governments to develop and implement programs for monitoring and notification for coastal recreation waters adjacent to beaches or similar points of access that are used by the public." CWA section 406(b)(2)(A), however, limits EPA's ability to award implementation grants only to those states and tribes that meet certain requirements (*see* Section II, Funding and Eligibility, below for information on specific requirements).

What activities are eligible for funding under the FY 2011 grants?

In fiscal year 2011, EPA intends to award grants authorized under CWA section 406(b) to eligible states and tribes to support the implementation of coastal recreation water monitoring and public notification programs that are consistent with EPA's required performance criteria for implementation grants. Also in fiscal year 2011, EPA intends to award development grants to eligible tribes to support the development of coastal recreation water monitoring and public notification programs that are consistent with EPA's performance criteria for grants. EPA published the required performance criteria for grants in its *National Beach Guidance and Required Performance Criteria for Grants* (EPA–823–B–02–004), on July 19, 2002. This document can be found on EPA's Web site at *http://water.epa.gov/grants_funding/beachgrants/guidance_index.cfm.* Copies of the document may also be obtained by writing, calling, or e-mailing: Office of Water Resource Center, U.S. Environmental Protection Agency, Mail Code RC–4100T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. (Phone: 202–566–1731 or e-mail: *center.water-resource@epa.gov*).

II. Funding and Eligibility

Who is eligible to apply for BEACH Act grants?

Coastal and Great Lake states that meet the requirements of CWA section 406(b)(2)(A) are eligible for grants in fiscal year 2011 to implement monitoring and notification programs. The definition of the term "state" in CWA section 502 includes the District of Columbia, and current U.S. territories: the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Tribes may also be eligible for BEACH Act grants. In order to be eligible, a tribe must have coastal recreation waters adjacent to beaches or similar points of access that are used by the public, and the tribe must demonstrate that it meets the "treatment in the same manner as a state" criteria in CWA section 518(e) for the purposes of receiving a section 406 BEACH Act grant.

Are local governments eligible for funding?

CWA section 406(b)(2)(B) authorizes EPA to make a grant to a local government for implementation of a monitoring and notification program only if, after July 19, 2003, EPA determines that the state within which the local government has jurisdiction is not implementing a program that meets the requirements of CWA section 406(b), which includes a requirement that the program is consistent with the performance criteria in *National Beach Guidance and Required Performance Criteria for Grants.* EPA has awarded an implementation grant to Erie County, Pennsylvania, the local government implementing the beach monitoring and notification program for all of Pennsylvania's coastal recreation waters. Local governments may contact their EPA Regional Office for further information about BEACH Act grants.

How may tribes apply for BEACH Act development grants and how much funding is available for tribes?

Section 518(e) of the CWA authorizes EPA to treat eligible Indian tribes in the same manner as states for the purpose of receiving CWA section 406 grant funding. For fiscal year 2011, EPA will make $100,000 available to eligible tribes. In order to be eligible for a CWA section 406 development grant, a tribe must have coastal recreation waters adjacent to beaches or similar points of access that are used by the public. The phrase "coastal recreation waters" is defined in CWA section 502(21) to mean the Great Lakes and marine coastal waters (including coastal estuaries) that are designated under CWA section 303(c) for use for swimming, bathing, surfing, or similar water contact activities. The statute explicitly excludes from the definition inland waters and waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea. In addition, a tribe must demonstrate that it meets the "treatment in the same manner as a state" (TAS) criteria contained in CWA section 518(e) for purposes of receiving a CWA section 406 grant. To demonstrate TAS, the tribe must show that it: (1) Is federally recognized; (2) has a governing body carrying out substantial governmental duties and powers; (3) will be exercising functions pertaining to waters within the reservation; and (4) is reasonably expected to be capable of carrying out the functions consistent with the CWA and all applicable regulations. EPA encourages those tribes with coastal recreation waters to contact their EPA Regional BEACH Act grant coordinator for further information regarding the application process as soon as possible.

Are there any additional eligibility requirements and grant conditions applicable to states and tribes?

Yes, there are additional eligibility requirements and grant conditions. First, CWA section 406(b)(2)(A) identifies eligibility requirements for implementation grants and CWA section 406(c) identifies conditions of receipt of a monitoring and notification grant. These requirements are discussed in the *National Beach Guidance and Required Performance Criteria for Grants.*

In addition, there are special reporting requirements for BEACH Act grants. See Section VI below.

How much funding is available?

For fiscal year 2011, the total available for BEACH Act grants is

expected to be $9,900,000. EPA expects to award all but $100,000 to eligible states for implementation grants. EPA intends to award the remaining $100,000 to eligible tribes. If EPA does not award any grants to eligible tribes, EPA will redistribute the money to eligible states using the base allocation formula described below.

How will the funding for states be allocated?

For fiscal year 2011, EPA expects to award grants to all eligible states who apply for funding based on a grant allocation formula that combines the formula that the Agency originally developed in 2002 ("base allocation formula") with a supplemental allocation formula introduced with the fiscal year 2010 grants (*see* 75 FR 1373, January 11, 2010).

How does EPA expect to allocate 2011 BEACH Act grant funds?

For 2011, the total available for BEACH Act grants is expected to be $9,900,000. Two tribes, the Grand Portage Band of Lake Superior Chippewa and the Makah Indian Nation, are expected to receive grants of $50,000 each (assuming no other grants are awarded to other eligible tribes), leaving $9,800,000 for grants to states and territories, $205,280 of which will be allocated using the supplemental allocation formula. Assuming all 35 states with coastal recreation waters apply and meet the statutory eligibility requirements for implementation grants (and have met the statutory grant conditions applicable to previously awarded section 406 grants), the allocation of the funds for year 2011 is expected to be:

For the state or territory of:	The year 2011 allocation is expected to be:	Portion of the total that is the supplemental allocation
Alabama	$268,000	$5,628
Alaska	154,000	4,183
American Samoa	306,000	4,183
California	524,000	9,888
Connecticut	228,000	4,260
Delaware	216,000	5,628
Florida	539,000	11,257
Georgia	293,000	6,997
Guam	307,000	4,183
Hawaii	331,000	8,443
Illinois	249,000	5,705
Indiana	209,000	2,814
Louisiana	325,000	2,814
Maine	260,000	5,628
Maryland	276,000	7,074
Massachusetts	263,000	8,443
Michigan	288,000	9,811
Minnesota	209,000	4,183
Mississippi	262,000	4,183
New Hampshire	209,000	4,260
New Jersey	285,000	7,074
New York	357,000	8,443
North Carolina	311,000	8,443
Northern Marianas	306,000	2,814
Ohio	228,000	4,260
Oregon	234,000	5,551
Pennsylvania	227,000	4,260
Puerto Rico	123,000	0
Rhode Island	220,000	6,997
South Carolina	305,000	8,443
Texas	392,000	8,443
U.S. Virgin Islands	306,000	2,814
Virginia	282,000	5,628
Washington	277,000	6,920
Wisconsin	231,000	5,628

What if a state does not apply or does not qualify for funding?

EPA expects that all 35 states and territories will apply for a grant. If fewer than 35 states apply for the allocated amount, or if any applicant fails to meet the statutory eligibility requirements (or the statutory conditions applicable to previously awarded section 406 grants), then EPA will distribute available grant funds to eligible states in the following order:

(1) States that meet the eligibility requirements for implementation grants and that have met the statutory conditions applicable to previously awarded section 406 grants will be awarded the full amount of funds allocated to the state under the formula described above.

(2) EPA may award program implementation grants to local governments in states that the Agency determines have not met the requirements for implementation grants.

(3) Consistent with CWA section 406(h), EPA will use grant funds to conduct a beach monitoring and notification program in the case of a state that has no program for monitoring and notification that is consistent with EPA's grant performance criteria.

What if a state or tribe cannot use all of its allocation?

If a state or tribe cannot use all of its allocation, the Regional Administrator may award the unused funds to any eligible coastal or Great Lake grant recipient in the Region for the continued development or implementation of its coastal recreation water monitoring and notification program. If, after re-allocation, there are

still unused funds within the Region, EPA Headquarters will redistribute these funds to any eligible coastal or Great Lake BEACH Act grant recipient according to the supplemental formula described in the **Federal Register** notice announcing the availability of the fiscal year 2010 grants (75 FR 1373, January 11, 2010).

How will the funding for tribes be allocated?

EPA expects to apportion the $100,000 set aside for tribal grants evenly among all eligible tribes that apply for funding.

What is the expected duration of funding and projects?

The expected funding and project periods for implementation grants awarded in fiscal year 2011 is one year.

Does EPA require matching funds?

Recipients do not have to provide matching funds for BEACH Act grants. EPA retains the option to establish a match requirement in the future based on a review of state program activity and funding levels.

III. Eligible Activities

Recipients of implementation grants may use funds for activities to support implementing a beach monitoring and notification program that is consistent with the required performance criteria for grants specified in the document, *National Beach Guidance and Required Performance Criteria for Grants* (EPA–823–B–02–004). Recipients of development grants may use the funds to develop a beach monitoring and notification program consistent with the performance criteria. EPA expects that grantees will send a representative to EPA's National Beach Conference. Costs for attending this conference will be provided for in the grant agreement, if necessary, in accordance with 2 CFR part 225, Appendix B, Item 27.

IV. Selection Process

EPA Regional Offices will award CWA section 406 grants through a non-competitive process. EPA expects to award grants to all eligible state, tribal, and territorial applicants that meet the applicable requirements described in this notice.

Who has the authority to award BEACH Act grants?

The Administrator has delegated the authority to award BEACH Act grants to the Regional Administrators.

V. Application Procedure

What is the Catalog of Federal Domestic Assistance (CFDA) number for the BEACH Monitoring and Notification Program Implementation grants?

The number assigned to the BEACH Act grants is 66.472, Program Code CU.

Can BEACH Act grant funds be included in a Performance Partnership grant?

For fiscal year 2011, BEACH Act grants cannot be included in a Performance Partnership Grant.

What is the application process?

Your application package should contain completed:

- EPA SF–424 Application for Federal Assistance, and
- Program Summary.

In order for EPA to determine that a state or local government is eligible for an implementation grant, the applicant must submit documentation with its application to demonstrate that its program is consistent with the performance criteria. The Program Summary must contain sufficient technical detail for EPA to confirm that a program meets the statutory eligibility requirements and statutory grant conditions for previously awarded CWA section 406 grants referenced in Section II (Funding and Eligibility) of this notice. The Program Summary must also describe how the State or local government used BEACH Act grant funds to develop and implement the beach monitoring and notification program, and how the program is consistent with the nine performance criteria in *National Beach Guidance and Required Performance Criteria for Grants* (EPA–823–B–02–004) which is found at *http://water.epa.gov/grants_funding/beachgrants/guidance_index.cfm.*

The Program Summary should also describe the state or local program's objectives for the grant year and target dates and milestones for timely project completion.

States, Erie County, and tribes that have previously been awarded BEACH Act grants must submit application packages to the appropriate EPA Regional Office by February 28, 2011. EPA will make an award after the Agency reviews the documentation and confirms that the program meets the applicable requirements. The Office of Management and Budget has authorized EPA to collect this information (BEACH Act Grant Information Collection Request, OMB control number 2040–0244). Please contact the appropriate EPA Regional Office for a complete application package. See Section VII for a list of EPA Regional Grant Coordinators or visit the EPA Beaches Web site at *http://water.epa.gov/type/oceb/beaches/contact.cfm.*

What should a tribe's Notice of Interest contain?

The Notice of Interest should include the tribe's name and the name and telephone number of a contact person.

Are Quality Assurance and Quality Control (QA/QC) required for applications?

Yes. Three specific QA/QC requirements must be met to comply with EPA's performance criteria for grants:

(1) Applicants must submit documentation that describes the quality system implemented by the state, territory, tribe, or local government. Documentation may be in the form of a Quality Management Plan or equivalent documentation.

(2) Applicants must submit a quality assurance project plan (QAPP) or equivalent documentation.

(3) Applicants are responsible for submitting documentation of the quality system and QAPP for review and approval by the EPA Quality Assurance Officer or his designee before they take primary or secondary environmental measurements. More information about the required QA/QC procedures is available in Chapter Four and Appendix H of *National Beach Guidance and Required Performance Criteria for Grants* (EPA–823–B–02–004).

VI. Reporting Requirements and Applicable Regulations

Are there reporting requirements?

Recipients must submit annual performance reports and financial reports as required in 40 CFR 31.40 and 31.41. The annual performance report explains changes to the beach monitoring and notification program during the grant year. It also describes how the grant funds were used to implement the program to meet the performance criteria listed in *National Beach Guidance and Required Performance Criteria for Grants* (EPA–823–B–02–004). The annual performance report required under 40 CFR 31.40 is due no later than 90 days after the grant year ends.

There are also special reporting requirements for BEACH Act grants. First, state grant recipients must submit to EPA a report that describes (1) data collected as part of the program for monitoring and notification as described in section 406(c), and (2) actions taken to notify the public when water quality

standards are exceeded. (*See* CWA section 406(b)(3)(A) and the *National Beach Guidance and Required Performance Criteria for Grants.*) Grant recipients must submit to EPA the monitoring and notification reports for any beach season by January 31 of the year following the beach season (68 FR 15446, 15449 (March 31, 2003)). For the 2011 beach season, the deadline for states to submit complete and correct reports is January 31, 2012.

In addition, grant recipients must report to EPA, latitude, longitude and mileage data on (1) the extent of beaches and similar points of public access adjacent to coastal recreation waters, and (2) the extent of those beaches that are monitored. EPA first established this requirement in the **Federal Register** notice for the fiscal year 2003 grants (68 FR 15446, 15447 (March 31, 2003)). EPA is continuing this requirement in order to capture any changes states, tribes, and local governments may make to their beach monitoring and notification programs. States, tribes, and local governments must report to EPA any changes to either the extent of their beaches or similar points of access, or to the extent of their beaches that are monitored.

As new predictive tools and methods of measuring water quality become more widespread, the ability to provide timely information to the public will increase. Coupled with improvements to the data submission process, it will be easier for states and EPA to make notification and water quality data available to the public. Therefore, EPA is considering requiring states to report to EPA more frequently than annually in the future. The Agency intends to review state and federal agency capabilities, resource constraints, and the impact of more frequent reporting, and make any necessary changes to the appropriate section of the *National Beach Guidance and Performance Criteria.* Any such changes would not affect reporting for the 2011 beach season.

What regulations apply to the award and administration of these grants?

The regulations at 40 CFR part 31 govern the award and administration of grants to states, tribes, local governments, and territories under CWA section 406(b). Allowable costs will be determined according to the cost principles outlined in 2 CFR part 225.

VII. Grant Coordinators

Headquarters—Washington, DC

Lars Wilcut, USEPA, 1200 Pennsylvania Ave., NW.—4305, Washington, DC 20460; T: 202–566–0447; F: 202–566–0409; *wilcut.lars@epa.gov.*

Region 1—Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island

Caitlyn Whittle, USEPA Region 1, 5 Post Office Square Suite 100 (OEP06–1), Boston, MA 02109–3912; T: 617–918–1748; F: 617–918–0748; *whittle.caitlyn@epa.gov.*

Region 2—New Jersey, New York, Puerto Rico, U.S. Virgin Islands

Helen Grebe, USEPA Region 2, 2890 Woodbridge Ave. MS220, Edison, NJ 08837–3679; T: 732–321–6797; F: 732–321–6616; *grebe.helen@epa.gov.*

Region 3—Delaware, Maryland, Pennsylvania, Virginia

Denise Hakowski, USEPA Region 3, 1650 Arch Street 3WP30, Philadelphia, PA 19103–2029; T: 215–814–5726; F: 215–814–2318; *hakowski.denise@epa.gov.*

Region 4—Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina

Joel Hansel, USEPA Region 4, 61 Forsyth St. 15th Floor, Atlanta, GA 30303–3415; T: 404–562–9274; F: 404–562–9224; *hansel.joel@epa.gov.*

Region 5—Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin

Holly Wirick, USEPA Region 5, 77 West Jackson Blvd. WT–16J, Chicago, IL 60604–3507; T: 312–353–6704; F: 312–886–0168; *wirick.holiday@epa.gov.*

Region 6—Louisiana, Texas

Mike Schaub, USEPA Region 6, 1445 Ross Ave. 6WQ–EW, Dallas, TX 75202–2733; T: 214–665–7314; F: 214–665–6689; *schaub.mike@epa.gov.*

Region 9—American Samoa, Commonwealth of the Northern Mariana Islands, California, Guam, Hawaii

Terry Fleming, USEPA Region 9, 75 Hawthorne St. WTR–2, San Francisco, CA 94105; T: 415- 972–3462; F: 415–947–3537; *fleming.terrence@epa.gov.*

Region 10—Alaska, Oregon, Washington

Rob Pedersen, USEPA Region 10, 120 Sixth Ave. OW–134, Seattle, WA 98101; T: 206–553–1646; F: 206–553–0165; *pedersen.rob@epa.gov.*

Dated: December 23, 2010.

Peter S. Silva,

Assistant Administrator for Water.

[FR Doc. 2010–32926 Filed 12–29–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8994–4]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements Filed 12/20/2010 Through 12/23/2010

Pursuant to 40 CFR 1506.9.

Notice

In accordance with Section 309(a) of the Clean Air Act, EPA is required to make its comments on EISs issued by other Federal agencies public. Historically, EPA met this mandate by publishing weekly notices of availability of EPA comments, which includes a brief summary of EPA's comment letters, in the **Federal Register**. Since February 2008, EPA has included its comment letters on EISs on its Web site at: *http://www.epa.gov/compliance/nepa/eisdata.html.* Including the entire EIS comment letters on the website satisfies the Section 309(a) requirement to make EPA's comments on EISs available to the public. Accordingly, on March 31, 2010, EPA discontinued the publication of the notice of availability of EPA comments in the **Federal Register**.

EIS No. 20100481, Draft EIS, FERC, CA, Eagle Mountain Pumped Storage Hydroelectric Project, Licensing Application for Eagle Mountain Mine, near the town of Desert Center, Riverside County, CA, Comment Period Ends: 02/14/2011, Contact: Kenneth Hogan 202–502–8434.

Amended Notices

EIS No. 20100449, Draft EIS, USFS, MT, Stillwater Mining Revised Water Management Plans and BOE Ranch LAD, Implementation, Stillwater and Nye Counties, MT, Comment Period Ends: 02/24/2011, Contact: Patrick Pierson 406–657–6200 Ext. 213.

Revision to FR Notice Published 11/26/2010: Extending Comment Period from 01/10/2011 to 02/24/2011.

Dated: December 27, 2010.

Ken Mittelholtz,

Deputy Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2010–32976 Filed 12–29–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9246–7]

Next Generation Risk Assessment Public Dialogue Conference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Public Dialogue Conference.

SUMMARY: As a part of the "Advancing the Next Generation of Risk Assessment" (NexGen) program, EPA is announcing a 2-day public dialogue conference to engage, inform, and encourage feedback from key stakeholders. The conference will take place on February 15 and 16, 2011 in Washington, DC and will be open to attendance by interested public participants on a first-come, first-serve basis up to the limits of available space.

DATES: The conference will be held on February 15, 2011 from 8 a.m. to 5:30 p.m. and on February 16, 2011 from 9 a.m. to 1 p.m.

ADDRESSES: The conference will take place at the Embassy Suites Convention Center, 900 10th Street, Northwest, Washington, DC 20001. ICF International, an EPA contractor, is providing logistical support for the conference. Questions regarding information, registration, and logistics for the workshop should be directed to Deshira Wallace, telephone: (703) 225–2910; e-mail: *epa_nexgen_workshop@icfi.com.* Questions regarding the scientific and technical aspects of the workshop should be directed to Audrey Hoffer, telephone: (703) 347–0218; e-mail: *hoffer.audrey@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary of Information About the Conference

The landscape of risk assessment is changing rapidly with new advances in molecular systems biology, the advent of several recent reports from the National Research Council, and volumes of new test data emerging from the Tox21 and European REACH programs. In response, EPA has developed the NexGen program, a collaborative exploration of new science and methods with the National Institutes of Environmental Health Sciences' National Toxicology Program, Center for Disease Control's Agency for Toxic Substances and Disease Registry, National Human Genome Research Institute, and the State of California's Environmental Protection Agency.

The NexGen program aims to create a cheaper, faster, and more robust system for chemical risk assessment by incorporating new knowledge about molecular system biology. This is the beginning of a process that will evolve over several years, and engaging key stakeholders from the beginning is central to making it a success. The NexGen public dialogue conference in February 2011 offers stakeholders an opportunity to become involved early, comment on the process, and help direct the next phases.

The conference will feature several informational presentations regarding the current science surrounding the NexGen program as well as highlights from an invitation-only scientists' meeting that took place in November 2010. Following these presentations, breakout sessions will be held in order to obtain public feedback and give stakeholders an opportunity to voice questions, comments, and concerns.

II. Conference Information

Members of the public may participate in the conference. Space is limited, and reservations will be accepted on a first-come, first-serve basis. For more information on how to register for the conference please visit: *http://epa.nexgen.icfi.com.* Further information regarding the conference and the NexGen program in general can be found at *http://www.epa.gov/risk/nexgen.*

Dated: December 22, 2010.

Darrell A. Winn,

Acting Director, National Center for Environmental Assessment.

[FR Doc. 2010–32977 Filed 12–29–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–1065; FRL–8854–8]

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 Tables 1A and 1B of Unit II., pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. This cancellation order follows two Notices of Receipt of Requests from the respective registrants listed in Table 2 of Unit II. The notice dated August 25, 2010, pertains to the fenoxycarb product registrations and the notice dated August 18, 2010, pertains to the propetamphos product registrations. In those notices, EPA indicated that it would issue an order implementing the cancellations, unless the Agency received substantive comments within the 30-day comment periods that would merit its further review of these requests, or unless the registrants withdrew their requests. The Agency did not receive any comments on the notice for fenoxycarb or propetamphos and neither request was withdrawn. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations. 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 as provided in Unit IV.

FOR FURTHER INFORMATION CONTACT: Matthew Lloyd, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0130; fax number: (703) 308–8090; e-mail address: *Lloyd.Matthew@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. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

EPA has established a docket for the fenoxycarb action under docket identification (ID) number EPA–HQ–OPP–2010–0623. EPA has established a docket for the propetamphos action under docket identification (ID) number EPA–HQ–OPP–2007–1195. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only

available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

II. What action is the agency taking?

This notice announces the cancellation, as requested by registrants, of products registered under FIFRA section 3. These registrations are listed in sequence by registration number in Tables 1A and 1B of this unit.

TABLE 1A—FENOXYCARB PRODUCT CANCELLATIONS

EPA registration No.	Product name
100–722	Award Fire Ant Bait.
100–723	Fenoxycarb Technical.
499–437	Whitmire PT 2120 TF Preclude.

TABLE 1B—PROPETAMPHOS PRODUCT CANCELLATIONS

EPA registration No.	Product name
002724–00313	Propetamphos Technical.
002724–00450	Zoecon 9001 EW.

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Tables 1A and 1B 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 1A and 1B of this unit.

TABLE 2—REGISTRANTS OF CANCELED PRODUCTS

EPA company No.	Company name and address
100	Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419–8300.
499	Whitmire Micro-Gen Research Laboratories, Inc., 3568 Tree Court Industrial Blvd., St. Louis, MO 63122–6682.
002724	Wellmark International, Attn: James McFadden, 1501 E. Woodfield Rd., Suite 200 West, Schaumberg, IL 60173.

III. Summary of Public Comments Received and Agency Response to Comments

During the public comment period provided, EPA received no comments in response to the August 18, 2010 or August 25, 2010 **Federal Register** notices announcing the Agency's receipt of the requests for voluntary cancellations of products listed in Tables 1A and 1B, respectively, of Unit II.

IV. Cancellation Order

Pursuant to FIFRA section 6(f), EPA hereby approves the requested cancellations of the registrations identified in Tables 1A and 1B of Unit II. Accordingly, for the fenoxycarb registrations (Table 1A), the Agency hereby orders that Syngenta Crop Protection, Inc.'s technical product (EPA Reg. No. 100–723) and the Whitmire Micro-Gen Research Laboratories, Inc.'s end-use product (EPA Reg. No. 499–437) are canceled effective immediately. The Agency further orders that Syngenta Crop Protection Inc.'s end-use product (EPA Reg. No. 100–722) is canceled effective December 31, 2012.

For the propetamphos registrations (Table 1B), the Agency hereby orders that propetamphos technical product (EPA Reg. No. 2724–313) is canceled effective immediately. The Agency further orders that the propetamphos end-use product (EPA Reg. No. 2724–450) is canceled effective March 30, 2012.

Any distribution, sale, or use of existing stocks of the products identified in Table 1A and 1B 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 canceled 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 the fenoxycarb action was published for comment in the **Federal Register** issue of August 25, 2010 (75 FR 53240) (FRL–8843–1). The comment period for fenoxycarb closed on September 24, 2010. The notice of receipt for the propetamphos action was published for comment in the **Federal Register** issue of August 18, 2010 (75 FR 51053) (FRL–8840–3). The comment period for propetamphos closed on September 17, 2010.

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. Disposition of Existing Stocks for All Fenoxycarb (Table 1A) Products

Syngenta Crop Protection, Inc. is prohibited from using, selling, or distributing technical fenoxycarb (EPA Reg. No. 100–723), except for (i) Export consistent with FIFRA section 17, (ii) for proper disposal, or (iii) to formulate existing stocks of the technical fenoxycarb (EPA Reg. No. 100–723) into its end-use product (EPA Reg. No. 100–722) effective immediately. After December 31, 2012, Syngenta Crop Protection, Inc. is prohibited from selling or distributing its end-use product (EPA Reg. No. 100–722), except for export consistent with FIFRA section 17 or for proper disposal. Persons other than Syngenta Crop Protection, Inc. are allowed to sell, distribute, and use existing stocks of the canceled end-use product (EPA Reg. No. 100–722) until supplies are exhausted, provided that such sale, distribution, and use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled product.

Whitmire Micro-Gen Research Laboratories, Inc. is permitted to sell and distribute existing stocks of its end-use fenoxycarb product (EPA Reg. No. 499–437) until December 31, 2013. Thereafter, Whitmire Micro-Gen Research Laboratories, Inc. is prohibited from selling or distributing its end-use product (EPA Reg. No. 499–437), except for export consistent with FIFRA section 17 or for proper disposal. Persons other than Whitmire Micro-Gen Research Laboratories, Inc. are allowed to sell, distribute, and use existing stocks of the canceled end-use product (EPA Reg. No. 499–437) until supplies are exhausted, provided that such sale, distribution, and use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled product.

B. Disposition of Existing Stocks for All Table 1B Products

Wellmark International is prohibited from using, selling, or distributing propetamphos technical (EPA Reg. No. 2724–313), except for (i) Export consistent with FIFRA section 17, (ii) for proper disposal or (iii) to formulate existing stocks of propetamphos technical (EPA Reg. No. 2724–313) into its propetamphos end-use product (EPA Reg. No. 2724–450) effective immediately. After March 30, 2012, Wellmark International is prohibited from using, as well as continuing to be prohibited from selling or distributing, its propetamphos technical (EPA Reg. No. 2724–313), except for export consistent with FIFRA section 17 or for proper disposal.

The cancellation of the propetamphos end-use product (EPA Reg. No. 2724–450) is effective March 30, 2012. Wellmark International is permitted to sell or distribute existing stocks of the canceled end-use product (EPA Reg. No. 2724–450) until such stocks are exhausted. Persons other than Wellmark International are allowed to sell, distribute, and use existing stocks of the canceled propetamphos end-use product (EPA Reg. No 2724–450) until supplies are exhausted, provided that such sale, distribution, and use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled product. The existing stocks provisions outlined in this notice are intended to allow depletion of the amount of technical propetamphos (EPA Reg. No. 2724–313) that Wellmark International currently has on-hand from purchases made prior to its decision to request voluntary cancellation. Use until depletion will preclude environmental disposal concerns of quantities of undiluted propetamphos that cannot be formulated or used.

List of Subjects

Environmental protection, Pesticides, Pests.

Dated: December 14, 2010.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2010–32923 Filed 12–29–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9245–7]

Notice of a Project Waiver of Section 1605 (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009 (ARRA) to the Buffalo Island Regional Water District, Monette, AR

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Regional Administrator of EPA Region 6 is hereby granting a project waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(2) [manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality] to the Buffalo Island Regional Water District ("District") for the purchase of a 15 horsepower (HP) vertical hollow shaft electric motor, for use in a water supply well. The 15 HP vertical hollow shaft electric motor is manufactured by foreign manufacturers and no United States manufacturer produces an alternative that meets the District's technical specifications. This is a project specific waiver and only applies to the use of the specified product for the ARRA funded project being proposed.

Any other ARRA project that may wish to use the same product must apply for a separate waiver based on the specific project circumstances. The Regional Administrator is making this determination based on the review and recommendations of the EPA Region 6, Water Quality Protection Division. The District has provided sufficient documentation to support its request.

The Assistant Administrator of the EPA's Office of Administration and Resources Management has concurred on this decision to make an exception to Section 1605 of ARRA. This action permits the purchase of a 15 HP vertical hollow shaft electric motor not manufactured in America, for the proposed project being implemented by the District.

DATES: *Effective Date:* December 17, 2010.

FOR FURTHER INFORMATION CONTACT: Nasim Jahan, Buy American Coordinator, (214) 665–7522, SRF & Projects Section, Water Quality Protection Division, U.S. EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733.

SUPPLEMENTARY INFORMATION:

In accordance with ARRA Section 1605(c) and 1605(b)(2), EPA hereby provides notice that it is granting a project waiver of the requirements of Section 1605(a) of Public Law 111–5, Buy American requirements to the District for the acquisition of a 15 HP vertical hollow shaft electric motor. The District has been unable to find an American made electric motor to meet its specific requirements of cross correlation functionality for pinpointing leaks throughout its water distribution system.

Section 1605 of the ARRA requires that none of the appropriated funds may be used for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States unless a waiver is provided to the recipient by EPA. A waiver may be provided if EPA determines that (1) applying these requirements would be inconsistent with public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and the relevant manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

The District's water system improvement project includes the development of a new water supply well serviced by a new vertical turbine well pump. The District has conducted a pumping test after the development of the new well and has determined that a 15 HP vertical hollow shaft electric motor is sufficient to provide the required production flow rate of 500 gallon per minute (gpm) at 87 feet Total Dynamic Head (TDH).

The District is requesting a waiver for the use of a 15 HP vertical hollow shaft electric motor on the basis that there are no domestic manufacturers of the electric motors that will meet the District's product specifications. The District contacted seventeen manufacturers and of the seventeen (17) listed manufacturers, only three (3) electric motor manufacturers were reported to make the 15 HP vertical hollow shaft electric motor, but none are manufactured in the United States.

Based on additional research conducted by EPA Region 6, there does not appear to be any domestic electric motor manufacturers that would meet the District's technical specifications. EPA's national contractor prepared a technical assessment report based on the waiver request submittal. The report

confirmed the waiver applicant's claim that there is no American-made 15 HP vertical hollow shaft electric motor available for use in a water supply well. Therefore, EPA Region 6 concludes that the District meets the "specifications in project plans and design."

EPA has determined that the District's waiver request is timely even though the request was made after the construction contract was signed. Consistent with the direction of the OMB Guidance at 2 CFR 176.120, EPA has evaluated the District's request to determine if the request constitutes a late request. EPA will generally regard waiver requests with respect to components that were specified in the bid solicitation or in a general/primary construction contract as "late" if submitted after the contract date. However, in this case EPA has determined that the District's request, though made after the contract date, may be treated as timely. This request is submitted after the contract date because the District was unable to specify the exact size of the motor until after the development of the new well and the completion of the pumping test. The need for a waiver was not determined until after the well contractor confirmed that there was no domestically made 15 HP vertical hollow shaft electric motor available to meet the project specifications. Accordingly, EPA will evaluate the request as a timely request.

The April 28, 2009 EPA HQ Memorandum, Implementation of Buy American provisions of Public Law 111–5, the "American Recovery and Reinvestment Act of 2009", defines reasonably available quantity as "the quantity of iron, steel, or relevant manufactured good is available or will be available at the time needed and place needed, and in the proper form or specification as specified in the project plans and design." The District has incorporated specific technical design requirements for installation of electric motor in its water supply well. Therefore, it meets the requirements of the "satisfactory quality" criterion for requesting a waiver from the Buy American provisions of Public Law 111–5.

The purpose of the ARRA is to stimulate economic recovery in part by funding current infrastructure construction, not to delay projects that are "shovel ready" by requiring utilities, such as the District, to revise their standards and specifications, institute a new bidding process, and potentially choose a more costly, less efficient project. The imposition of ARRA Buy American requirements on such projects otherwise eligible for State Revolving Fund assistance would result in unreasonable delay and thus displace the "shovel ready" status for this project. To further delay construction is in direct conflict with a fundamental economic purpose of the ARRA, which is to create or retain jobs.

The Region 6 Water Quality Protection Division has reviewed this waiver request, and has determined that the supporting documentation provided by the District is sufficient to meet the criteria listed under ARRA, Section 1605(b), Office of Management and Budget (OMB) regulations at 2 CFR 176.60–176.170, and in the April 28, 2009, memorandum, "Implementation of Buy American provisions of Public Law 111–5, the American Recovery and Reinvestment Act of 2009. The basis for this project waiver is the authorization provided in ARRA, Section 1605(b)(2). Due to the lack of production of this product in the United States in sufficient and reasonably available quantities and of a satisfactory quality in order to meet the District's technical specifications, a waiver from the Buy American requirement is justified.

EPA headquarters' March 31, 2009 Delegation of Authority Memorandum provided Regional Administrators with the authority to issue exceptions to Section 1605 of ARRA within the geographic boundaries of their respective regions and with respect to requests by individual grant recipients. Having established both a proper basis to specify the particular good required for this project, and that this manufactured good was not available from a producer in the United States, the District is hereby granted a waiver from the Buy American requirements of ARRA, Section 1605(a) of Public Law 111–5 for the purchase of a 15 HP vertical hollow shaft electric motor, using ARRA funds, as specified in the District's request. This supplementary information constitutes the detailed written justification required by ARRA, Section 1605(c), for waivers "based on a finding under subsection (b)."

Authority: Public Law 111–5, section 1605.

Dated: December 17, 2010.

Al Armendariz,

Regional Administrator, U.S. Environmental Protection Agency, Region 6.

[FR Doc. 2010–32927 Filed 12–29–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9246–2]

Proposed Settlement Agreement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Proposed Settlement Agreement; Request for Public Comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, 42 U.S.C. 7413(g), notice is hereby given of a proposed settlement agreement to address lawsuits filed by the following groups of Petitioners: (1) The States of New York, California, Connecticut, Delaware, Maine, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively "State Petitioners"); and (2) Natural Resources Defense Council, Sierra Club, and Environmental Integrity Project (collectively "Environmental Petitioners"). State and Environmental Petitioners filed their lawsuits in the United States Court of Appeals for the District of Columbia Circuit, which were consolidated under the lead case *American Petroleum Institute, et al.* v. *EPA,* No. 08–1277 (DC Cir.). Petitioners filed petitions for review of EPA's final rule entitled "Standards of Performance for Petroleum Refineries," published at 73 FR 35838 (June 24, 2008). The proposed settlement agreement establishes deadlines for EPA's proposed and final actions for meeting its obligations in the agreement.

DATES: Written comments on the proposed settlement agreement must be received by *January 31, 2011.*

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2010–1045, online at *http://www.regulations.gov* (EPA's preferred method); by e-mail to *oei.docket@epa.gov;* by mail to EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Comments on a disk or CD–ROM should be formatted in Word or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

FOR FURTHER INFORMATION CONTACT: Susan Stahle, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone:* (202) 564–1272; fax number (202) 564–5603; *e-mail address: stahle.susan@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Settlement Agreement

The State and Environmental Petitioners filed petitions for judicial review of the final rule promulgated under the Clean Air Act ("CAA") section 111, 42 U.S.C. 7411, entitled, "Standards of Performance for Petroleum Refineries, Final Rule," published at 73 FR 35838 (June 24, 2008). These petitions for review currently are pending before the U.S. Court of Appeals for the District of Columbia Circuit in consolidated cases under the lead case *American Petroleum Institute, et al.* v. *EPA,* No. 08–1277. The Final Rule includes amendments to the current standards of performance (40 CFR part 60, subpart J) and separate standards of performance for new process units (40 CFR part 60, subpart Ja) at petroleum refineries. In connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas emissions ("GHGs").

The Environmental Petitioners also filed a petition for administrative reconsideration pursuant to CAA section 307(d)(7)(B), 42 U.S.C. 7607(d)(7)(B), and EPA granted reconsideration with respect to some of the issues raised in that petition for reconsideration. 73 FR 55751 (Sept. 26, 2008). On December 22, 2008, EPA published a proposed rule concerning issues that were raised in the Environmental Petitioners' administrative petition for reconsideration. 73 FR 78522 (Dec. 22, 2008). On December 29, 2009, EPA granted reconsideration of all remaining issues that were raised in the petitions for administrative reconsideration, including the failure to regulate GHGs.

Under the terms of the proposed settlement agreement, within 3 business days after this Settlement Agreement is executed, the Parties shall file a joint motion with the Court notifying it of this agreement and requesting that the Petitioners' petitions for review be held in abeyance pending completion of the process under CAA section 113(g) as set forth in the agreement. Also pursuant to the proposed settlement agreement, EPA shall sign a proposed rule by December 10, 2011, that includes at a minimum, the following: (A) Standards of performance for GHGs pursuant to CAA section 111(b), 42 U.S.C. 7411(b), for affected facilities at refineries that are subject to the following NSPS: (1) Subparts J and Ja, (2) subpart Db, (3) subpart Dc, (4) subpart GGG, and (5) subpart QQQ, and emissions guidelines for GHGs pursuant to CAA section 111(d), 42 U.S.C. 7411(d), and 40 CFR 60.22, from existing affected facilities at refineries in the source categories covered by those NSPS subparts; (B) a review of the emission standards set forth in 40 CFR Part 63, subpart UUU, pursuant to CAA sections 112(d)(6) and (f)(2), 42 U.S.C. 7412(d)(6) and (f)(2); and (C) a resolution of all other issues raised in Environmental Petitioners' August 25, 2008 petition for administrative reconsideration. EPA shall sign a final rule by November 10, 2012, that includes final determinations with regard to each of the elements in the proposed rule. If EPA fulfills its obligations, the State and Environmental Petitioners shall, no later than 5 business days after the date on which that final rule takes effect, file an appropriate pleading seeking the dismissal of Petitions for Review Nos. 08–1279 and 08–1281, with prejudice, in accordance with Rule 42(b) of the Federal Rules of Appellate Procedure.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed settlement agreement from persons who are not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed settlement agreement if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to this settlement agreement should be withdrawn, the terms of the agreement will be affirmed.

II. Additional Information About Commenting on the Proposed Settlement Agreement

A. How can I get a copy of the settlement agreement?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2010–1045) contains a copy of the proposed settlement agreement. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *http://www.regulations.gov.* You may use the *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select "search".

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *http://www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information

provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *http://www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (e-mail) system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through *http://www.regulations.gov,* your e-mail address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: December 23, 2010.

Patricia A. Embrey,

Acting Associate General Counsel.

[FR Doc. 2010–32929 Filed 12–29–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9246–1]

Proposed Settlement Agreement, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Proposed Settlement Agreement; Request for Public Comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended ("CAA" or the "Act"), 42 U.S.C. 7413(g), notice is hereby given of a proposed settlement agreement between the following groups of Petitioners: (1) The States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively "State Petitioners"); and (2) Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund (collectively "Environmental Petitioners"), and Respondent, the U.S. Environmental Protection Agency ("EPA") (collectively "the Parties"). This proposed settlement is intended to resolve threatened litigation over the EPA's failure to respond to United States Court of Appeals for the District of Columbia Circuit's remand in *State of New York, et al.* v. *EPA,* No. 06–1322. Under the terms of the proposed settlement agreement deadlines have been established for EPA to take action.

DATES: Written comments on the proposed settlement agreements must be received by January 31, 2011.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2010–1057, online at *http://www.regulations.gov* (EPA's preferred method); by e-mail to *oei.docket@epa.gov;* by mail to EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Comments on a disk or CD–ROM should be formatted in Word or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

FOR FURTHER INFORMATION CONTACT: Elliott Zenick, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone:* (202) 564–1822; fax number (202) 564–5603; *e-mail address: zenick.elliott@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Settlement Agreements

EPA published a final action entitled "Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units," 71 FR 9866 (Feb. 27, 2006) (the "Final Rule"), which included amendments to the standards of performance for electric utility steam generating units subject to 40 CFR part 60, subpart Da ("EGUs") but did not establish standards of performance for greenhouse gas ("GHG") emissions. The State and Environmental Petitioners filed petitions for judicial review of the Final Rule under the CAA Section 111, 42 U.S.C. 7411, contending, *inter alia,* that the Final Rule was required to include standards of performance for GHG emissions from EGUs. The portions of State and Environmental Petitioners' petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District of Columbia Circuit (the "Court") under the caption *State of New York, et al.* v. *EPA,* No. 06–1322. Following the Supreme Court's decision in *Massachusetts* v. *EPA,* 549 U.S. 497 (2007), EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of that decision and the Court remanded the Final Rule to EPA for further proceedings. The State Petitioners submitted letters to EPA dated June 16, 2008 and August 4, 2009 inquiring as to the status of EPA's action on the remand and stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111. The Environmental Petitioners submitted a letter to EPA on August 20, 2010 seeking commitments to rulemaking on GHG emissions from EGUs as a means of avoiding further litigation. These letters are included in the docket for this notice.

Under the proposed settlement agreement, EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 CFR part 60, subpart Da. EPA will also sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 CFR part 60, subpart Da if they were new sources. Under the proposed settlement agreement EPA will take final action with respect to the proposed rule no later than May 26, 2012. The proposed settlement agreement provides that EPA's fulfillment of its obligations under the agreement shall result in a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed settlement agreement from persons who were not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may

withdraw or withhold consent to the proposed settlement agreement if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to this settlement agreement should be withdrawn, the terms of the agreement will be affirmed.

II. Additional Information About Commenting on the Proposed Settlement Agreement

A. How can I get a copy of the settlement agreement?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2010–1057) contains a copy of the proposed settlement agreement. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *http://www.regulations.gov.* You may use *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select "search".

It is important to note that EPA's policy is that public comments, whether submitted electronically or on paper, will be made available for public viewing online at *http://www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment and with any disk or CD–ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *http://www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (e-mail) system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through *http://www.regulations.gov,* your e-mail address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: December 23, 2010.

Patricia A. Embrey,

Acting Associate General Counsel.

[FR Doc. 2010–32935 Filed 12–29–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB), Comments Requested

December 21, 2010.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before January 31, 2011. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or the Internet at *Nicholas_A._Fraser@omb.eop.gov;* and to *the* Federal Communications Commission's PRA mailbox (*e-mail address: PRA@fcc.gov.*). Include in the e-mail the OMB control number of the collection as shown in the **SUPPLEMENTARY INFORMATION** section below, or if there is no OMB control number, include the Title as shown in the **SUPPLEMENTARY INFORMATION** section.

If you are unable to submit your comments by e-mail, contact the person listed below to make alternate arrangements.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-b.herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1094.

Title: Sections 4.1 and 4.2, and Part 4 of the Commission's Rules Concerning Disruptions to Communications (NORS).

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 71 respondents; 139 responses.

Estimated Time per Response: 2 hours.

Frequency of Response: On occasion reporting requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 151, 154, 218, 219, 256, 301, 302, 303, 403 and 621.

Total Annual Burden: 19,738 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: In accordance with 47CFR 4.2 of the Commission's rules, reports under Part 4 are presumed confidential.

Needs and Uses: The Commission will submit this expiring information collection (IC) to the OMB during this comment period. The Commission is seeking OMB approval for an extension (there are no changes to the reporting requirement). The Commission is reporting a significant increase of 10,100 total annual burden hours. This is due to a recalculation of our burden estimates and fewer respondents reporting information. The estimated number of respondents fluctuates because of the type of event to be reported and the location where it occurred.

In recognition of the critical need for rapid, full, and accurate information on service disruptions that could affect homeland security, public health and safety, as well as the economic well-being of our Nation, and in view of the increasing importance of non-wireline communications in the Nation's communications networks, and critical infrastructure, the Commission adopted rules requiring mandatory service disruptions reporting from all communications providers (cable, satellite, wireline and wireless) that provide voice and/or paging communications. As envisioned, the information collected pursuant to these rules has helped improve network reliability.

OMB Control Number: 3060–1139.

Title: Residential Fixed Broadband Services Testing and Measurement.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households and business or other for-profit.

Number of Respondents: 11,016 respondents; 11,016 responses.

Estimated Time per Response: The estimated time per response is 1 hour for respondents based on a 10 minute initial sign-up for the panel; 30 minutes to connect and install the hardware appliance; and two 10-minute contacts to be conducted by the vendor over the course of the study period. The 16 ISP partners participating in the study is estimated at 200 hours per respondent per partner for all participation activities.

Frequency of Response: Biennial reporting requirement and third party disclosure requirement.

Obligation to Respond: Voluntary. Statutory authority for this information collection is contained in the Broadband Data Improvement Act of 2008, Public Law 110–385, Stat 4096 § 103(c)(1).

Total Annual Burden: 14,200 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: This information collection affects individuals or households. However, the collection of personally identifiable information (PII) is not being collected, made available or accessible by the Commission but instead by third parties including SamKnows, a third party contractor and ISP Partners.

Nature and Extent of Confidentiality: No personally identifiable information (PII) will be transmitted to the Commission from the contractor as a matter of vendor policy. SamKnows maintains a series of administrative, technical, and physical safeguards to protect against the transmission of personally identifying information. At point of registration, individuals will be given full disclosure in a "privacy statement" highlighting what information will be collected. ISP Partners will receive personally identifying information about volunteers to confirm the validity of the information against their subscription records, but will be bound by a non-disclosure agreement that will maintain various administrative, technical and physical safeguards to protect the information and limit its use. ISP Partners will provide support to the testing program will likewise be bound to the same series of administrative, technical and physical safeguards developed by SamKnows. In addition, all third parties supporting the program directly will be bound by a "Code of Conduct" to ensure that all participate and act in good faith.

Needs and Uses: The Commission will submit this expiring information collection (IC) to the OMB during this comment period. The Commission is requesting OMB approval for an extension (no change in the reporting and/or third party disclosure requirements). There is no change in the Commission's burden estimates that were submitted and approved by OMB on October 4, 2010.

The Broadband Data Improvement Act of 2008, Public Law 110–385, Stat 4096 § 103(c)(1) directs the Commission to collect information on the type of technology used to provide broadband to consumers, the price of such services, actual transmission speeds, and the reasons for non-adoption of broadband service.

The collection of information is necessary to complete research done for the Broadband Plan on key consumer issues including transparency and actual speeds and performance of broadband service.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–32953 Filed 12–29–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB), Comments Requested

December 21, 2010.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's

burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before January 31, 2011. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or the Internet at *Nicholas_A._Fraser@omb.eop.gov;* and to the Federal Communications Commission's PRA mailbox (e-mail address: *PRA@fcc.gov.*). Include in the e-mail the OMB control number of the collection as shown in the **SUPPLEMENTARY INFORMATION** section below, or if there is no OMB control number, include the Title as shown in the **SUPPLEMENTARY INFORMATION** section. If you are unable to submit your comments by e-mail, contact the person listed below to make alternate arrangements.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-b.herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 3060–0698.

Title: Sections 25.203(i) and 73.1030(a)(2), Radio Astronomy Coordination Zone in Puerto Rico.

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and State, local or tribal government.

Number of Respondents: 200 respondents; 1,000 responses.

Estimated Time per Response: 5–40 minutes (.0833 hours to .667 hours.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 154(i), 303(f), 303(r), and 309(j)(13).

Total Annual Burden: 142 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission will submit this expiring information collection (IC) to the OMB during this comment period. The Commission is seeking OMB approval for a revision. The Commission is reporting a 114 hour program change decrease to the total burden hour estimate. The revision is because 47 CFR section 23.20 has been removed from this information collection since the last time OMB approved this information collection.

The Commission adopted and released a *Report and Order,* IB Docket No. 05–216, FCC 10–7, which eliminated Part 23 rules because there were no International Fixed Public Radiocommunications Services (IFPRS) licenses in operation.

The information collected is used to facilitate coordination between the Observatory and Commission-licensed services in the Commonwealth of Puerto Rico. Applicants for new or modified radio communication facilities within the Coordination Zone are required to submit technical information concerning the applicant's proposed services to enable the Observatory to determine the potential for interference with its operations. The Observatory will perform interference evaluations at no cost to the applicants. If potential interference problems are identified, applicants are required to make reasonable attempts to resolve or mitigate such problems in order to protect the Observatory.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–32956 Filed 12–29–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested

December 23, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before January 31, 2011.

If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget via fax at 202–395–5167 or via e-mail to *Nicholas_A._Fraser@omb.eop.gov* and to *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.* Include in the e-mail the OMB control number of the collection. If you are unable to submit your comments by e-mail contact the person listed below to make alternate arrangements.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918, or via e-mail to *Cathy.Williams@fcc.gov,* and/or *PRA@fcc.gov.* To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called "Currently Under Review," (3) click on the downward pointing arrow in the "Select Agency"

box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0686.

Title: International Section 214 Process and Tariff Requirements, 47 CFR Sections 63.10, 63.11, 63.13, 63.18, 63.19, 63.21, 63.24, 63.25 and 1.1311.

Form No.: FCC Form 214.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 1,670 respondents; 10,264 responses.

Estimated Time per Response: 0.50–16 hours (average).

Frequency of Response: On occasion reporting requirement, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Sections 1, 4(i), 4(j) 11, 201–205, 211, 214, 219, 220, 303(r), 309, 310 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 161, 201–205, 21, 214, 219, 220, 303(r), 309 and 403, and sections 34–39.

Total Annual Burden: 34,376 hours.

Total Annual Cost: $3,625,390.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The Federal Communications Commission ("Commission") is requesting that the Office of Management and Budget (OMB) approve the revision of OMB Control No. 3060–0686 titled, "International Section 214 Authorization Process and Tariff Requirements—47 CFR Sections 63.10, 63.11, 63.13, 63.18, 63.19, 63.21, 63.24, 63.25 and 1.1311." This information collection is being revised to receive OMB approval for information collection requirements that were adopted in the Matter of Amendment of Parts 1 and 63 of the Commission's Rules, IB Docket No. 04–47; FCC 07–118 on June 20, 2007 (released June 22, 2007). The following information collection requirements need OMB review and approval:

Section 63.19(a)(1) states that the carrier shall notify all affected customers of the planned discontinuance, reduction or impairment at least 30 days prior to its planned action. Notice shall be in writing to each affected customer unless the Commission authorizes in advance, for good cause shown, another form of notice.

Section 63.19(a)(2) states that the carrier shall file with this Commission a copy of the notification on the date on which notice has been given to all affected customers. The filing may be made by letter (sending an original and five copies to the Office of the Secretary, and a copy to the Chief, International Bureau) and shall identify the geographic areas of the planned discontinuance, reduction or impairment and the authorization(s) pursuant to which the carrier provides service.

Section 63.24(c) requires that a transfer of control is a transaction in which the authorization remains held by the same entity, but there is a change in the entity or entities that control the authorization holder. A change from less than 50 percent ownership to 50 percent or more ownership shall always be considered a transfer of control. A change from 50 percent or more ownership to less than 50 percent ownership shall always be considered a transfer of control. In all other situations, whether the interest being transferred is controlling must be determined on a case-by-case basis. Once a carrier determines that there has been a transfer of control, it must file an application with the Commission.

OMB Control Number: 3060–0944.

Title: Cable Landing License Act, 47 CFR 1.767 and 1.768; Executive Order 10530.

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 255 respondents; 255 responses.

Estimated Time per Response: 1–16 hours (average).

Frequency of Response: On occasion reporting requirement; third party disclosure requirement and quarterly reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in the Submarine Cable Landing License Act of 1921, Executive Order 10530, 47 U.S.C. 34–39, 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

Total Annual Burden: 534 hours.

Total Annual Cost: $268,545.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: On November 2, 2010, the Commission released a Recon Order titled, "In the Matter of Amendment of Parts 1 and 63 of the Commission's Rules," IB Docket No. 04–47, FCC 10–187. In this Recon Order, the Commission amended its cable landing license application rules and application procedures to require applicants to certify their compliance with the Coastal Zone Management Act of 1972 (CZMA), as amended, 16 U.S.C. Section 1456. The goal of the CZMA is to preserve, protect, develop and, where possible, restore and enhance the national's coastal resources. Therefore, 47 CFR Section 1.767(k)(4) states that cable landing license applicants must furnish a certification to the Commission that the applicant is not required to submit a consistency certification with any state pursuant to the Coastal Zone Management Act.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–32958 Filed 12–29–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Notice

TIME AND DATE: 10 a.m., Thursday, January 13, 2011.

PLACE: The Richard V. Backley Hearing Room, 9th Floor, 601 New Jersey Avenue, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will hear oral argument in the matter *Secretary of Labor* v. *Ames Construction, Inc.,* Docket No. WEST 2009–693–M. (Issues include whether a non-production operator may be strictly liable for a violation occurring in an area which the operator allegedly controls or supervises.)

Any person attending this oral argument who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen, (202) 434–9950/(202) 708–

9300 for TDD Relay/1–800–877–8339 for toll free.

Jean H. Ellen,

Chief Docket Clerk.

[FR Doc. 2010–33038 Filed 12–28–10; 11:15 am]

BILLING CODE 6735–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[CMS–2420–NC]

Medicaid Program: Initial Core Set of Health Quality Measures for Medicaid-Eligible Adults

AGENCY: Office of the Secretary, HHS.

ACTION: Notice with comment period.

SUMMARY: This notice identifies an initial core set of health quality measures recommended for Medicaid-eligible adults, as required by section 2701 of the Affordable Care Act, for voluntary use by State programs administered under title XIX of the Social Security Act (the Act), health insurance issuers and managed care entities that enter into contracts with Medicaid, and providers of items and services under these programs. This notice also solicits comments on these initial measures, on facilitating the use of these measures by States and on identifying priority areas for measure enhancement and development.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on March 1, 2011.

ADDRESSES: Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of two ways (please choose only one of the ways listed):

1. *Electronic Mail.* medicaidadultmeasures@ahrq.hhs.gov.

2. *Regular Mail.* Agency for Healthcare Research and Quality, Attention: Nancy Wilson, Immediate Office of the Director, Room 3028, 540 Gaither Road, Rockville, MD 20850.

FOR FURTHER INFORMATION CONTACT: Nancy Wilson, M.D., M.P.H., Coordinator of the Advisory Council Subcommittee, at the Agency for Healthcare Research and Quality, 540 Gaither Road, Rockville, MD 20850, (301) 427–1310. For press-related information, please contact Karen Migdail at (301) 427–1855.

SUPPLEMENTARY INFORMATION:

I. Background

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (Affordable Care Act) (Pub. L. 111–148). Section 2701 of the Affordable Care Act added new section 1139B to the Social Security Act (the Act); section 1139B(a) of the Act now mandates that the Secretary of Health and Human Services (HHS) identify and publish for public comment a recommended initial core set of health quality measures for Medicaid eligible adults. Section 1139B(b) of the Act, as added by section 2701 of the Affordable Care Act, requires that a recommended initial core set be published for public comment by January 1, 2011, and that an initial core set be published by January 1, 2012.

In addition, the Affordable Care Act mandates that HHS should complete the following actions

—By January 1, 2012:

- Establish a Medicaid Quality Measurement Program to fund development, testing, and validation of emerging and innovative evidence-based measures.

—By January 1, 2013:

- Develop a standardized reporting format on the core set and procedures to encourage voluntary reporting by the States.

—By January 1, 2014:

- Annually publish recommended changes to the initial core set that shall reflect the results of the testing, validation, and consensus process for the development of adult health quality measures.

—By September 30, 2014:

- Collect, analyze, and make publicly available the information reported by the States as required in section 1139B(d)(1) of the Act.

Additionally, the statute requires the initial core set recommendation to consist of existing adult health quality measures that are in use under public and privately sponsored health care coverage arrangements or are part of reporting systems that measure both the presence and duration of health insurance coverage over time and that may be applicable to Medicaid-eligible adults.

II. Method for Determining Proposed Initial Core Set of Adult Health Quality Measures

The Affordable Care Act parallels the requirement under title IV of the Children's Health Insurance Program Reauthorization Act (Pub. L. 111–3) to identify and publish a recommended initial core set of quality measures for children in Medicaid and the Children's Health Insurance Program. A similar process was used to identify the proposed initial core set of adult health quality measures. To facilitate an evidence-based and transparent process for making recommendations, the National Advisory Council of the Agency for Healthcare Research and Quality (AHRQ) created a subcommittee (the Subcommittee) for identifying quality measures for Medicaid-eligible adults. The Subcommittee consisted of State Medicaid representatives, health care quality experts, and representatives of health professional organizations and associations. The Subcommittee held a public meeting October 18th and 19th and considered public comments. The Subcommittee's advice was reported to the Chair of AHRQ's National Advisory Council and considered further by the Centers for Medicare & Medicaid Services (CMS) and staff in the Office of the Secretary of HHS prior to this public posting.

The initial core set was developed by reviewing measures from nationally recognized sources, including measures currently endorsed by the National Quality Forum (NQF), measures submitted by Medicaid medical directors, measures currently in use by CMS, and measures suggested by the Co-Chairs and members of the Subcommittee of AHRQ's National Advisory Council.

In prioritizing measures, the Subcommittee considered the needs of adults (ages 18 and older) enrolled in Medicaid. To help guide the discussion of priority health needs within the adult populations covered by Medicaid, the Subcommittee was divided into four workgroups—Maternal/Reproductive Health, Overall Adult Health, Complex Health Care Needs, and Mental Health and Substance Use. The workgroups considered potential measurement opportunities across the Institute of Medicine's (IOM) eight domains of quality: Safe, timely, effective, efficient, access, patient and family centeredness, care coordination, and infrastructure capabilities for health care. The Subcommittee also considered how health care equity and value (also from the IOM) could be reflected in the initial measurement set. Ultimately, the Subcommittee used the following three criteria in voting on the recommended measures for the core set:

- The scientific acceptability of measure properties.
- Feasibility of use by Medicaid.
- Importance to Medicaid programs.

The Subcommittee also considered whether the measures were currently used in other Medicaid quality

measurement efforts (for example, three maternity care measures included in the initial core set of children's quality measures, and measures designated for inclusion in the Medicare and Medicaid Electronic Health Record Incentive Payment Programs). The Subcommittee identified many measures that were cross-cutting and relevant to the entire adult Medicaid population. In the end, the Subcommittee identified a set of 51 measures to recommend as the initial core set of adult quality measures.

We are now soliciting public comments on the recommended initial core set of adult quality measures. Specifically, we seek comment on whether any measures should be added or deleted from the initial core set, the reporting burden, which measures may need further development, and the types of technical assistance and other resources States may need to implement these measures. We also are interested in feedback on how many measures are feasible and realistic for a State to collect and use in its monitoring of quality of care. We are trying to strike a balance between the need for State data to monitor and improve quality and an interest in minimizing the reporting burden on States and providers by aligning with other quality reporting and incentive initiatives.

HHS will be making improvements and enhancements to the core set as a result of public comments on the initial recommended core measure set. To further these efforts, AHRQ and CMS are working to identify ways to align State reporting requirements with other HHS quality reporting initiatives and requirements; coordinate quality measurement efforts with payment reform strategies, health information technology, and electronic health record initiatives; and identify priority areas for the development of new measures. States will also receive technical assistance to facilitate implementation of the measures. The initial core set of adult quality measures, as required by the Affordable Care Act, will serve as the groundwork for creating a standardized approach to better understand the quality of care adults in Medicaid receive, improve how this care is measured, and create opportunities to impact health outcomes.

III. The Draft Initial Core Set of Health Quality Measures for Medicaid-Eligible Adults

The list of measures in the accompanying table of measures was developed on the basis of advice from the Subcommittee. For additional information, see the background paper at *http://ahrq.hhs.gov/*.

Respondents commenting on the measurement set are encouraged to:

- Specify which of the measures are being addressed.
- Explain the reasoning behind their comment.

In addition, we invite comments on ways to enhance the initial core set of measures so they can be implemented efficiently and accurately across all Medicaid programs, providers, and enrollees.

IV. Collection of Information Requirements

This document does not impose information collection and record-keeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

V. Regulatory Impact Statement

In accordance with the provisions of Executive Order 12866, this notice was reviewed by the Office of Management and Budget.

Authority: Sections XIX and XXI of the Social Security Act (42 U.S.C. 13206 through 9a).

Dated: November 17, 2010.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

Approved: December 20, 2010.

Kathleen Sebelius,

Secretary, Health and Human Services.

Measures Recommended for Initial Core Set of Health Quality Measures for Medicaid-Eligible Adults

This table of the recommended initial core measure set includes National Quality Forum (NQF) identifying numbers for measures that have been endorsed, provides the measure owners, and indicates those measures that have been designated for inclusion in the Medicare & Medicaid Electronic Health Record Incentive Payment Programs for eligible health care professionals and hospitals that adopt certified Electronic Health Record technology under the Final Rule published in the July 28, 2010 **Federal Register** (75 FR 44314).

Number	NQF ID†	Measure owner	Measure name	EHR‡
			Prevention & Health Promotion	
1	0039	NCQA	Flu Shots for Adults Ages 50–64 (Collected as part of HEDIS CAHPS Supplemental Survey).	
2	0421	CMS	Adult Weight Screening and Follow up	X
3	0031	NCQA	Breast Cancer Screening	X
4	0032	NCQA	Cervical Cancer Screening	X
5	NA	RAND	Alcohol Misuse: Screening, Brief Intervention, Referral for Treatment	
6	0027	NCQA	Medical Assistance With Smoking and Tobacco Use Cessation	X
7	0418	CMS	Screening for Clinical Depression and Followup Plan	
8	NA	NCQA	Plan All-Cause Readmission.	
9	0272	AHRQ	PQI 01: Diabetes, short-term complications	
10	0273	AHRQ	PQI 02: Perforated appendicitis.	
11	0274	AHRQ	PQI 03: Diabetes, long-term complications	
12	0275	AHRQ	PQI 05: Chronic obstructive pulmonary disease	
13	0276	AHRQ	PQI 07: Hypertension.	
14	0277	AHRQ	PQI 08: Congestive heart failure.	
15	0280	AHRQ	PQI 10: Dehydration	
16	0279	AHRQ	PQI 11: Bacterial pneumonia	
17	0281	AHRQ	PQI 12: Urinary Tract Infection Admission Rate	
18	0282	AHRQ	PQI 13: Angina without procedure.	
19	0638	AHRQ	PQI 14: Uncontrolled Diabetes Admission Rate	
20	0283	AHRQ	PQI 15: Adult asthma.	

Number	NQF ID†	Measure owner	Measure name	EHR‡
21	0285	AHRQ	PQI 16: Lower extremity amputations among patients with diabetes	
		Management of Acute Conditions		
22	0052	NCQA	Use of Imaging Studies for Low Back Pain	X
23	0640	TJC	HBIPS—2 Hours of physical restraint use.	
24	0576	NCQA	Followup After Hospitalization for Mental Illness	
25	0476	Providence St. Vincent Medical Center.	Appropriate Use of Antenatal Steroids.	
26	0469	Hospital Corporation of America	Elective delivery prior to 39 completed weeks gestation	
27	0648	AMA–PCPI	Timely Transmission of Transition Record (Inpatient Discharges to Home/Self-Care or Any Other Site of Care).	
28	0647	AMA–PCPI	Transition Record With Specified Elements Received by Discharged Patients (Inpatient Discharges to Home/Self-Care or Any Other Site of Care).	
		Management of Chronic Conditions		
29	0071	NCQA	Persistence of Beta-Blocker Treatment After a Heart Attack	
30	0018	NCQA	Controlling High Blood Pressure	X
31	0074	AMA–PCPI	Coronary Artery Disease (CAD): Drug Therapy for Lowering LDL Cholesterol.	X
32	0075	NCQA	Comprehensive Ischemic Vascular Disease Care: Complete Lipid Profile and LDL–C Control Rates.	X
33	0063	NCQA	Diabetes: Lipid profile.	
34	0057	NCQA	Comprehensive Diabetes Care: Hemoglobin A1c testing	
35	0036	NCQA	Use of Appropriate Medications for People With Asthma	X
36	0403	NCQA	HIV/AIDS: Medical visit.	
37	0105	NCQA	Antidepressant Medication Management	X
38	NA	RAND	Bipolar I Disorder 2: Annual assessment of weight or BMI, glycemic control, and lipids.	
39	NA	RAND	Bipolar I Disorder C: Proportion of patients with bipolar I disorder treated with mood stabilizer medications during the course of bipolar I disorder treatment.	
40	NA	RAND	Schizophrenia 2: Annual assessment of weight/BMI, glycemic control, lipids.	
41	NA	RAND	Schizophrenia B: Proportion of schizophrenia patients with long-term utilization of antipsychotic medications.	
42	NA	RAND	Schizophrenia C: Proportion of selected schizophrenia patients with antipsychotic polypharmacy utilization.	
43	0021	NCQA	Annual Monitoring for Patients on Persistent Medications	
44	0541	PQA	Proportion of Days Covered (PDC): 5 Rates by Therapeutic Category	
		Family Experiences of Care		
45	0006	AHRQ	CAHPS Health Plan Survey v 4.0—Adult Questionnaire	
46	0007	NCQA	CAHPS Health Plan Survey v 4.0H—NCQA Supplemental items for CAHPS 4.0 Adult Questionnaire.	
		Availability		
47	NA	NCQA	Ambulatory Care: Outpatient and Emergency Department Visits	
48	NA	NCQA	Inpatient Utilization: General Hospital/Acute Care	
49	0004	NCQA	Initiation and Engagement of Alcohol and Other Drug Dependence Treatment.	X
50	NA	NCQA	Mental Health Utilization.	
51	NA	NCQA	Prenatal and Postpartum Care: Postpartum Care Rate	

† NQF ID National Quality Forum identification numbers are used for measures that are NQF-endorsed; otherwise, NA is used.

‡ EHR Measures with an "X" are included in the Medicare and Medicaid Electronic Health Record Incentive Payment Program and may be collected through electronic health records. Specifications for these measures are available from the Centers for Medicare & Medicaid Services Web site at: *http://www.cms.gov/QualityMeasures/03_ElectronicSpecifications.asp#TopOfPage*.

[FR Doc. 2010–32978 Filed 12–29–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Stakeholders Meeting To Provide Updates on NIOSH-Funded Research, Certification and Standards, Educate Participants on Resources To Reinforce the Proper Use of NIOSH-Certified Respirators, and Explore Personal Protective Technology Use in Industry Sectors

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of a public meeting.

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH), Personal Protective Technology (PPT) Program and National Personal Protective Technology Laboratory (NPPTL) will conduct a stakeholders meeting to provide updates on NIOSH-funded research, certification and standards, educate participants on resources to reinforce the proper use of NIOSH-certified respirators, and explore personal protective technology use in industry sectors. In addition, conformity assessment (certification and standards) needs and gaps relative to the personal protective technology will be discussed at this meeting.

DATES: The public meeting will be held 8 a.m. to 5 p.m., March 29, 2011.

ADDRESSES: The public meeting will be held at Hyatt Regency Pittsburgh International Airport, 1111 Airport Boulevard, Pittsburgh, PA 15231, telephone 724–899–1234.

FOR FURTHER INFORMATION CONTACT: Ed Fries, NPPTL, Office of the Director, P.O. Box 18070, Pittsburgh, PA 15236, telephone 412–386–6111, fax 412–386–4951, E-mail *npptlevents@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Status: The meeting will be open to the public, limited only by the space available. The meeting room accommodates approximately 200 people. Preregistration is recommended. This meeting will also be available through remote access capabilities (Microsoft Live Meeting), whereby participants simultaneously listen and view presentations over the internet. This option will be available to participants on a first-come, first-serve basis and is limited to the first 100 participants. Preregistration for this option is required.

Instructions: Registration and additional Information is available on the NIOSH NPPTL Web site, *http://www.cdc.gov/niosh/npptl* or by contacting NIOSH NPPTL Office of the Director, P.O. Box 18070, Pittsburgh, PA 15236, telephone 412–386–6111, fax 412–386–6617, E-mail *npptlevents@cdc.gov.*

Background: While this meeting will highlight the personal protective technology related to the four industries, the information and technology is relevant and can be transferred to other industries.

Discussions will highlight the following four occupational sectors:

1. Agriculture—Discussions will focus on identifying solutions to major barriers for appropriate PPE use practices that occur in pesticide handling in agricultural crop production. Discussions will use a process flow approach for focusing on each of the critical stages for PPE use in pesticide handling. Potential barriers and regulations, such as those identified from brainstorming meetings of the NIOSH PPE Surveillance and Intervention Program for Agricultural Pesticide Handlers, that may influence safe performance will be highlighted. Stakeholders will provide their input, clarify barriers and help identify solutions for future development. The goal of these discussions is to bring diverse stakeholders together to discuss barriers to appropriate PPE use and to jointly formulate and develop creative solutions.

2. Mining—One session will focus on technologies to improve current self-contained self-rescuer (SCSR) designs and mine rescue ensembles. Presentations from researchers, manufacturers, and users will focus on SCSR design improvements and technologies to address user needs. The second session will focus on best practices learned from ensemble users, performance requirements for mine rescue ensembles and identification of existing limitations and current best practices.

3. Healthcare—PPE use and usability issues in acute care and community healthcare settings and the alignment of current and recommended PPT research to narrow knowledge gaps, reduce exposures, and improve healthcare worker proper use and compliance will be emphasized. These sessions will explore respiratory protective equipment use and application issues as well as use and application issues with other types of PPE commonly used in healthcare, including integrated ensembles.

4. Public Safety—These sessions will focus on personal protective technology applications, performance/certification standards and use related to the fire service and law enforcement communities. Two breakout sessions will be conducted, one for fire service and one for law enforcement. The fire service-related breakout session will include issues and requirements related to the design, certification, inspection of firefighting personal protection ensembles, and NIOSH research supporting use of protective ensembles and respiratory protective equipment by the fire service. The law enforcement breakout session will address performance requirements and standards for law enforcement protective ensembles with a focus on CBRN hazards. The CBRN Protective Ensemble Standard for Law Enforcement released by the National Institute for Justice in late 2010 will be discussed.

Dated: December 21, 2010.

Tanja Popovic,

Deputy Associate Director for Science, Centers for Disease Control and Prevention.

[FR Doc. 2010–32964 Filed 12–29–10; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Development of Health Risk Assessment Guidance; Public Forum

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of Public Meeting.

SUMMARY: On November 16, 2010, the Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS), published a notice in the **Federal Register** (75 FR 70009) requesting public comment to assist development of guidance for Health Risk Assessments (HRAs). Section 4103 of the Affordable Care Act (ACA) (Pub. L. 111–148) requires that a Health Risk Assessment be included in the annual wellness visit benefit authorized for Medicare beneficiaries under the ACA. CDC is collaborating with the Centers for Medicare and Medicaid Services (CMS), also located within HHS, in the development of guidance for this type of assessment. This guidance is also intended to be useful for HRAs

conducted in other patient populations, including those persons covered by employer healthcare plans. In the November 16, 2010 notice, CDC also announced that it would hold a public forum in early February 2011 to obtain additional public comment. Today's notice announces the public forum.

DATES: The public forum will be held on:

Tuesday, February 1, 2011, from 9 a.m. to 5 p.m. EST and Wednesday, February 2, 2011, from 9 a.m. to 5 p.m. EST.

ADDRESSES: The Public Forum will be held at the Centers for Disease Control and Prevention, Roybal Campus, Tom Harkin Global Communications Center, Building 19, Auditorium A, 1600 Clifton Road, NE., Atlanta, Georgia 30333.

Upon entering the campus visitors must stop at the CDC Visitor's Center parking guard station. Visitors will be asked for identification and the purpose of the visit. Please be aware that your vehicle is subject to search before being allowed to enter the facility. A government-issued photo ID is required for entry for all adults over the age of 16. Acceptable forms of identification include a valid driver's license, a passport or a state-issued photo identification card. Parking spaces for visitors are available in the parking lot adjacent to the CDC Visitor's Center (Building 19). Once inside the CDC Visitor's Center, visitors will be asked to show their picture ID again and a visitor's badge will be issued. Those who have registered in advance will have a visitor's badge waiting and entry will be expedited. Non-U.S. citizens (including permanent residents) must register in advance. Please note, this is a working Federal Facility. Please follow the guards' directions. Backpacks, suitcases or large containers are prohibited and photography is restricted.

Please visit our Web site for additional information on security and for directions to the facility *(http://www.cdc.gov/museum/security.htm*).

CDC will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Paula Staley at (404) 639–0210 at least 7 days in advance of the meeting.

Registration: Participants are encouraged to pre-register for the Public Forum. On-line registration and a draft agenda is available at: *http://www.cdc.gov/policy*. As space is limited, registration by January 7, 2011 is strongly encouraged.

FOR FURTHER INFORMATION CONTACT: Paula Staley, Office of Prevention through Healthcare, Office of the Associate Director for Policy, Centers for Disease Control and Prevention, 1600 Clifton Road, NE., Atlanta, Georgia 30333; *phone:* (404) 639–0210.

SUPPLEMENTARY INFORMATION: Section 4103 of the Affordable Care Act (ACA) requires that a Health Risk Assessment (HRA) be included in the annual wellness visit benefit authorized for Medicare beneficiaries under the ACA. CDC is collaborating with the Centers for Medicare and Medicaid Services (CMS) in the development of guidance for this type of assessment. This guidance is also intended to be useful for HRAs conducted in other patient populations such as privately insured populations, including those persons covered by employer healthcare plans. Currently there is considerable variation in available HRAs, with the majority created to support employer-based health and wellness programs. Several instruments have been created for use in research and are not available in the marketplace; and the scientific rigor of HRA tools is not always evident. Therefore, the development of HRA guidance is essential for effective implementation of this part of the Medicare wellness visit and to support broader HRA use within primary care.

Agenda: The meeting will open with presentations related to background information on the elderly population, HRAs and the HRA guidance development. The meeting will consist of panel presentations for each of the areas of emphasis which are listed in this notice as well as in the November 16, 2010 **Federal Register** notice. Participants attending the public forum will be invited to provide comment at the end of each half day of the meeting. The final agenda and panelists' presentations will be made available to the public no later than two business days before the meeting. If CDC is unable to post the presentations on its Web site prior to the meeting, the material will be made publicly available at the location of the meeting. The final agenda and panelists' presentations will be available at *http://www.cdc.gov/policy*. The agenda is subject to change without notice.

Areas of Emphasis:

Content and Design

- Risk assessment domains—What are generic elements of any HRA and what elements must be tailored to specific populations, particularly those stratified by age?
- How should literacy and other cultural appropriateness factors be factored into the design?
- Should the HRA instrument support shared decision-making by provider and patient? If so, how?

Mode of Administration

- How will individuals access the HRA (*e.g.,* via kiosk or some other means in the physician's office, internet, mail-in paper form, other non-traditional healthcare locations, such as, kiosk in a pharmacy)?
- What are the cultural appropriateness factors in patient HRA access?

Primary Care Office Capacity

- What primary care office capacity (personnel, Information Technology (IT), *etc.*) is required to utilize HRA data effectively in support of personalized prevention planning?
- Is training and technical assistance necessary for effective practice utilization of an HRA? What entity should provide this technical assistance?
- What are potential or demonstrated community care transition linkages—follow-up outside the office by other providers—that help patients and providers manage priority risks identified by the HRA?
- What is the current practice of HRA in medical practices of various sizes, particularly those with five or fewer physicians?

Consumer/Patient Perspective

- How could HRA data be shared with the patients for their feedback and follow up in the primary care practice?
- What role, if any, do incentives play in motivating patients to take the HRA and/or participate in follow-up interventions?

Data

- With respect to IT, how could HRA data entered in any form populate electronic health records, and what special challenges and solutions occur if the data are entered in a non-electronic form?
- Are there standardized and certified tools available to support this data migration from multiple data entry sources?

Certification

- What certification tools and processes should complement the HRA standards and how should they be made available to support primary care office selection of an HRA instrument?

Evaluation and Quality Assurance

• How should the HRA standards be evaluated and updated with respect to individual and population-level (practice-based panel management) health outcomes?

Procedure: Interested persons may present data, information, or views orally or in writing, on topics listed in this **Federal Register** notice. Written submissions for the public comment period may be made to the contact person on or before January 18, 2011. Oral presentations from the public will be scheduled during 30-minute public comment periods at the end of each half day of proceedings, *i.e.,* from 11:30 a.m. to 12 noon and 4:30 p.m. to 5 p.m. on Tuesday, February 1, 2011 and Wednesday, February 2, 2011. Those individuals interested in making formal oral comments should notify the contact person and submit a brief statement of the general nature of the comments they wish to present and the names and addresses of proposed participants on or before January 11, 2011. Each commenter will be limited to 3–5 minutes. The CDC is not responsible for providing access to electrical outlets.

Individuals who have not submitted comments ahead of time will have the opportunity to sign up to comment during registration on the day of the forum. However, if time does not allow for all interested parties to comment, individuals who have submitted their comments ahead of time will be given preference. If the number of participants requesting to comment is greater than can be reasonably accommodated, the CDC may conduct a lottery to determine the speakers for the scheduled open public comment sessions. The contact person will notify interested persons regarding their request to comment by January 18, 2011.

Public forum participants not receiving an opportunity to comment during the open public comment period may submit their comments to OPTH mailbox at: *http://www.cdc.gov/policy*. CDC will make all comments it receives available to the public without change, including personal information you may provide, which includes the name of the person submitting the comment or signing the comment on behalf of an organization, business, or any such entity. If anyone does not wish to have this information published, then that information should not be included when submitting the comment.

Dated: December 21, 2010.

Tanja Popovic,

Deputy Associate Director for Science, Centers for Disease Control and Prevention.

[FR Doc. 2010–32963 Filed 12–29–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Proposed Consolidated Vaccine Information Materials for Multiple Infant Vaccines

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: Under the National Childhood Vaccine Injury Act (NCVIA) (42 U.S.C. 300aa–26), the CDC must develop vaccine information materials that all health care providers are required to give to patients/parents prior to administration of specific vaccines. CDC seeks written comment on a proposed new vaccine information statement that consolidates the six vaccine information statements for the following childhood vaccines: DTaP, *Haemophilus influenzae* type b, inactivated polio vaccine, pneumococcal conjugate vaccine, hepatitis B, and rotavirus. This consolidated Vaccine Information Statement is available to be used by vaccination providers as an alternative to providing the six individual Vaccine Information Statements for the same vaccines.

DATES: Written comments are invited and must be received on or before February 28, 2011.

ADDRESSES: Written comments should be addressed to Jennifer Hamborsky, National Center for Immunization and Respiratory Diseases, Centers for Disease Control and Prevention, Mailstop E–52, 1600 Clifton Road, NE., Atlanta, Georgia 30333.

FOR FURTHER INFORMATION CONTACT: Skip Wolfe, National Center for Immunization and Respiratory Diseases, Mailstop E–52, 1600 Clifton Road, NE., Atlanta, Georgia 30333, telephone (404) 639–8809.

SUPPLEMENTARY INFORMATION: The National Childhood Vaccine Injury Act of 1986 (Pub. L. 99–660), as amended by section 708 of Public Law 103–183, added section 2126 to the Public Health Service Act. Section 2126, codified at 42 U.S.C. 300aa–26, requires the Secretary of Health and Human Services to develop and disseminate vaccine information materials for distribution by all health care providers in the United States to any patient (or to the parent or legal representative in the case of a child) receiving vaccines covered under the National Vaccine Injury Compensation Program.

Development and revision of the vaccine information materials, also known as Vaccine Information Statements (VIS), have been delegated by the Secretary to the Centers for Disease Control and Prevention (CDC). Section 2126 requires that the materials be developed, or revised, after notice to the public, with a 60-day comment period, and in consultation with the Advisory Commission on Childhood Vaccines, appropriate health care provider and parent organizations, and the Food and Drug Administration. The law also requires that the information contained in the materials be based on available data and information, be presented in understandable terms, and include:

(1) A concise description of the benefits of the vaccine,

(2) A concise description of the risks associated with the vaccine,

(3) A statement of the availability of the National Vaccine Injury Compensation Program, and

(4) Such other relevant information as may be determined by the Secretary.

The vaccines initially covered under the National Vaccine Injury Compensation Program were diphtheria, tetanus, pertussis, measles, mumps, rubella and poliomyelitis vaccines. Since April 15, 1992, any health care provider in the United States who intends to administer one of these covered vaccines is required to provide copies of the relevant vaccine information materials prior to administration of any of these vaccines. Hepatitis B, *Haemophilus influenzae* type b (Hib), varicella (chickenpox), pneumococcal conjugate, hepatitis A, meningococcal conjugate and polysaccharide, rotavirus, human papillomavirus (HPV), and trivalent influenza vaccines have subsequently been added to the National Vaccine Injury Compensation Program. Use of the Vaccine Information Statements applicable to all of these vaccines, except meningococcal, rotavirus and HPV, is also required. (Interim versions of Vaccine Information Statements for meningococcal, rotavirus and HPV vaccines are available for discretionary use pending completion of the statutory process for finalizing VISs applicable to those vaccines.) Instructions for use of the vaccine information materials and copies of the materials can be found on

the CDC Web site at: *http://www.cdc.gov/vaccines/pubs/vis.*

Proposed Consolidated Vaccine Information Materials

With six vaccines recommended for infants from birth through 6 months of age—all covered by the National Vaccine Injury Compensation Program—CDC, as required under 42 U.S.C. 300aa–26, developed Vaccine Information Statements for each of those vaccines. In addition, CDC published, in 2008, an alternative consolidated Vaccine Information Statement covering those six vaccines in one document, which providers can choose to use instead of the existing individual Vaccine Information Statements for the same vaccines. The attached document is an update of this consolidated Vaccine Information Statement.

Development of Vaccine Information Materials

The vaccine information materials referenced in this notice are being developed in consultation with the Advisory Commission on Childhood Vaccines, the Food and Drug Administration, and parent and health care provider groups.

In addition, we invite written comment on the proposed vaccine information materials that follow, entitled "Your Baby's First Vaccines: What You Need to Know." Comments submitted will be considered in finalizing these materials.

* * * * *

Proposed Multi-Vaccine Vaccine Information Statement:

Your Baby's First Vaccines: What You Need to Know

Many Vaccine Information Statements are available in Spanish and other languages. See *http://www.immunize.org/vis* Hojas de Informacián Sobre Vacunas están disponibles en Español y en muchos otros idiomas. Visite *http://www.immunize.org/vis*

Babies get six vaccines between birth and 6 months of age, with at least one "booster" dose given later.

These vaccines protect your baby from 8 serious diseases.

Your baby will get these vaccines today:

☐ DTaP ☐ Polio ☐ Hib
☐ Rotavirus ☐ Hepatitis B
☐ PCV13

(Provider: Check appropriate boxes.)

Ask your doctor about "combination vaccines," which can reduce the number of shots your baby needs by combining several vaccines in one shot. These combination vaccines are as safe and effective as these vaccines given separately.

About This Vaccine Information Statement

Please read this Vaccine Information Statement (VIS) before your baby gets his or her immunizations, and take it home with you afterward. Ask your doctor, nurse, or other healthcare professional if you have any questions.

This VIS tells you about the benefits and risks of these 6 vaccines. It also contains information about reporting an adverse reaction and about the National Vaccine Injury Compensation Program, and how to get more information about vaccines and vaccine-preventable diseases. (Individual VISs are also available for these six vaccines.)

How Vaccines Work

Most medicines are designed to treat diseases. Vaccines are designed to prevent diseases, by producing immunity. A child who is immune to a disease will not get sick from it.

Immunity from Disease: Before vaccines, a child had to get sick to get immunity. When a child gets sick with a disease, like measles or whooping cough, her immune system produces protective "antibodies," which keep her from getting the same disease again. But getting sick the first time is unpleasant, and it can be dangerous or even fatal.

Immunity from Vaccines: Vaccines are made with the same bacteria or viruses that cause disease, but they have been weakened or killed to make them safe. A child's immune system responds to a vaccine by producing antibodies, just the same as it would if the child were infected with the actual disease. This means he will develop immunity in the same way * * * but without having to get sick first.

Vaccine benefits: Why get vaccinated?

Your baby's first vaccines protect him from 8 serious diseases, caused by viruses and bacteria. These diseases have injured and killed millions of children (and adults) over the years. Polio killed more than 1,000 people a year, and paralyzed tens of thousands more in the early 1950s. Hib disease was once the leading cause of bacterial meningitis in children under 5 years of age. About 15,000 people a year died from diphtheria before there was a vaccine. Most children have at least one rotavirus infection before their 5th birthday.

These diseases might be uncommon today, but if we stopped vaccinating they would come back. This has happened in the past, and even today disease rates go up when vaccination rates go down. For example in 2010 California had more pertussis cases than in any year since 1947.

8 Diseases Prevented by Childhood Vaccines

1. Diphtheria

You can get it from contact with an infected person.

Signs and symptoms include a thick covering in the back of the throat that can make it hard to breathe.

It can lead to breathing problems, heart failure, and death.

2. Tetanus (Lockjaw)

You can get it from a cut or wound. It does not spread from person to person.

Signs and symptoms include painful tightening of the muscles, usually all over the body.

It can lead to stiffness of the jaw that prevents swallowing or even opening the mouth. Of every 5 people who get tetanus, 1 dies.

3. Pertussis (Whooping Cough)

You can get it from contact with an infected person.

Signs and symptoms include violent coughing spells that can make it hard for an infant to eat, drink, or breathe. These spells can last for weeks.

It can lead to pneumonia, seizures, brain damage, and death.

4. Hib (Haemophilus influenzae type b)

You can get it from contact with an infected person.

Signs and symptoms. There may not be any signs or symptoms in mild cases.

It can lead to meningitis (infection of the brain and spinal cord coverings); pneumonia; infections of the blood, joints, bones, and covering of the heart; brain damage; deafness; and death.

5. Hepatitis B

You can get it from blood or body fluids of an infected person. Babies can get it at birth if the mother is infected, or through a cut or wound.

Signs and symptoms include tiredness, diarrhea and vomiting, jaundice (yellow skin or eyes), and pain in muscles, joints and stomach.

It can lead to liver damage, liver cancer, and death.

6. Polio

You can get it from close contact with an infected person. It enters the body through the mouth.

Signs and symptoms can include cold-like illness, or there may be no signs or symptoms at all.

It can lead to paralysis (can't move an arm or leg), or death (by paralyzing the breathing muscles).

7. Pneumococcal Disease

You can get it from contact with an infected person.

Signs and symptoms include fever, chills, cough, and chest pain.

It can lead to meningitis (infection of the brain and spinal cord coverings), blood infections, ear infections, pneumonia, deafness, brain damage, and death.

8. Rotavirus

You can get it from contact with other children who are infected.

Signs and symptoms include diarrhea (sometimes severe), vomiting and fever.

It can lead to dehydration, hospitalization (up to about 70,000 a year), and death.

Routine Baby Vaccines

Vaccine	Number of doses	Recommended ages	Other information
DTaP (diphtheria, tetanus, and pertussis.	5	2 months, 4 months, 6 months, 15–18 months, 4–6 years.	Some children should not get pertussis vaccine. These children should get a vaccine called DT.
Hepatitis B	3	Birth, 1–2 months, 6–18 months	A child might receive a 4th dose if "combination" vaccines are used.
Polio	4	2 months, 4 months, 6–18 months, 4–6 years.	A child might receive a 5th dose if "combination" vaccines are used.
Hib (Haemophilus influenzae type b)	3 or 4	2 months, 4 months, (6 months), 12–15 months.	There are 2 types of Hib vaccine. With one type the 6-month dose is not needed.
PCV13 (pneumococcal)	4	2 months, 4 months, 6 months, 12–15 months.	Older children with certain chronic diseases may also need this vaccine.
Rotavirus	2 or 3	2 months, 4 months, (6 months)	Rotavirus vaccine is given as drops that are swallowed. There are 2 types of rotavirus vaccine. With one type the 6-month dose is not needed. A virus called porcine circovirus is present in both vaccines. There is no evidence that it is a safety risk. For information ask your doctor or visit *http://www.cdc.gov/vpd-vac/rotavirus.*

An annual dose of flu vaccine is also recommended for children 6 months of age and older.

Precautions

Most babies can get all of these vaccines. But some babies should not get certain vaccines because of allergies or other health conditions. Your doctor can advise you.

If your child ever had a serious reaction, such as a life-threatening allergic reaction, after a dose of vaccine, she should not get another dose of that vaccine. *Tell your doctor if your child has any severe allergies.* (Serious reactions to vaccines and severe allergies are rare.)

If your child ever had any of these reactions after a dose of DTaP vaccine:
—A brain or nervous system disease within 7 days,
—Non-stop crying for 3 hours or more,
—A seizure or collapse,
—A fever of over 105 °F.
Talk to your doctor before getting DTaP vaccine.
If your child has:
—A life-threatening allergy to the antibiotics neomycin, streptomycin, or polymyxin B,
Talk to your doctor before getting Polio vaccine.
If your child has:
—A life-threatening allergy to yeast,
Talk to your doctor before getting Hepatitis B or PCV13 vaccine.
If your child has:
—SCID (Severe Combined Immunodeficiency),
— A weakened immune system for any other reason,
—Ongoing digestive problems,
—Recently gotten a blood transfusion or other blood product,
—Ever had intussusception (an uncommon type of bowel obstruction),
Talk to your doctor before getting Rotavirus vaccine.
If your child has:
—Ever had a severe reaction after any vaccine containing diphtheria toxoid (such as DTaP),
Talk to your doctor before getting PCV13 or DTaP vaccine.

If your child is sick on the day her vaccinations are scheduled, your doctor might want to reschedule them after she recovers. A child with a mild cold or low fever can usually be vaccinated the same day, but for a more serious illness it might be better to wait.

Risks

Vaccines can cause side effects, like any medicine. The risk of a serious reaction, such as a severe allergic reaction, or death, is extremely low.

Mild Reactions: Most vaccine reactions are mild "local" reactions: Tenderness, redness, or swelling where the shot was given; or a mild fever. These affect about 1 child in 4. They appear soon after the shot is given and go away within a day or two.

Other Reactions: Severe allergic reactions to a substance in a vaccine happen very rarely—less than once in a million shots. They generally occur within minutes or hours after the vaccination. Individual vaccines have been associated with other mild problems, or with moderate or serious problems:

DTaP Vaccine

Mild Problems: Fussiness (up to 1 child in 3); tiredness or poor appetite (up to 1 child in 10); vomiting (up to 1 child in 50); swelling of the entire arm or leg for 1–7 days (up to 1 child in 30)—usually after the 4th or 5th dose.

Moderate Problems: Seizure (1 child in 14,000); non-stop crying for 3 hours or longer (up to 1 child in 1,000); fever over 105 °F (1 child in 16,000).

Serious problems: Long term seizures, coma, lowered consciousness, and permanent brain damage have been reported. These are so rare it is hard to tell if they are caused by the vaccine.

Polio Vaccine/Hepatitis B Vaccine/Hib Vaccine

These vaccines have not been associated with mild problems other than local reactions. These vaccines have not been associated with problems other than mild local reactions.

Pneumococcal Vaccine

Mild Problems: During studies of the vaccine, some children became fussy or drowsy or lost their appetite.

Rotavirus Vaccine

Mild Problems: Children who get rotavirus vaccine are slightly more

likely than other children to be irritable or to have mild, temporary diarrhea or vomiting. This happens within the first week after getting a dose of the vaccine.

Serious Problems: Some studies have shown a small increase in cases of intussusception during the week after the first dose. Intussusception is a type of bowel blockage that is treated in a hospital. In some cases surgery might be required. The estimated risk is 1 case per 100,000 infants.

What if my child has a severe reaction?

What should I look for?

Any unusual condition, such as a high fever or behavior changes. Signs of a severe allergic reaction can include difficulty breathing, hoarseness or wheezing, hives, paleness, weakness, a fast heart beat or dizziness.

What should I do?

Call a doctor, or get the person to a doctor right away.

Tell the doctor what happened, the date and time it happened, and when the vaccination was given.

Ask your doctor to report the reaction by filing a Vaccine Adverse Event Reporting System (VAERS) form. Or you can file this report through the VAERS Web site at *http://www.vaers.hhs.gov,* or by calling 1–800–822–7967. *VAERS does not provide medical advice.*

The National Vaccine Injury Compensation Program

The National Vaccine Injury Compensation Program (VICP) was created in 1986.

People who believe they may have been injured by a vaccine can learn about the program and about filing a claim by calling 1–800–338–2382, or visiting the VICP Web site at *http://www.hrsa.gov/vaccinecompensation.*

For More Information

• Ask your doctor. They can give you the vaccine package insert or suggest other sources of information.

• Call your local or state health department.

• Contact the Centers for Disease Control and Prevention (CDC):

—Call 1–800–232–4636 (1–800–CDC–INFO) or

—Visit CDC's Web site at *http://www.cdc.gov/vaccines.*

Department of Health and Human Services

Centers for Disease Control and Prevention

Vaccine Information Statement (00/00/0000) (Proposed)

42 U.S.C. 300aa–26

Dated: December 21, 2010.

Tanja Popovic,

Deputy Associate Director for Science, Centers for Disease Control and Prevention (CDC).

[FR Doc. 2010–32965 Filed 12–29–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Statement of Organization, Functions, and Delegations of Authority

Part F of the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS), (last amended at 75 FR 14176–14178, dated March 24, 2010) is amended to change the title of the Office of Executive Operations and Regulatory Affairs to the Office of Strategic Operations and Regulatory Affairs, to reflect the establishment of a new Federal Coordinated Health Care Office and to update the organization for CMS, as follows:

(1) Under Part F, CMS, FC. 10 Organizations, change the title of the Office of Executive Operations and Regulatory Affairs (FCF) to the Office of Strategic Operations and Regulatory Affairs (FCF).

(2) Under Part F, CMS, FC. 10 Organizations, insert the following new Office after the Center for Medicare and Medicaid Innovation (FCP): "Federal Coordinated Health Care Office (FCQ)."

(3) Under Part F, CMS, FC. 20 Functions, change the title of the Office of Executive Operations and Regulatory Affairs (FCF) to the Office of Strategic Operations and Regulatory Affairs (FCF).

(4) Under Part F, CMS, FC. 20 Functions, insert the following after the description of the Center for Medicare and Medicaid Innovation (FCP):

Federal Coordinated Health Care Office (FCQ)

• Manages the implementation and operation of the Federal Coordinated Health Care Office mandated in section 2602 of the Affordable Care Act, ensuring more effective integration of benefits under Medicare and Medicaid for individuals eligible for both programs and improving coordination between the Federal Government and States in the delivery of benefits for such individuals.

• Monitors and reports on annual total expenditures, health outcomes and access to benefits for all dual eligible individuals, including subsets of the population.

• Coordinates with the Center for Medicare and Medicaid Innovation to provide technical assistance and programmatic guidance related to the testing of various delivery system, payment, service and/or technology models to improve care coordination, reduce costs, and improve the beneficiary experience for individuals dually eligible for Medicare and Medicaid.

• Performs policy and program analysis of Federal and State statutes, policies, rules and regulations impacting the dual eligible population.

• Makes recommendations on eliminating administrative and regulatory barriers between the Medicare and Medicaid programs.

• Develops tools, resources and educational materials to increase dual eligibles' understanding of and satisfaction with coverage under the Medicare and Medicaid programs.

• Provides technical assistance to States, health plans, physicians and other relevant entities of individuals with education and tools necessary for developing integrated programs for dual eligible beneficiaries.

• Consults with the Medicare Payment Advisory Commission and the Medicaid and CHIP Payment Advisory Commission with respect to policies relating to the enrollment in and provision of benefits to dual eligible beneficiaries under Medicare and Medicaid.

• Studies the provision of drug coverage for new full benefit dual eligible individuals.

• Develops policy and program recommendations to eliminate cost shifting between the Medicare and Medicaid program and among related health care providers.

• Develops annual report containing recommendations for legislation that would improve care coordination and benefits for dual eligible individuals.

Authority: 44 U.S.C. 3101.

Dated: December 7, 2010.

Kathleen Sebelius,

Secretary.

[FR Doc. 2010–32957 Filed 12–27–10; 4:15 pm]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Provisions of Services in Interstate Child Support.

Enforcement: Standard Forms.

OMB No.: 0970–0085.

Description: Public Law 104–193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, amended 42 U.S.C. 666 to require State and Territory Child Support Enforcement (CSE) IV–D agencies to enact the Uniform Interstate Family Support Act (UIFSA) into State and Territory law by January 1, 1998. Section 311(b) of UIFSA requires States and Territories to use standard interstate forms. 45 CFR 303.7 also requires CSE IV–D agencies to transmit child support case information on standard interstate forms when referring cases to other States and Territories for processing. During the OMB clearance process, we are taking the opportunity to make revisions that have been requested by the State.

Overall, the language, format and instructions have been standardized across the forms. The title of the forms has been changed to "Intergovernmental" to reflect their use by States, Tribes, and foreign countries. For clarity in the Transmittal Initial Request we added a field for Born Out of Wedlock and Date Paternity Established. Instructions for the new fields have been added. Fields to identify Tribal affiliation have been added to all three Transmittals as well as instructions for this field. The instructions have been clarified by highlighting policy information that was included with the instructions so it is distinct and by making the instructions that are common across the forms consistent. Minor changes to common labels across the instructions have been made for consistency, *e.g.,* Social Security No. and SSN to Social Security Number, email and E-mail to E-Mail, fax and Fax to FAX. These changes are in response to requests and comments made by States.

Respondents: State and Territory agencies administering the Child Support Enforcement program under title IV–D of the Social Security Act.

Annual Burden Estimates

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Transmittal 1	54	19,278	.25	260,253
Transmittal 2	54	14,458	.08	62,459
Transmittal 3	54	964	.08	4,164
Uniform Petition	54	9,639	.08	41,640
General Testimony	54	11,567	.33	206,124
Affidavit—Paternity	54	4,819	.17	44,238
Locate Data Sheet	54	375	.08	1,620
Notice of Controlling Order	54	964	.08	4,164
Registration Statement	54	8,675	.08	37,476
Estimated Total Annual Burden Hours	.....	.....	.....	662,138

Additional Information:

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

OMB Comment:

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following:

Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–6974, Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2010–32925 Filed 12–29–10; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0356]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Designated New Animal Drugs for Minor Use and Minor Species

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Designated New Animal Drugs for Minor Use and Minor Species" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of September 28, 2010 (75 FR 59721), the Agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0605. The approval expires on December 31, 2013. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: December 23, 2010.

David Dorsey,

Acting Deputy Commissioner for Policy, Planning and Budget.

[FR Doc. 2010–32948 Filed 12–29–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0118]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Prior Notice of Imported Food Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Prior Notice of Imported Food Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of May 28, 2010 (75 FR 30036), the Agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0520. The approval expires on December 31, 2013. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: December 23, 2010.

David Dorsey,

Acting Deputy Commissioner for Policy, Planning and Budget.

[FR Doc. 2010–32946 Filed 12–29–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; Testing Successful Health Communications Surrounding Aging-Related Issues From the National Institute on Aging (NIA)

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institute on Aging, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. This proposed information collection was previously published in the **Federal Register** on 09–27–2010 at 08:45:00 (*http://federalregister.gov/a/2010–24277,* Vol. 75, No. 187, Page: 59723–59724 (2 pages); Document Citation: 75 FR 59723; Document Number: 2010–24277) and allowed 60-days for public comment. One comment was received from an organization who requested to be considered as a contractor for NIA's project. No other public comments were received. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection: *Title:* Testing successful health communications surrounding aging-related issues from the National Institute on Aging (NIA*). Type of Information Collection Request:* New. *Need and Use of Information Collection:* This study will support NIA's mission "to communicate information about aging and advances in research on aging to the scientific community, health care providers, and the public." The primary objectives of this study are to:

- Assess audiences' trusted/preferred sources for information, knowledge, attitudes, behaviors, and other characteristics for the planning/development of health messages and communications strategies;
- Pre-test health messages and outreach strategies while they are in developmental form to assess audience response, including their likes and dislikes.

NIA's Office of Communications and Public liaison will collect this information through formative qualitative research with its key audiences—older people, caregivers, and health professionals. Methods will include focus groups, individual interviews, self-administered questionnaires, and website surveys. The information will be used to (1) develop and revise health information resources and outreach strategies to maximize their effectiveness; (2) determine new topic areas to explore for future NIA publications; and (3) identify new ways to support the health information needs of older adults and people who serve older adults. NIA is requesting a generic clearance for a range of research data collection procedures to ensure that they successfully develop and disseminate effective health communications on aging-related issues. *Frequency of Response:* On occasion. *Affected Public:* Older people, caregivers, and health professionals (physicians and non-physicians). *Type of Respondents:* Older people, caregivers, and health professionals (physicians and non-physicians). The annual reporting burden is as follows: *Estimated Number of Respondents:* 630. *Estimated Number of Responses per Respondent:* 1. *Average Burden Hours per Response:* 0.37. *Estimated Total Annual Burden Hours Requested:* 234. The annualized cost to respondents is estimated at: $5,680. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
Older adults	260	1	.37	97
Non-physician health professionals and caregivers	310	1	.35	107
Physicians	60	1	.5	30
Total				234

Request for Comments: Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, *Attention:* Desk Officer for NIH. *To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact:* Megan Homer, Writer/Editor, Office of Communications and Public Liaison, NIH, Building 31C Room 5C27, 9000 Rockville Pike, Bethesda, MD 20892, or call non-toll-free number 301–496–1752 or E-mail your request, including your address to: *homerm@mail.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

Dated: December 20, 2010.

Lynn Hellinger,

Director of Management, National Institutes of Health.

[FR Doc. 2010–32911 Filed 12–29–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Initial Review Group; Interventions Committee for Disorders Involving Children and Their Families.

Date: January 31, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852. (Telephone Conference Call).

Contact Person: David I. Sommers, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, 6001 Executive Blvd., Room 6154, MSC 9606, Bethesda, MD 20892–9606. 301–443–7861. *dsommers@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Initial Review Group; Mental Health Services in Non-Specialty Settings.

Date: February 8, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

Contact Person: Aileen Schulte, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd, Room 6140, MSC 9608, Bethesda, MD 20892–9608. 301–443–1225. *aschulte@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Initial Review Group; Interventions Committee for Adult Disorders.

Date: February 8, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852. (Telephone Conference Call).

Contact Person: David I. Sommers, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, 6001 Executive Blvd., Room 6154, MSC 9606, Bethesda, MD 20892–9606. 301–443–7861. *dsommers@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Initial Review Group; Mental Health Services in MH Specialty Settings.

Date: February 11, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

Contact Person: Marina Broitman, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6153, MSC 9608, Bethesda, MD 20892–9608. 301–402–8152. *mbroitma@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: December 23, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32907 Filed 12–29–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Prevention; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Substance Abuse and Mental Health Services Administration (SAMHSA) Center for Substance Abuse Prevention Drug Testing Advisory Board (DTAB) on January 26 and 27, 2011.

A portion of the meeting will be open and will include the Federal drug testing updates from the Department of Transportation, the Department of Defense, the Nuclear Regulatory Commission, and the Federal Drug-Free Workplace Programs; updates on the Mandatory Guidelines for Federal Workplace Drug Testing Programs (the Guidelines); review of the topics that the DTAB will be addressing in the future, including alternate matrices, the electronic custody and control form, and the medical review officer certification; a historical perspective of oral fluid as a drug testing matrix; and the current perspective of the oral fluid matrix, including specimen, drug analytes and their cutoffs, methodologies, proficiency testing, best practices experiences, and specimen drug testing data.

The public is invited to attend the open session in person or to listen via teleconference. Due to the limited space, attendance will be on a registration-only basis. Public comments are welcome. To register, to make arrangements to attend, to obtain the teleconference call-in numbers and access codes, to submit

written or brief oral comments, or to request special accommodations for persons with disabilities, please register at the SAMHSA Committees' Web site at *https://nac.samhsa.gov/Registration/meetingsRegistration.aspx* or communicate with DTAB's Program Assistant, Ms. Giselle Hersh (*see* contact information below).

The Board will also meet to discuss proposed revisions to the Guidelines on January 27 between 1:30 p.m.–5 p.m. EST. This portion of the meeting will be conducted in a closed session as determined by the Administrator, SAMHSA, in accordance with 5 U.S.C. 552b(c)(9)(B) and 5 U.S.C. App. 2, Section 10(d).

Substantive program information, a summary of the meeting, and a roster of DTAB members may be obtained as soon as possible after the meeting, either by accessing the SAMHSA Committee Web site, *https://www.nac.samhsa.gov/DTAB/meetings.aspx*, or by contacting Dr. Cook. The transcript for the open meeting will also be available on the SAMHSA Committee Web site within three weeks after the meeting.

Committee Name: Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Prevention Drug Testing Advisory Board.

Date/Time/Type: January 26, 2011 from 11 a.m. to 5 p.m. EST: Open; January 27, 2011 from 8:30 a.m. to 12:15 p.m. EST: Open; January 27, 2011 from 1:30 p.m. to 5 p.m. EST: Closed.

Place: Sugarloaf and Seneca Conference Rooms, 1 Choke Cherry Road, Rockville, Maryland 20857.

Contacts: Janine Denis Cook, PhD, Designated Federal Official, SAMHSA Drug Testing Advisory Board, 1 Choke Cherry Road, Room 2–1045, Rockville, Maryland 20857. Telephone: 240–276–2600. Fax: 240–276–2610. E-mail: *janine.cook@samhsa.hhs.gov.*

Ms. Giselle Hersh, Program Assistant, SAMHSA Drug Testing Advisory Board, 1 Choke Cherry Road, Room 2–1042, Rockville, Maryland 20857. Telephone: 240–276–2600. Fax: 240–276–2610. E-mail: *Giselle.Hersh@samhsa.hhs.gov.*

Toian Vaughn,

Committee Management Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. 2010–32858 Filed 12–29–10; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5375–N–51]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7262, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: December 23, 2010.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

[FR Doc. 2010–32792 Filed 12–29–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2010–N286; 96300–1671–0000–P5]

Endangered Species; Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service (USFWS), invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (ESA) prohibits activities with listed species unless a Federal permit is issued that allows such activities. The ESA laws require that we invite public comment before issuing these permits.

DATES: We must receive comments or requests for documents on or before January 31, 2011.

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or e-mail *DMAFR@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an e-mail or address not listed under **ADDRESSES**. If you provide an e-mail address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (*see* **DATES**) or comments delivered to an address other than those listed above (*see* **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be

available for public review at the address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

II. Background

To help us carry out our conservation responsibilities for affected species, the Endangered Species Act of 1973, section 10(a)(1)(A), as amended (16 U.S.C. 1531 *et seq.*), require that we invite public comment before final action on these permit applications.

III. Permit Applications

A. Endangered Species

Applicant: Mote Marine Laboratory, Sarasota, FL; PRT–25983A.

The applicant requests a permit to import one Kemp's ridley sea turtle (*Lepidochelys kempii*) from Zoomarine-Mundo Aquatico SA, Portugal, where it was rehabilitated after stranding and recovery in the Netherlands for the purpose of enhancement of the survival of the species.

Applicant: Wildlife Conservation Society, Bronx, NY; PRT–781606.

The applicant requests amendment and renewal of the permit to import biological samples from hawksbill sea turtles (*Eretmochelys imbricata*), leatherback sea turtles (*Dermochelys coriacea*), loggerhead sea turtles (*Caretta caretta*), and green sea turtles (*Chelonia mydas*) collected in the wild in Nicaragua for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Zoo Atlanta, Atlanta, GA; PRT–008519.

The applicant requests reissuance of their permit for scientific research with two captive-born giant pandas (*Ailuropoda melanoleuca*) and their offspring currently held under loan agreement with the Government of China and under provisions of the USFWS Giant Panda Policy. The proposed research will cover all aspects of behavior, reproductive physiology, genetics, nutrition, and animal health and is a continuation of activities currently in progress. This notice covers activities conducted by the applicant over a period of 5-years.

Applicant: Reggie Pratt, Minot, ME; PRT–30840A.

The applicant requests a permit to import a sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Dated: December 24, 2010.

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2010–32942 Filed 12–29–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Advisory Board for Exceptional Children

AGENCY: Bureau of Indian Education, Interior.

ACTION: Notice of meeting.

SUMMARY: The Bureau of Indian Education (BIE) is announcing that the Advisory Board for Exceptional Children (Advisory Board) will hold its next meeting in Albuquerque, New Mexico. The purpose of the meeting is to meet the mandates of the Individuals with Disabilities Education Act of 2004 (IDEA) for Indian children with disabilities.

DATES: The Advisory Board will meet on Thursday, January 13, 2011, from 8:30 a.m. to 4:30 p.m. and Friday, January 14, 2011, from 8:30 a.m. to 4:30 p.m. Mountain Standard Time.

ADDRESSES: The meeting will be held at the Manuel Lujan, Jr. Indian Affairs Building, 1011 Indian School Road North West, Albuquerque, New Mexico 87104; telephone number (505) 563–5383.

FOR FURTHER INFORMATION CONTACT: Sue Bement, Designated Federal Official, Bureau of Indian Education, Albuquerque Service Center, Division of Performance and Accountability, 1011 Indian School Road, NW., Suite 332, Albuquerque, NM 87104; telephone number (505) 563–5274.

SUPPLEMENTARY INFORMATION: In accordance with the Federal Advisory Committee Act, the BIE is announcing that the Advisory Board will hold its next meeting in Albuquerque, New Mexico. The Advisory Board was established under the Individuals with Disabilities Act of 2004 (20 U.S.C. 1400 *et seq.*) to advise the Secretary of the Interior, through the Assistant Secretary-Indian Affairs, on the needs of Indian children with disabilities. The meetings are open to the public.

The following items will be on the agenda:

- Introduction of Advisory Board members.
- Appointment of Advisory Board Vice Chair.
- Report from Gloria Yepa, Supervisory Education Specialist, BIE, Division of Performance and Accountability.
- Report from BIE Director's Office.
- Report from Dr. Jeffrey Hamley, Associate Deputy Director, BIE.
- Stakeholder input on BIE Annual Performance Report.
- Public Comment (via conference call, January 14, 2011, meeting only*).
- Part B and C (0–5) Updates.
- Presentation by Casey Sovo, New Mexico South Education Line Officer.
- Panel discussion with Special Education faculty, Reading Coach and Math Coach from Sky City Community School, Acoma, New Mexico.
- BIE Advisory Board-Advice and Recommendations.

* During the January 13, 2011, meeting, time has been set aside for public comment via conference call from 1:30–2 p.m. Mountain Standard Time. The call-in information is: Conference Number 1–888–417–0376, Passcode 1509140.

Dated: December 23, 2010.

George T. Skibine,

Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2010–32931 Filed 12–29–10; 8:45 am]

BILLING CODE 4310–6W–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *In Re Certain Game Devices, Components Thereof, and Products Containing the Same,* DN 2776; the Commission is soliciting comments on any public interest issues raised by the complaint.

FOR FURTHER INFORMATION CONTACT: Marilyn R. Abbott, Secretary to the Commission, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint filed on behalf of Microsoft Corporation on December 23, 2010. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain game devices, components thereof, and products containing the same. The complaint names as respondents Datel Design and Development Inc. of Clearwater, FL; Datel Design and Development Ltd. of Staffordshire, United Kingdom; Datel Direct Ltd. of Staffordshire, United Kingdom; Datel Holdings Ltd. of Staffordshire, United Kingdom; and Datel Electronics Ltd. of Staffordshire, United Kingdom.

The complainant, proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five pages in length, on any public interest issues raised by the complaint. Comments should address whether issuance of an exclusion order and/or a cease and desist order in this investigation would negatively affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the potential orders;

(iii) indicate the extent to which like or directly competitive articles are produced in the United States or are otherwise available in the United States, with respect to the articles potentially subject to the orders; and

(iv) indicate whether Complainant, Complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to an exclusion order and a cease and desist order within a commercially reasonable time.

Written submissions must be filed no later than by close of business, five business days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Submissions should refer to the docket number ("Docket No. 2776") in a prominent place on the cover page and/or the first page. The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (*see* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf).* Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50(a)(4) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50(a)(4)).

By order of the Commission.

Issued: December 23, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–32866 Filed 12–29–10; 8:45 am]

BILLING CODE 7020–02–P

LEGAL SERVICES CORPORATION

Sunshine Act Meeting

DATE AND TIME: The Legal Services Corporation Board of Directors will meet telephonically on January 3, 2011 at 2:30 p.m., Eastern Time.

LOCATION: The Legal Services Corporation, 3rd Floor Conference Center, 3333 K Street, NW., Washington, DC 20007.

PUBLIC OBSERVATION: Unless otherwise noticed, all meetings of the LSC Board of Directors are open to public observation. Members of the public that are unable to attend but wish to listen to a public proceeding may do so by following the telephone call-in directions given below. You are asked to keep your telephone muted to eliminate background noises. From time to time the presiding Chair may solicit comments from the public.

Call-In Directions for Open Sessions:

- Call toll-free number: 1–(866) 451–4981;
- When prompted, enter the following numeric pass code: 5907707348;
- When connected to the call, please "MUTE" your telephone immediately.

STATUS OF MEETING: Open.

Matters To Be Considered

OPEN SESSION

1. Approval of agenda
2. Report of the Search Committee regarding selection of a candidate for the position of LSC President
3. Consider and act on the recommendation of the Search Committee
4. Consider and act on other business
5. Consider and act on adjournment of meeting

CONTACT PERSON FOR INFORMATION: Katherine Ward, Executive Assistant to the Vice President & General Counsel, at (202) 295–1500. Questions may be sent by electronic mail to *FR_NOTICE_QUESTIONS@lsc.gov.*

SPECIAL NEEDS: Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Katherine Ward, at (202) 295–1500 or *FR_NOTICE_QUESTIONS@lsc.gov.*

Dated: December 27, 2010.

Patricia D. Batie,

Corporate Secretary.

[FR Doc. 2010–32980 Filed 12–28–10; 11:15 am]

BILLING CODE 7050–01–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 75 FR 65527, 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 e-mail to *splimpto@nsf.gov.* Comments regarding this information collection 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 e-mail to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

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: Revitalizing Computing Pathways (CPATH) in Undergraduate Education Program Evaluation.

OMB Number: 3145–0211.

Type of Request: Revision to an existing collection.

Abstract: The CPATH program was established by the National Science Foundation's Computer & Information Science & Engineering (CISE) division with a vision towards preparing a U.S. workforce with the computing competencies and skills imperative to the Nation's health, security, and prosperity in the 21st century. This workforce includes a cadre of computing professionals prepared to contribute to sustained U.S. leadership in computing in a wide range of application domains and career fields, and a broader professional workforce with knowledge and understanding of critical computing concepts, methodologies, and techniques. To achieve this vision, CISE/CPATH is calling for colleges and universities to work together and with other stakeholders (industry, professional societies, and other types of organizations) to formulate and implement plans to revitalize undergraduate computing education in the United States. The full engagement of faculty and other individuals in CISE disciplines will be critical to success. Successful CPATH projects will be systemic in nature, address a broad range of issues, and have significant potential to contribute to the transformation and revitalization of undergraduate computing education on a national scale. The qualitative data collection of this program evaluation will document CPATH program strategies utilized in infusing computational thinking across different contexts and disciplines, examine the development of communities of practitioners and the dissemination of best practices around computational thinking, and analyze preliminary evidence for how the CPATH program is preparing students for career options in the STEM workforce. Five overarching evaluation questions will guide this program evaluation: (1) How is the CPATH program infusing computational thinking into a wide range of disciplines serving undergraduate education? (2) What is the evidence that university and community college departments and faculty are integrating computational thinking into their courses? (3) How are undergraduate students benefiting from participating in CPATH projects? (4) What is the evidence that the CPATH program is developing communities of practitioners that regularly share best practices across different contexts and disciplinary boundaries? (5) How is the CPATH program promoting sustainable multi-sector partnerships that represent a broad range of stakeholders (e.g., industry, higher education, K12) and contribute to workforce development that supports continued U.S. leadership in innovation? Answers to these questions are currently obtained using mixed evaluation methods including document analyses, site visit interviews, and telephone interviews with selected CPATH grant participants including principal investigators, staff, faculty, administrators, students, and external partners. This revision of the existing data collection activities will now include new protocols for interviewing faculty via phone, project evaluators, as well as edits to the previous protocols. Participation in CPATH program evaluation activities is a mandatory requirement for all CPATH awardees in accordance with the America Competes Act, H.R. 2272, and implementing directives.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1.75 hours per response.

Respondents: Individuals.

Estimated Number of Responses per Form: 340.

Estimated Total Annual Burden on Respondents: 380 hours.

Frequency of Response: One time.

Dated: December 23, 2010.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2010–32846 Filed 12–29–10; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Docket No. NRC–2010–0348

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The NRC invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* "DOE/NRC Form 742C, Physical Inventory Listing."

2. *Current OMB approval number:* 3150–0058.

3. *How often the collection is required:* DOE/NRC Form 742C is submitted annually following a physical inventory of nuclear materials.

4. *Who is required or asked to report:* Persons licensed to possess specified quantities of special nuclear or source material.

5. *The number of annual respondents:* For DOE/NRC Form 742C, there are approximately 360 respondents annually.

6. *The number of hours needed annually to complete the requirement or request:* 1,440.

7. *Abstract:* Each licensee authorized to possess special nuclear material totaling more than one gram of contained uranium-235, uranium-233, or plutonium, or any combination thereof, is required to submit DOE/NRC Form 742C data. NRC uses this information to fulfill its responsibilities as a participant in US/IAEA Safeguards Agreement and various bilateral agreements with other countries and to satisfy its domestic safeguards responsibilities.

Submit, by February 28, 2011 comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC–2010–0348. You may submit your comments by any of the following methods. Electronic comments: Go to *http://www.regulations.gov* and search for Docket No. NRC–2010–0348. Mail comments to NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Questions about the information collection requirements may be directed to the NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–6258, or by e-mail to *INFOCOLLECTS.Resource@NRC.GOV.*

Dated at Rockville, Maryland, this 22nd day of December 2010.

For the Nuclear Regulatory Commission.

Kristen Benney,

Acting NRC Clearance Officer, Office of Information Services.

[FR Doc. 2010–32919 Filed 12–29–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2010–0347]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The NRC invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* "DOE/NRC Form 742, Material Balance Report and NUREG/BR–0007, Instructions for the Preparation and Distribution of Material Status Report."

2. *Current OMB approval number:* 3150–0004.

3. *How often the collection is required:* DOE/NRC Form 742 is submitted annually following a physical inventory of nuclear materials.

4. *Who is required or asked to report:* Persons licensed to possess specified quantities of special nuclear or source material.

5. *The number of annual respondents:* For DOE/NRC Form 742, there are approximately 360 respondents annually.

6. *The number of hours needed annually to complete the requirement or request:* 1,260.

7. *Abstract:* Each licensee authorized to possess special nuclear material totaling more than one gram of contained uranium-235, uranium-233, or plutonium, or any combination thereof, are required to submit DOE/NRC Forms 742 and 742C. In addition, any licensee authorized to possess 1,000 kilograms of source material is required to submit DOE/NRC Form 742. The NRC uses this information to fulfill its responsibilities as a participant in US/IAEA Safeguards Agreement and various bilateral agreements with other countries, and to satisfy its domestic safeguards responsibilities.

Submit, by February 28, 2011 comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized,

including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC–2010–0347. You may submit your comments by any of the following methods. Electronic comments: Go to *http://www.regulations.gov* and search for Docket No. NRC–2010–0347. Mail comments to NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Questions about the information collection requirements may be directed to the NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–6258, or by e-mail to *INFOCOLLECTS.Resource@NRC.GOV.*

Dated at Rockville, Maryland, this 2nd day of December, 2010.

For the Nuclear Regulatory Commission.

Kristen Benney,

Acting NRC Clearance Officer, Office of Information Services.

[FR Doc. 2010–32920 Filed 12–29–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–261; NRC–2010–0062]

Carolina Power & Light Company; H. B. Robinson Steam Electric Plant, Unit No. 2; Exemption

1.0 Background

Carolina Power & Light Company (CP&L, the licensee) is the holder of Renewed Facility Operating License No. DPR–23, which authorizes operation of the H.B. Robinson Steam Electric Plant, Unit 2 (HBRSEP). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect. The facility consists of one pressurized-water reactor located in New Hill, North Carolina.

2.0 Request/Action

Title 10 of the Code of Federal Regulations (10 CFR) part 73, "Physical protection of plants and materials," Section 73.55, "Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage," published as a final rule in the **Federal Register** on March 27, 2009, effective May 26, 2009, with a full implementation date of March 31, 2010, requires licensees to protect, with high assurance, against radiological sabotage by designing and implementing comprehensive site security plans. The amendments to 10 CFR 73.55 published on March 27, 2009 (74 FR 13926), establish and update generically applicable security requirements similar to those previously imposed by Commission orders issued after the terrorist attacks of September 11, 2001, and implemented by licensees. In addition, the amendments to 10 CFR 73.55 include additional requirements to further enhance site security based upon insights gained from implementation of the post-September 11, 2001, security orders.

By letter dated March 3, 2010 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML100082190), the NRC granted an exemption to the licensee for two specific items subject to the new rule in 10 CFR 73.55, allowing the implementation of these items to be extended until December 30, 2010. The licensee has implemented all other physical security requirements established by this rulemaking prior to March 31, 2010, the required implementation date.

By letter dated September 30, 2010, the licensee requested an exemption in accordance with 10 CFR 73.5, "Specific exemptions." Specifically, the licensee requested an extension of the implementation date for the remaining one item from December 30, 2010, to September 16, 2011. Portions of the licensee's September 30, 2010, letter contain security-related information and, accordingly, a redacted version of this letter is available for public review in the ADAMS No. ML103360283. The licensee requested this exemption to allow an additional extension from the current implementation date granted in the prior exemption to implement one remaining item of the requirements that involves important physical modifications to the HBRSEP security system. The licensee has performed an extensive evaluation of the revised 10 CFR part 73 and has achieved compliance with a vast majority of the revised rule. However, the licensee has determined that implementation of one specific item of the rule will require more time to implement because it involves upgrades to the security system that require significant physical modifications (*e.g.,* the relocation of certain security assets to a new security building that will be constructed, and the addition of certain power supplies). Granting an exemption would allow the licensee time to complete the necessary security modifications to meet the regulatory requirements.

3.0 Discussion of Part 73 Schedule Exemption From the March 31, 2010, Full Implementation Date

Pursuant 10 CFR 73.55(a)(1), "By March 31, 2010, each nuclear power reactor licensee, licensed under 10 CFR Part 50, shall implement the requirements of this section through its Commission-approved Physical Security Plan, Training and Qualification Plan, Safeguards Contingency Plan, and Cyber Security Plan referred to collectively hereafter as 'security plans.'" In accordance with 10 CFR 73.5, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 73 when the exemptions are authorized by law, and will not endanger life or property or the common defense and security, and are otherwise in the public interest.

In the draft final rule provided to the Commission, the NRC staff proposed that the requirements of the new regulation be met within 180 days. The Commission directed a change from 180 days to approximately 1 year for licensees to fully implement the new requirements. This change was incorporated into the final rule.

As noted in the final rule, the Commission anticipated that licensees would have to conduct site-specific analyses to determine what changes were necessary to implement the rule's requirements, and that changes could be accomplished through a variety of licensing mechanisms, including exemptions. Since issuance of the final rule, the Commission has rejected a request to generically extend the rule's compliance date for all operating nuclear power plants, but noted that the Commission's regulations provide mechanisms for individual licensees, with good cause, to apply for relief from the compliance date (Reference: June 4,

2009, letter from R.W. Borchardt, NRC, to M.S. Fertel, Nuclear Energy Institute (ADAMS Accession No. ML091410309)). The licensee's request for an exemption is, therefore, consistent with the approach set forth by the Commission and discussed in the June 4, 2009, letter.

NRC approval of this exemption would allow an additional extension from the implementation date granted under a previous exemption from December 30, 2010, to September 16, 2011, for one remaining item of the final rule. As stated above, 10 CFR 73.5 allows the NRC to grant exemptions from the requirements of 10 CFR part 73. The NRC staff has determined that granting of the licensee's proposed exemption would not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

H.B. Robinson Schedule Exemption Request

The licensee provided detailed information in its letter dated September 30, 2010, describing the reason and justification for an exemption to extend the implementation date for the one remaining requirement. Additionally, the licensee has provided information regarding the revised scope for projects at HBRSEP and the impacts on the licensee's ability to meet the current implementation date of December 30, 2010. The proposed exemption is needed to provide the licensee with additional time, beyond the date granted by the NRC letter dated March 3, 2010, to implement one remaining item of the two requirements in the previous exemption that involves important physical modifications to the HBRSEP security system. The licensee has determined that implementation of one specific provision of the rule will require more time to implement because it involves upgrades to the security system that require significant physical modifications. The licensee identified several issues that have delayed the work to this point and impacted the projected schedule: (1) The complexity of the design and construction of the projects which lead to unforeseen scope growth; (2) a better understanding of the time necessary for transition and testing for the new systems; and (3) due to a fire in an electrical switchgear room, the spring refueling outage was extended beyond that originally anticipated when schedules were first developed. These issues were revealed as the design evolved from the conceptual state to a detailed design. Additional time, beyond that previously approved, is needed due the extensive redesign and review effort that was unforeseen at the conceptual design stage. Portions of the September 30, 2010, letter contain security-related information regarding the site security plan, details of specific portions of the regulation from which the licensee seeks exemption, justification for the additional extension request, a description of the required changes to the physical security systems, and a revised timeline with critical path activities that would enable the licensee to achieve full compliance by September 16, 2011. The timeline provides dates indicating when (1) Design activities will be completed and approved, (2) the extended refueling outage started and finished, (3) various construction activities will be completed, and (4) the new and relocated equipment will be installed and tested.

The site-specific information provided within the HBRSEP exemption request is relative to the requirements from which the licensee requested exemption and demonstrates the need for modification to meet the one specific remaining requirement of 10 CFR 73.55. The proposed implementation schedule depicts the critical activity milestones of the security system upgrades; is consistent with the licensee's solution for meeting the requirements; is consistent with the scope of the modifications and the issues and challenges identified; and is consistent with the licensee's requested compliance date.

Notwithstanding the proposed schedule exemption for this one remaining requirement, the licensee will continue to be in compliance with all other applicable physical security requirements as described in 10 CFR 73.55 and reflected in its current NRC-approved physical security program. By September 16, 2011, the HBRSEP physical security system will be in full compliance with all of the regulatory requirements of 10 CFR 73.55, as published on March 27, 2009.

4.0 Conclusion for Part 73 Schedule Exemption Request

The NRC staff has reviewed the licensee's submittals and concludes that the licensee has provided adequate justification for its request for an extension of the previously authorized implementation date from December 30, 2010, with regard to one remaining requirement of 10 CFR 73.55, to September 16, 2011. This conclusion is based on the NRC staff's determination that the licensee has made a good faith effort to meet the requirements in a timely manner, has sufficiently described the reason for the unanticipated delays, and has provided an updated detailed schedule with adequate justification to the additional time requested for the extension.

The long-term benefits that will be realized when the security systems upgrade is complete justify extending the full compliance date with regard to the specific requirements of 10 CFR 73.55 for this particular licensee. The security measures that HBRSEP needs additional time to implement are new requirements imposed by amendments to 10 CFR 73.55, as published on March 27, 2009, and are in addition to those required by the security orders issued in response to the events of September 11, 2001. Accordingly, an exemption from the March 31, 2010, implementation date is authorized by law and will not endanger life or property or the common defense and security, and the Commission hereby grants the requested exemption.

As per the licensee's request and the NRC's regulatory authority to grant an exemption to the March 31, 2010, implementation date for the one remaining item specified in Attachment 1 of the CP&L letter dated September 30, 2010, the licensee is required to implement this one remaining item and be in full compliance with 10 CFR 73.55 by September 16, 2011. In achieving compliance, the licensee is reminded that it is responsible for determining the appropriate licensing mechanism (*i.e.,* 10 CFR 50.54(p) or 10 CFR 50.90) for incorporation of all necessary changes to its security plans.

In accordance with 10 CFR 51.32, "Finding of no significant impact," the Commission has previously determined that the granting of this exemption will not have a significant effect on the quality of the human environment (75 FR 80545 dated December 22, 2010).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 22nd day of December 2010.

For the Nuclear Regulatory Commission.

Joseph G. Giitter,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–32917 Filed 12–29–10; 8:45 am]

BILLING CODE 7590–01–P

PEACE CORPS

Proposed Information Collection Renewals

ACTION: Submission for Office of Management and Budget (OMB) review; comment request.

SUMMARY: The Peace Corps has submitted the following three (3) information collections to the Office of Management and Budget (OMB) for extension under the provisions of the Paperwork Reduction Act of 1995. This notice invites the public to comment on the renewal of three information collections: World Wise Schools Conference Online Registration Form (OMB 0420–0541); Speakers Match: Online Request for a Speaker Form (OMB 0420–0539); and Correspondence Match Educator Online Enrollment Form: Educator Sign Up Form (OMB 0420–0540). Peace Corps invites comments on whether the proposed collection of information is necessary for proper performance of the functions of the Peace Corps, including whether the information will have practical use; the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

DATES: Comments regarding this collection must be received on or before January 31, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name/or OMB approval number and should be sent via e-mail to: *oira_submission@omb.eop.gov* or fax to: 202–395–3086. Attention: Desk Officer for Peace Corps.

FOR FURTHER INFORMATION CONTACT: Denora Miller, FOJA Officer, Peace Corps, 1111 20th Street, NW., Washington, DC 20526, (202) 692–1236, or e-mail at *pcfr@peacecorps.gov.* Copies of available documents submitted to OMB may be obtained from Denora Miller.

SUPPLEMENTARY INFORMATION: Proposal to renew the following three (3) information collections currently approved collection of information:

1. *Title:* World Wise Schools Conference—Online Registration Form.

OMB Control Number: 0420–0541.

Type of Review: Regular—extension, without change, currently approved collection.

Respondents: Educators and employees of local governmental and nongovernmental organizations interested in promoting global education in the classroom.

Estimated annual number of respondents: 300.

Estimated average time to respond: 10 minutes.

Frequency of response: Annually.

Estimated total annual burden hours: 50 hours.

Purpose of collection: The information collected is used to officially register attendees to the annual World Wise Schools Conference. The information is used as a record of attendance.

2. *Title: Speakers Match:* Online Request for a Speaker Form.

OMB Control Number: 0420–0539.

Type of Review: Regular—extension, without change, currently approved collection.

Respondents: Educators interested in promoting global education in the classroom.

Estimated annual number of responses: 300.

Estimated average time to respond: 10 minutes.

Frequency of response: Annually.

Estimated annual burden hours: 50 hours.

Purpose of collection: The information collected is used to make suitable matches between the educators and returned Peace Corps Volunteers for the Speakers Match program.

3. *Title: Correspondence Match Educator Online Enrollment Form:* Educator Sign Up Form.

OMB Control Number: 0420–0540.

Type of Review: Regular—extension, without change, currently approved collection.

Respondents: Educators interested in promoting global education in the classroom.

Estimated annual number of responses: 10,000.

Estimated average time to respond: 10 minutes.

Frequency of response: Annually.

Estimated annual burden hours: 1,667 hours.

Purpose of collection: The information collected is used to make suitable matches between the educators and currently serving Peace Corps Volunteers.

Dated: December 23, 2010.

Garry W. Stanberry,

Deputy Associate Director for Management.

[FR Doc. 2010–32913 Filed 12–29–10; 8:45 am]

BILLING CODE 6051–01–M

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 206(3)–3T, SEC File No. 270–571, OMB Control No. 3235–0630.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 350l *et seq.*), the Securities and Exchange Commission (the "Commission") is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget ("OMB") for extension and approval.

Temporary rule 206(3)–3T (17 CFR 275.206(3)–3T) under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) is entitled: "Temporary rule for principal trades with certain advisory clients." The temporary rule provides investment advisers who are registered with the Commission as broker-dealers an alternative means to meet the requirements of section 206(3) of the Advisers Act (15 U.S.C. 80b–6(3)) when they act in a principal capacity in transactions with certain of their advisory clients.

Temporary rule 206(3)–3T permits investment advisers also registered as broker-dealers to satisfy the Advisers Act's principal trading restrictions by: (i) Providing written, prospective disclosure regarding the conflicts arising from principal trades; (ii) obtaining written, revocable consent from the client prospectively authorizing the adviser to enter into principal transactions; (iii) making oral or written disclosure and obtaining the client's consent before each principal transaction; (iv) sending to the client confirmation statements disclosing the capacity in which the adviser has acted; and (v) delivering to the client an annual report itemizing the principal transactions.

Providing the information required by rule 206(3)–3T is necessary for investment advisers also registered as broker-dealers to obtain the benefit of the alternative means of complying with section 206(3) of the Advisers Act. Disclosures under the rule provide important investor protections when advisers engage in principal trades. Clients of advisers will primarily use

the information to monitor principal trades in their accounts.

The Commission staff estimates that approximately 380 investment advisers make use of rule 206(3)–3T, including an estimated 24 advisers (on an annual basis) also registered as broker-dealers who do not offer non-discretionary services, but whom the Commission staff estimates will choose to do so and rely on rule 206(3)–3T. The Commission staff estimates that these advisers spend, in the aggregate, approximately 378,992 hours annually in complying with the requirements of the rule, including both initial and annual burdens. The aggregate hour burden, expressed on a per-eligible-adviser basis, is therefore approximately 997 hours per eligible adviser (378,992 hours divided by the estimated 380 advisers that will rely on rule 206(3)–3T).

Written comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burdens of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Director/CIO, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov.*

Dated: December 27, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32941 Filed 12–29–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63606; File No. PCAOB 2010–01]

Public Company Accounting Oversight Board; Order Approving Proposed Rules on Auditing Standards Related to the Auditor's Assessment of and Response to Risk and Related Amendments to PCAOB Standards

December 23, 2010.

I. Introduction

On September 15, 2010, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission") a notice (the "Notice") of proposed rules (File No. PCAOB 2010–01) on Auditing Standards Related to the Auditor's Assessment of and Response to Risk and Related Amendments to PCAOB Standards. Those eight auditing standards (hereinafter referred to as "Risk Assessment Standards"), which will supersede six of the Board's interim auditing standards, are:

- Auditing Standard ("AS") No. 8, *Audit Risk;*
- AS No. 9, *Audit Planning;*
- AS No. 10, *Supervision of the Audit Engagement;*
- AS No. 11, *Consideration of Materiality in Planning and Performing an Audit;*
- AS No. 12, *Identifying and Assessing Risks of Material Misstatement;*
- AS No. 13, *The Auditor's Responses to the Risks of Material Misstatement;*
- AS No. 14, *Evaluating Audit Results;* and
- AS No. 15, *Audit Evidence.*

Notice of the proposed rules was published in the **Federal Register** on September 27, 2010.[1] The Commission received two comment letters relating to the proposed rules. For the reasons discussed below, the Commission is granting approval of the proposed rules. As specified by the Board, the rules are effective for audits of fiscal years beginning on or after December 15, 2010.

II. Description

The Board adopted eight auditing standards and related amendments that are designed to benefit investors by establishing requirements that enhance the effectiveness of the auditor's assessment of and response to the risks of material misstatement in an audit. Assessing and responding to risks underlies the entire audit process. The risk assessment standards that the PCAOB is replacing were part of the Board's interim standards and were in large part written twenty to thirty years ago. In adopting the new Risk Assessment Standards, the Board intended to build upon and improve the risk framework that was already established by the interim standards, rather than replacing that framework altogether.

Changes that the Board made to the interim standards reflect: Improvements that the PCAOB has observed in the audit methodologies of many registered firms; recommendations from academia; recommendations from the Board's Standing Advisory Group ("SAG") and other groups; the adoption of AS No. 5, *An Audit of Internal Control Over Financial Reporting That is Integrated with an Audit of Financial Statements;* improvements made to similar risk assessment standards by other standard setters (*e.g.,* the International Auditing and Assurance Standards Board ("IAASB") and the Auditing Standards Board ("ASB") of the American Institute of Certified Public Accountants); and observations from the Board's oversight activities.

Key changes made to the standards include an increased emphasis on fraud risks, an increased emphasis on disclosures, inclusion of multi-location audit requirements, an alignment of the standards with AS No. 5, and inclusion of a concept of materiality more specifically grounded to that used in the Federal securities laws.

III. Discussion

The Commission received two comment letters: One from Deloitte & Touche, LLP ("Deloitte") and one from the Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce ("CMCC"). Deloitte supported approval of the standards, while expressing certain concerns largely of a more general nature regarding the PCAOB's approach to standard-setting. The CMCC believed that the Risk Assessment Standards should not be approved, but rather sent back to the PCAOB in order for the PCAOB to address certain concerns, most of which also related to the PCAOB's overall approach to standard-setting as opposed to the particular standards at issue.

[1] *See* Release No. 34–62919 (September 15, 2010) [75 FR 59332 (September 27, 2010)]. The notice included a 21-day comment period. The comment period closed on October 18, 2010.

Integration of Fraud Risk Standard Into the Risk Assessment Standards

One of the significant changes to the Risk Assessment Standards was the incorporation of aspects of AU sec. 316, *Consideration of Fraud in a Financial Statement Audit,* into the Risk Assessment Standards. In explaining why the PCAOB incorporated portions of the fraud standard into the Risk Assessment Standards, it stated that:

> Incorporating these requirements makes clear that the auditor's responsibilities for assessing and responding to fraud risks are an integral part of the audit process rather than a separate, parallel process. It also benefits investors by prompting auditors to make a more thoughtful and thorough assessment of fraud risks and to develop appropriate audit responses.[2]

The CCMC did not agree with the level of integration. The CCMC made a similar comment during the PCAOB's due process stage, which the Board addressed in its adopting release. This comment largely relates to a disagreement as to the manner in which the standards are constructed, as compared to the performance required of auditors. The Commission believes that the PCAOB has given due consideration to the comments received about this matter.

Effective Date

The effective date of the standards will be for audits of fiscal years beginning on or after December 15, 2010. The CMCC expressed concern about the effective date, stating that the effective date "would not allow adequate time for audit firms to revise their audit methodologies and train their audit staffs around the world for audits in 2011." In response to similar concerns raised in its comment letter process, including from the CCMC, the PCAOB stated in its release that the underlying concepts of risk-based auditing have not changed, and therefore, while there are many incremental requirements in the updated standards, these standards should not require wholesale changes to audit methodologies.[3] Any delay in the effective date of these standards would likely delay the implementation for most issuers for at least one year *(e.g.,* the standards would not be applicable generally until calendar year 2012 audits related to audit reports to be issued in 2013).

After considering the nature of the changes in the Risk Assessment Standards, the timing of Commission approval, and the fact that the standards will not be applicable to audits for which audit reports will be issued in 2011 (*i.e.,* the first audit reports issued for which audits would be required to be conducted using the new standards would not be issued until 2012) we believe the PCAOB's approach for implementation is not unreasonable.

PCAOB Standard-Setting Process

Both commenters noted various concerns about the PCAOB's standard-setting process. The concerns identified included divergence from other standard-setters, what the commenters viewed as a "prescriptive" nature of the standards, the lack of a codification of PCAOB standards, the usefulness of the appendix that compares the PCAOB proposed standard to the similar standards of other standard-setters, and the use of certain terms in the standards. These comments all relate more to the PCAOB's overall approach to standard-setting than particular concerns with respect to the individual Risk Assessment Standards.

All of these comments are similar to those received by the PCAOB during its standard-setting process, which the Board addressed. For example with respect to divergence from other standard-setters, the Board noted the following:

> In previous releases on its proposed risk assessment standards, the Board has stated that it has sought to eliminate unnecessary differences with the risk assessment standards and those of other standards-setters. However, because the Board's standards must be consistent with the Board's statutory mandate, differences will continue to exist between the Board's standards and the standards of the IAASB and ASB, e.g., when the Board decides to retain an existing requirement in PCAOB standards that is not included in IAASB or ASB standards. Also, certain differences are often necessary for the Board's standards to be consistent with relevant provisions of the federal securities laws or other existing standards or rules of the Board.[4]

The Board also noted that it "continually endeavors to improve its processes" and explained other initiatives it uses in both gaining input on its standard-setting activities (*e.g.,* through its SAG and by releasing multiple exposure documents) and providing additional transparency of its standards-setting process (*e.g.,* through posting its standards-setting agenda and enhanced discussions in its releases on the Board's conclusions). The Commission notes and encourages the Board's efforts to consider standards issued by the IAASB and the ASB, and appreciates the reasons why it is reasonable to expect that the Board's standards may appropriately differ from such standards. The Commission and its staff will continue to provide oversight of the Board and its staff's ongoing endeavor to improve its processes.

Regarding the "prescriptive" nature of the standards, we recognize that there should be an appropriate balance in auditing standards between providing necessary minimum requirements and allowing auditors to apply judgment in determining the nature and extent of audit procedures given the particular circumstances of an individual engagement. PCAOB standards recognize that the auditor uses judgment in planning and performing audit procedures and evaluating the evidence obtained from those procedures. We recognize, however, that overly broad standards without an appropriate balance of necessary requirements could lead to a level of discretion in the nature and extent of audit procedures that may limit the effectiveness of audits. The Commission believes the PCAOB's approach in the Risk Assessment Standards is not unreasonable and encourages the PCAOB to monitor implementation and evaluate the input received during the development of future standards to continue to strive to achieve an optimal balance.

Regarding a codification of the auditing standards, the Commission notes that the Board has recently added this project to its strategic plan and amended its performance measure on standard-setting activities to reflect this new initiative.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed PCAOB Rules on Auditing Standards Related to the Auditor's Assessment of and Response to Risk and Related Amendments to PCAOB Standards (File No. PCAOB–2010–01) are consistent with the requirements of the Sarbanes-Oxley Act of 2002, as amended (the "Act") and the securities laws and are necessary or appropriate in the public interest or for the protection of investors.

It is therefore ordered, pursuant to Section 107 of the Act and Section 19(b)(2) of the Securities Exchange Act of 1934, that the proposed PCAOB Rules on Auditing Standards Related to the Auditor's Assessment of and Response to Risk and Related Amendments to PCAOB Standards (File No. PCAOB–2010–01) be and hereby are approved.

[2] PCAOB Release No. 2010–004, August 5, 2010, p. 3.

[3] PCAOB Release No. 2010–004, August 5, 2010, p. 8.

[4] *See* PCAOB Release No. 2010–004, August 5, 2010, pp. A10–91—A10–92 (internal footnotes omitted).

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–32885 Filed 12–29–10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63603; File No. SR–Phlx–2010–180]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Revising Floor Qualification Examination

December 22, 2010

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on December 10, 2010, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change, and an amendment thereto on December 15, 2010, as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.[3]

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to revise its floor qualification examination. Specifically, the Exchange proposes to delete obsolete questions, revise outdated questions and add several new questions, as described further below.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to improve the Exchange's program for qualification of members by updating its floor qualification examination. The Exchange has employed a written floor qualification examination, which is required for persons seeking to act as members on the trading floor,[4] for many years. The examination, which has not been substantively amended for many years,[5] covers many areas of the Exchange's rules.

At this time, the Exchange proposes to update the exam in a variety of ways. The exam would continue to be comprised of 100 questions, randomly and electronically selected from a question bank of approximately 148 questions. The floor qualification examination is administered by the Exchange's membership department, and requires a passing score of 70 during a 75 minute testing period.

In terms of outdated questions, the Exchange proposes to delete about 31 obsolete questions, mostly pertaining to: (i) The "Wheel," an obsolete method of allocating trades among specialist and Registered Options Traders ("ROTs"); (ii) "AUTO–X" functionality and specialists manually conducting an opening and executing trades, which have been replaced by the current trading system, Phlx XL II; and (iii) the "ten-up" guarantees that preceded displayed size for options and the application of the Quote Rule to options.[6]

The Exchange also proposes to eliminate the foreign currency options qualification examination, because there have been no foreign currency options participants for many years.[7] In addition, the Exchange no longer offers the foreign currency options products that were the subject of this examination, but rather now offers a U.S. dollar-settled foreign currency option,[8] which trades pursuant to the Exchange's options trading rules that are covered on the floor qualification exam.

The Exchange proposes to modify approximately 17 questions pertaining to electronic quoting, various changes in priority rules and to reflect the existence of Options Exchange Officials ("OEOs"), who replaced Floor Officials, as well as make various minor corrections reflecting rule changes over time. Similarly, the Exchange proposes to add approximately 46 new questions reflecting trade reporting, disputes and OEO rulings, priority and trade allocation, spreads, openings, halts and reopening, quoting obligations, order types, Floor Broker obligations and Rule 703.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [9] in general, and furthers the objectives of Section 6(b)(5) of the Act [10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. In addition, the Exchange believes that the proposed rule change is consistent with Section 6(c)(3)(B) of the Act,[11] which authorizes exchanges to prescribe standards of training, experience and competence for persons associated with exchange members, and gives exchanges the authority to bar a natural person from becoming a member or a person associated with a member, if the person does not meet the standards of training, experience and competence prescribed in the rules of the exchange. The Exchange believes that revising its floor member qualification examination should better test the knowledge of its floor members, and thereby enhance the Exchange's standards for training, experience and competence.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Amendment No. 1.

[4] *See* Rules 620(a) and 901(c). *See also* Rule 1061 applicable to Floor Brokers.

[5] Securities Exchange Act Release No. 33304 (December 9, 1993), 58 FR 65613 (December 15, 1993)(SR–Phlx–92–34).

[6] For current requirements, *see e.g.,* Rules 1080 and 1082.

[7] The Exchange intends to separately delete "foreign currency options participant" and related terms from its rules.

[8] *See* Securities Exchange Act Release No. 54989 (December 21, 2006), 71 FR 78506 (December 29, 2006)(SR–Phlx–2006–34).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78f(c)(3)(B).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(1)[13] thereunder, the Exchange has designated this proposal as one that constitutes a stated policy, practice or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the SRO, and therefore has become effective.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–PHLX–2010–180 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–PHLX–2010–180. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–PHLX–2010–180 and should be submitted on or before January 20, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32891 Filed 12–29–10; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(1).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63607; File No. SR–NASDAQ–2010–137]

Self-Regulatory Organizations, The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change To Amend IM–5101–2 To Provide Special Purpose Acquisition Companies the Option To Hold a Tender Offer in Lieu of a Shareholder Vote on a Proposed Acquisition and Other Changes to the SPAC Listing Standards

December 23, 2010.

I. Introduction

On October 22, 2010, The NASDAQ Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to provide special purpose acquisition companies ("SPACs") an option to hold a tender offer in lieu of a shareholder vote on a proposed acquisition and to make certain other changes to the SPACs listing requirements as discussed below. The proposed rule change was published in the **Federal Register** on November 9, 2010.[3] The Commission received three comment letters on the proposal.[4] This order approves the proposed rule change.

II. Description of the Proposal

As discussed in more detail below, the Exchange is proposing to amend its listing rules to provide SPACs an option to hold a tender offer in lieu of a shareholder vote on a proposed acquisition, to require SPACs, trying to complete a business combination, that are not subject to the Commission's proxy rules to conduct a tender offer allowing shareholders to redeem shares for cash and provide information similar to that provided under the Commission's proxy rules and to amend the definition of public shareholder for purposes of the SPAC conversion rights to also exclude beneficial holders of more than 10% of the total shares outstanding, consistent with the Exchanges existing definition of Public Holder.[5]

SPACs are companies that raise capital in an initial public offering ("IPO") to enter into future undetermined business combinations through mergers, capital stock exchanges, asset acquisitions, stock purchases, reorganizations or other similar business combinations with one or more operating businesses or assets. In the IPO, SPACs typically sell units consisting of one share of common stock and one or more warrants (or fraction of a warrant) to purchase common stock. The units are separable at some point after the IPO. Management of the SPAC typically receives a percentage of the equity at the outset and may be required to purchase additional shares in a private placement at the time of the IPO. Due to their unique structure, SPACs do not have any prior financial history like operating companies. In July 2008, the Commission approved Nasdaq rules to permit the listing of securities of SPACs.[6] Prior to that time, the Exchange

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 63239 (November 3, 2010), 75 FR 68846.

[4] *See* Letters from Floyd I. Wittlin and Ann F. Chamberlain, Bingham McCutchen LLP, dated November 22, 2010 ("Bingham Letter"); David Alan Miller, Managing Partner and Jeffrey M. Gallant, Partner, Graubard Miller, dated November 22, 2010 ("Graubard Letter"); and Joel L. Rubinstein and Jonathan Rochwarger, McDermott Will & Emery, dated November 30, 2010 ("McDermott Letter").

[5] *See* Nasdaq IM–5101–2(e) and Nasdaq Rule 5005(a)(34).

[6] *See* Securities Exchange Act Release No. 58228 (July 25, 2008), 73 FR 44794 (July 31, 2008).

did not list securities of companies without a specific business plan or that indicated that their plan was to engage in a merger or acquisition with unidentified companies. In addition to requiring securities of SPACs to meet the Exchange's initial listing standards, Nasdaq's rules provided additional investor protection standards to provide safeguards to shareholders who invest in SPAC securities.

Currently, Nasdaq's rules for listing securities of SPACs provide at least 90% of the proceeds raised in the IPO and any concurrent sale of equity securities must be placed in a trust account.[7] Further, Nasdaq's listing rules specify that within 36 months or such shorter time period as specified by the SPAC, the SPAC must complete one or more business combinations having an aggregative fair market value of at least 80% of the value of the trust account.[8] Until the SPAC has completed a business combination of at least 80% of the trust account value, the SPAC must, among other things, submit the business combination to a shareholder vote.[9] Any public shareholders who vote against the business combination have a right to convert their shares of common stock into a pro rata share of the aggregate amount then in the trust account, if the business combination is approved and consummated.[10]

Nasdaq proposes three changes to the SPAC shareholder approval process. First, Nasdaq proposes to add an option for the SPAC to conduct a tender offer instead of a shareholder vote. Nasdaq proposes that until a SPAC has completed a business combination of at least 80% of the trust account value, if a shareholder vote on the business combination is not held for which the SPAC must file and furnish a proxy or information statement subject to Regulation 14A or 14C under the Act, in order to complete the business combination the SPAC must provide all shareholders with the opportunity to redeem all their shares for cash equal to their pro rata share of the aggregate amount then in the deposit account pursuant to Rule 13e–4 and Regulation 14E under the Act.[11] The SPAC must file tender offer documents with the Commission containing substantially the same information about the business combination and the redemption rights as required under Regulation 14A of the Act, which regulates proxy solicitations.

Second, Nasdaq proposes to require that the shareholder vote provisions currently in the rule requiring the business combination to be approved by a majority of the shares voting at the meeting apply to shareholder votes where the SPAC must file and furnish a proxy or information statement subject to Regulation 14A or 14C under the Act in advance of the shareholder meeting.[12] This part of the Exchange's proposal, taken together with the tender offer provisions discussed above, in essence require a SPAC, not required by law to file and furnish a proxy or information statement subject to Regulation 14A or 14C under the Act, to conduct a tender offer for shares in exchange for a pro rata share of the cash held in deposit in the trust account. As noted above, any issuer that elects to or is required to conduct a tender offer must comply with Rule 13e–4 and Regulation 14E under that Act, as well as file tender offer documents with the Commission containing substantially the same financial and other information about the business combination and redemption rights as would be required under the federal proxy rules in Regulation 14A of the Act. This provision will assure that investors will receive comparable information about a proposed business combination irrespective of whether the company is conducting a tender offer with or without a vote, or a shareholder vote that requires the issuer to file and furnish a proxy or information statement in compliance with the Commission's proxy rules.

Finally, Nasdaq proposes to exclude beneficial holders of more than 10% of the total outstanding SPAC shares from those public shareholders entitled to receive conversion rights under paragraph (d) of IM–5101–2. According to Nasdaq, when it originally adopted the SPAC rules, Nasdaq intended to have the public shareholder exclusions closely mirror the defined term "Public Holders" as well as exclude certain categories specific to SPACs. However, the definition of public shareholder under the SPAC rules did not exclude beneficial holders of more than 10% of the total shares outstanding while the definition of Public Holders excludes this group. Nasdaq is amending the SPAC rules to ensure consistency between these two rules.[13]

III. Summary of Comments

The Commission received three comments supporting the proposal. One commenter stated that the proposal "would represent a major step toward elimination of the abuses that have plagued the shareholder voting process relating to acquisitions by SPACS while continuing to enable shareholders to make a fully informed voting decision on proposed acquisitions by SPACs."[14]

While the three commenters support the proposal, they believed that Nasdaq should propose to change its shareholder approval rule in Nasdaq Rule 5635, which, among other things, require that a Nasdaq listed issuer obtain shareholder approval to issue securities in connection with an acquisition where the number of shares of common stock to be issued is equal to or more than 20% of the number of shares outstanding prior to the issuance.[15] One commenter believed that "adoption of the proposed change to Rule IM–5101–2 will not be sufficient to encourage SPACs to list on Nasdaq" and anticipated that "the proposed rule change, standing alone, will have no practical effect."[16] The commenter stated that the value of the target for a SPAC is generally greater than the amount in the SPAC's trust account, and thus, the SPAC would need to issue additional shares at the time of the business combination to raise capital.[17] According to the commenter, the greater number of shares issued, the lesser the dilutive impact of the founders' shares and the warrants. The commenter argues that any protection provided by Nasdaq's shareholder approval requirements is unnecessary since under Nasdaq's proposal, shareholders not subject to a vote are able to "vote with their feet" and get their investment back through the tender offer process. Accordingly, the commenter urged Nasdaq to exempt SPACs from Nasdaq's shareholder approval requirements in Rule 5635.

Another commenter stated that because "SPACs are often unable to determine with accuracy the amount of funds that will be required to pay shareholders that ultimately elect to convert their shares into cash, the funds held in the trust account are typically not used as consideration to effect the acquisition transaction."[18] As a result, this commenter stated that SPACs often use stock as consideration for the business combination and cash in the trust account is used to redeem shareholders and possibly finance the operations of the target. As a result, the securities issued to do a business

[7] *See* Nasdaq IM–5101–2(a).
[8] *See* Nasdaq IM–5101–2(b).
[9] *See* Nasdaq IM–5101–2(d).
[10] *See* Nasdaq IM–5101–2(e).
[11] *See* proposed Nasdaq IM–5101–2(e).
[12] *See* proposed Nasdaq IM–5101–2(d).
[13] *See* proposed Nasdaq IM–5101–2(d).
[14] *See* Bingham Letter.
[15] *See* Nasdaq Rule 5635(a).
[16] *See* Bingham Letter.
[17] *See* Bingham Letter.
[18] *See* Graubard Letter.

combination almost always represent more than 20% of the outstanding shares before the business combination. This commenter views the tender offer proposal providing even greater participation for shareholders then a vote alone under Nasdaq Rule 5635 since in the tender offer situation shareholders can receive their money back and therefore, believes that there should be an exception to the voting requirements in Nasdaq's rules.

Another commenter noted that most "SPAC business combination transactions involve the issuance by the SPAC of a significant number of shares, which typically triggers one or more shareholder approval requirements of Rule 5635." [19] This commenter believes that by having the ability to redeem their shares and "vote with their feet", shareholders do not need the additional protection of Nasdaq Rule 5635. The commenter also notes that the shareholder vote requirement currently in the SPAC rules has resulted in greenmail [20] tactics that the rule filing is meant to address, and that without an exception to the shareholder approval requirements the potential for greenmail to continue and other delays caused by the vote can narrow the pool of quality acquisition targets for the SPAC which would be contrary to shareholder interests.

Finally, two more additional comments were raised by the commenters. First, the Bingham Letter suggests Nasdaq's rule be amended to make clear that the SPAC founders' shares can be excluded from the pro rata calculation used to determine the per share redemption price in those cases where the sponsor has agreed not to exercise their redemption rights.[21] Second, the Graubard Letter states that Nasdaq should be allowed to amend its rule to permit it to list securities of SPACs with smaller size by eliminating the 2 year operating history in one of its Capital Market initial listing requirements.[22] In support of this, the commenter notes that all the other protections for SPACs in Nasdaq's rules would apply and that this would recognize the current market environment for smaller offerings.

IV. Discussion and Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act and the rules and regulations thereunder. Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[23] which requires that an exchange have rules designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, to protect investors and the public interest, and to not permit unfair discrimination between customers, issuers, brokers, or dealers.[24]

The development and enforcement of adequate standards governing the initial and continued listing of securities on an exchange is an activity of critical importance to financial markets and the investing public. Listing standards, among other things, serve as a means for an exchange to screen issuers and to provide listed status only to bona fide companies that have or, in the case of an IPO, will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets. Adequate standards are especially important given the expectations of investors regarding exchange trading and the imprimatur of listing on a particular market. Once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained.

As noted above, SPACs are companies that raise capital in IPOs, with the purpose of purchasing operating companies or assets within a certain time frame. Because of their unique structure, and the fact that at the outset investors will not know the ultimate business of the company similar to a blank check company, the Commission approved Nasdaq listing standards for SPACs that were similar in some respects to the investor protection measures contained in Rule 419 under the Securities Act of 1933.[25] One of the important investor protection safeguards, as noted above, is the ability of public shareholders to convert their shares for a pro rata share of the cash held in the trust account if they vote against a business combination. In approving this provision, the Commission noted that the conversion rights will help to ensure that public shareholders who disagree with management's decision with respect to a business combination have adequate remedies.[26]

As noted by Nasdaq in its rule filing, however, there have been certain abuses as a result of the vote requirement. According to Nasdaq, hedge funds and other activist investors would acquire an interest in a SPAC and use their ability to vote against a proposed acquisition as leverage to obtain additional consideration not available to other shareholders. In its filing, Nasdaq refers to these abuses as "greenmail" and is now proposing to add an option for the SPAC to conduct a tender offer instead of a shareholder vote. As described above, under the proposal the SPAC must provide all shareholders with the opportunity to redeem all their shares for cash equal to their pro rata share of the aggregate amount then in the deposit account pursuant to Rule 13e–4 and Regulation 14E under the Act.[27] The SPAC must file tender offer documents with the Commission containing substantially the same information about the business combination and the redemption rights as required under the Federal proxy solicitation rules. According to Nasdaq this is the same outcome available to public shareholders who vote against the acquisition pursuant to Nasdaq's existing rule and will allow shareholders to "vote with their feet" if they oppose a proposed acquisition by the SPAC while preventing activist shareholders from denying shareholders the benefit of the transaction.

The Commission notes that the commenters are supportive of this proposal and believe that the change should help to eliminate the abuses that have occurred in relation to the voting process on acquisitions by SPACs.[28] Nasdaq's rule would retain the option to

[19] *See* McDermott Letter.

[20] *See* Section IV, *infra.*

[21] *See* Bingham Letter.

[22] *See* Graubard Letter.

[23] 15 U.S.C. 78f(b)(5).

[24] In approving this proposed rule change, the Commission notes that it has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[25] *See* 17 CFR 230.419. Rule 419 applies to blank check companies issuing penny stock as defined under rule 3a51–1(a)(2) of the Act. *See* 17 CFR 240.3a51–1(a)(2).

[26] The Commission also noted, among other things, that the requirement that a majority of the independent directors approve a business combination should also help to ensure that a business combination is entered into by the SPAC after a fair and impartial decision. *See* IM–5101–2(c). This provision will continue to apply to all SPAC business combinations whether approved through a shareholder vote or conducted through a tender offer under the new provisions being adopted in this order.

[27] *See* proposed Nasdaq IM–5101–2(e).

[28] *See* Section III, *supra.* As noted above, while generally supportive of the proposal, the commenters raised concerns that Nasdaq's proposal does not go far enough.

hold a shareholder vote, and provide SPACs with a tender offer option, so long as the tender offer is consistent with Federal securities laws. Further, shareholders' right to redeem their shares would be preserved under either scenario. The Commission further notes that irrespective of whether a SPACs business combination is achieved through a tender offer or shareholder vote, shareholders, under Nasdaq's rule, will receive comparable financial and other information about the business combination and the redemption rights.

In summary, the Commission believes that shareholders who are not in favor of a business combination should continue to have an adequate remedy under Nasdaq's proposal if they disagree with management's decision with respect to a business combination, and that the Nasdaq's SPAC rules will continue to have safeguards to address investor protection, while at the same time allowing the greenmail abuses noted by Nasdaq to be addressed. Based on the above, the Commission finds that this proposal is consistent with the requirements of the Act and in particular the investor protection standards under Section 6(b)(5) of the Act.

Nasdaq is also proposing to add language to existing provision IM–5101–2(d) which concerns the shareholder voting requirements applicable to business combinations. Under this change if a SPAC holds a shareholder vote to approve a business combination, the provisions, only apply where the SPAC must file and furnish a proxy or information statement subject to Regulation 14A or 14C under the Act in advance of the shareholder meeting. This change, viewed together with the changes discussed above allowing a SPAC to do a business combination through a tender offer rather than a shareholder vote, basically ensures that certain SPACs that are not required under the federal securities laws to comply with the Commission's proxy solicitation rules when soliciting proxies, will have to follow the tender offer provisions under Nasdaq's rules. Under this provision, the tender offer documents are specifically required to contain substantially the same financial and other information about the business combination and redemption rights as would be required under the proxy rules in Regulation 14A of the Act.[29] The Commission notes that this proposal would clarify the manner in which a shareholder vote is held and the information that would be required by the SPAC to send to shareholders. Further, it ensures that all investors will be receiving the same information about a proposed business combination whether it is holding a vote and required by law to follow the proxy rules or conducting a tender offer under the conditions set forth in Nasdaq's rules. This provision also does not preclude a SPAC that does not have to comply with the federal proxy rules when soliciting proxies from having a shareholder vote, but just ensures, through the tender offer process, that the SPAC will be required to provide comparable information. Based on the above, the Commission finds that this portion of the proposal is consistent with the requirements of the Act, and in particular, the investor protections requirements under Section 6(b)(5) of the Act.

Finally, Nasdaq proposes to amend language in the SPAC rules to also include beneficial holders of more than 10% of the total outstanding SPAC shares to the groups of shareholders that are not entitled to convert their shares on a pro rata basis for cash if they vote against a business combination.[30] The SPAC definition was originally drafted, according to Nasdaq, to mirror the "Public Holder" definition under Nasdaq rules in addition to excluding other groups from having conversion rights such as the sponsors and founding shareholders. The Commission notes that the proposed change in the definition is consistent with Nasdaq's definition of "Public Holders," which also excludes from its definition "the beneficial holder of more than 10% of the total shares outstanding."[31] This will ensure consistency with the two rules and according to Nasdaq is consistent with its original intent. Based on this and the existing definition under Nasdaq's rules, the Commission, finds that this proposal is consistent with the requirements of the Act.

The commenters also urge the Commission to permit Nasdaq to change its rules to exempt from the shareholder approval requirements in Nasdaq Rule 5635, SPACs that issue 20% or more of their outstanding shares to achieve an acquisition. As summarized above, the commenters believe that the proposed changes allowing a tender offer option to avoid "greenmail" situations will not be effective if there is a separate shareholder approval requirement for issuances of 20% or more of the SPACs common stock since most SPACs issue a large number of shares when conducting a business combination. The Commission notes that the instant proposal centers on the approval of shareholders with respect to a business combination and the recourse a shareholder may have should the shareholder disapprove the business combination. Nasdaq's shareholder approval rules, on the other hand, are stand alone requirements that are meant to address different issues such as dilution of existing shareholders by the issuance of additional shares. While the commenters have attempted to address some of the concerns arguing that the shareholders don't need the further protection of a vote since shareholders in a SPAC will be fully aware of their redemption rights through disclosure and that dilution is not a concern since the SPAC must complete business combinations with a target having a fair market value of at least 80% of the value of the trust account, the Commission is not convinced that these factors alone adequately address the concerns underlying the shareholder approval rules.

In conclusion, the Commission notes that it has long recognized that the Exchange's shareholder approval requirements provide important protections to shareholders of listed companies from certain corporate transactions. These protections are central to a shareholder owning shares in a Nasdaq listed issuer. Based on this, the Commission is not prepared to state that a shareholder vote is unnecessary in situations where certain disclosures are made or there is only a possibility the issuance may not cause dilution. Any such determination would raise significant issues that would have to be fully considered by the Commission and published for public comment, and may raise issues that could potentially go beyond the listing of SPACs. The Commission further notes that since the Exchange has not proposed to change the shareholder approval rule at this time, that topic is not before the Commission and does not need to be separately considered at this time. Moreover, the commenters indicated that issuing additional shares is not a requirement, but rather a typical business practice for SPACs. The Commission notes, for example, that SPACs could seek out business combinations with a fair market value consistent with the value of the SPAC's trust account and possibly avoid the issuance of additional shares to trigger Nasdaq Rule 5635.

As to the two remaining comments, that the Nasdaq rule language should be amended to permit founders shares from being excluded from the pro rate calculation and that the Nasdaq listing rules should be amended to permit the

[29] *See* proposed Nasdaq IM–5101–2(e).

[30] *See* proposed Nasdaq IM–5101–2(d).

[31] *See* Nasdaq Rule 5005(a)(34).

listing of smaller sized SPACs, the Commission notes that Nasdaq has not proposed such changes. As to the suggestion on the language concerning the pro rata calculation, the Commission notes that the current language states that the pro rata amount is calculated based on the aggregate amount in the deposit account. It is unclear if founders share funds are typically deposited in the deposit account. If they are, then it is possible a clarification may be helpful that the value of the founders shares and founders warrants should not be used in calculating the pro rata amount owed the shareholders in cases where the founders agree not to exercise their redemption rights. Nasdaq may wish to examine this issue further to see if a rule filing is necessary to clarify the issue. Finally, as to the suggestion that Nasdaq's initial listing standards be changed to accommodate the listing of smaller sized SPACs, the Commission notes that such SPACS can currently trade in the over-the-counter market. Any change to permit smaller sized SPACs to trade on Nasdaq would have to be separately proposed and considered and could only be approved if such a proposal was found to be consistent with the requirements of the Act.

V. Conclusion

Based on the foregoing, the Commission finds the proposal is consistent with the requirements of the Act. *It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[32] that the proposed rule change (SR–NASDAQ–2010–137) is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32904 Filed 12–29–10; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 7237]

The Secretary of State's International Council on Women's Business Leadership

AGENCY: Department of State.

ACTION: Notice of intent to establish an advisory committee.

The Secretary of State announces an intent to establish the International Council on Women's Business Leadership, in accordance with the Federal Advisory Committee Act.

Nature and Purpose: The Council will provide advice and assistance in the formulation of U.S. policy, positions, proposals and strategies for multilateral and bilateral negotiations, business outreach and commercial diplomacy, particularly pertaining to the economic empowerment of women for global economic prosperity where the State Department has the lead negotiating authority. The objective of the Council is to bring to the United States Government a source of expertise, knowledge and insight not available within the Department or elsewhere in the government on these issues.

Other information: It is anticipated that the Council will meet at least once a year and at such other times and places as are required to fulfill the objectives of the Council. The Department of State affirms that the advisory committee is necessary and in the public interest.

For further information, please contact: Nancy Smith-Nissley at (202) 647–1682.

Dated: December 20, 2010.

Lorraine Hariton

Special Representative, Office of Commercial & Business Affairs, U.S. Department of State.

[FR Doc. 2010–32884 Filed 12–29–10; 8:45 am]

BILLING CODE 4710–07–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

2011 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing

AGENCY: Office of the United States Trade Representative.

ACTION: Action: Request for written submissions from the public and announcement of public hearing.

SUMMARY: Section 182 of the Trade Act of 1974 (Trade Act) (19 U.S.C. 2242) requires the United States Trade Representative (USTR) to identify countries that deny adequate and effective protection of intellectual property rights (IPR) or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. (The provisions of Section 182 are commonly referred to as the "Special 301" provisions of the Trade Act.). The USTR is required to determine which, if any, of these countries should be identified as Priority Foreign Countries. Acts, policies, or practices that are the basis of a country's identification as a Priority Foreign Country can be subject to the procedures set out in sections 301–305 of the Trade Act.

In addition, USTR has created a "Priority Watch List" and "Watch List" to assist the Administration in pursuing the goals of the Special 301 provisions. Placement of a trading partner on the Priority Watch List or Watch List indicates that particular problems exist in that country with respect to IPR protection, enforcement, or market access for persons relying on intellectual property. Trading partners placed on the Priority Watch List are the focus of increased bilateral attention concerning the problem areas.

USTR chairs an interagency team that reviews information from many sources, and that consults with and makes recommendations to the USTR on issues arising under Special 301. Written submissions from interested persons are a key source of information for the Special 301 review process. In 2011, USTR through the Special 301 Committee will conduct a public hearing as part of the review process.

USTR is hereby requesting written submissions from the public concerning foreign countries' acts, policies, or practices that are relevant to the decision on whether a particular trading partner should be identified as a priority foreign country under Section 182 of the Trade Act or placed on the Priority Watch List or Watch List. Interested parties, including foreign governments, who want to testify at the public hearing must submit a request to testify at the hearing and a short hearing statement. The deadlines for these procedures are set out below.

DATES: The schedule for the 2011 Special 301 review is set forth below.

Tuesday, February 15, 2011 (by 5 p.m.)—For interested parties, except for foreign governments: Submit written comments, requests to testify at the Special 301 Public Hearing, and hearing statements.

Tuesday, February 22, 2011 (by 5 p.m.)—For foreign governments: Submit written comments, requests to testify at the Special 301 Public Hearing, and hearing statements.

Wednesday, March 2, 2011—Special 301 Committee Public Hearing for interested parties, including representatives of foreign governments, will be held at the offices of USTR, 1724 F Street, NW., Washington, DC 20508. Any change in the date or location of the hearing will be announced on *http://www.ustr.gov.*

On or about April 30, 2011—In accordance with statutory

[32] 15 U.S.C. 78s(b)(2).

[33] 17 CFR. 200.30–3(a)(12).

requirements, USTR will publish the 2011 Special 301 Report on or about April 30, 2011.

ADDRESSES: All written comments, requests to testify, and hearing statements should be sent electronically via *http://www.regulations.gov,* docket number USTR–2010–0037. Submissions should contain the term "2011 Special 301 Review" in the "Type comment & Upload file" field on *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Rhonda Lindsay, Office of the United States Trade Representative, at (202) 395–4510. Further information about Special 301 can be located at *http://www.ustr.gov.*

SUPPLEMENTARY INFORMATION:

1. Background

USTR requests that interested persons identify those countries that deny adequate and effective protection for intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. USTR requests that, where relevant, submissions mention particular regions, provinces, states, or other subdivisions of a country in which an act, policy, or practice is believed to warrant special attention. Submissions may report positive or negative developments with respect to these sub-national entities.

Section 182 contains a special rule regarding actions of Canada affecting United States cultural industries. The USTR must identify any act, policy or practice of Canada that affects cultural industries, is adopted or expanded after December 17, 1992, and is actionable under Article 2106 of the North American Free Trade Agreement (NAFTA). USTR must make the above-referenced identifications within 30 days after publication of the National Trade Estimate (NTE) report, *i.e.,* approximately April 30, 2011.

2. Public Comments

a. Written Comments

The Special 301 Committee invites written submissions from the public concerning foreign countries' acts, policies, or practices that are relevant to the decision whether a particular trading partner should be identified under Section 182 of the Trade Act. As noted above, interested parties, except for foreign governments, must submit any written comments by February 15, 2011 at 5 p.m. Interested foreign governments must submit any written comments by February 22, 2011 at 5 p.m.

b. Requirements for Comments

Written comments should include a description of the problems experienced by the submitter and the effect of the acts, policies, and practices on U.S. industry. Comments should be as detailed as possible and should provide all necessary information for assessing the effect of the acts, policies, and practices. Any comments that include quantitative loss claims should be accompanied by the methodology used in calculating such estimated losses. Comments must be in English. All comments should be sent electronically via *http://www.regulations.gov,* docket number USTR–2010–0037.

To submit comments to *http://www.regulations.gov,* find the docket by entering the number USTR–2010–0037 in the "Enter Keyword or ID" window at the *http://www.regulations.gov* home page and click "Search." The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting "Notice" under "Document Type" on the left side of the search-results page, and click on the link entitled "Submit a comment." (For further information on using the *http://www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on "How to Use This Site" on the left side of the home page).

The *http://www.regulations.gov* site provides the option of providing comments by filling in a "Type comment & Upload file" field, or by attaching a document. It is USTR's preference that comments be provided in an attached document. If a document is attached, please type "2011 Special 301 Review" in the "Type comment & Upload file" field. USTR prefers submissions in Microsoft Word (.doc) or Adobe Acrobat (.pdf). If the submission is in an application other than those two, please indicate the name of the application in the "Comments" field.

3. Public Hearing

a. Notice of Public Hearing

The Special 301 Committee will hold a public hearing at the offices of USTR, 1724 F Street, NW., Washington, DC 20508 for interested parties, including representatives of foreign governments, on March 2. The hearing will be open to the public, and a transcript of the hearing will be made available on *http://www.ustr.gov.* Any change in the date or location of the hearing will be announced on *http://www.ustr.gov.*

b. Submission of Requests To Testify at the Public Hearing and Hearing Statements

All interested parties, except foreign governments, wishing to testify at the hearing must submit, by 5 p.m. on February 15, 2011, a "Notice of Intent to Testify" and "Hearing Statement" to *http://www.regulations.gov* (following the procedures set forth in "Requirements for Comments" above), the name of the witness, name of the organization (if applicable), address, telephone number, fax number, and e-mail address. Oral testimony before the Special 301 Committee will be limited to one five-minute presentation in English. A five-minute period will be allowed for questions from the Special 301 Committee. If those testifying wish to submit a longer "Hearing Statement" for the record, that statement must accompany the "Notice of Intent to Testify" to be submitted on February 15, 2011.

All interested foreign governments who wish to testify at the hearing must submit, by 5 p.m. on February 22, 2011, a "Notice of Intent to Testify" to *http://www.regulations.gov* (following the procedures set forth in "Requirements for Comments" above), the name of the witness, name of the organization (if applicable), address, telephone number, fax number, and e-mail address. Oral testimony before the Special 301 Committee will be limited to one five-minute presentation in English. A five-minute period will be allowed for questions from the Special 301 Committee. If foreign governments testifying wish to submit a "Hearing Statement" for the record, that statement must be submitted by February 22, 2011.

4. Business Confidential Information

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such, the submission must be marked "BUSINESS CONFIDENTIAL" at the top and bottom of the cover page and each succeeding page, and the submission should indicate, via brackets, the specific information that is confidential. Additionally, "Business Confidential" should be included in the "Type comment & Upload file" field. Anyone submitting a comment containing business confidential information must also submit as a separate submission a

non-confidential version of the confidential submission, indicating where confidential information has been redacted. The non-confidential summary will be placed in the docket and open to public inspection.

5. Inspection of Comments, Notices, and Hearing Statements

USTR will maintain a docket on the 2011 Special 301 Review, accessible to the public. The public file will include non-confidential comments, notices of intent to testify, and hearing statements received by USTR from the public, including foreign governments, with respect to the 2011 Special 301 Review. Comments will be placed in the docket and open to public inspection pursuant to 15 CFR 2006.13, except confidential business information exempt from public inspection in accordance with 15 CFR 2006.15. Comments may be viewed on the *http://www.regulations.gov* Web site by entering docket number USTR–2010–0037 in the search field on the home page.

Stanford K. McCoy,

Assistant U.S. Trade Representative for Intellectual Property and Innovation.

[FR Doc. 2010–32916 Filed 12–29–10; 8:45 am]

BILLING CODE 3190–W1–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35457]

Wichita, Tillman & Jackson Railway Company—Acquisition Exemption—Oklahoma Department of Transportation

Wichita, Tillman & Jackson Railway Company (WTJR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to acquire approximately 61.02 miles of rail line owned by the Oklahoma Department of Transportation (ODOT), referred to as the Western Branch. The Western Branch extends between milepost 17.54 at the Texas-Oklahoma State line near Burkburnett, Tex., and milepost 78.56 at Altus, Okla. WTJR has leased and operated the Western Branch since 1991.[1]

In *Wichita, Tillman & Jackson Railway Company—Lease Renewal Exemption—Oklahoma Department of Transportation,* FD 35451 (STB served Dec. 23, 2010), WTJR was authorized to renew and supplement its 1991 lease agreement for the 61.02-mile line of railroad. WTJR states that the 1991 lease agreement grants WTJR an option to purchase the Western Branch upon the payment or prepayment of a specified aggregate rental amount and the payment of the specified purchase price.

WTJR states that, due to actions and inactions of others, it now has elected to exercise the purchase option. WTJR points out that the filing of this notice of exemption to acquire the line does not render the lease renewal moot, because WTJR will not be able to consummate the acquisition before the current term of the lease ends. WTJR states that the proposed transaction does not contain any provisions that would limit future interchange with a third-party connecting carrier.

WTJR certifies that its projected annual revenues as a result of the transaction will not result in WTJR becoming a Class II or Class I rail carrier and further certifies that its projected annual revenues will not exceed $5 million.

The transaction is expected to be consummated on or shortly after January 16, 2011.

If the verified notice 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. Petitions for stay must be filed no later than January 9, 2011 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35457, 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 Karl Morell, Ball Janik LLP, Suite 225, 1455 F Street, NW., Washington, DC 20005.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: December 23, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. 2010–32933 Filed 12–29–10; 8:45 am]

BILLING CODE 4915–01–P

[1] *See Wichita, Tillman & Jackson Ry.—Lease and Operation Exemption—State of Okla.,* FD 31788 (ICC served Jan. 8, 1991).

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35454]

Big Four Terminal Railroad, LLC—Operation Exemption—RMW Ventures, LLC

Big Four Terminal Railroad, LLC (BFTR), has filed a verified notice of exemption under 49 CFR 1150.31 to operate over 5.2 +/− miles of rail line between milepost 0.0 in Connorsville, Ind. and milepost 5.2 +/− in Beesons, Ind., in Fayette and Wayne Counties, Ind. BFTR states that it has entered into an agreement dated December 1, 2010, with RMW Ventures, LLC (RMW), the current owner of the line, to provide rail service upon obtaining Board authorization and that it will replace C&NC Railroad Corporation (C&NC) as the operator of the line.[1]

BFTR states that its operating agreement with RMW does not contain any interchange commitments and that its interchange agreements with its connecting carriers will not contain any interchange commitments either. BFTR certifies that the projected annual revenues as a result of the proposed transaction will not exceed those that would qualify it as a Class III carrier and will not exceed $5 million.

BFTR states that consummation of the transaction will occur on or after the effective date of the exemption, which is January 15, 2011 (30 days after the exemption was filed).

If the verified notice 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. Stay petitions must be filed no later than January 7, 2011 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35454, 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 Richard R. Wilson, Esq., Richard R. Wilson, P.C., 518 N. Center Street, Suite 1, Ebensburg, PA 15931.

[1] C&NC obtained authority to lease and operate the line in *C&NC Railroad Corp.—Lease and Operation Exemption—Lines of the Norfolk and Western Railway Corp. and Indiana Hi Rail Corp,* FD 33475 (STB Served Oct. 31, 1997). C&NC will continue to have a common carrier obligation to operate the line until such time as appropriate discontinuance authority is sought and granted.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: December 23, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. 2010–32932 Filed 12–29–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Departmental Offices; Privacy Act of 1974, as Amended

AGENCY: Departmental Offices, Treasury.

ACTION: Notice of Proposed Privacy Act System of Records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, the Departmental Offices, U.S. Department of the Treasury ("Treasury") gives notice of the establishment of one Privacy Act System of Records.

DATES: Comments must be received no later than January 31, 2011. The new system of records will be effective January 31, 2011 unless the comments received result in a contrary determination.

ADDRESSES: Comments should be sent to Claire Stapleton, Consumer Financial Protection Bureau (CFPB) Implementation Team, 1801 L Street, NW., Washington, DC 20036.

Comments will be made available for inspection upon written request. Treasury will make such comments available for public inspection and copying in Treasury's Library, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect comments by telephoning (202) 622–0990. All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Claire Stapleton, Consumer Financial Protection Bureau Implementation Team, 1801 L Street, NW., Washington, DC 20036, (202) 435–7220.

SUPPLEMENTARY INFORMATION: The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Act"), Public Law 111–203, Title X, established the Consumer Financial Protection Bureau (CFPB). Once fully operational, CFPB will administer, enforce and implement Federal consumer financial protection laws, and, among other powers, will have authority to protect consumers from unfair, deceptive, and abusive practices when obtaining consumer financial products or services. The Act grants Treasury certain "interim authority" to help stand up the agency. The CFPB implementation team, currently within Treasury, will maintain the records covered by this Notice.

The new systems of records described in this Notice, Treasury/DO.320—CFPB Implementation Team Mailing List Database will focus on collecting mailing list information on individuals who have indicated an interest in receiving information from CFPB concerning CFPB and its initiatives and activities. A description of the new system of records follows this Notice.

The report of a new system of records has been submitted to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and the Office of Management and Budget, pursuant to Appendix I to OMB Circular A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated November 30, 2000, and the Privacy Act, 5 U.S.C. 552a(r).

The system of records entitled "Treasury/DO.320—CFPB Implementation Team Mailing List Database" is published in its entirety below.

Dated: December 15, 2010.

Melissa Hartman,

Deputy Assistant Secretary for Privacy and Treasury Records.

TREASURY/DO.320

SYSTEM NAME:

CFPB Implementation Team Mailing List Database.

SYSTEM LOCATION:

Consumer Financial Protection Bureau Implementation Team, 1801 L Street, NW., Washington, DC 20036.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All persons appearing on mailing lists maintained by the CFPB implementation team to facilitate mailings to multiple addresses. These lists include individuals who may have attended CFPB programs, exhibits, conferences, or similar events; may have participated in a voluntary web-based or other survey offered by CFPB or its contractors; or may have otherwise asked to be added to our mailing list. Information collected is subject to the Privacy Act only to the extent that it concerns individuals; information pertaining to corporations and other business entities and organizations is not subject to the Privacy Act.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in the system are limited to the following four pieces of information: name, mailing address, phone number, and email address. The system may also contain a computer-generated identifier or case number in order to retrieve information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Public Law 111–203, Title X, Sec. 1066, codified at 12 U.S.C. 5586.

PURPOSE(S):

The purpose of this system of records is to maintain lists of individuals who have indicated an interest in receiving information from CFPB concerning CFPB's activities and initiatives, and the CFPB implementation team will use the information in the system to distribute such information to those individuals. Mailing list information from survey participants will not be stored with the survey results.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records may be disclosed to:

(1) Congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(2) Disclose information to the U.S. Department of Justice ("DOJ") for its use in providing legal advice to the Treasury Department (Department) or in representing the Department in a proceeding before a court, adjudicative body, or other administrative body before which the Department is authorized to appear, where the use of such information by the DOJ is deemed by the Department to be relevant and necessary to the litigation, and such proceeding names as a party or interests:

(a) The Department or any component thereof;

(b) Any employee of the Department in his or her official capacity;

(c) Any employee of the Department in his or her individual capacity where DOJ has agreed to represent the employee; or

(d) The United States, where the Department determines that litigation is likely to affect the Department or any of its components.

(3) The National Archives and Records Administration for use in records management inspections;

(4) A contractor or agent who needs to have access to this system of records to perform an assigned activity;

(5) Appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the bureau or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPENSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records maintained in this system are stored electronically and in file folders. Paper copies of individual records are made by the authorized CFPB Implementation Team staff.

RETRIEVABILITY:

Records are retrievable by any of the four fields of information in the system or the computer-generated identifier or case number.

SAFEGUARDS:

Access to electronic records is restricted to authorized personnel who have been issued non-transferrable access codes and passwords. Other records are maintained in locked file cabinets or rooms with access limited to those personnel whose official duties require access.

RETENTION AND DISPOSAL:

Computer and paper records will be maintained indefinitely until a records disposition schedule is approved by the National Archives Records Administration.

SYSTEM MANAGER(S) AND ADDRESS:

Consumer Financial Protection Bureau Implementation Team, 1801 L Street, NW., Washington, DC 20036.

NOTIFICATION PROCEDURE:

Individuals seeking notification and access to any record contained in this system of records, or seeking to contest its content, may inquire in writing in accordance with instructions appearing at 31 CFR part 1, subpart C, appendix A. Address such requests to: Disclosure Services Director, Disclosure Services, Department of the Treasury, 1500 Pennsylvania Ave., NW., Washington, DC 20220.

RECORD ACCESS PROCEDURES:

See "Notification Procedures" above.

CONTESTING RECORD PROCEDURES:

See "Notification Procedures" above.

RECORD SOURCE CATEGORIES:

Information in this system is obtained from individuals.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010–32918 Filed 12–29–10; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF VETERANS AFFAIRS

VASRD Improvement Forum—Updating Disability Criteria for the Genitourinary System, Digestive System, Dental Conditions, and Infectious Diseases, Immune Disorders and Nutritional Deficiencies

AGENCY: Department of Veterans Affairs.

ACTION: Notice of meeting.

SUMMARY: The Veterans Benefits Administration (VBA) and Veterans Health Administration (VHA) will co-host the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD) Improvement Forum—Updating Disability Criteria for the Genitourinary System, Digestive System, Dental Conditions, and Infectious Diseases, Immune Disorders and Nutritional Deficiencies. The purpose of the VASRD Improvement Forum is to capture public comment and current medical science information from presentations made by subject matter experts. VA plans to use this information to update the sections of the VASRD that pertain to the following four body systems: (1) Infectious Diseases, Immune Disorders and Nutritional Deficiencies (38 CFR 4.88–4.89), (2) the Digestive System (38 CFR 4.110–4.114), (3) the Genitourinary System (38 CFR 4.115–4.115b) and (4) Dental and Oral Conditions (38 CFR 4.150). Specifically, diagnostic code descriptors and evaluation criteria will be discussed. Contingent upon available capacity and time, individuals wishing to make oral statements will be accommodated on a first-come, first-served basis.

DATES: Four public meetings, each dedicated to a different body system, will be held from 8:30 a.m. to 4:30 p.m. on Tuesday, January 25; Thursday, January 27; Monday, January 31; and Wednesday, February 2, 2011.

ADDRESSES: The meetings will be held at the DoubleTree Paradise Valley Resort, located at 6333 North Scottsdale Road, in Scottsdale, Arizona.

FOR FURTHER INFORMATION CONTACT: R. P. Watkins, Regulation Staff (211D), Compensation and Pension Service, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Anyone wishing to attend these meetings or seeking additional information may also contact Mr. Watkins at (202) 461–9214 or *Robert.Watkins2@va.gov.*

Dated: December 21, 2010.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

[FR Doc. 2010–32909 Filed 12–29–10; 8:45 am]

BILLING CODE P

Federal Register

Thursday,
December 30, 2010

Part II

Environmental Protection Agency

40 CFR Part 52

Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2010–1033; FRL–9245–2]

RIN 2060–AQ67

Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim Final rule.

SUMMARY: EPA is correcting its previous full approval of Texas's Clean Air Act (CAA) Prevention of Significant Deterioration (PSD) program to be a partial approval and partial disapproval. The state did not address, or provide adequate legal authority for, the program's application to all pollutants that would become newly subject to regulation in the future, including non-National Ambient Air Quality Standard (NAAQS) pollutants, among them greenhouse gases (GHGs). Further, EPA is promulgating a federal implementation plan (FIP), as required following the partial disapproval, to establish a PSD permitting program in Texas for GHG-emitting sources. EPA is taking this action through interim final rulemaking, effective upon publication, to ensure the availability of a permitting authority—EPA—in Texas for GHG-emitting sources when they become subject to PSD on January 2, 2011. This will allow those sources to proceed with plans to construct or expand. This rule will expire on April 30, 2011. EPA is also proposing a notice-and-comment rulemaking that mirrors this rulemaking.

DATES: This action is effective on December 30, 2010.

ADDRESSES: EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2010–1033. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, Air Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Peter Keller, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, NC 27711; *telephone number:* (919) 541–5339; *fax number:* (919) 541–5509; *e-mail address: keller.peter@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

The only governmental entity potentially affected by this rule is the State of Texas. Other entities potentially affected by this rule include sources in all industry groups within the State of Texas, which have a direct obligation under the CAA to obtain a PSD permit for GHGs for projects that meet the applicability thresholds set forth in the Tailoring Rule.[1] This independent obligation on sources is specific to PSD and derives from CAA section 165(a). The majority of entities potentially affected by this action are expected to be in the following groups:

Industry group	NAICS [a]
Utilities (electric, natural gas, other systems)	2211, 2212, 2213.
Manufacturing (food, beverages, tobacco, textiles, leather)	311, 312, 313, 314, 315, 316.
Wood product, paper manufacturing	321, 322.
Petroleum and coal products manufacturing	32411, 32412, 32419.
Chemical manufacturing	3251, 3252, 3253, 3254, 3255, 3256, 3259.
Rubber product manufacturing	3261, 3262.
Miscellaneous chemical products	32552, 32592, 32591, 325182, 32551.
Nonmetallic mineral product manufacturing	3271, 3272, 3273, 3274, 3279.
Primary and fabricated metal manufacturing	3311, 3312, 3313, 3314, 3315, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329.
Machinery manufacturing	3331, 3332, 3333, 3334, 3335, 3336, 3339.
Computer and electronic products manufacturing	3341, 3342, 3343, 3344, 3345, 4446.
Electrical equipment, appliance, and component manufacturing	3351, 3352, 3353, 3359.
Transportation equipment manufacturing	3361, 3362, 3363, 3364, 3365, 3366, 3366, 3369.
Furniture and related product manufacturing	3371, 3372, 3379.
Miscellaneous manufacturing	3391, 3399.
Waste management and remediation	5622, 5629.
Hospitals/nursing and residential care facilities	6221, 6231, 6232, 6233, 6239.
Personal and laundry services	8122, 8123.
Residential/private households	8141.
Non-residential (commercial)	Not available. Codes only exist for private households, construction and leasing/sales industries.

[a] North American Industry Classification System.

B. How is the preamble organized?

The information presented in this preamble is organized as follows:

[1] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule. 75 FR 31514 (June 3, 2010). The Tailoring Rule is described in more detail later in this preamble.

II. Overview of Interim Final Rule

A. Brief Summary

This rulemaking is intended to assure that large GHG-emitting sources in Texas will be able to obtain preconstruction permits under the CAA New Source Review (NSR) PSD program, and do so when they become subject to PSD, which will occur on January 2, 2011. In this manner, this rulemaking will allow those sources to avoid delays in construction or modification.

In this rulemaking, EPA is determining that it erred in fully approving Texas's PSD program in 1992 because at that time, the program had a gap, which recent statements by Texas have made particularly evident. The program did not address its application to, or provide assurances that it has adequate legal authority to apply to, all pollutants newly subject to regulation, including non-NAAQS pollutants, among them GHGs. As a result, EPA is correcting its previous full approval to be a partial approval and partial disapproval. EPA is taking this action through the error-correction mechanism provided under CAA section 110(k)(6). The partial disapproval requires EPA, under CAA section 110(c)(1)(B), to promulgate a FIP within 2 years, and, as part of this rulemaking, EPA is exercising its discretion to promulgate the FIP immediately. Under the FIP, EPA will become the permitting authority for, and apply federal PSD requirements to, large GHG-emitting sources in accordance with the thresholds established under what we call the Tailoring Rule, which EPA recently promulgated.

By becoming the permitting authority, EPA will be able to process preconstruction PSD permit applications for GHG-emitting sources and thereby allow the affected sources to avoid delays in construction and modification.[2] According to Texas, 167 GHG-emitting sources will require PSD permits during 2011. It is likely that some of these sources will become subject to PSD soon after January 2, 2011, and therefore will have a pressing need to have a permitting authority in place by that time. Although the CAA allows states to implement PSD, and Texas has been implementing an EPA-approved PSD program since 1992, Texas has recently informed EPA that it does not have the intention or the authority to apply PSD to GHG-emitting sources, and that it could very well maintain this position even if the DC Circuit upholds the GHG rules against legal challenges that Texas and other parties have recently brought. Texas's unwillingness to implement this aspect of the federal PSD program leaves EPA no choice but to resume its role as the permitting authority for this portion, in order to assure that businesses in Texas are not subject to delays or potential legal challenges and are able to move forward with planned construction and expansion projects that will create jobs and otherwise benefit the state's and the nation's economy. It bears emphasizing that it is incumbent on EPA to take action now so that there will be no period of time when sources are unable to obtain necessary PSD permits, beginning on January 2, 2011.

In order to assure no gap in permitting, EPA is taking this action, including the FIP, through an interim final rule that is exempt from notice-and-comment due to the "good cause" exception of the Administrative Procedure Act. This interim final rule will remain in place until April 30, 2011. On a parallel track, EPA is also initiating a proposed rulemaking that mirrors this rulemaking, and that EPA intends to finalize and make effective by May 1, 2011.

B. Detailed Overview

The CAA requires each state, including Texas, to adopt into its State Implementation Plan (SIP) a PSD program. CAA sections 110(a)(2)(C), 110(a)(2)(J), 161. One of the PSD requirements is that PSD applies by operation of law to any pollutant as soon as that pollutant becomes subject to regulation under the CAA for the first time, and that includes non-NAAQS pollutants. CAA section 165(a)(1), 169(1). EPA has consistently interpreted these CAA provisions in that manner. The CAA further requires that EPA-approved PSD programs must meet all CAA requirements, CAA section 110(k)(3), and this includes applying PSD to all pollutants newly subject to regulation, including non-NAAQS pollutants. In addition, the CAA requires each state to adhere to various requirements related to SIP adoption, including that the state "provide * * * necessary assurances that the State * * * will have adequate * * * authority under State * * * law to carry out such implementation plan. * * *" CAA section 110(a)(2)(E)(i). Once a state has made a SIP submittal, the CAA requires EPA to approve or disapprove the SIP revision in whole or in part,

[2] Texas will continue to be the permitting authority for sources of other pollutants. This split permitting process will also take place in the seven other states for which EPA is implementing a GHG PSD FIP.

depending on the extent to which the CAA requirements are met. CAA section 110(k)(3),(4). If EPA disapproves, it must promulgate a FIP that addresses the disapproved SIP or portion of the SIP at any time within two years of the disapproval. CAA section 110(c)(1)(B). In addition, the CAA authorizes EPA to "determine [ ]" if a previous action in approving a SIP revision was "in error," and if so, to "revise such action as appropriate." CAA section 110(k)(6).

In 1972, EPA approved Texas's initial SIP to attain and maintain the NAAQS. At that time, EPA approved the state's assurances of adequate legal authority. In the early 1980s, following the 1977 CAA Amendments that enacted the PSD program, EPA, which at that time administered PSD, delegated to Texas partial authority to implement the PSD program. During this time, EPA made clear to Texas that EPA's regulatory PSD program covers non-NAAQS pollutants.

In 1985–88, Texas developed a PSD program and in a series of submittals, submitted it to EPA as a SIP revision. The Texas program incorporated by reference much of EPA's PSD regulations, 40 CFR part 52, including the PSD applicability provisions in 40 CFR part 52.21(b)(1)(i). Thus, the Texas PSD program by its terms applied to "any air pollutant regulated under the Clean Air Act." However, Texas state law imposed limits that precluded the Texas PSD program from applying automatically, as a matter of law, to each newly regulated pollutant. Rather, Texas's program applied only to pollutants that were subject to regulation at the time the state adopted the SIP revision establishing the PSD program, so that the state would need to take additional action to subject subsequently regulated pollutants to PSD, for example, an expeditious state law change that would be promptly submitted to EPA as a SIP revision to update the PSD program. Texas and EPA were both well aware of this limitation. In fact, while EPA was reviewing Texas's PSD SIP revision, EPA promulgated a national ambient air quality standard (NAAQS) for PM_{10}, thereby subjecting that pollutant to PSD for the first time, and Texas updated its state PSD rule to apply to PM_{10} and submitted that as a SIP revision. Texas did not, however, explicitly recognize that after EPA approved its PSD program, EPA could well subject to PSD for the first time additional pollutants, and Texas did not address that situation in any manner. For example, Texas did not provide assurances that it would take action to apply its PSD program to all pollutants newly subject to regulation, including non-NAAQS pollutants; nor did Texas provide information as to the method or timing of such action.

During the course of its consideration of Texas's proposed PSD SIP revision, EPA became concerned that Texas would not implement EPA's interpretation of the core PSD requirement that sources' implement best available control technology (BACT). As a result, EPA asked for written commitments that Texas would implement the PSD program in accordance with EPA interpretations. In a September 5, 1989, letter, which we call the Texas PSD Commitments Letter, Texas stated that it was "committed to the implementation of EPA decisions regarding PSD program requirements." Separately, as for Texas's legal authority to carry out the PSD program, the state, in its various SIP submittals, made general references to its legal authority for adopting and submitting SIP revisions.

In 1992, EPA fully approved Texas's PSD rules. In the preamble to this final approval, EPA did not specifically address the issue of how the PSD program would apply to pollutants newly subject to regulation, including non-NAAQS pollutants, or the state's legal authority for applying PSD to such pollutants. EPA did state that it was basing the approval on (among other things) the 1989 Texas PSD Commitments Letter. However, EPA acknowledged questions about the scope of these commitments and EPA made clear that even with that letter, Texas retained significant discretion in implementing the PSD program.

Because the application of PSD to pollutants newly subject to regulation is a key component of the program, and because Texas's PSD program, unlike that of most states, did not automatically apply to such pollutants, it was important that Texas, in its SIP submittals, address how it would apply its program to such pollutants. This could include providing, for example, assurances that its program would apply to such pollutants or information as to the method and timing for applying its program to such pollutants. In addition, under CAA section 110(a)(2)(E)(i), Texas was required to provide assurances that it had adequate legal authority to apply its program to such pollutants.

However, as noted previously, there is no indication in the record of Texas's SIP submissions or EPA's action on them that Texas specifically addressed its program's application to pollutants newly subject to regulation. Texas did provide the 1989 Texas PSD Commitments Letter, in which it generally committed "to implement EPA requirements relative to [PSD]." But by its terms, this 1989 letter did not commit to apply PSD to such pollutants and in any event, EPA, in discussing this letter in the preamble to the final rule, acknowledged that Texas retained substantial discretion in implementing PSD.

Thus, at the time that Texas submitted and EPA approved the state's PSD program, the program had important gaps. It did not address its application to, or provide the requisite assurance that it had legal authority to apply to, pollutants newly subject to regulation, including non-NAAQS pollutants.

Texas has recently made statements that have made these gaps particularly evident.[3] Texas has stated that it is not required to submit a SIP revision to apply PSD to non-NAAQS pollutants, including GHGs. Texas has explained that in its view, the CAA is clear, under the legal doctrine that we call *Chevron* step 1, described later, that the PSD program is limited to NAAQS pollutants and does not apply to non-NAAQS pollutants. In addition, Texas has stated that it does not have the intention or the authority to apply PSD to GHG-emitting sources, and that it could very well maintain this position even if the D.C. Circuit upholds the GHG rules in the current litigation before that Court.

Texas's recent statements highlight the gaps in its PSD program concerning the application of PSD, and the legal authority for applying PSD, to pollutants newly subject to regulation, including non-NAAQS pollutants, among them GHGs. What's more, Texas's recent statements are consistent with the view that the state's silence on this subject at the time it submitted and EPA approved its PSD SIP means that Texas did not, at that time, view itself as obligated to apply PSD to each pollutant newly subject to regulation, including non-NAAQS pollutants.

Specifically, Texas's recent statement that the CAA PSD provisions are clear by their terms—which is what a *Chevron* step 1 interpretation means—that they do not apply to non-NAAQS pollutants, suggests that Texas would have interpreted the CAA PSD provisions the same way at the time Texas submitted its PSD program. But at the least, Texas's PSD program contained a gap because it failed to address this issue; and that gap is significant because it facilitates Texas, at this time, taking the position that PSD does not apply to non-NAAQS

[3] Texas made these statements in various letters to EPA in response to rulemakings and in court filings challenging those rulemakings, as discussed in detail later in this preamble.

pollutants.[4] Texas's recent statement that it does not have the authority to apply PSD to GHG-emitting sources highlights that Texas's PSD program has a gap due to its failure to provide assurances of adequate legal authority. Specifically, Texas's direct statement that it does not have authority to apply PSD to GHGs casts doubt on whether Texas, at the time it submitted the PSD SIP submittals, would have viewed itself as having such authority. There seems to be a meaningful possibility that at the time Texas submitted and EPA approved the state's PSD program, during 1985–1992, Texas considered itself under some legal limit or constraint in applying PSD to all pollutants newly subject to regulation. At the least, it is apparent that at the time that Texas submitted its PSD program, Texas did not provide the "necessary assurances" that it "will have adequate * * * authority under State * * * law to carry out such implementation plan (and is not prohibited by any provision of * * * State law from carrying out such implementation plan or portion thereof)," as required under CAA section 110(a)(2)(E)(i).

The gaps in Texas's PSD SIP—its failure to address, or provide assurances of the requisite legal authority concerning, the application of PSD to all pollutants newly subject to regulation, including non-NAAQS pollutants—means that the PSD SIP was flawed at the time that EPA reviewed it for action. EPA did not address those flaws and instead, issued a full approval of the SIP.

In this rulemaking, therefore, EPA is "determin[ing]" that EPA's previous action fully approving Texas's PSD program was "in error," under CAA section 110(k)(6). The key terms in this provision, as just quoted, confer broad discretion upon EPA to make decisions as to when it erred in approving a SIP revision. Thus, it is clear that under this provision, EPA erred in approving the Texas PSD program in light of that program's flaws.

Once EPA determines that its previous approval of the Texas PSD SIP was in error, EPA, under CAA section 110(k)(6), "may * * * revise [its previous full approval] as appropriate. * * *" In this rulemaking, EPA is revising its previous full approval of Texas's PSD SIP to be (i) a partial approval, so that Texas's SIP remains approved to the extent of the pollutants that the PSD program already does cover; and (ii) a partial disapproval. The partial disapproval is based on the Texas PSD SIP's failure to apply PSD to each pollutant newly subject to regulation, including each non-NAAQS pollutant, among them GHGs. An alternative legal basis for this rulemaking is EPA's inherent administrative authority to reconsider a previous action.

It should be noted that even if the general assurances that Texas provided in its 1989 PSD Commitments Letter or may have otherwise provided in the record of its PSD SIP submittal were read to indicate that Texas did provide assurances that it would implement, and had legal authority to implement, EPA's interpretation that PSD applies to each pollutant newly subject to regulation, including non-NAAQS pollutants, then Texas's recent statements to the contrary indicate that Texas now is not complying with those assurances. Under these circumstances, EPA would still be justified in determining that its prior approval was in error and should be converted to a partial approval and partial disapproval. This is because under these circumstances, EPA's prior approval should be considered to have been based on those assurances, so that Texas's explicitly stated intent to not act in accordance with those assurances would eliminate the basis for that prior approval.

After promulgating the partial disapproval in this rulemaking, EPA is required to promulgate a FIP "at any time within 2 years," under CAA section 110(c)(1). EPA is exercising its discretion to immediately promulgate the FIP, and is doing so as part of this rulemaking. The FIP consists of appropriate action to apply the PSD program to pollutants that are subject to the PSD program under the CAA, but that Texas has not made subject to Texas's PSD program. At present, Texas has stated that it has neither the intention nor the authority to apply its PSD program to GHG-emitting sources. Therefore, the FIP applies the EPA PSD regulatory program to the GHG portion of the PSD permit for GHG-emitting sources in Texas, including the thresholds in what we call the Tailoring Rule that limit PSD to large sources. Further, the FIP commits EPA to take future action as appropriate with respect to any additional newly regulated pollutants. The FIP does not apply to any other currently regulated pollutants because at this point, Texas's PSD program addresses all other pollutants that are subject to regulation under the CAA. EPA is promulgating the FIP immediately, as opposed to a later time within the two-year period, because certain GHG-emitting sources in Texas will become subject to the PSD program as of January 2, 2011. Immediate promulgation of the FIP will allow EPA to act as the permitting authority in Texas for these sources as of January 2, 2011, and thereby avoid delays in these sources' ability to construct or modify.

It should be noted that EPA has recently taken another action concerning Texas's PSD program as that program relates to GHGs. In a final rule signed on December 1, 2010 and published by notice dated December 13, 2010, EPA issued what we call a SIP call, under CAA section 110(k)(5), requiring Texas and 12 other states whose SIP-approved PSD programs do not apply to GHG-emitting sources to submit a corrective SIP revision; and EPA established a deadline for that SIP submittal for each state, which ranged from as early as December 22, 2010 for seven of the states to December 1, 2011 for Texas. In addition, EPA stated that if Texas or any of the other states failed to submit its corrective SIP revision by its deadline, EPA intended to promulgate a FIP immediately thereafter.

The timing of the SIP call was driven by the fact that the affected states did not have authority to issue PSD permits to GHG-emitting sources and, as a result, those sources could face delays in construction and modification when they become subject to PSD as early as January 2, 2011. EPA designed the SIP call to maximize the opportunity of each affected state to assure that its sources would have a permitting authority available as of that date. EPA did so by allowing each state flexibility for its SIP submittal deadline, and therefore for the date that EPA could put a FIP in place. Each of the affected states except Texas responded with a plan that would assure that its sources would not confront permitting delays. Texas did not submit such a plan and as a result, its sources—according to Texas, as many as 167 during 2011—do confront the possibility of permitting delays. In addition, it was in responding to the SIP call and related EPA rulemakings that Texas made the statements noted earlier in this preamble that made particularly evident the flaws in its PSD program.

This is an important reason why EPA is proceeding with this error-correction/partial-disapproval rulemaking at this time. This rulemaking allows EPA to put a FIP in place immediately, instead of waiting until December 1, 2011;

[4] It should be noted that in the past, Texas has applied its PSD program to non-NAAQS pollutants. Even so, Texas's recent statements indicate very clearly that Texas does not consider itself obligated to update its PSD program to apply to all newly regulated non-NAAQS pollutants, but instead Texas may choose which non-NAAQS pollutants to which it will apply PSD.

thereby act as the permitting authority in Texas beginning January 2, 2011; and in that capacity, allow Texas sources to avoid delays in construction or modification.

Although this rulemaking and the SIP call have similarities, EPA is authorized to proceed with each rulemaking with respect to Texas at this time, and it is both necessary and appropriate that we do so. EPA is authorized to proceed with the SIP call for reasons explained in that rule. Nothing in CAA section 110(k)(5), which authorizes the SIP call, precludes EPA from proceeding with this rulemaking, which, as noted earlier, is authorized under CAA section 110(k)(6). As we discuss below, it was Texas's response to the SIP call proposal, along with other statements Texas made around the same time, that focused attention on the underlying flaws in Texas PSD SIP, which led to this error-correction rulemaking. EPA is not, at this time, undertaking a similar error-correction rulemaking for any of the other states that are subject to the SIP call. EPA has discretion as to whether and when to undertake such a rulemaking, and each of the other states has chosen a course of action that at present appears to assure that its large GHG-emitting sources will have a permitting authority available when the sources need one, and therefore will not face delays in constructing or modifying. Moreover, none of these other states has made the type of recent statements that may have exposed flaws in its SIP, as Texas has done. As a result, EPA sees no need to inquire into whether any of these other states have flaws in their SIP PSD programs as Texas does.

EPA is applying the "good cause" exemption from notice-and-comment rulemaking, authorized under Administrative Procedure Act section 553(b)(3)(B) to promulgate this action as an interim final rulemaking that takes effect immediately upon publication in the **Federal Register.** As a result, this action, including the FIP, will take effect by January 2, 2011, when GHG-emitting sources become subject to the requirement to obtain a PSD preconstruction permit. The use of the "good cause" exemption is justified because the notice-and-comment process would add delays in issuing the final rule and therefore is impractical and contrary to public interest. Unless and until EPA promulgates this rule, Texas sources will not have available a permitting authority to process their PSD permit applications and as a result, may face delays in construction and modification.

Simultaneously with issuing this interim final rulemaking, EPA is proposing for notice-and-comment an error-correction/partial-disapproval and FIP rule that mirrors this rule. EPA expects to complete final action on this notice-and-comment rule so that it takes effect by May 1, 2011. This interim final rule will stay in place until April 30, 2011, and then be replaced by the notice-and-comment rule.

Although we recognize that Texas has indicated that the state does not intend to submit a SIP revision to apply its PSD program to GHG-emitting sources, we emphasize that it is our preference that Texas assume responsibility for permitting GHG-emitting sources as soon as possible, and we are prepared to work with Texas to bring this about. Thus, we are prepared to work with the state to help it promptly develop and submit to us a SIP revision that extends its PSD program to GHG-emitting sources and if it does so, we intend to act on that SIP revision promptly. We also encourage Texas to accept a delegation of authority to implement the FIP, so that it will still be the state that processes the permit applications, albeit operating under federal law.

III. Background

EPA described the relevant background information in the preambles for several proposed and final rulemakings that implement the PSD GHG permitting program. These include the Tailoring Rule,[5] 75 FR at 31518–21, and the GHG PSD SIP call,[6] 75 FR at 53896–98 (September 7, 2010) (proposal), or, simply, the SIP call. Knowledge of this background information is presumed and will be only briefly summarized here.

A. Legal Background

1. Requirements for SIP Submittals and EPA Action

This section reviews background information concerning the CAA requirements for what SIPs must include, the process for state submittals of SIPs, requirements for EPA action on SIPs and SIP revisions, and FIPs.

[5] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule." 74 FR 55,292 (Oct. 27, 2009) (proposed Tailoring Rule).

[6] "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule," 75 FR 77698 (Dec. 13, 2010) (final SIP call); "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Proposed Rule," 75 FR 53,892 (proposed SIP call).

a. Requirements for What SIPs Must Include

Congress enacted the NAAQS and SIP requirements in the 1970 CAA Amendments. CAA section 110(a)(1) requires that states adopt and submit to EPA for approval SIPs that implement the NAAQS. CAA section 110(a)(2) contains a detailed list of requirements that all SIPs must include to be approvable by EPA.

Of particular relevance for this action, subparagraph (E)(i) of CAA section 110(a)(2) provides that SIPs must "provide * * * necessary assurances that the state * * * will have adequate personnel, funding, and authority under State * * * law to carry out such implementation plan. * * *" As applicable to PSD programs, this provision means that EPA may approve the SIP PSD provisions only if EPA is satisfied that the state will have adequate legal authority under state law.

b. EPA Action on SIP Submittals

After a SIP or SIP revision has been submitted, EPA is authorized to act on it under CAA section 110(k)(3)–(4). Those provisions authorize a full approval or, if the SIP or SIP revision meets some but not all of the applicable requirements, a conditional approval, a partial approval and disapproval, or a full disapproval. If EPA disapproves a required SIP or SIP revision, then EPA must promulgate a FIP at any time within two years after the disapproval, unless the state corrects the deficiency within that period of time by submitting a SIP revision that EPA approves. CAA § 110(c)(1).[7]

c. SIP Call

The CAA provides a mechanism for the correction of SIPs with certain types of inadequacies, under CAA section 110(k)(5), which provides:

(5) Calls for Plan Revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to * * * comply with any requirement of this Act, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.

This provision by its terms authorizes the Administrator to "find[] that [a SIP] * * * is substantially inadequate to

[7] States are subject to sanctions for failure to submit, or for EPA disapproval of, SIPs for nonattainment areas, under CAA section 179. These sanctions provisions are not relevant for this rule because they do not apply to PSD SIPs.

* * * comply with any requirement of this Act," and, based on that finding, to "require the State to revise the [SIP] * * * to correct such inadequacies." This latter action is commonly referred to as a "SIP call." In addition, this provision authorizes EPA to establish a "reasonable deadline (not to exceed 18 months after the date of such notice)" for the submission of the corrective SIP revision.

If EPA does not receive the corrective SIP revision by the deadline, CAA section 110(c) authorizes EPA to "find[ ] that [the] State has failed to make a required submission." CAA section 110(c)(1)(A). Once EPA makes that finding, CAA section 110(c)(1) requires EPA to "promulgate a Federal implementation plan at any time within 2 years after the [finding] * * * unless the State corrects the deficiency, and [EPA] approves the plan or plan revision, before [EPA] promulgates such [FIP]."

CAA section 110(k)(5), by its terms—specifically, the use of the term "[w]henever"—authorizes, but does not require, EPA to make the specified finding and does not impose any time constraints for EPA to do so. As a result, EPA has discretion in determining whether and when to make the specified finding. *See New York Public Interest Research Group* v. *Whitman,* 321 F.3d 316, 330–31 (2d Cir. 2003) (opening phrase "Whenever the Administrator makes a determination" in CAA section 502(i)(1) grants EPA "discretion whether to make a determination"); *Her Majesty the Queen in Right of Ontario* v. *EPA,* 912 F.2d 1525, 1533 (DC Cir. 1990) ("whenever" in CAA section 115(a) "impl[ied] a degree of discretion" in whether EPA had to make a finding).

d. Authority for EPA To Revise Previous Action on SIPs

EPA has authority to revise its previous action concerning SIP submittals. Two mechanisms are available to EPA: The error correction mechanism provided under CAA section 110(k)(6), and EPA's general administrative authority to reconsider its own actions under CAA sections 110 and 301(a), in light of case law.

(i). Error Correction Under CAA Section 110(k)(6)

CAA section 110(k)(6) provides as follows:

> Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

The key provisions for present purposes are that the Administrator has the authority to "determine ;" when a SIP approval was "in error," and when she does so, she may then revise the SIP approval "as appropriate," in the same manner as the approval, and without requiring any further submission from the state.

As quoted previously, CAA section 110(k)(6) provides EPA with the authority to correct its own "error," but nowhere does this provision or any other provision in the CAA define what qualifies as "error." Thus, the term should be given its plain language, everyday meaning, which includes all unintentional, incorrect or wrong actions or mistakes.

The legislative history of CAA section 110(k)(6) is silent regarding the definition of error, but the timing of the enactment of the provision suggests a broad interpretation. The provision was enacted shortly after the Third Circuit decision in *Concerned Citizens of Bridesburg* v. *U.S. EPA,* 836 F.2d 777 (1987). In *Bridesburg,* the court adopted a narrow interpretation of EPA's authority to unilaterally correct errors. The court stated that such authority was limited to typographical and other similar errors, and stated that any other change to a SIP must be accomplished through a SIP revision. *Id.* at 786. In *Bridesburg,* EPA determined that it lacked authority to include odor regulations as part of a SIP unless the odor regulations had a significant relationship to achieving a NAAQS, and so directly acted to remove 13-year-old odor provisions from the Pennsylvania SIP. *Id.* at 779–80. EPA found the previous approval of the provisions to have been an inadvertent error, and so used its "inherent authority to correct an inadvertent mistake" to withdraw its prior approval of the odor regulations without seeking approval of the change from Pennsylvania. *Id.* at 779–80, 785. After noting that Congress had not contemplated the need for revision on the grounds cited by EPA, *Id.* at 780, the court found that EPA's "inherent authority to correct an inadvertent mistake" was limited to corrections such as "typographical errors," and that instead EPA was required to use the SIP revision process to remove the odor provision from the SIP. *Id.* at 785–86.

When the court made its determination in *Bridesburg* in 1987, there was no provision explicitly addressing EPA's error correction authority under the CAA. In 1990, Congress passed CAA section 110(k)(6), apparently for the purpose of overturning the *Bridesburg* opinion. This is apparent because CAA section 110(k)(6) both (i) authorizes EPA to correct SIP approvals and other actions that were "in error," which, as noted previously, broadly covers any mistake, and thereby contrasts with the holding in *Bridesburg* that EPA's pre-section 110(k)(6) authority was limited to correction of typographical or similar mistakes; and (ii) provides that the error correction need not be accomplished via the SIP revision or SIP call process, which contrasts with the holding of *Bridesburg* requiring a SIP revision. Because Congress apparently intended CAA section 110(k)(6) to overturn *Bridesburg,* the definition of "error" in that provision should be sufficiently broad to encompass the error that EPA asserted it made in its approval action at issue in *Bridesburg,* which goes well beyond typographical or other similar mistakes.

EPA has used CAA section 110(k)(6) in the past to correct errors of a non-technical nature. For example, EPA has used CAA section 110(k)(6) as authority to make substantive corrections to remove a variety of provisions from federally approved SIPs that are not related to the attainment or maintenance of NAAQS or any other CAA requirement. *See, e.g.,* "Approval and Promulgation of Implementation Plans; Kentucky: Approval of Revisions to the State Implementation Plan," 75 FR 2440 (Jan. 15, 2010) (correcting the SIP by removing a provision, approved in 1982, used to address hazardous or toxic air pollutants); "Approval and Promulgation of Implementation Plans; New York," 73 FR 21,546 (April 22, 2008) (issuing a direct final rule to correct a prior SIP correction from 1998 that removed general duties from the SIP but neglected to remove a reference to "odor" in the definition of "air contaminant or air pollutant"); "Approval and Promulgation of Implementation Plans; New York," 63 FR 65557 (Nov. 27, 1998) (issuing direct final rule to correct SIP by removing a general duty "nuisance provision" that had been approved in 1984); "Correction of Implementation Plans; American Samoa, Arizona, California, Hawaii, and Nevada State Implementation Plans," 63 FR 34,641 (June 27, 1997) (correcting five SIPs by deleting a variety of administrative provisions concerning variances, hearing board procedures, and fees that had been approved during the 1970s).

CAA section 110(k)(6), by its terms—specifically, the use of the terms "[w]henever" and "may" and the lack of any time constraints—authorizes, but does not require, EPA to make the specified finding. As a result, EPA has discretion in determining whether and when to make the specified finding. *See New York Public Interest Research Group* v. *Whitman,* 321 F.3d 316, 330–31 (2d Cir. 2003) (opening phrase "Whenever the Administrator makes a determination" in CAA section 502(i)(1) grants EPA "discretion whether to make a determination"); *Her Majesty the Queen in Right of Ontario* v. *EPA,* 912 F.2d 1525, 1533 (D.C. Cir. 1990) ("whenever" in CAA section 115(a) "impl[ied] a degree of discretion" in whether EPA had to make a finding).

(ii) Inherent Authority To Reconsider

The provisions in CAA section 110 that authorize EPA to take action on a SIP revision inherently authorize EPA to, on its own initiative, reconsider and revise that action as appropriate. The courts have found that an administrative agency has the inherent authority to reconsider its decisions, unless Congress specifically proscribes the agency's discretion to do so. *See, e.g., Gun South, Inc.* v. *Brady,* 877 F.2d 858, 862 (11th Cir. 1989) (holding that agencies have implied authority to reconsider and rectify errors even though the applicable statute and regulations do not provide expressly for such reconsideration); *Trujillo* v. *General Electric Co.,* 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider"); *see also New Jersey* v. *EPA,* 517 F.3d 574 (DC Cir. 2008) (holding that an agency normally can change its position and reverse a prior decision but that Congress limited EPA's ability to remove sources from the list of hazardous air pollutant source categories, once listed, by requiring EPA to follow the specific delisting process at CAA section 112(c)(9)).[8]

Section 301(a) of the CAA, read in conjunction with CAA section 110 and the case law just described, provides further statutory authority for EPA to reconsider its actions under CAA section 110. CAA section 301(a) authorizes EPA "to prescribe such regulations as are necessary to carry out [EPA's] functions" under the CAA. Reconsidering prior rulemakings, when necessary, is part of "[EPA's] functions" under the CAA—in light of EPA's inherent authority as recognized under the case law to do so—and as a result, CAA section 301(a) confers such authority upon EPA.

EPA finds further support for its authority to narrow its approvals in APA section 553(e), which requires EPA to give interested persons "the right to petition for the issuance, amendment, or repeal of a rule," and CAA section 307(b)(1), which expressly contemplates that persons may file a petition for reconsideration under certain circumstances (at the same time that a rule is under judicial review). These authorizations for other persons to petition EPA to amend or repeal a rule suggest that EPA has inherent authority, on its own, to issue such amendment or repeal. This is because EPA may grant a petition from another person for an amendment to or repeal of a rule only if justified under the CAA, and if such an amendment or repeal is justified under the CAA, then EPA should be considered as having inherent authority to initiate the process on its own, even without a petition from another person.

EPA recently used its authority to reconsider prior actions and limit its prior approval of a SIP in connection with California conformity SIPs. *See, e.g.,* 68 FR 15720, 15723 (discussing prior action taken to limit approvals); 67 FR 69139 (taking final action to amend prior approvals to limit their duration); 67 FR 46618 (proposing to amend prior approvals to limit their duration, based on CAA sections 110(k) and 301(a)). EPA had previously approved SIPs with emissions budgets based on a mobile source model that was current at the time of EPA's approval. Later, EPA updated the mobile source model. But, even though the model had been updated, emissions budgets would continue to be based on the older, previously approved model in the SIPs, rather than the updated model. To rectify this problem, EPA conducted a rulemaking that revised the previous SIP approvals so that the approvals of the emissions budgets would expire early, when the new ones were submitted by states and found adequate, rather than when a SIP revision was approved. This helped California more quickly adjust its regulations to incorporate the newer model. EPA is using its authority to reconsider and limit its prior approval of SIPs generally in the same manner as it did in connection with California conformity SIPs.

f. FIPs

As noted previously, if the state fails to submit a required SIP revision, or does so but EPA then disapproves that SIP revision, then the CAA requires EPA to promulgate a FIP and thereby, in effect, federalize the part of the air pollution control requirements for which the state, through the required SIP revision, would otherwise have been responsible. Specifically, under CAA section 110(c)(1), EPA is required to—

> promulgate a [FIP] at any time within 2 years after the Administrator (A) finds that a State has failed to make a required submission * * *, or (B) disapproves a [SIP] submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such [FIP].

Although this provision, by its terms, mandates that EPA promulgate a FIP under the specified circumstances, and mandates that EPA do so within two years of when those circumstances occur, the provision gives EPA discretion to promulgate the FIP "at any time within [that] 2 year [ ]" period. Thus, EPA is authorized to promulgate a FIP immediately after either the specified state failure to submit or EPA disapproval.

However, CAA section 110(c)(1), as quoted earlier, further provides that if EPA delays promulgating a FIP until later in the 2-year period, and, in the meantime, the state corrects the deficiency by submitting an approval SIP revision that EPA approves, then EPA is precluded from promulgating the FIP. Similarly, once EPA promulgates a FIP, it stays on the books until the state submits an approvable SIP that EPA then approves.

2. General Requirements for the PSD Program

The PSD program is a preconstruction review and permitting program applicable, under EPA rules, to large new stationary sources and, in general, expansions of existing sources. The PSD program applies in areas that are designated "attainment" or "unclassifiable" for a NAAQS, and is contained in part C of title I of the CAA.[9]

[8] For additional case law, *see Belville Mining Co.* v. *United States,* 999 F.2d 989, 997 (6th Cir. 1993); *Dun & Bradstreet Corp.* v. *United States Postal Service,* 946 F.2d 189, 193 (2d Cir. 1991); *Iowa Power & Light Co.* v. *United States,* 712 F.2d 1292 (8th Cir. 1983).

[9] In contrast, the "nonattainment new source review (NSR)" program applies in areas not in attainment of a NAAQS and in the Ozone Transport Region and is implemented under the requirements of part D of title I of the CAA. We commonly refer to the PSD program and the nonattainment NSR program together as the major NSR program. The EPA rules governing both programs are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51, Appendices S and W. There is no NAAQS for CO_2 or any of the other well-mixed GHGs, nor has EPA

The applicability of PSD to a particular source must be determined in advance of construction or modification and is pollutant-specific. Sources subject to PSD cannot construct or modify unless they first obtain a PSD permit that, among other things, includes emission limitations that qualify as BACT (discussed later). CAA sections 165(a)(1), 165(a)(4), 169(1).

Under the CAA, PSD applies to a stationary source that qualifies as a "major emitting facility," and that newly constructs or undertakes a modification. A source is a "major emitting facility" if it emits or has the potential to emit 100 or 250 tpy, depending on the source category, of "any air pollutant." CAA section 165(a)(1), 169(1). We refer to these levels as the 100/250-tpy thresholds. EPA has implemented these requirements in its regulations, which, as discussed next, use somewhat different terminology for determining PSD applicability and which have interpreted the term "any air pollutant" more narrowly so that only emissions of any pollutant subject to regulation under the CAA trigger PSD.

Specifically, under EPA's regulations, PSD applies to a "major stationary source" that newly constructs or that undertakes a "major modification." 40 CFR 52.166(a)(7), (b)(1)(i), (b)(2)(i). A "major stationary source" is any source that emits or has the potential to emit 100 or 250 tpy or more, depending on the source category, of any "regulated NSR pollutant." 40 CFR 51.166(b)(1)(i)(a). The regulations define that term to include four classes of air pollutants, including, as a catch-all, "any pollutant that otherwise is subject to regulation under the Act." 40 CFR 51.166(b)(49)(iv). As discussed below, the phrase "subject to regulation" will begin to include GHGs on January 2, 2011, under our interpretation of that phrase as described in the Tailoring Rule, 75 FR at 31,580/3, and what we call the "Johnson Memo Reconsideration" (or the "Timing Decision").[10]

One principal PSD requirement is that a new major source or major modification must meet emissions limitations based on application of BACT, which must be determined on a case-by-case basis taking into account energy, environmental, and economic impacts, among other factors. To ensure that these criteria are satisfied, EPA has developed and recommends that permitting authorities apply a "top-down" approach for BACT review, a decision process that includes identification of all available control technologies, elimination of technically infeasible options, ranking of remaining options by control and effectiveness; evaluation (and possible elimination) of controls based on economic, environmental or energy impacts; and then selection of the remaining top-ranked option as BACT. When PSD applies to a source because of its emissions of a particular pollutant, then BACT (and other PSD requirements) apply for other pollutants that are subject to regulation and that exceed specified levels.

3. SIP PSD Requirements

The CAA contemplates that the PSD program be implemented by the states through their SIPs. CAA section 110(a)(2)(C) requires that:

> Each implementation plan * * * shall * * * include a program to provide for * * * regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in part [ ] C * * * of this subchapter.

CAA section 110(a)(2)(J) requires that:

> Each implementation plan * * * shall * * * meet the applicable requirements of * * * part C of this subchapter (relating to significant deterioration of air quality and visibility protection).

CAA section 161 provides that:

> Each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part [C], to prevent significant deterioration of air quality for such region * * * designated * * * as attainment or unclassifiable.

These provisions, read in conjunction with the PSD applicability provisions, CAA section 165(a)(1), 169(1), mandate that SIPs include PSD programs that are applicable to any air pollutant that is subject to regulation under the CAA, including, as discussed later in this preamble, GHGs as of January 2, 2011.[11]

Most states have EPA-approved SIP PSD programs, and as a result, in those states, PSD permits are issued by state or local air pollution control agencies. In states that do not have EPA-approved SIP PSD programs, EPA issues PSD permits under its own authority, although in some cases, EPA has delegated such authority to the state or local agency.

B. Regulatory Background: Texas SIP and PSD Program

1. Texas's Initial Attainment SIP Revision

In 1972, shortly after the enactment of the 1970 CAA Amendments, Texas submitted to EPA its SIP to attain and maintain the NAAQS that EPA had promulgated by that time. As part of that SIP revision, Texas provided assurances that it had legal authority to carry out the SIP, in accordance with the predecessor to CAA section 110(a)(2)(E)(i). EPA approved Texas's SIP, including the assurances of legal authority, by notice dated May 31, 1972. 37 FR 10842.

2. Texas Initial PSD SIP Revision

In the 1977 CAA Amendments, Congress enacted the PSD program. In the immediate aftermath, EPA acted as the PSD permitting authority in the states, but EPA began to delegate to various state authorities all or part of EPA's authority to issue PSD permits. In addition, at this time, EPA revised its pre-existing regulations, which had established a preconstruction permitting program, to conform to the 1977 CAA requirements. Each state was required to adopt a PSD program and submit it for approval as a SIP revision, and if the PSD program met CAA requirements, EPA approved the program, and the state then became the PSD permitting authority.

This process occurred for most of the states in the Nation, including Texas. A brief history of Texas's initial PSD SIP approval follows:[12]

a. Texas's Receipt of Delegation Authority for the PSD Program

Beginning in 1980, when EPA was still the permitting authority for federally required PSD permits in Texas, the state requested delegation of certain

proposed any such NAAQS; therefore, unless and until we take further such action, the nonattainment NSR program does not apply to GHGs.

[10] "Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 FR 17,004 (April 2, 2010). This action finalizes EPA's response to a petition for reconsideration of "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program" (commonly referred to as the "Johnson Memo"), December 18, 2008.

[11] In the Tailoring Rule, we noted that commenters argued, with some variations, that the PSD provisions applied only to NAAQS pollutants, and not GHGs, and we responded that the PSD provisions apply to all pollutants subject to regulation, including GHGs. *See* 75 FR 31560–62; "Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA's Response to Public Comments," May 2010, pp. 38–41. We are not reopening that issue in this rulemaking.

[12] This history is described in "Approval and Promulgation of Implementation Plan, State of Texas; Prevention of Significant Deterioration—Final rulemaking, 57 FR 28,093, 28,094 (June 24, 1992); "Approval and Promulgation of Implementation Plan, State of Texas; Prevention of Significant Deterioration—Proposed rulemaking, 54 FR 52,823, 52,824 (December 22, 1989).

aspects of the Federal PSD program, and in a series of actions, EPA granted that authority.[13] During this time, Texas also revised its state—i.e., Texas Air Control Board (TACB)—PSD regulations. EPA commented on an early set of proposed revisions to TACB regulations by letter dated December 23, 1980 and made clear that PSD applies to non-NAAQS pollutants.[14] EPA reiterated these statements to Texas in 1983.[15]

b. Texas's SIP PSD Program

During 1985–1988, Texas submitted a series of SIP revisions comprising its PSD program to EPA for approval. In these SIP revisions, Texas established key components of its PSD rules by incorporating by reference EPA's PSD rules found in 40 CFR 52.21. Of most importance for present purposes, Texas incorporated by reference (IBR'd) EPA's PSD applicability regulations in 52.21.[16] Under EPA's regulations, as then written, PSD applied to "any pollutant subject to regulation under the [Clean Air] Act." 40 CFR 52.21(b)(1)(i)) (1985–1988). It bears emphasis that this provision, by its terms, applied PSD to each and every air pollutant subject to regulation under the CAA, which, as discussed elsewhere, has been EPA's consistent interpretation of the CAA requirements for PSD applicability. CAA section 165(a)(1), 169(1).[17]

(i). Incorporation by Reference

In adopting a particular SIP revision that IBR'ed EPA's regulations, however, Texas intended that IBR to apply to only the EPA regulations as they read as of the date that Texas adopted the SIP revision. Texas did not intend that IBR in that SIP revision to apply to subsequent revisions to those regulations. This became readily apparent during the course of EPA's review of Texas's SIP revisions. The TACB adopted the first SIP revision on July 26, 1985.[18] This SIP revision consisted, in relevant part, of a revision to TACB Regulation VI—§ 116.3.(a) to add subparagraph (13), which read, in relevant part,

> (13) The proposed facility shall comply with the Prevention of Significant Deterioration of Air Quality regulations promulgated by the [EPA] in the Code of Federal Regulations at 40 CFR 52.21 as amended * * *, hereby incorporated by reference, except for [certain identified] paragraphs [not here relevant].[19]

The TACB submitted this SIP revision to EPA on December 11, 1985.[20] EPA responded with a letter to Texas, dated July 3, 1986, commenting on several aspects of the SIP revision, including inquiring whether the state had authority to IBR Federal rules prospectively, asking for "legal clarification" on the subject, and recommending that if the TACB did not have such authority, then the TACB should clarify the IBR by "referencing the appropriate date."[21]

Texas responded with a letter dated October 24, 1986,[22] in which it stated:

> An issue of concern * * * is whether the [TACB] intended to incorporate by reference federal rules prospectively in the PSD rule § 116.3(a)(13) and in the stack height rule § 116.3(a)(14). [A]lthough our intention was not prospective rulemaking and we do not believe the rule language implies such, we have no specific objection to including the date of federal adoption of any federal material adopted by reference by the TACB in future SIP revisions (including the proposed PSD and stack height revisions). By initiating the public hearing process for PSD rules again (to incorporate requested revisions), federal PSD regulations amended on July 12, 1985 will be subject to the state public participation process. This should eliminate the concern expressed in your July 3, 1986 letter.[23]

Accordingly, on July 17, 1987, the TACB adopted a revision to its PSD rule, § 116.3(a)(13), so that the rule continued to IBR EPA's PSD regulatory requirements at 40 CFR 52.21, but referenced the date of November 7, 1986.[24] Texas submitted that as a SIP revision to EPA on October 26, 1987.[25]

However, some eight months later, by notice published on July 1, 1987, EPA adopted the PM_{10} NAAQS,[26] and thereby subjected to PSD sources emitting PM_{10}. Recognizing this, the TACB, on July 15, 1988, adopted still another revision to its PSD rule to change the referenced date to August 1, 1987, and thereby incorporated EPA's application of PSD to PM_{10}-emitting sources into Texas's PSD program.[27] Texas submitted that revised rule to EPA as a SIP revision on September 29, 1988.[28] As so revised, the Texas PSD rule (again, § 116.3(a)(13)) read, in relevant part, as follows:

> (13) The proposed facility shall comply with the Prevention of Significant Deterioration (PSD) of Air Quality regulations promulgated by the Environmental Protection Agency (EPA) in the Code of Federal Regulations at 40 CFR 52.21 as amended August 1, 1987 * * *, except for [certain identified] paragraphs [not here relevant].[29]

EPA proposed to approve this SIP revision, with this iteration of the Texas PSD rule, by notice dated December 22,

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[13] *See, e.g.,* 48 FR 6023 (February 9, 1983).

[14] Letter from Jack S. Divita, U.S EPA, Region 6, to Roger Wallis, Texas Air Control Board (December 23, 1980), p. 2. In that letter, EPA objected to Texas's proposed definitions of the terms "major facility/stationary source" and "major modification" on grounds they are not equivalent to the definition of those terms in EPA's PSD and nonattainment NSR regulations because Texas's proposed definitions—include only those stationary sources and modifications with emissions of air contaminants for which a [NAAQS] has been issued. Under the PSD and [nonattainment] NSR requirements, [Texas's] definitions must include sources with emissions of "*any* air pollutant subject to regulation under the Act." * * * Since the proposed definitions would exclude PSD and [nonattainment] NSR coverage for those sources emitting pollutants subject to regulations under the Act, but for which a NAAQS has not been issued, they are not equivalent to the federal definitions of "major stationary source" and "major modification."

Id. (emphasis omitted).

[15] Environmental Protection Agency—Region 6, "EPA Review of Texas Revisions to the General Rules and Regulations VI," p. 4 (August 1983), *cited in* 48 FR 55483/1 & n.1 (December 13, 1983).

[16] For convenience, we will use the acronym "IBR" for the various grammatical usages of incorporate by reference, including the noun form, *i.e., IBR, for incorporation by reference; as well as the* verb form, *e.g.,* IBR'd, for incorporated by reference.

[17] As also discussed elsewhere, this is a narrowing interpretation of the PSD applicability requirements in CAA section 169(1), which, read literally, apply PSD to "any air pollutant."

[18] TACB Board Order No. 85–7 (July 26, 1985).

[19] *Id.*

[20] Letter from Mark White, Governor of Texas, to Lee M. Thomas, Administrator of U.S. EPA, December 11, 1985.

[21] Letter from William B. Hathaway, Director, Air, Pesticides and Toxics Division, EPA Region 6, to Allen Eli Bell, Executive Director, TACB (July 3, 1986). Specifically, EPA stated— State's authority to IBR Federal rules prospectively—The Board approved and signed the incorporation of the PSD regulations on July 26, 1985, An amendment to the Federal PSD regulations [40 CFR 52.21(o)(3), p(1) and p(3)] occurred on July 12, 1985. However, the TACB proposed to adopt the Federal regulations and carried out the public participation process before the July 12, 1985, promulgation date of the amendments. We need a legal analysis from the state concerning the TACB's legal authority to incorporate by reference the Federal rules prospectively. We recognize that the proposed Federal rules were unchanged on the final promulgation; however, the Texas Water Commission believes that the State can not adopt prospective Federal rules under the State laws. We would appreciate a legal clarification on this subject. If the State did not intend prospective adoption, the rules should be clarified by referencing the appropriate date. *Id.* p. 2 and Enclosure p. 5.

[22] Letter from to Steve Spaw, Deputy Executive Director, TACB, to William B. Hathaway, Director, Air, Pesticides and Toxics Division, EPA Region 6 (October 24, 1986).

[23] *Id.* 1–2.

[24] TACB Board Order No. 87–09 (July 17, 1987). *See* 12 Tex. Reg. 2575/2 (August 7, 1987) (discussing revision to section 116.3(a)(13) in response to request from U.S. EPA).

[25] Letter from William P. Clements, Jr., Governor of Texas, to Lee M. Thomas, Administrator of U.S. EPA (October 26, 1987).

[26] 52 FR 24634 (July 1, 1987).

[27] TACB Board Order No. 88–08 (July 15, 1988).

[28] Letter from Letter from William P. Clements, Jr., Governor of Texas, to Lee M. Thomas, Administrator of U.S. EPA (September 29, 1988).

[29] TACB Board Order No. 88–08 (July 15, 1988).

1989,[30] and EPA issued a final approval by notice dated June 24, 1992.[31] In the preambles to the proposed and final rule, and in supporting documents, EPA recounted part of this history of Texas revising its regulations to IBR the current EPA regulatory requirements.[32]

This history shows that both EPA and Texas were well aware that Texas's method of IBR'ing EPA's regulatory requirements into Texas's PSD rule was not prospective, and that as a result, Texas would need to take further action, such as a SIP revision, to update its PSD rules whenever EPA newly subjected another pollutant to PSD. In fact, Texas did so—to apply PSD to PM_{10}—during the time that EPA was reviewing its PSD SIP. However, after stating simply that it does not intend prospective IBR, Texas did not explicitly address this issue. That is, Texas did not acknowledge that following approval of Texas's PSD program, EPA could well subject to regulation additional pollutants—whether through a revised NAAQS or regulation under another CAA provision—and Texas did not discuss how it would respond.[33]

(ii). Legal Authority

The record of Texas's PSD program includes limited references to, or discussion of, legal authority that may be relevant to whether Texas provided assurances that it had adequate legal authority to apply PSD to pollutants newly subject to regulation. The following merit review:

First, in adopting and submitting the PSD SIP revisions, the TACB—the agency charged with taking that action—relied on its general legal authority to adopt and submit the SIP revisions. The TACB adopted regulatory amendments through "Board Orders," and then submitted those Board Orders to EPA as SIP revisions. The Board Orders typically cited general authority under the Texas CAA. One example is TACB Board Order No. 88–08 (July 15, 1988), which revised the Texas PSD rule to provide a later date for IBR'ing EPA's PSD program, and which comprised one of the SIP revisions that formed the basis for the Texas PSD program that EPA approved by notice dated June 24, 1992 (57 FR 28093). This Board Order provides, in relevant part, "Section 3.09(a) of the Texas CAA gives the Board authority to make rules and regulations consistent with the general intent and purposes of the Act and to amend any rule or regulation it makes" and "the Board hereby certifies that the amendments as adopted have been reviewed by legal counsel and found to be a valid exercise of the Board's legal authority." Board Order No. 88–08, page 2.

Second, the 1990 CAA Amendments amended CAA section 169(1) to add another type of source that was subject to PSD: Large municipal combustors. Shortly after the 1990 amendments, and before issuing final approval for the Texas PSD program, EPA asked Texas for assurances that its PSD program would apply to large municipal waste combustors. In a March 30, 1992 letter, EPA stated the following:

> Since we proposed approval of this SIP before enactment of the 1990 Clean Air Act Amendments (CAAA), it is necessary that we address several issues in the final approval notice in order to be in conformance with the CAAA.
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> * * * * *
>
> "Municipal Waste Combustion—Section 169(1) is amended by expanding the list of major emitting facilities that are subject to PSD requirements if they emit or have the potential to emit 100 tons per year or more of any regulated pollutant. This list now includes municipal incinerators capable of charging more than fifty tons of refuse per day. This requirement has been effective since November 15, 1990, for all applicable PSD sources. In the conference call [with EPA Region 6], the * * * TACB * * * legal representative said that the TACB has the existing legal authority, and can and will be reviewing such sources for PSD applicability and permitting."[34]

Thus, according to this letter, Texas provided oral statements in a conference call with EPA Region 6 that Texas has legal authority to apply its state PSD rules to large municipal waste combustors.

Texas responded in a letter dated April 17, 1992:

> We understand that you need confirmation in several areas to conform with the requirements of the 1990 Federal Clean Air Act Amendment * * * before the final delegation will be made.
>
> * * * * *
>
> We will address as a major source subject to PSD review, municipal waste combustors capable of changing more than 50 tons of refuse per day as one of the sources subject to PSD review if they emit or have the potential to emit 100 tons per year or more of any regulated pollutant.[35]

Although the TACB Board Order referred to the TACB's general legal authority, the record reveals no discussion or assurances that this legal authority was adequate to apply PSD to pollutants newly subject to regulation. Similarly, the oral assurance that the TACB apparently provided that it had legal authority to apply PSD to large municipal combustors, as required under the then-newly enacted 1990 CAA Amendments, does not address whether Texas had adequate authority to apply PSD to each pollutant that EPA newly subjects to regulation.

(iii). Texas's Commitments

The rulemaking record of EPA's approval of Texas's PSD SIP shows that Texas provided two commitments that are relevant for present purposes:

(I). 1987 Texas PSD Commitments Statement

The TACB adopted revisions to TACB Regulation VI on July 17, 1987, which the Governor submitted on October 27, 1987. Those revisions included the following statement, which we call the 1987 Texas PSD Commitments Statement:

> Revision To The Texas State Implementation Plan For Prevention Of Significant Deterioration Of Air Quality
>
> The Texas Air Control Board (TACB) will implement and enforce the federal requirements for Prevention of Significant Deterioration of Air Quality (PSD) as specified in 40 CFR 51.166(a) by requiring all new major stationary sources and major modifications to obtain air quality permits as provided in TACB regulation VI, Control of Air Pollution by Permits for New Construction and Modification. In addition, the TACB will adhere to the following conditions in the implementation of the PSD program:
>
> * * * * *
>
> 4. Plan assessment
>
> The TACB will review the adequacy of the Texas PSD plan on an annual basis and within 60 days of the time information becomes available that an applicable increment may be violated. If the TACB determines that an increment is being

[30] 54 FR 52823.

[31] 57 FR 28093.

[32] 57 FR 28093, 28094/2 (June 24, 1992) (final rule); 54 FR 52823, 52824/1 (December 22, 1989) (proposed rule); Technical Support Document: Texas State Implementation Plan for Prevention of Significant Deterioration, U.S. Environmental Protection Agency, 4 (November 28, 1988). Moreover, Texas submitted another SIP revision on February 18, 1991 to change the date in section 116.3(a)(13) from "August 1, 1987" to "October 17, 1988" to reflect the amendments to 40 CFR 52.21 as promulgated in the Federal Register on October 17, 1988 (53 FR 40656) (Nitrogen Oxides PSD increments). EPA did not act on this SIP revision when it approved the Texas PSD program on June 24, 1992, but did approve this SIP revision later, on September 9, 1994 (59 FR 46556). *See* 62 FR 44084/2.

[33] Following EPA approval of Texas's PSD program, Texas has occasionally submitted SIP revisions to update its PSD program to accommodate further EPA regulatory revisions. *See, e.g.,* 69 FR 43752, 43753 (July 22, 2004).

[34] Letter from A. Stanley Meiburg, Director, Air, Pesticides & Toxics Division, EPA Region 6, to Steve Spaw, Executive Director, TACB (March 30, 1992).

[35] Letter from Steve Spaw, Executive Director, TACB, to A. Stanley Meiburg, Director, Air, Pesticides and Toxics Division, EPA Region 6 (April 17, 1992).

exceeded due to the violation of a permit condition, appropriate enforcement action will be taken to stop the violation. If an increment is being exceeded due to a deficiency in the state PSD plan, the plan will be revised and the revisions will be subject to public hearing.

This 1987 Texas PSD Commitments Statement does not specifically address the application of PSD to pollutants newly subject to regulation. The first paragraph, as quoted above, commits TACB to require "all new major stationary sources and major modifications to obtain air quality permits as provided in TACB regulation VI * * *," but this does not commit TACB to address pollutants newly subject to regulation. Instead, this limits the TACB requirement to application of PSD to sources "as provided in TACB regulation VI," and that regulation VI does not automatically update. As for "#4, Plan assessment," although the first sentence calls for the TACB to review the adequacy of the Texas PSD plan on an annual basis, and although the rest of the provision requires a plan revision if an increment violation is determined to result from a deficiency in the plan, this does not address what happens when a new pollutant becomes subject to regulation and does not require a plan revision to apply to the new pollutant. The fact that Texas agreed to revise the plan if the plan is found to be deficient and that deficiency results in an increment being exceeded serves to highlight the lack of any comparable focus on how the plan would deal with pollutants newly subject to regulation.

EPA's technical support document supporting its proposed approval stated, with respect to this 1987 Texas PSD Commitments Statement:

> The "Revision to Texas State Implementation Plan for Prevention of Significant Deterioration of Air Quality" specifies how the TACB will fulfill the requirements of 40 CFR 51.166(a), plan revisions, and plan assessment. The EPA has reviewed the State's commitment and has determined that the TACB has addressed the continuous plan revisions and assessments adequately.[36]

This general discussion by EPA does not indicate that EPA considered the Texas statement to apply to pollutants newly subject to regulation.

(II). 1989 Texas Commitment Letter

In 1989, as EPA considered Texas's SIP revision submittal, EPA became concerned that a Texas official had made statements that lead EPA to question whether Texas would adhere to EPA's interpretation that BACT must be implemented through the Top-Down process.[37] Accordingly, EPA advised Texas that EPA would not approve Texas's PSD program unless Texas provided a letter assuring EPA that Texas would follow EPA requirements in general, and particularly with respect to the interpretation of BACT. Texas provided this letter, which we call the Texas PSD Commitments Letter, on September 5, 1989.[38] In this letter, Texas acknowledged EPA's concern that a Texas official had—

> indicated a lack of intent to follow federal interpretations of the Clean Air Act and Environmental Protection Agency (EPA) operating policies, most specifically, the "Top-Down" approach for Best Available Control Technology (BACT) analysis in reviewing PSD permit applications.

Texas went on to state:

> [Y]ou may be assured that the position of the [Texas Air Control Board (TACB)] is, and will continue to be, to implement EPA requirements relative to programs for which we have received State Implementation Plan approval, and to do so as effectively as possible.* * * Again, the TACB is committed to the implementation of EPA decisions regarding PSD program requirements. We look forward [39] approval of the PSD revisions and believe EPA will find the management of that program in Texas to be capable and effective.[40]

By notice dated December 22, 1989, EPA proposed to fully approve Texas's PSD program.[41] In this proposal, EPA focused on the issue of how EPA's current and future interpretations of PSD statutory requirements would be reflected in the state-implemented program. EPA stated:

> In adopting the Clean Air Act, Congress designated EPA as the agency primarily responsible for interpreting the statutory provisions and overseeing their implementation by the states. The EPA must approve state programs that meet the requirements of 40 CFR 51.166. Conversely, EPA cannot approve programs that do not meet those requirements. However, PSD is by nature a very complex and dynamic program. It would be administratively impracticable to include all statutory interpretations in the EPA regulations and the SIPs of the various states, or to amend the regulations and SIPs every time EPA interprets the statute or regulations or issues guidance regarding the proper implementation of the PSD program, and the Act does not require EPA to do so. Rather, action by the EPA to approve this PSD program as part of the SIP will have the effect of requiring the state to follow EPA's current and future interpretations of the Act's PSD provisions and EPA regulations, as well as EPA's operating policies and guidance (but only to the extent that such policies are intended to guide the implementation of approved state PSD programs). Similarly, EPA approval also will have the effect of negating any interpretations or policies that the state might otherwise follow to the extent they are at variance with EPA's interpretation and applicable policies. Of course, any fundamental changes in the administration of PSD would have to be accomplished through amendments to the regulations in 40 CFR 52.21 and 51.166, and subsequent SIP revisions.

54 FR 52,824/2–3.

EPA went on to state that it was basing its proposed approval of Texas's PSD program on Texas's agreement, as contained in the September 5, 1989, letter, that Texas would "implement that PSD SIP approved program in compliance with all of the EPA's statutory interpretations and operating policies." 54 FR 82,825/2. EPA stated—

> * * * EPA's approval of the Texas PSD SIP requires the state to follow EPA's statutory interpretations and applicable policies[], including those concerning [BACT].* * *
>
> In support of the discussion above, the Executive Director of the TACB has submitted a letter, dated September 5, 1989, which commits the TACB to implement the PSD SIP approval program in compliance with all of the EPA's statutory interpretations and operating policies. Specifically, the TACB's letter states that (1) "* * * you may be assured that the position of the agency is, and will continue to be, to implement EPA requirements relative to programs for which we have received [SIP] approval, and to do as effectively as possible * * *", and (2) "* * * the TACB is committed to the implementation of the EPA decisions regarding PSD program requirements * * *". The EPA has evaluated the content of this letter and has determined that the letter sufficiently commits the TACB to carry out the PSD program in accordance with the Federal requirements as set forth in the [CAA] applicable regulations, and as further clarified in the EPA's statutory and regulatory interpretations, including the proper conduct of BACT analyses. The EPA also interprets this letter as committing the TACB to follow applicable EPA policies such as the "Top-Down" approach. This letter will be incorporated into the SIP upon the final approval action.

54 FR 52,825/1–2.

EPA issued a final rule to give full approval to the program by notice dated June 24, 1992, 57 FR 28,093. In the final rule, EPA indicated that it had received adverse comments concerning its statements in the proposal that Texas was required to adopt all of EPA's

[36] Technical Support Document: Texas State Implementation Plan for Prevention of Significant Deterioration, U.S. Environmental Protection Agency, 6 (November 28, 1988).

[37] Letter from Allen Eli Bell, Executive Director, Texas Air Control Board to Robert Layton Jr., Regional Administrator, U.S. EPA (September 5, 1989) 1 (Texas's Commitments Letter).

[38] Texas's 1989 Commitments Letter, p. 1.

[39] *Sic:* the word "to" should be in between "forward" and "approval"

[40] Texas's 1989 Commitments Letter, p. 1.

[41] 54 FR 52823.

interpretations of the PSD requirements. Accordingly, EPA refined its views. EPA stated:

Comment 1: The commenters expressed concern with the preamble language in the proposal notice, suggesting that final approval would require that the State follow EPA's current and future interpretations of the Act's PSD provisions and EPA regulations as well as EPA's operating policies and guidance. The commenter contended that such a condition would be unlawful * * * and would improperly limit the State's flexibility. * * *

Response 1: The EPA did not intend to suggest that Texas is required to follow EPA's interpretations and guidance issued under the Act in the sense that those pronouncements have independent status as enforceable provisions of the Texas PSD SIP, such that mere failure to follow such pronouncements, standing alone, would constitute a violation of the Act. As clarified herein, EPA's intent is merely to place the State and the public on notice of EPA's longstanding views that the Agency must continue to oversee the State's implementation of the PSD SIP.* * *

* * * Texas and other states [have] considerable discretion to implement the PSD program as they see fit.

* * * PSD–SIP approved states remain free to follow their own course, provided that state action is consistent with the letter and spirit of the SIP, when read in conjunction with the applicable statutory and regulatory provisions.

* * * * *

Comment 4: One commenter noted that the TACB's letter, dated September 5, 1989, cannot reasonably be interpreted as a legal requirement that the State follow the EPA's present and future new source review interpretations, policies and guidance, including the BACT "Top-Down" approach, because it only commits Texas to implement properly established EPA requirements and legally-binding EPA decisions. The commenter said that the Clean Air Act specifically requires that, if at all, any such change in EPA policy for BACT determinations be accomplished through notice and comment rulemaking, and that the EPA first prepare an economic impact assessment.

Response 4: In certain circumstances, EPA's approval of a SIP revision through notice-and-comment rulemaking procedures can serve to adopt specific interpretations or decisions of the Agency. For example, a state may commit in writing to follow particular EPA interpretations or decisions in administering the PSD program. As part of the SIP revision process, EPA may incorporate that State's commitment into the SIP by reference. This process has been followed in today's action. Of course, EPA agrees with the commenter that the Agency must act reasonably in construing the terms of a commitment letter, so as to avoid approving it in a manner that would contravene the state's intent in issuing the letter in the first place. Moreover, the State commitment must be consistent with the plain language of the applicable statutory or regulatory provisions at issue. Similarly, EPA cannot unilaterally change the clear meaning of any approved SIP provision by later guidance or policy. Rather, as stated in the proposed approval notice, such fundamental change must be accomplished through the SIP revision process.

Consistent with the terms of the TACB letter dated September 5, 1989, EPA views that letter as a commitment on the part of the TACB to "implement EPA program requirements * * * as effectively as possible," and as a commitment "to the implementation of the EPA decisions regarding PSD program requirements." EPA agrees, however, that the TACB letter need not be interpreted as a specific commitment by the State to follow a "Top-Down" approach to BACT determinations.

57 FR 28095/1–2; 28096/1.

As for the fact that Texas's PSD program was limited to pollutants that were regulated as of the date Texas adopted the program as a SIP revision, but did not automatically apply to newly regulated pollutants, the preamble to the final rule alluded to this limitation:

The State's regulation VI requires review and control of air pollution from new facility construction and modification and allows the TACB to issue permits for stationary sources subject to this regulation. Section 116.3(a)(13) of the TACB Regulation VI incorporates by reference the Federal PSD regulations (40 CFR 52.21) as they existed on August 1, 1987, which include revisions associated with the July 1, 1987, promulgation of revised National Ambient Air Quality Standards for particulate matter (52 FR 24872) and the visibility NSR requirements noted above.

57 FR 28094.

However, there is no indication in the preamble for the final rule that (i) Texas specifically addressed the requirement that its PSD program apply to pollutants newly subject to PSD, including non-NAAQS pollutants, or (ii) Texas provided assurances that it had adequate authority under State law to carry out the PSD program, including applying PSD to pollutants newly subject to regulation, among them non-NAAQS pollutants. Nor is there any indication that EPA asked Texas to do so.[42]

As discussed later, in 1996 EPA proposed, and in 2002 finalized, what we call the NSR Reform Rule,[43] which included a set of amendments to the PSD provisions that included revisions to conform to the 1990 CAA Amendments. *See* 61 FR 38250 (July 23, 1996), 67 FR 80186 (December 31, 2002). The NSR Reform Rule revised the terminology for PSD applicability. In 2006, Texas submitted a SIP revision to incorporate the NSR Reform Rule into its PSD program, including revising its applicability provisions. EPA disapproved this SIP revision by notice dated September 15, 2010.[44] Accordingly, the applicable Texas PSD applicability provisions remain the ones in the state's currently approved SIP.

C. Regulatory Background: GHG Rules

1. GHGs and Their Sources

Greenhouse gases trap the Earth's heat that would otherwise escape from the atmosphere into space, and form the greenhouse effect that helps keep the Earth warm enough for life. Greenhouse gases are naturally present in the atmosphere and are also emitted by human activities. Human activities are intensifying the naturally occurring greenhouse effect by increasing the amount of GHGs in the atmosphere, which is changing the climate in a way that endangers human health, society, and the natural environment.

Some GHGs, such as carbon dioxide (CO_2), are emitted to the atmosphere through natural processes as well as human activities. Other gases, such as fluorinated gases, are created and emitted solely through human activities. As previously noted, the well-mixed GHGs of concern directly emitted by human activities include CO_2, methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). These six GHGs, for the purposes of this final rule, are referred to collectively as "the six well-mixed GHGs," or, simply, GHGs, and together constitute the "air pollutant" upon which the GHG thresholds in the Tailoring Rule are based. These six gases remain in the atmosphere for decades to centuries where they become well-mixed globally in the atmosphere. When they are emitted more quickly than natural processes can remove them from the atmosphere, their concentrations increase, thus increasing the greenhouse effect. The heating effect caused by the human-induced buildup of GHGs in the atmosphere is very likely the cause of most of the observed global warming over the last 50 years. A detailed explanation of greenhouse gases, climate change and its impact on health, society, and the environment is

[42] *See* "Technical Support Document (TSD): State of Texas State Implementation Plan for Prevention of Significant Deterioration" (November 28, 1988).

[43] "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects—Final Rule," 67 FR 80186 (December 31, 2002) (NSR Reform rule).

[44] 75 FR 56,424 (September 15, 2010).

included in EPA's technical support document (TSD) for the endangerment finding final rule (Docket ID No. EPA–HQ–OAR–2009–0472–11292).

In the United States, the combustion of fossil fuels (*e.g.,* coal, oil, gas) is the largest source of CO_2 emissions and accounts for 80 percent of the total GHG emissions. Anthropogenic CO_2 emissions released from a variety of sources, including fossil fuel combustion and industrial manufacturing processes that rely on geologically stored carbon (*e.g.,* coal, oil, and natural gas) that is hundreds of millions of years old, as well as anthropogenic CO_2 emissions from land-use changes such as deforestation, all perturb the atmospheric concentration of CO_2 and cause readjustments in the distribution of carbon within different reservoirs. More than half of the energy-related emissions come from large stationary sources such as power plants, while about a third comes from transportation. Of the six well-mixed GHGs, four (CO_2, CH_4, N_2O, and HFCs) are emitted by motor vehicles. In the United States industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management are also important sources of GHGs.

Different GHGs have different heat-trapping capacities. The concept of Global Warning Potential was developed to compare the heat-trapping capacity and atmospheric lifetime of one GHG to another. The definition of a GWP for a particular GHG is the ratio of heat trapped by one unit mass of the GHG to that of one unit mass of CO_2 over a specified time period. When quantities of the different GHGs are multiplied by their GWPs, the different GHGs can be summed and compared on a CO_2e basis. For example, CH_4 has a GWP of 21, meaning each ton of CH_4 emissions would have 21 times as much impact on global warming over a 100-year time horizon as 1 ton of CO_2 emissions. Thus, on the basis of heat-trapping capability, 1 ton of CH_4 would equal 21 tons of CO_2e. The GWPs of the non-CO_2 GHGs range from 21 (for CH_4) up to 23,900 (for SF_6). Aggregating all GHGs on a CO_2e basis at the source level allows a facility to evaluate its total GHG emissions contribution based on a single metric.

2. GHG Regulatory Actions

Over the past year, EPA has completed four distinct actions related to greenhouse gases under the CAA. The result of these rules, in conjunction with the operation of the CAA, has been to trigger PSD applicability for GHG sources on and after January 2, 2011, but to limit the scope of PSD for those sources. These actions include, as they are commonly called, the "Endangerment Finding" and "Cause or Contribute Finding," which we issued in a single final action;[45] the Johnson Memo Reconsideration, noted previously; the "Light-Duty Vehicle Rule" (LDVR or Vehicle Rule);[46] and the "Tailoring Rule," also noted previously.

a. Endangerment Finding, Vehicle Rule, Johnson Memo Reconsideration

In the Endangerment Finding, which is governed by CAA section 202(a), the Administrator exercised her judgment, based on an exhaustive review and analysis of the science, to conclude that "six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations." 74 FR at 66,496. The Administrator also found "that the combined emissions of these greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas air pollution that endangers public health and welfare under CAA section 202(a)." *Id.*

The Endangerment Finding led directly to promulgation of the Vehicle Rule, also governed by CAA § 202(a), in which EPA set standards for the emission of greenhouse gases for new motor vehicles built for model years 2012–2016. 75 FR 25,324. The Vehicle Rule established the first controls for GHGs under the CAA.

The Johnson Memo Reconsideration—as well as the Tailoring Rule, which we discuss later—is governed by the PSD and Title V provisions in the CAA. It was issued to address the automatic statutory triggering of the PSD and Title V programs for GHGs due to the Vehicle Rule establishing controls for GHGs. The Johnson Memo Reconsideration provided EPA's interpretation of a pre-existing definition in its PSD regulations delineating the "pollutants" that are taken into account in determining whether a source must obtain a PSD permit and the pollutants each permit must control. The Johnson Memo Reconsideration stated that when the Vehicle Rule takes effect on January 2, 2011, it will, in conjunction with the applicable CAA requirements, trigger the application of PSD to GHG-emitting sources. 75 FR 17,004.

b. Tailoring Rule

In the Tailoring Rule, EPA limited PSD applicability, at the outset, to only the largest GHG-emitting sources, and to phase-in PSD applicability, as appropriate, to smaller sources over time. 75 FR 31,514. In the Tailoring Rule, EPA identified the air pollutant that, if emitted or potentially emitted by the source in excess of specified thresholds, would subject the source to PSD requirements, as the aggregate of six GHGs: CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6. EPA based this identification on the Vehicle Rule, which included applicability provisions specifying that the rule "contains standards and other regulations applicable to the emissions of those six greenhouse gases." 75 FR at 25686 (promulgating 40 CFR 86.1818–12(a)). The Tailoring Rule noted that it was because the Vehicle Rule subjected to regulation the pollutant that comprises the six GHGs, that PSD was triggered for that pollutant and that, as a result, the pollutant must be defined for PSD purposes in the same way as it is identified in the Vehicle Rule. 75 FR 31,527. The Vehicle Rule identified the pollutant as the aggregate of the six gases because in the Endangerment Finding, the Administrator found that those six gases—which she described as long-lived and directly emitted GHGs—may reasonably be anticipated to endanger public health and welfare.

c. Scope of PSD Applicability

In the Tailoring Rule and subsequent rulemakings, commenters raised an issue concerning the applicability of PSD to non-NAAQS pollutants. A discussion of this issue is useful background information for the present action, including what we call the automatic-updating nature of PSD requirements under the CAA, that is, that as soon as a pollutant becomes subject to regulation under another CAA provision, it becomes subject to PSD.

i. Applicability of PSD to Non-NAAQS Pollutants

In the Tailoring Rule, EPA responded to a set of comments that PSD applies only to NAAQS pollutants, and not non-NAAQS pollutants such as GHGs. In brief, several commenters advanced the argument that primarily because the PSD provisions in CAA sections 161 and 165(a) limit PSD applicability to sources located in attainment or unclassifiable areas, PSD applicability should be limited to the NAAQS pollutants for which the area in which the source is located is attainment or unclassifiable. On the basis of this interpretation, the commenters urged

[45] "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66,496 (December 15, 2009).

[46] "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25,324 (May 7, 2010).

EPA to conclude that PSD does not apply to GHGs. 75 FR 31,560/2–3.

EPA disagreed with these comments and reiterated its long-held view that PSD applies to "any pollutant subject to regulation under the CAA," and that includes non-NAAQS pollutants. 75 FR 31,560/3. EPA explained—

> We recognize, as we have said elsewhere, that a major purpose of the PSD provisions is to regulate emissions of NAAQS pollutants in an area that is designated attainment or unclassifiable for those pollutants. However, we do not read CAA sections 161 and the "in any area to which this part applies" clause in 165(a), in the context of the PSD applicability provisions, as limiting PSD applicability to those pollutants. The key PSD applicability provisions are found in sections 165(a) and 169(1). Section 165(a) states, "No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless [certain requirements are met]. A "major emitting facility" is defined, under CAA section 169(1), as "any * * * stationary source[] which emit[s], or ha[s] the potential to emit, one hundred [or, depending on the source category, two hundred fifty] tons per year or more of any air pollutant." As discussed elsewhere, EPA has long interpreted the term "any air pollutant" to refer to "any air pollutant subject to regulation under the CAA," and for present purposes, will continue to read the "subject to regulation" phrase into that term.
>
> Although section 165(a) makes clear that the PSD requirements apply only to sources located in areas designated attainment or unclassifiable, it does not, by its terms, state that the PSD requirements apply only to pollutants for which the area is designated attainment or unclassifiable. Rather, section 165(a) explicitly states that the PSD requirements apply more broadly to any pollutant that is subject to regulation.

Id.

EPA went on to discuss the statements by the D.C. Circuit concerning the PSD applicability provisions—which, again, according to their literal terms, apply PSD to "any air pollutant," CAA section 165(a)(1), 169(1)—in the seminal case interpreting the PSD requirements: *Alabama Power* v. *Costle,* 636 F.2d 323 (DC Cir. 1980). There, the DC Circuit noted that these PSD applicability provisions must be read to apply PSD quite broadly; indeed, the Court indicated they could apply even to air pollutants not yet regulated under other provisions of the Act. 636 F.2d at 352–53 & n. 60.[47]

EPA also emphasized that EPA's long-standing regulations have interpreted this provision broadly enough to capture non-NAAQS pollutants:

> In addition, it should not be overlooked that we have applied PSD to non-NAAQS pollutants since the inception of the program over 30 years ago. For example, prior to the 1990 CAA Amendments, PSD applied to HAPs regulated under CAA section 112; and over the years, EPA has established significance levels for fluorides, sulfuric acid mist, hydrogen sulfide, TRS, reduced sulfur compounds, municipal waste combustor organics, municipal waste combustor metals, municipal waste combustor acid gases, and municipal solid waste landfill emissions, *see* 40 CFR 51.166(b)(23)(i) * * *. Of course, the basis for all these actions is PSD's applicability to these non-NAAQS air pollutants. We are not aware that EPA's actions in establishing significance levels for these pollutants gave rise to challenges on grounds that the PSD provisions do not apply to them. As the U.S. Supreme Court recently stated in upholding an EPA approach in another context: "While not conclusive, it surely tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion * * * that the agency has been proceeding in essentially this fashion for over 30 years." *Entergy Corp.* v. *Riverkeeper,* Inc., 129 S.Ct. 1498, 1509 (2009) (citations omitted).

75 FR 31,581/3 to 31,582/1

To this, it may be added that the regulatory history of the PSD applicability provisions supports their broad application: EPA's initial, 1977–78 rulemaking implementing the PSD program made explicit that the PSD program applied to "any pollutant regulated under the Clean Air Act." 43 FR 26380, 26403, 26406 (June 19, 1978) (promulgating 40 CFR 51.21(b)(1)(i)). In 1979–1980, EPA revised the PSD program to conform to *Alabama Power* v. *Costle,* 636 F.2d 323 (DC Cir. 1980). 44 FR 51924 (September 5, 1979) (proposed rule); 45 FR 52676 (August 7, 1980) (final rule). In this rulemaking, EPA did not disturb the pre-existing provisions that applied the PSD program to regulated air pollutants. In October 1990, EPA prepared the "New Source Review Workshop Manual—Prevention of Significant Deterioration and Nonattainment Area Permitting" (draft NSR Manual), which although in draft form, and not a binding rule, has often been referenced as a reflection of EPA's thinking on PSD permitting issues. *See, Alaska Dept. of Conservation* v. *EPA*, 540 U.S. 461, 476 n. 7 (2004); *In re: Indeck-Elwood, LLC,* 13 E.A.D. 133 n. 13 (EAB Sept. 27, 2006); *In re: Prairie State Generating Company,* 13 E.A.D. 6 n. 2 (EAB Aug 24, 2006). This manual states that PSD applies to "each pollutant regulated by the Act," including "criteria and * * * noncriteria" pollutants. Draft NSR Manual, pp. A.18. *See id.* at A.28, A.30. In 1996 EPA proposed, and in 2002 finalized what we call the NSR Reform Rule,[48] which included a set of amendments to the PSD provisions that included revisions to conform to the 1990 CAA Amendments. *See* 61 FR 38250 (July 23, 1996), 67 FR 80186 (December 31, 2002). In the preamble to the final rule, EPA noted that based on a request from a commenter, EPA was amending the regulations to "clarify which pollutants are covered under the PSD program." EPA accomplished this by promulgating a definition for "regulated NSR pollutant," and by substituting that defined term for the phrase "pollutant regulated under the Act" that was previously used in various parts of the PSD regulations. 67 FR 80240. The definition of "regulated NSR pollutant" includes several categories of pollutants, including, in general, NAAQS pollutants and precursors, pollutants regulated under CAA section 111 NSPS, Class I or II substances regulated under CAA title VI, and a catch-all category, "[a]ny pollutant that otherwise is subject to regulation under the Act." *E.g.,* 40 CFR 52.21(b)(50). The explicit inclusion of Class I or II substances regulated under CAA title VI confirms that PSD applies to non-NAAQS pollutants. 75 FR 31,561/3 to 31,562/1.

In the Tailoring Rule, EPA went on to discuss other PSD and CAA provisions, including their legislative history and interpretation in the case law, that all support applying PSD to any pollutant this is subject to regulation, including non-NAAQS pollutants. *Id.* 31,560/2 to 31,562/2.[49]

ii. Automatic Application of PSD to Newly Regulated Pollutants

Under the PSD applicability requirements, PSD applies to sources automatically, that is, by operation of law, as soon as their emissions of pollutants become subject to regulation

[47] "Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA's Response to Public Comments," p. 39.

[48] "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects—Final Rule," 67 FR 80186 (December 31, 2002) (NSR Reform rule).

[49] EPA gave additional reasons why it does not agree that PSD applies only to NAAQS pollutants in the record for the Tailoring Rule, "Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA's Response to Public Comments," May 2010, pp.38–41; and in EPA's court filings in defense of challenges to the Tailoring Rule. "EPA's Response To Motions To Stay" 47–59 *Coalition for Responsible Regulation* v. *EPA,* No. 09–1322 (and consolidated cases) (DC Cir. 2010), *Coalition for Responsible Regulation* v. *EPA,* No. 09–1073 (and consolidated cases) (DC Cir. 2010), *Coalition for Responsible Regulation* v. *EPA,* No. 09–1092 (and consolidated cases) (DC Cir. 2010), *Coalition for Responsible Regulation* v. *EPA,* No. 09–1131 (and consolidated cases) (DC Cir. 2010) (hereafter, *Coalition for Responsible Regulation* v. *EPA,* No. 09–1322 (and consolidated cases)).

under the CAA. This is because CAA section 165(a)(1) prohibits "major emitting facilit[ies]" from constructing or modifying without obtaining a permit that meets the PSD requirements, and CAA section 169(1) defines a "major emitting facility" as a source that emits a specified quantity of "any air pollutant," which, as noted earlier, EPA has long interpreted as any pollutant subject to regulation. Whenever EPA promulgates control requirements for a pollutant for the first time, that pollutant becomes subject to regulation, and any stationary source that emits that pollutant in sufficient quantities becomes a "major emitting facility" that, when it constructs or modifies, becomes subject to PSD without any further action from EPA or a state or local government.

EPA regulations have long codified automatic PSD applicability. *See* 43 FR 26380, 26403/3, 26406 (June 19, 1978) (promulgating 40 CFR 51.21(b)(1)(i)) and 42 FR 57479, 57480, 57483 (November 3, 1977) (proposing 40 CFR 51.21(b)(1)(i)) (applying PSD requirements to a "major stationary source" and defining that term to include sources that emit specified quantities of "any air pollutant regulated under the Clean Air Act"). Most recently, in the 2002 NSR Reform Rule, noted previously, EPA reiterated these requirements, although changing the terminology to "any regulated NSR pollutant." 67 FR 80,186. EPA stated in the preamble: "The PSD program applies automatically to newly regulated NSR pollutants, which would include final promulgation of an NSPS applicable to a previously unregulated pollutant." 67 FR at 80240/1.

In most states with approved PSD programs, PSD does apply automatically. However, in a minority of states with approved PSD programs, it does not.[50] Instead, each time EPA subjects a previously unregulated air pollutant to regulation, these states must submit a SIP revision incorporating that pollutant into its program. Despite the time needed for the state to submit a SIP revision and EPA to approve it, the pollutant-emitting sources in the state become subject to PSD under the CAA as soon as EPA first subjects that pollutant to control. Because under CAA section 165(a)(1) and 169(1), as interpreted by EPA, a source that emits specified quantities of any air pollutant subject to regulation cannot construct or modify unless it first receives a PSD permit, as a practical matter, in a state with an approved PSD program that does not automatically update and that has not been revised to include the newly regulated pollutant, the sources may find themselves subject to the CAA requirement to obtain a permit, but without a permitting authority to issue that permit. As discussed later, this action is needed because GHG-emitting sources in Texas would otherwise confront that situation.

In a recent decision, the 7th Circuit, mistakenly citing to PSD provisions when the issue before the court involved the separate and different non-attainment provisions of CAA sections 171–193, concluded that sources could continue to abide by permitting requirements in an existing SIP until amended, even if that SIP does not comport with the law. *United States* v. *Cinergy Corp.,* No. 09–3344, 2010 WL 4009180 (7th Cir. Oct. 12, 2010). In stark contrast to the nonattainment provisions actually at issue in Cinergy—which are not self-executing and must therefore be implemented through a SIP–PSD is self-executing; it is the statute (CAA section 165), not just the SIP, that prohibits a source from constructing a project without a permit issued in accordance with the Act.

3. Implementation of GHG PSD Requirements

Because PSD is implemented through the SIP system, EPA has taken a series of actions to address the obligations of states (including localities and other jurisdictions, as appropriate) to implement PSD requirements for GHG-emitting sources. EPA has taken these actions through the Tailoring Rule and a series of subsequent actions.[51]

a. Tailoring Rule

EPA proposed the Tailoring Rule by notice dated October 27, 2009, 74 FR 55292. In that action, EPA proposed to phase in PSD applicability, for GHGs, starting with a threshold of 25,000 tpy on a CO_2e basis. This threshold was above the statutory thresholds of 100 or 250 tpy on a mass basis, depending on the source category, for new construction).[52]

EPA finalized the Tailoring Rule by notice dated June 3, 2010. 75 FR 31514. Comments on the proposed rule had persuaded EPA that the proposed GHG-applicability threshold was too low to avoid undue administrative burdens. Accordingly, in the final Tailoring Rule, EPA raised those threshold levels to, depending on the circumstances, 75,000 and/or 100,000 tpy on a CO_2e basis, while retaining the approach of a phase-in. EPA established the initial levels in the first two steps of the phase-in schedule, committed the agency to take future steps addressing smaller sources, and excluded the smallest sources from PSD permitting for GHG emissions until at least April 30, 2016.

In addition, in the Final Tailoring Rule, EPA incorporated the PSD thresholds for GHGs in the definition of the term "subject to regulation." As noted previously, under EPA's PSD regulations, PSD applies to a "major stationary source;" a "major stationary source" is defined as a source that emits 100/250 tpy on a mass basis of a "regulated NSR pollutant;" and a "regulated NSR pollutant," in turn, is defined as, among other things, a pollutant that is "subject to regulation" under the CAA.[53] In the Tailoring Rule, EPA added a limitation to the term "subject to regulation" so that the only GHG emissions that would be treated as "subject to regulation" (and therefore subject to PSD) are those emitted at or above specified thresholds of, depending on the circumstances, 75,000 and/or 100,000 tpy on a CO_2e basis.[54]

[50] 75 FR at 53,897/3 (proposed GHG PSD SIP call).

[51] A detailed description of EPA's implementation efforts, and the status of state compliance with those efforts, is included in Declaration of Regina McCarthy, *Coalition for Responsible Regulation* v. *EPA,* DC Cir. No. 09–1322 (and consolidated cases) (McCarthy Declaration), including Attachment 1 (Tables 1, 2, and 3), which can be found in the docket for this rulemaking.

[52] Even so, EPA recognized that many SIPs with approved PSD programs would continue to require PSD permitting of GHG-emitting sources at the statutory thresholds because these SIPs would remain in place even after EPA finalized the Tailoring Rule. Until the states revised those SIPs, sources in those states would remain subject to those thresholds as a matter of both state and federal law. This would result in the same problems of overwhelming administrative burdens and costs that EPA designed the Tailoring Rule to address. To solve these problems, EPA encouraged each affected state to submit a SIP revision that EPA would approve to raise the thresholds to conform to the Tailoring Rule. EPA recognized that it would take time for the states to develop and submit for approval such SIP revisions, and for EPA to approve them. Accordingly, as an interim measure, EPA proposed, as part of the proposed Tailoring Rule, to narrow its approval of the existing EPA-approved SIPs so that those SIPs would remain approved only to the extent they regulate GHG emissions at or above the Tailoring Rule thresholds. Specifically, EPA proposed to rescind its approval of the SIP permitting threshold provisions to the extent they required PSD permits for sources whose GHG emissions fall below the proposed Tailoring Rule thresholds. 74 FR at 55,340/3 to 55,343/3 (proposed Tailoring Rule).

[53] 40 CFR 51.166(a)(7)(i), (b)(1)(i)(a), (b)(49).

[54] Specifically, under the revised definition of "subject to regulation," sources that emit at least the 75,000 and/or 100,000 tpy CO_2e threshold amount of GHGs are subject to PSD as long as the amount of GHG emissions also exceeds, in general, 100/250 tpy on a mass basis for new sources and zero tpy on a mass basis for modifications of existing sources. 40 CFR 51.166(b)(48), 75 FR at 31,606; *see* EPA Office of Air Quality Planning and Standards, "PSD and Title V Permitting Guidance for Greenhouse Gases (November 2010).

Some states advised EPA that it is likely they would be able to implement the Tailoring Rule thresholds by interpreting the term "subject to regulation" in their SIPs, and without having to take further action. A state's ability to take this approach would have implications for how EPA needed to implement the Tailoring Rule.[55] Accordingly, in the Tailoring Rule, EPA began a process to gather more information about how states would implement permitting for GHG-emitting sources.

b. 60-Day Letters

To gather this information, EPA, in the Tailoring Rule, asked states to submit letters within 60 days of publication of the Tailoring Rule, which we refer to as the 60-day letters, concerning the status of their PSD program and their legal authority for applying PSD program to GHG-emitting sources. This information would help clarify, for each state, the two central issues for PSD applicability to GHG-emitting sources: (i) Whether the state has an approved PSD program that applies to GHG-emitting sources; and (ii) if so, what action the state would take to limit the applicability of its PSD program to GHG-emitting sources at or above the Tailoring Rule thresholds.[56] This information would assist EPA to determine what, if any, action it needed to take with respect to the states.

Almost all states submitted 60-day letters, generally by August 4, 2010. The letters, along with other information EPA received through review of state requirements and further communications with state officials, indicate that the states, localities, and other jurisdictions may be divided into three categories, described below, for purposes of EPA's implementation of the PSD program to GHG-emitting sources.

c. The Three Categories of States and EPA's Implementation Process

The first category, which includes 7 states, 35 subsections of states, the District of Columbia, American Samoa, Guam, Puerto Rico, the U.S. Virgin Islands, and Indian Territory, does not have an approved SIP PSD permitting program. Instead, federal requirements apply. Thus, implementation of PSD for GHG-emitting sources in these jurisdictions is the simplest of all the states: GHG-emitting sources will become subject to PSD and the thresholds in the Tailoring Rule will apply as of January 2, 2011 without further action.[57]

The second category includes 14 states and a number of districts within states that have approved PSD SIPs, but those SIPs do not apply the PSD program to GHG-emitting sources. This group includes Texas, which is the focus of this action. The implementation process for this category is discussed later.[58]

The third category includes the remaining states, which have an approved SIP PSD program that applies to GHG-emitting sources. As for the implementation process for this category, some of these states have indicated that they are able to interpret their SIPs to apply PSD only to GHG emissions at or above the Tailoring Rule thresholds, and they do not need to revise their SIPs to do so. However, most indicated that they would need to submit SIP revisions to EPA in order to incorporate the Tailoring Rule thresholds. This means that in these states, until they do submit their SIP revisions and EPA approves them, sources emitting GHGs at or above the 100/250 tpy levels will be subject to PSD requirements as of January 2, 2011 if they construct or modify. EPA has encouraged these states to submit SIP revisions adopting the Tailoring Rule thresholds as soon as possible and some of these states have already done so. Moreover, almost all of these states are proceeding to revise their state law to reflect the Tailoring Rule thresholds and will do so by January 2, 2011 or very soon thereafter. In the meantime, EPA has finalized the Narrowing Rule so that as of January 2, 2011, at least for federal purposes, PSD will apply to GHG-emitting sources only at the Tailoring Rule thresholds or higher.[59] As a result of these state actions and EPA's Narrowing Rule, by January 2, 2011 or shortly thereafter, in all or almost all of these states, only GHG-emitting sources at or above the Tailoring Rule thresholds will be subject to PSD requirements.[60]

d. SIP Call States, Including Texas

As just noted, the second category, which includes Texas, includes 14 states and some districts within states whose SIPs have an approved PSD program but do not have the authority to apply that program to GHG-emitting sources. For most of these states, including Texas, the reason is that their PSD applicability provision applies to any "pollutant subject to regulation" under the CAA (or a similar term), but other provisions of state law preclude automatic updating. As a result, this applicability provision covers only pollutants—not including GHGs—that were subject to regulation at the time the state adopted the applicability provision.

After proposing action by notice dated September 2, 2010,[61] EPA promulgated the final SIP call for 13 states, including Texas, by notice signed on December 1, 2010, and published on December 13, 2010, 75 FR 77,698, which we call the GHG PSD SIP Call or, simply, the SIP call.[62] In this action, consistent with the requirements of CAA section 110(k)(5), EPA (i) issued a finding that the SIPs for 13 states (comprising 15 state and local programs) are "substantially inadequate to * * * comply with any requirement of this Act" because their PSD programs do not apply to GHG-emitting sources as of January 2, 2011; (ii) issued a SIP call requiring submission of a corrective SIP revision; and (iii) established a "reasonable deadline[] (not to exceed 18 months after the date of such notice)" for the submission of the corrective SIP revision. This deadline ranges, for different states, from 3 weeks to 12

[55] Specifically, a state's implementation of the Tailoring Rule in this manner prior to January 2, 2011 would obviate the need for EPA to narrow its approval of that state's SIP, as EPA had proposed in the proposed Tailoring Rule. Thus, in the Final Tailoring Rule, EPA delayed final action on its narrowing proposal so that EPA could gather information about the process and time-line for states to implement the Tailoring Rule.

[56] Alternatively, a state could choose to apply its PSD program to sources below the Tailoring Rule thresholds and acquire sufficient resources to implement the program as expanded, but no state had indicated an intention to proceed in this manner.

[57] McCarthy Declaration, paragraphs 28–33, page 8, and Attachment 1, Table 1.

[58] *Id.,* paragraphs 34–55, pages 8–12, and Attachment 1, Table 2.

[59] Specifically, for these states, EPA has stated that it intends to finalize its proposal in the Tailoring Rule to narrow its approval of their PSD applicability provisions to only the extent they apply PSD to GHG-emitting sources at or above the Tailoring Rule thresholds, which we call the Narrowing Rule. *Id.* paragraph 90, page 19. In addition, recognizing that GHG-emitting sources also have permitting obligations under state law, EPA has strongly encouraged states to revise their state law as promptly as possible to eliminate the state PSD obligations of sources below the Tailoring Rule thresholds. *Id.* paragraph 92, page 19.

[60] *Id.* paragraphs 62–94, pages 13–20, and Attachment 1, Table 3.

[61] "Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call—Proposed Rule," 75 FR 53892 (September 2, 2010); "Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan—Proposed Rule," 75 FR 53883 (September 2, 2010).

[62] "Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call—Final Rule," 75 FR 77,698 (December 13, 2010).

months after the date of the final SIP call, as discussed below.

EPA justified its finding that the affected SIPs are "substantially inadequate" to comply with CAA requirements on grounds that (i) the CAA requires that PSD requirements apply to any stationary source that emits specified quantities of any air pollutant subject to regulation under the CAA, and those PSD requirements must be included in the approved SIPs; (ii) as of January 2, 2011, GHG-emitting sources will become subject to PSD; (iii) as a result, the CAA requires PSD programs to apply to GHG-emitting sources; and (iv) accordingly, the failure of any SIP PSD applicability provisions to apply to GHG-emitting sources means that the SIP fails to comply with these CAA requirements.

In the SIP call proposal, EPA discussed in some detail the SIP submittal deadline under CAA section 110(k)(5). Under this provision, in issuing a SIP call, EPA "may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions." EPA proposed to allow each of the affected states up to 12 months from the date of signature of the final finding of substantial inadequacy and SIP call within which to submit the SIP revision, unless, during the comment period, the state expressly advised that it would not object to a shorter period—as short as 3 weeks from the date of signature of the final rule—in which case EPA would establish the shorter period as the deadline. EPA stated that, assuming that EPA were to finalize the SIP call on or about December 1, 2010, as EPA said it intended to do in the proposal, then the earliest possible SIP submittal deadline would be December 22, 2010.

EPA made clear that the purpose of establishing the shorter period as the deadline for any interested state is to accommodate states that wish to ensure that a FIP is in effect as a backstop to avoid any gap in PSD permitting. EPA also made clear that if a state did not advise EPA that it does not object to a shorter deadline, then the 12-month deadline would apply. EPA emphasized that for any state that receives a deadline after January 2, 2011, the affected GHG-emitting sources in that state may be delayed in their ability to receive a federally approved permit authorizing construction or modification. This is because after January 2, 2011, these sources may not have available a permitting authority to review their permit applications until the date that EPA either approves the SIP submittal or promulgates a FIP.

EPA asked that each of the affected states write EPA a letter during the comment period to identify the deadline for SIP submission to which the state would not object if EPA established. We call these the 30-day letters. Each affected state wrote a 30-day letter to EPA, as requested. Except for Texas, each state identified a SIP submittal deadline, which differed among the states, and which ranged from three weeks to 12 months. In the final SIP call, EPA established SIP submittal deadlines identified by the states, except that EPA established a deadline of 12 months for Texas, in accordance with EPA's proposal. Except for Texas, each state explained in its 30-day letter and in subsequent communications with EPA, that it was planning on either receiving a FIP or adopting a SIP and that it chose a deadline that would result in having either the FIP or an approved SIP, as appropriate, in place by January 2, 2011 or soon enough thereafter so as to avoid any hardship to its sources. In the final SIP call, EPA justified approving this three-week-to-12-month time period, although expeditious, as meeting the CAA section 110(k)(5) requirement to be a "reasonable" deadline in light of: (i) The SIP development and submission process; (ii) the preference of the state; and (iii) the imperative to minimize the period when sources will be subject to PSD but will not have available a PSD permitting authority to act on their permit application and therefore may face delays in constructing or modifying.

In the final SIP call, based on the states' 30-day letters and other communications, EPA established a SIP submittal deadline of December 22, 2010 for seven states. Each of the states indicated that it did not expect to submit a SIP revision by that date and instead expected to receive a FIP. On December 23, 2010, for each of the seven states, EPA issued a finding of failure to submit its corrective SIP revision by that deadline, and EPA promulgated a FIP.

Except for Texas, EPA expects each of the other states subject to the SIP call to adopt a SIP revision and receive EPA approval of it, or receive a FIP, within the first half of 2011, and, in most cases, substantially sooner. Although none of these states will have a permitting authority in place as of January 2, 2011, none of these states expects that gap to pose meaningful difficulties for sources because, depending on the state, the gap is brief, the state does not expect any sources to seek a permit during the gap, or even if the state were the permitting authority during the gap, it could not complete processing the permits during that time.[63]

As discussed later, Texas has responded to the SIP call differently than the other states. As a result, its GHG-emitting sources do face the prospect of permitting delays. This rulemaking action addresses that situation.

4. Summary of the Effect of EPA's Implementation Actions in States Other Than Texas

EPA recently summarized the status of its implementation efforts, for all three categories of sources, as follows:

> Overall, EPA has received information about the status of 99 jurisdictions (49 states,[64] 4 territories, 45 localities, and the District of Columbia), and included that information in Attachment 1. Of these jurisdictions, 94 will have, for Federal law purposes, a PSD permitting program for GHG emissions at the Tailoring Rule thresholds on Jan. 2, 2011. Of these 94 entities, 84 will have made any necessary amendments to state or local law to ensure that state or local permits are not required for GHG emissions below Tailoring Rule thresholds. By the end of the first quarter of 2011, only one jurisdiction will not have authority to permit GHG sources, and that jurisdiction will obtain authority by July 1, 2011 and in the meantime, does not expect large sources seeking permits for their GHGs. In addition, by the end of the first quarter of 2011, all but one more state will have made any necessary amendments to state or local law to ensure that permits are not required for GHG emissions below Tailoring Rule levels. 1 program with GHG permitting authority at the lower statutory levels has not yet determined how, and on which timeline, it will incorporate the Tailoring Rule thresholds into its state law.[65]

Thus, under EPA's implementation program, (i) in every state, (a) only sources at or above the Tailoring Rule thresholds will be subject under federal law to obtain a PSD permit when they construct or modify as of January 2, 2011, and (b) only those same sources will be subject under state law to obtain a PSD permit when they construct or modify as of January 2, 2011 or very

[63] McCarthy Declaration, p. 12, paragraph 55.

[64] In California's PSD program is administered in its entirety by local jurisdictions.

[65] McCarthy Declaration, p. 20, paragraph 98. There have been a few changes in the status of individual states since this time, but the overall picture remains the same. In no small part, the current state of EPA's implementation effort is attributable to the fact that EPA has been in close communication with almost every state and many other jurisdictions, along with multi-state organizations such as the National Association of Clean Air Agencies (NACAA). In addition to the letters that states have sent responding to the Tailoring Rule (the 60-day letters) and proposed SIP Call (the 30-day letters), EPA officials, primarily through the Regional offices, have had numerous communications with their state counterparts.

soon thereafter; and (ii) in every state, except for Texas, as of January 2, 2011 or very soon thereafter, GHG sources that construct or modify will be able to receive permits when they need them, so that the sources will not face obstacles to constructing and modifying. Again, Texas has responded to EPA's implementation program in a manner that has resulted in its sources facing obstacles to constructing and modifying, as discussed next, which this rulemaking addresses.

5. EPA's Implementation Approach for Texas and Texas's Response

The following describes the progress to date of implementing PSD for GHG emissions in Texas, based on extensive communications between EPA and TCEQ. It should be borne in mind, as noted earlier, that Texas is in the second of the three categories of states, that is, it has an approved PSD program that does not apply to GHGs-emitting sources.

a. Texas's 60-Day Letter

Texas's 60-day letter provides the state's clearest articulation of its response to EPA's efforts to implement PSD for GHG-emitting sources at the Tailoring Rule thresholds beginning January 2, 2011. As noted previously, in the preamble to the final Tailoring Rule, EPA asked each state to send EPA a letter within 60 days to identify which category the state was in and what action the state intended to take. Specifically, with regard to sources in Category 2, EPA stated:

> In our proposed rule, we also noted that a handful of EPA-approved SIPs fail to include provisions that would apply PSD to GHG sources at the appropriate time. This is generally because these SIPs specifically list the pollutants subject to the SIP PSD program requirements, and do not include GHGs in that list, rather than include a definition of NSR regulated pollutant that mirrors the federal rule, or because the state otherwise interprets its regulations to limit which pollutants the state may regulate. At proposal, we indicated that we intended to take separate action to identify these SIPs, and to take regulatory action to correct this SIP deficiency.
>
> We ask any state or local permitting agency that does not believe its existing SIP provides authority to issue PSD permits to GHG sources to notify the EPA Regional Administrator by letter, and to do so no later than August 2, 2010. This letter should indicate whether the state intends to undertake rulemaking to revise its rules to apply PSD to the GHG sources that will be covered under the applicability thresholds in this rulemaking, or alternatively, whether the state believes it has adequate authority through other means to issue federally-enforceable PSD permits to GHG sources consistent with this final rule. For any state that lacks the ability to issue PSD permits for GHG sources consistent with this final rule, we intend to undertake a separate action to issue a SIP call, under CAA section 110(k)(5). As appropriate, we may also impose a FIP through 40 CFR 52.21 to ensure that GHG sources will be permitted consistent with this final rule.

75 FR 31582/3.

With regard to states in category 3, EPA requested that in the states' 60-day letter,

> The state should explain whether it will apply EPA's meaning of the term "subject to regulation" and if so, whether the state intends to incorporate that meaning of the term through interpretation, and without undertaking a regulatory or legislative process. If a state must undertake a regulatory or legislative process, then the letter should provide an estimate of the time needed to adopt the final rules. If a state chooses not to adopt EPA's meaning by interpretation, the letter should address whether the state has alternative authority to implement either our tailoring approach or some other approach that is at least as stringent, whether the state intends to use that authority. If the state does not intend to interpret or revise its SIP to adopt the tailoring approach or such other approach, then the letter should address the expected shortfalls in personnel and funding that will arise if the state attempts to carry out PSD permitting for GHG sources under the existing SIP and interpretation.
>
> For any state that is unable or unwilling to adopt the tailoring approach by January 2, 2011, and that otherwise is unable to demonstrate adequate personnel and funding, we will move forward with finalizing our proposal to limit our approval of the existing SIP.

75 FR 31582/3.

On August 2, 2010, Texas submitted its 60-day letter, signed by the Texas Attorney General and the Chairman of the Texas Commission on Environmental Quality.[66] In that letter, Texas responded specifically to EPA's request that "any state * * * that does not believe its existing SIP provides authority to issue PSD permits to GHG sources to notify [EPA and] * * * indicate whether the state intends to * * * to revise its rules to apply PSD to * * * GHG sources" by stating: "Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emission." *Id.* p. 1. Texas offered several explanations for this position. First, Texas noted:

> Texas' stationary source permitting program encompasses all "federally regulated new source review pollutants," including, "any pollutant that otherwise is subject to regulation under the [federal Clean Air Act]." 30 Tex. Admin. Code § 116.12(14)(D). The rules of the Texas Commission on Environmental Quality (TCEQ), like the EPA's rules, do not define the phrase "subject to regulation."

Id. p. 2. Texas then explained that it had several objections to interpreting the phrase "subject to regulation" to allow regulation of GHGs. For one thing, according to Texas, long-standing state case law precluded the term—and the PSD applicability provisions generally—from automatically incorporating newly regulated pollutants. Specifically, Texas said:[67]

> * * *Texas' stationary source permitting program encompasses all "federally regulated new source review pollutants," including "any pollutant that otherwise is subject to regulation under the [federal Clean air Act]." 30 Tex. Admin. Code § 116.12(14)(D). This delegation of legislative authority to the EPA is limited solely to those pollutants regulated when Texas Rule 116.12 was adopted (1993) and last amended (2006). As the Texas Supreme Court has explained, "The general rule is that when a statute is adopted by a specific descriptive reference, the adoption takes the statute as it exists at that time, and the subsequent amendment thereof would not be within the terms of the adopting act." *Trimmer* v. *Carlton,* 296 S.W. 1070 (1927). Thus, in order for Texas Rule 116.12 to pass constitutional muster, it must be limited to adopting by reference the definition of "subject to regulation" in existence when Rule 116.12 was last amended in 2006. In other words, Texas Rule 116.12 cannot delegate authority to the EPA to define "subject to regulation" in 2010 to include pollutants that were not "subject to regulation" in 2006.

Id. at 4.

Secondly, Texas took the position that PSD applies only to NAAQS pollutants, and not non-NAAQS pollutants. Texas stated:

> The only sensible interpretation of the Clean Air Act is one that requires the EPA to promulgate a National Ambient Air Quality Standard (NAAQS) for greenhouse gases before the EPA can require PSD permitting of greenhouse gases.* * * EPA, however, has not developed a NAAQS for greenhouse gases. * * *

Id. at 4–5.

Texas provided a more detailed exposition of its view that PSD applies

[66] Letter from Bryan W. Shaw, Chairman, Texas Commission on Environmental Quality, and Greg Abbott, Attorney General of Texas, to Hon. Lisa Jackson, Administrator, U.S. Environmental Protection Agency, and Dr. Alfredo "Al" Armendariz, Regional Administrator, U.S. Environmental Protection Agency, Region 6 (August 2, 2010) (Texas's 60-day letter), included in the docket for this rulemaking.

[67] In this explanation, Texas was referring to the PSD applicability provision that Texas adopted under State law in 2006, which differed slightly from the applicability provision approved into the SIP in 1993.

only to NAAQS pollutants in its challenges before the D.C. Circuit to EPA's GHG actions, where Texas moved to stay the Endangerment Finding, the Vehicle Rule, and the Johnson Memo Reconsideration (Texas's Motion to Stay Three GHG Actions).[68] (In a separate motion, Texas also moved to stay the Tailoring Rule.[69]) There, Texas reiterated arguments based on the text of some of the CAA PSD provisions that, in Texas's view, lead to the conclusion that the CAA precludes applying PSD to non-NAAQS. As noted previously, these arguments were raised by commenters to the Tailoring Rule. Texas concluded that EPA's efforts to apply PSD to GHGs—

> Thus violates the CAA. Moreover, [EPA's] interpretation of the CAA is not entitled to deference because the text of the statute is unambiguous. *Chevron, U.S.A.* v. *NRDC,* 467 U.S. 837, 842 (1984) (the Agency must give effect to the unambiguously expressed intent of Congress). Accordingly, EPA's attempt to short cut the CAA's NAAQS process in order to regulate GHG emissions from stationary sources through PSD and Title V must fail.[70]

At the close of its 60-day letter, Texas added, "In the event a court concludes EPA's actions comport with the law, Texas specifically reserves and does not waive any rights under the federal Clean Air Act or other law with respect to the issues raised herein."[71]

b. Texas's 30-Day Letter

As noted previously, in the GHG PSD SIP call proposal, EPA proposed to establish, for each affected state, a deadline of 12 months from the date of signature of the final SIP call for submitting the corrective SIP revision, unless the state expressly advised EPA in its 30-day letter that it would not object to a shorter period. Texas submitted a 30-day letter on October 4, 2010,[72] and in that letter, voiced various objections to the proposed SIP call. Texas reiterated its view that PSD is limited to NAAQS pollutants, and therefore cannot apply to GHGs, and added that the SIP call is "based on an impermissible interpretation of the [Clean Air Act]. EPA cannot * * * impose permitting through [the PSD] program without first setting a NAAQS. * * * " Texas 30-day letter p. 2, 4. EPA responded to those objections in the final SIP call.[73]

In its 30-day letter, Texas went on to discuss the SIP submission schedule and FIP that EPA proposed, but Texas declined EPA's invitation to identify a specific deadline for the state's SIP submission. As a result, in the final SIP call, EPA was obliged to establish the default SIP submission deadline for Texas of December 1, 2011, in accordance with EPA's proposal. Because Texas has clearly stated that it does not intend, and, in its view, does not have the authority, to adopt a SIP revision to apply PSD to GHG-emitting sources, EPA expects to promulgate a FIP to do so. But, again, because Texas did not identify an earlier deadline for its SIP submittal, the earliest that EPA could promulgate such a FIP would be December 2, 2011. Under this approach, due to the position Texas has taken, absent further action, sources in Texas could not expect to have a permitting authority with authority to issue preconstruction permits for their GHG emissions until that December 2, 2011 date. As a result, absent further action, sources in Texas would face obstacles in constructing or modifying before that date.

Texas's 30-day letter indicates that Texas was well aware of the consequences of its decision not to identify a specific deadline for its SIP submission, but had several reasons for making that decision. These included its view, again, that PSD applies only to NAAQS pollutants, and also that EPA was required to employ a different process for requiring a SIP revision, one that would have provided the state with more time to adopt a SIP revision. Texas 30-day letter at 4–5. In addition, Texas asserted that there is no reason to allow EPA to promulgate an early FIP for the benefit of Texas's sources because, in Texas's view, for practical reasons, EPA could not issue those permits for the "foreseeable future" anyway. Specifically, Texas explained that EPA had not issued guidance for determining BACT, the key element of a PSD permit for a GHG source. Texas added that even after EPA issued that guidance, BACT will, in Texas's view, remain uncertain and contentious, and the guidance will be of limited usefulness until the control technology is proven. *Id.* at 5. Texas added that "[i]ndustry should be particularly concerned about EPA's lack of resources and experience to issue these permits * * *." *Id.* at 6. Texas concluded, "The result of all this is that, even under a FIP, it is unlikely that construction of new major GHG sources or major modifications will commence in the foreseeable future." *Id.* at 6.

It should be noted that Texas stated in filings before the D.C. Circuit in which it challenged the Tailoring Rule that it believed 167 projects in Texas would be affected by the lack of a permitting authority during 2011.[74]

IV. Interim Final Action

In this action, EPA is taking the following actions on an interim final basis to ensure that the PSD program in Texas complies with the CAA. First, EPA is determining that the Administrator's action approving the Texas SIP PSD program was in error under CAA section 110(k)(6).

Second, EPA, in the same manner as its action to approve the Texas SIP PSD program, is revising such action as appropriate without requiring any further submission from Texas. *Id.* The appropriate revision is to convert the previous approval to a partial approval and a partial disapproval. The partial approval applies to the extent that Texas's PSD program actually covers pollutants that are required to be included in PSD. The partial disapproval applies to the extent that Texas failed to address or to include assurances of adequate legal authority (required under CAA section 110(a)(2)(E)(i)) for the application of PSD to each newly regulated pollutant, including non-NAAQS pollutants, under the CAA. Note that as an alternative basis to CAA section 110(k)(6) for taking these first two steps, EPA relies on its inherent administrative authority to reconsider its previous action.

Third, in this rulemaking, EPA is promulgating a FIP to apply appropriate measures to assure that EPA's PSD regulatory requirements will apply to non-NAAQS pollutants that are newly subject to regulation under the CAA that the Texas PSD program does not already cover. At present, the only such pollutant is GHGs. Therefore, EPA's FIP will at present apply the EPA regulatory PSD program in the GHG portion of PSD

[68] "State of Texas's Motion For A Stay Of EPA's Endangerment Finding, Timing Rule, and Tailpipe Rule," *Coalition for Responsible Regulation* v. *EPA,* No. 09–1322 (and consolidated cases) (September 15, 2010). On December 10, 2010, the DC Circuit denied Texas's, and other parties', motions to stay. Order, *Coalition for Responsible Regulation* v. *EPA,* No. 09–1322 (and consolidated cases) (December 10, 2010).

[69] "State of Texas's Motion For A Stay Of EPA's Greenhouse Gas Tailoring Rule," *Coalition for Responsible Regulation* v. *EPA,* No. 09–1322 (and consolidated cases) (September 15, 2010) (Texas's Motion to Stay the Tailoring Rule).

[70] Texas's Motion to Stay Three GHG Actions, at 27.

[71] *Id.* at 5.

[72] "Texas Commission on Environmental Quality Comments on Actions to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions, Finding of Substantial Inadequacy and SIP Call, Docket ID No. EPA–HQ–OAR–2010–0107, FRL–9190–7 Federal Implementation Plan (FIP), Docket ID No EPA–HQ–OAR–2010–0107, FRL–9190–8 (October 4, 2010) (Texas 30-day letter).

[73] Final SIP Call, 75 FR at 77706/2–3 and n. 18.

[74] Texas's Motion to Stay the Tailoring Rule, pp. 2, 16.

permits for GHG-emitting sources in Texas, and EPA commits to take whatever steps are appropriate if, in the future, Texas fails to apply PSD to another newly regulated non-NAAQS pollutant.

In light of the immediate need of Texas's GHG-emitting sources for a permitting authority to process their permit applications for GHGs, EPA is promulgating this action immediately though an interim final rule, in reliance on the good cause exemption from notice-and-comment rulemaking under section 553(b)(3)(B) of the Administrative Procedures Act. This action will remain in effect until April 30, 2011. At the same time, EPA is initiating a notice-and-comment rulemaking that mirrors this one and that EPA expects to replace this one.

A. Determination That EPA's Previous Approval of Texas's PSD Program Was in Error

In applying CAA section 110(k)(6), EPA must first "determine[] that the Administrator's action approving * * * [the Texas PSD program] was in error * * *." EPA has determined that the Texas PSD program had flaws at the time Texas submitted it and EPA approved it, so that EPA's approval was in error.

1. Gaps in Texas's PSD Program Concerning Application of PSD to Pollutants Newly Subject to Regulation and Concerning Assurances of Legal Adequacy

Texas's PSD program, although approved by EPA, contained important gaps concerning the application of PSD to pollutants newly subject to regulation, including non-NAAQS pollutants, and Texas's legal authority for doing so.

a. Gaps in Texas's PSD Program at the Time of EPA Approval

The application of the PSD program to pollutants newly subject to regulation, including non-NAAQS pollutants, is a key component of the program. As noted earlier, it is EPA's long-standing position that PSD applies to all such pollutants, and most of the states' PSD programs do apply to such pollutants automatically, as soon as those pollutants become subject to regulation.

In particular, as noted previously, EPA had previously made clear to Texas, during 1980 and again during 1983, that PSD applies to non-NAAQS pollutants. Because Texas's PSD program, unlike that of most states, did not automatically apply to such pollutants, it was important that during the time when Texas submitted SIP revisions and EPA acted on them, 1985–1992, that Texas address the application of PSD to pollutants newly subject to regulation.

It is clear from the record that both Texas and EPA were well aware that the Texas PSD rules' IBR of EPA PSD regulatory requirements did not automatically update. Indeed, when EPA promulgated the NAAQS for PM_{10}, a previously unregulated pollutant, and thereby subjected that pollutant to PSD for the first time, Texas revised its PSD rules to update the IBR and thereby assure that the state PSD program applied to PM_{10}.

Had Texas recognized that following approval of its PSD program, EPA would likely continue to subject previously unregulated pollutants to regulation, and therefore to PSD for the first time, Texas could have addressed how it would handle that situation. Texas could have provided both assurances that the state would apply PSD to such pollutants and information as to the method and timing for doing so. The most likely method would be through a separate SIP revision. The timing would most likely relate to the time necessary to adopt and submit a SIP revision. This timing issue is important because the sources emitting pollutants are subject to PSD under the CAA as soon as the pollutants become subject to regulation, but if the SIP PSD program does not automatically apply to the sources, then the state does not have authority to issue permits to the sources as soon as the sources become required to obtain the permits. By comparison, as noted earlier in this preamble, Texas committed to submit a SIP revision if a SIP inadequacy led to an increments violation.

However, there is no indication in the record of Texas's SIP submissions that Texas specifically addressed this issue of the treatment of pollutants that would newly become subject to PSD after Texas's PSD SIP was approved, or that Texas provided any such information as to method or timing. Nor is there any indication in the record that during this 1985–92 period, EPA identified this issue and sought such information from Texas.

Texas did provide the 1987 Texas PSD Commitments Statement, in which Texas agreed to "implement and enforce the federal requirements for [PSD] as specified in [EPA regulations] by requiring all new major stationary sources and major modifications to obtain air quality permits as provided in TACB regulation VI, Control of Air Pollution by Permits for New Construction and Modification." However, this 1987 statement does not specifically address the application of PSD to pollutants newly subject to regulation. It commits TACB to require "all new major stationary sources and major modifications to obtain air quality permits as provided in TACB regulation VI * * *", but that regulation VI does not automatically update.

Texas also provided the 1989 Texas PSD Commitments Letter, in which Texas generally committed "to implement EPA requirements relative to [PSD]." However, as quoted previously, this letter was phrased generally and did not specifically commit to apply PSD to pollutants newly subject to regulation, including non-NAAQS pollutants; nor did the letter identify the method and timing for doing so. Accordingly, we do not read this letter as a commitment by Texas to apply PSD to each newly regulated pollutant, including non-NAAQS pollutants, whether through a SIP revision or some other method, or on any particular timetable. Moreover, although EPA approved the Texas PSD program in reliance on the letter, EPA indicated, in the final approval preamble, that the scope and binding impact of the letter were limited and that Texas retained discretion in implementing the PSD program.

In addition, the rulemaking record for Texas's PSD program does not indicate that Texas provided, as required under CAA § 110(a)(2)(E)(i), assurances that Texas had adequate legal authority to carry out the PSD program, including, insofar as relevant for this rulemaking, applying PSD to pollutants newly subject to regulation, among them non-NAAQS pollutants. Some 15 years previously, in Texas's 1972 submission of its original SIP, the state had provided assurances of legal authority to carry out the SIP, and EPA had approved those assurances. But the record for the PSD SIP submission does not indicate whether, or how, that legal authority applied to PSD applicability to such pollutants. In submitting the PSD SIP program, the TACB provided general references to legal authority, but the TACB did not indicate whether PSD applies to such pollutants either. Nor did the Texas PSD Commitments Letter specifically identify legal authority to apply PSD to such pollutants. Nor did the assurance of legal authority to apply the Texas PSD program to large municipal waste combustors, as required by the 1990 CAA Amendments, which assurances Texas apparently made in a 1992 conference call with EPA Region 6 officials, address legal authority to apply PSD to pollutants that newly become subject to PSD as a result of EPA regulation.

Therefore, the Texas PSD SIP submittal contained gaps: It did not

address the application of PSD to pollutants newly subject to regulation, including non-NAAQS pollutants; and it did not include any information concerning Texas's methods or timing for doing so. Nor did the program provide assurances that the state had adequate legal authority to apply PSD to such pollutants.

b. Recent Statements by Texas That Confirm the Gaps in Texas's PSD Program

Texas has recently made several statements that confirm that at the time EPA approved the state's PSD program, that program had gaps.[75]

(i). Gap Concerning Application of PSD to All Pollutants Newly Subject to Regulation, Including Non-NAAQS Pollutants

First, Texas has made clear that it is not required to apply PSD to non-NAAQS pollutants that are newly subject to regulation, including GHGs. Specifically, in its August 2, 2010 60-day letter, Texas stated that it interprets the CAA PSD applicability provisions to apply to only NAAQS pollutants, and therefore to not include non-NAAQS pollutants, among them GHGs. Texas asserted that "the only sensible interpretation of the CAA" is that PSD applies to only NAAQS pollutants. Texas 60-day letter, p. 4. Similarly, in its court challenge to EPA's four GHG rules, Texas stated that its interpretation is mandated under *Chevron* step 1. There, Texas stated that EPA's "interpretation of the CAA [that PSD applies to non-NAAQS pollutants] is not entitled to deference because the text of the statute is unambiguous. *Chevron, U.S.A.* v. *NRDC,* 467 U.S. 837, 842 (1984) (the Agency must give effect to the unambiguously expressed intent of Congress)."[76] As noted previously, EPA responded at length to this argument in the Tailoring Rule and in EPA's response in the court challenge to EPA's GHG rules. EPA asserts that the CAA mandates that PSD apply to non-NAAQS pollutants, including GHGs, once they become subject to regulation; and EPA is not reopening this issue on the merits in this rulemaking.

For present purposes, however, what is important is that Texas takes the position that under a *Chevron* step 1 reading of the CAA, the PSD program does not apply to non-NAAQS pollutants. This position has important ramifications for how Texas must interpret EPA's PSD applicability regulations and for the meaning of Texas's SIP PSD applicability provisions. As noted previously, under EPA's current regulations, PSD applies to "any pollutant that otherwise is subject to regulation under the [CAA]." 52.166(b)(49)(iv). These regulations have read this way since they were revised in EPA's 2002 NSR Reform Rule, and the regulations that predated them were phrased in much the same way: They applied PSD to "any air pollutant regulated under the Clean Air Act."[77] These regulations are based on the CAA PSD applicability requirements, and as a result, cannot apply PSD to any pollutants that the CAA does not itself subject to PSD. Accordingly, although Texas did not specifically address the meaning of EPA's regulations in its 60-day letter or court filings, it must be that in Texas's view, these EPA regulations may lawfully apply PSD to only NAAQS pollutants.

Texas's SIP PSD applicability provisions, in turn, mirror EPA's. As quoted earlier, Texas's EPA-approved PSD applicability provisions apply PSD to "any air pollutant subject to regulation under the [Clean Air] Act." Although these Texas provisions mirror EPA's regulatory applicability provisions—which, again, Texas appears to interpret as limited to applying PSD only to NAAQS pollutants—Texas is authorized to apply them more expansively than the EPA regulations. This is because a state must comply with CAA requirements as a minimum, but retains authority to impose additional or more stringent requirements. CAA section 116. Therefore, it is in accordance with Texas's view that the CAA and EPA regulatory requirements for PSD applicability be limited to NAAQS pollutants, that Texas would nevertheless consider itself authorized—but not required—to apply its PSD program to particular non-NAAQS pollutants. This position would allow Texas, in effect, to choose which non-NAAQS pollutants to subject to PSD.

In fact, Texas has clearly stated that it does not consider itself required to apply its PSD program to one non-NAAQS pollutant in particular: GHGs. In its 60-day letter, Texas stated: "Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions." Texas 60-day letter, at 1. Texas's letter went on to provide numerous reasons for why it did not believe EPA lawfully subjected GHGs to PSD; why, in any event, EPA was required to allow states more time before PSD would apply to GHG-emitting sources; and, as noted previously, why, in any event, Texas' SIP does not automatically update to apply PSD to newly regulated pollutants. Texas added, "[i]n the event a court concludes EPA's actions comport with the law, Texas specifically reserves and does not waive any rights under the federal Clean Air Act or other law with respect to the issues raised here." Texas 60-day letter, p. 5. With this statement, Texas intimated that it may not consider itself obligated to apply PSD to GHGs even if a Court dismissed all of Texas's arguments and upheld all of EPA's actions that lead to the requirement to apply PSD to GHGs.

With these two statements—that (i) "Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions," and (ii) Texas would not necessarily consider itself bound by EPA requirements even if those requirements are upheld in Court—Texas has made clear that it does not view itself as obligated to apply PSD to GHGs under the CAA. Thus, these statements confirm Texas's view that it is not obligated to apply PSD to each newly regulated non-NAAQS, including, of course, GHGs.[78]

These statements from Texas are significant because they confirm that Texas's PSD program, as approved by EPA, had an important gap: Texas did not address the applicability of its PSD program to pollutants newly subject to regulation, including non-NAAQS pollutants, such as by providing assurances that Texas would take action to apply PSD to such pollutants or describing the methods (such as SIP revision) and timing for doing so.

[75] As noted previously, Texas has also recently confirmed, in Texas' 60-day letter, that its PSD program does not automatically apply to pollutants newly subject to regulation.

[76] *See* Texas "Motion to Stay Three GHG Actions" 27, *Coalition for Responsible Regulation* v. *EPA,* No. 09–1322 (and consolidated cases).

[77] *See* 43 FR 26380, 26403/3, 26406 (June 19, 1978) (promulgating 40 CFR 51.21(b)(1)(i)) and 42 FR 57479, 57480, 57483 (November 3, 1977) (proposing 40 CFR 51.21(b)(1)(i)) (applying PSD requirements to a "major stationary source" and defining that term to include sources that emit specified quantities of "any air pollutant regulated under the Clean Air Act").

[78] It should be noted that Texas has applied its PSD program to non-NAAQS pollutants because Texas has IBR'd EPA's PSD regulatory requirements and those requirements apply to non-NAAQS pollutants. However, as noted earlier, Texas has made clear that it has no intention of submitting a SIP revision to apply PSD to GHGs. All this is consistent with the view described previously that Texas interprets its PSD applicability provision to authorize it to apply PSD to non-NAAQS pollutants at Texas's discretion, but that Texas does not view itself as required to apply PSD to non-NAAQS pollutants.

Moreover, Texas's recent statements are consistent with the view that Texas's silence on the subject at the time of the PSD SIP action means that Texas did not, at that time, view itself as obligated to apply PSD to each pollutant.[79]

In particular, Texas's recent statement that the CAA PSD provisions are clear by their terms, as a matter of *Chevron* step 1, that they do not apply to non-NAAQS pollutants, suggests that Texas would have viewed the CAA PSD provisions the same way at the time Texas submitted its PSD program. As noted earlier, the Texas Attorney General and the Chairman of the Texas Commission on Environmental Quality, who are the joint signatories of Texas's 60-day letter, are of the view that "[t]he only sensible interpretation of the Clean Act" is that PSD applies only to NAAQS pollutants, and not non-NAAQS pollutants. Texas 60-day letter, p. 4. Texas has confirmed its reading—and clarified that it is based on a *Chevron* step 1 interpretation—in filings before the D.C. Circuit. The fact that these high state officials view this reading of the CAA as, again, "[t]he only sensible reading," indicates that in the past, Texas is less likely to have adopted the opposite reading, which would be that the CAA mandates that PSD applies to non-NAAQS pollutants. Statutory provisions whose meaning is clear on their face, at least to a particular reader, would not be expected to have had a different or uncertain meaning to that same reader at an earlier point in time. By the same token, Texas's insistence, noted previously, that it does not have the intention or authority to apply PSD to one non-NAAQS in particular, GHGs, suggests that Texas could well have expressed the same view, had the issue arisen, at the time EPA approved Texas's PSD program.

We further note that Texas itself appears to take the position that an agency's present interpretation of its regulations should be presumed to have been the agency's past interpretation of those regulations, so that Texas's current interpretation that its PSD program does not apply to at least one non-NAAQS, GHGs, should be presumed to be Texas's interpretation of its PSD program in the past, including at the time Texas submitted its program as a SIP revision to EPA and EPA approved it. Specifically, in its 60-day letter, Texas noted that in the Tailoring Rule, EPA asked states to consider whether their SIPs that include the term "subject to regulation" can be interpreted to incorporate the Tailoring Rule thresholds on grounds that the state interprets that term as being sufficiently open-ended.
75 FR 51,581/2. Texas stated,

> In the Tailoring Rule you have asked TCEQ to report to you by August 2, 2010, whether it would "interpret" the undefined phrase "subject to regulation" in TCEQ Rule 116.12 consistent with the newly promulgated definition in EPA Rule 51.166, in all its specifics and particulars. That is, you have effectively requested that Texas agree to regulate greenhouse gases in the exact manner and method proscribed by the EPA.
>
> In other words, you have asked Texas to agree that when it promulgated its air quality permitting program rules for pollutants "subject to regulation" in 1993, that Texas really meant to define the term "subject to regulation" as set forth in the dozens of paragraphs and subparagraphs of EPA Rule 51.166, first promulgated in 2010.

Texas 60-day letter, p. 3. In these statements, Texas appears to reveal Texas's own understanding of the circumstances under which Texas can be said to give the term "subject to regulation" a particular interpretation, and that is if Texas interpreted that term that same way at the time that Texas first promulgated the term in 1993. By that same logic, Texas's position, as stated in its 60-day letter, that it "has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions" would have applied to "its laws"—including the SIP PSD requirements—at the time that Texas adopted those rules. Therefore, it seems reasonable to conclude that just as Texas does not currently view its PSD program as applying to all newly regulated non-NAAQS pollutants, Texas did not, at the time it submitted and EPA approved its PSD program, view its PSD program as applying to all newly regulated non-NAAQS pollutants.

By the same token, Texas's recent statements also confirm that the assurances Texas provided in its 1989 Texas PSD Commitments Letter cannot be interpreted as having committed Texas to apply PSD to all pollutants newly subject to regulation, including non-NAAQS pollutants. The assurances, by their terms, were phrased generally and did not address the application of PSD to such pollutants; and EPA, in the preamble for the final approval of Texas's PSD SIP, indicated that the scope and binding impact of the assurances were limited.[80] Texas's recent direct statements that PSD does not cover non-NAAQS pollutants indicates that the generally phrased assurances in the letter, whatever they meant, did not mean that Texas would apply PSD to each newly regulated pollutant, including non-NAAQS pollutants.

As a result, it stands to reason that at the time Texas submitted its PSD program, Texas did not view the CAA as mandating the application of PSD to at least certain pollutants newly subject to regulation, non-NAAQS pollutants. But at a minimum, it can be said that Texas's PSD program contained a gap: EPA required that PSD apply to each pollutant newly subject to regulation, including non-NAAQS pollutants; Texas's program applied only to pollutants already subject to regulation at the time Texas adopted its program, not to subsequently regulated pollutants, including non-NAAQS; and Texas did not address its program's applicability to such pollutants, including how or when its program would do so. This gap is significant because it facilitates Texas's current position, with which EPA disagrees, that PSD does not apply to non-NAAQS pollutants.

(ii). Gap Concerning Assurances of Adequate Legal Authority

Texas's recent statement that it does not have the authority to apply PSD to GHG-emitting sources also highlights that Texas's PSD program had a gap in its failure to provide "necessary assurances" of adequate legal authority to carry out the PSD program. Although Texas's letter described obstacles to applying PSD to GHG-emitting sources without first adopting a SIP revision, and did not describe obstacles that precluded Texas from adopting a SIP revision if it chose to do so, Texas's direct statement that it does not have authority to apply PSD to GHGs at least casts doubt on whether Texas has such authority under any circumstances. Moreover, Texas has never indicated that there has been a recent change that places new limits on its legal authority to carry out the CAA.

Accordingly, it is possible that at the time that Texas submitted its PSD program, Texas considered itself under limits in its legal authority to apply PSD to each non-NAAQS pollutant. At a minimum, in light of Texas's recent statement that it does not have authority to apply PSD to at least one newly regulated, non-NAAQS, GHGs, it is apparent that at the time that Texas submitted its PSD program, Texas did not provide the "necessary assurances" that it "will have adequate * * * authority under State * * * law to carry out such implementation plan (*and is*

[79] By the same token, we see nothing in these recent statements to indicate that Texas views itself as rescinding any pre-existing understanding that it would apply PSD to each such pollutant.

[80] 57 FR at 28095/2, 28096/1.

*not prohibited by any provision of * * * State law from carrying out such implementation plan or portion thereof*)." CAA section 110(a)(2)(E)(i) (emphasis added). "[C]arrying out such implementation plan" includes meeting all CAA requirements applicable to the plan and, in the case of a PSD SIP program, that includes applying PSD to each pollutant newly subject to regulation, including non-NAAQS pollutants.

2. Flaws in PSD Program

The Texas PSD program's gaps—which are, again, that Texas did not address the applicability of PSD to all pollutants newly subject to regulation, including non-NAAQS pollutants; and Texas did not provide assurances of adequate legal authority to do so—mean that the state's PSD program has flaws. These flaws were present at the time that EPA approved Texas's PSD program. Moreover, these flaws are significant. They have figured prominently into the present situation in which EPA takes the position that Texas is obligated under the CAA and EPA regulations to apply its PSD program to a newly regulated pollutant—GHGs—but Texas takes the opposite position.

3. EPA's Error in Approving Texas's PSD Program

In this rulemaking, EPA is "determin[ing]" that EPA's action fully approving Texas's PSD program was "in error" within the meaning of CAA section 110(k)(6). This section contains EPA's basis for that determination.

a. CAA Section 110(k)(6) Error Correction

Under the familiar *Chevron* two-step framework for interpreting administrative statutes, an agency must, under *Chevron* step 1, determine whether "Congress has directly spoken to the precise question at issue." If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." However, under *Chevron* step 2, if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837, 842–43 (1984).

As noted previously, the term "error" in CAA section 110(k)(6) is not defined and, as a result, should be given its ordinary, everyday meaning. The dictionary definition of "error" is "a mistake" or "the state or condition of being wrong in conduct or judgment," *Oxford American College Dictionary* 467 (2d ed. 2007); or "(1) an act, assertion, or belief that unintentionally deviates from what is correct, right or true (2) the state of having false knowledge * * * (4) a mistake * * *." *Webster's II New Riverside University Dictionary* 442 (Houghton Mifflin Co. 1988). These definitions are broad, and include all unintentional, incorrect or wrong actions or mistakes.

Moreover, CAA section 110(k)(6) authorizes EPA to "determine[]" that its action was in error, and does not direct or constrain that determination in any manner. That is, the provision does not identify any factors that EPA must, or may not, consider in making the determination. This further indicates that this provision confers broad discretion upon EPA.

b. Gaps in Texas PSD Program

As previously discussed, the Texas SIP PSD program was flawed because it contained gaps: Texas did not address the applicability of PSD to all pollutants newly subject to regulation, including non-NAAQS pollutants; and Texas did not provide assurances of adequate legal authority to do so. EPA did not address these gaps in its action on Texas SIP PSD program and instead, EPA fully approved the PSD program.

Therefore, EPA's action in fully approving Texas's SIP PSD program in the face of these flaws was "in error" under CAA section 110(k)(6), in accordance with *Chevron* step 1. "[E]rror" should be defined broadly to include any mistake, and approval of a flawed SIP is a mistake. Moreover, this flaw is significant because it affects the applicability of the PSD program to a pollutant and, as a result, to an entire set of sources.

Even if the term "error" is not considered unambiguously to encompass, under *Chevron* step 1, the mistake that EPA made in approving the Texas PSD SIP, and instead is considered ambiguous on this question, then under *Chevron* step 2 EPA has sufficient discretion to determine that its approval action meets the definition of "error." That is, under CAA section 110(k)(6), the breadth of the term "error" and of the authorization for EPA to "determine[]" when it made an error, mean that EPA has sufficient discretion to identify the gaps in Texas's PSD program as flawed and to identify EPA's action in approving Texas's PSD SIP in the face of those flaws as an error.

c. Alternative Basis for Error Correction

As explained previously, we view Texas's recent statements that the CAA does not apply to non-NAAQS pollutants and that Texas has neither the authority nor the intention to apply PSD to GHGs as an indication that at the time Texas submitted its PSD program, Texas did not address the applicability its program to pollutants newly subject to regulation or provide assurances that it legal authority to do so. Absent specific evidence to the contrary, we are not inclined to conclude that at the time EPA approved the Texas PSD program in 1992, Texas in fact had filled those gaps—by, for example, providing assurances that it would apply PSD to each newly regulated non-NAAQS pollutants and had the legal authority to do so—but that more recently, Texas has failed to comply with those assurances. The CAA is based on a partnership between the states and the federal government, and we think it more consonant with the principles of that partnership to interpret the evidence as indicating that Texas never addressed the gap or provided the requisite assurances.

However, in the alternative, if one were to conclude that during the course of Texas's submittal of, and EPA's action on, the state's PSD program, Texas did in fact provide the requisite assurances—in particular, that the 1989 Texas PSD Commitment Letter provided adequate assurances that Texas would apply PSD to pollutants newly subject to regulation, including non-NAAQS—so that no gaps in Texas's PSD program existed at that time, then Texas's recent statements would amount to failing to comply with, or even rescinding, those assurances. Under these circumstances, EPA would still consider its previous approval of Texas's PSD SIP to have been in error. This is because if one assumes that Texas provided the appropriate assurances, then one should also assume that EPA's approval would have been based on those assurances. In fact, EPA stated in approving the Texas PSD program that EPA was relying on the Commitments Letter. Rescinding or failing to comply with those assurances—if that is what Texas is considered to have done—would eliminate the basis for EPA's approval. *Compare* CAA section 110(k)(4) (authorizing EPA to approve a SIP revision based on a commitment by the state to adopt certain measures by a date certain, but if the state does not do so, then the conditional approval is treated as a disapproval).

B. Error Correction: Conversion of Previous Approval to Partial Approval and Partial Disapproval

Under CAA section 110(k)(6), once EPA determines that its previous action approving a SIP revision was in error, EPA "may * * * revise such action as

appropriate without requiring any further submission from the State. * * *" Under this provision, EPA may revise its previous full approval of Texas's PSD program as appropriate, without requiring any submission from Texas.

This provision offers EPA a great deal of discretion in revising its previous action. Indeed, the use of the term "may" means that this provision simply authorizes, and does not require, EPA to revise its previous action even after EPA has determined the error, and that, in turn, implies that EPA has discretion in determining how to revise its previous action. Moreover, if EPA does decide to revise its previous action, EPA may do so in any way that is "appropriate." The term "appropriate" offers EPA significant latitude in deciding what type of revision to do.

Here, EPA is revising its previous full approval of Texas's PSD program to be a partial approval and a partial disapproval. Specifically, EPA is retaining the approval of Texas's PSD program to the extent of the pollutants that the PSD program already does cover. This amounts to a partial approval. In addition, EPA is disapproving the Texas PSD program because it has not provided assurances that its PSD program will apply to each pollutant newly subject to regulation, including non-NAAQS pollutants, and because it has not provided assurances of adequate legal authority to do so.

C. Reconsideration Under CAA Section 301, Other CAA Provisions, and Case Law

As an alternative to the error correction provision of CAA section 110(k)(6), EPA is using its inherent administrative authority to reconsider its prior approval actions as a basis for revising its previous full approval of the Texas PSD program to a partial approval and partial disapproval. This authority lies in CAA section 301(a), read in conjunction with CAA section 110 and case law holding that an agency has inherent authority to reconsider its prior actions.

As noted earlier, EPA approved the Texas PSD program by notice dated June 24, 1992, 57 FR 28,093, under the authority of CAA section 110(k)(3)–(4). These provisions authorize EPA to approve a SIP submittal "as a whole," "approve [the SIP submittal] in part and disapprove [it] in part," or issue a "conditional approval" of a SIP submittal. CAA section 110(k)(3)–(4). EPA issued a full approval under CAA section 110(k)(3).

In its approval action under that provision, EPA retained inherent authority to revise that action. The courts have found that an administrative agency has the inherent authority to reconsider its decisions, unless Congress specifically proscribes the agency's discretion to do so. *See, e.g., Gun South, Inc.* v. *Brady,* 877 F.2d 858, 862 (11th Cir. 1989) (holding that agencies have implied authority to reconsider and rectify errors even though the applicable statute and regulations do not provide expressly for such reconsideration); *Trujillo* v. *General Electric Co.,* 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider").

Section 301(a) of the CAA, read in conjunction with CAA section 110(k)(3) and the case law just described, provides statutory authority for EPA's reconsideration action in this rulemaking. Section 301(a) authorizes EPA "to prescribe such regulations as are necessary to carry out [EPA's] functions" under the CAA. Reconsidering prior rulemakings, when necessary, is part of "[EPA's] functions" under the CAA—in light of EPA's inherent authority as recognized under the case law to do so—and as a result, CAA section 301(a) confers authority upon EPA to undertake this rulemaking.

EPA finds further support for its authority to narrow its approval in APA section 553(e), which requires EPA to give interested persons "the right to petition for the issuance, amendment, or repeal of a rule;" and CAA section 307(b)(1), which expressly contemplates that persons may file a petition for reconsideration under certain circumstances (at the same time that a rule is under judicial review). These authorizations for other persons to petition EPA to amend or repeal a rule suggest that EPA has inherent authority, on its own, to issue such amendment or repeal. This is because EPA may grant a petition from another person for an amendment to or repeal of a rule only if justified under the CAA, and if such an amendment or repeal is justified under the CAA, then EPA should be considered as having inherent authority to initiate the process on its own, even without a petition from another person.

EPA recently used its authority to reconsider prior actions and limit its prior approval of a SIP in connection with California conformity SIPs. *See, e.g.,* 68 FR 15720, 15723 (discussing prior action taken to limit approvals); 67 FR 69139 (taking final action to amend prior approvals to limit their duration); 67 FR 46618 (proposing to amend prior approvals to limit their duration, based on CAA sections 110(k) and 301(a)). EPA had previously approved SIPs with emissions budgets based on a mobile source model that was current at the time of EPA's approval. Later, EPA updated the mobile source model. But, even though the model had been updated, emissions budgets would continue to be based on the older, previously approved model in the SIPs, rather than the updated model. To rectify this problem, EPA conducted a rulemaking that revised the previous SIP approvals so that the approvals of the emissions budgets would expire early, when the new ones were submitted by states and found adequate, rather than when a SIP revision was approved. This helped California more quickly adjust its regulations to incorporate the newer model. In this rule, EPA is using its authority to reconsider and limit its prior approval of SIPs generally in the same manner as it did in connection with California conformity SIPs.

EPA is relying, in the alternative, on this inherent authority to convert its previous approval of Texas's PSD program to a partial approval and partial disapproval for the same reasons discussed previously in connection with the "error" correction provision of CAA section 110(k)(6). That is, EPA approved Texas's PSD program even though that program had significant flaws because Texas did not provide the requisite assurances that it would apply PSD to all pollutants newly subject to regulation, including non-NAAQS, and that Texas had adequate legal authority to do so.

EPA's inherent authority to reconsider its previous action also supports revising its previous action in the same manner, and for the same reasons, as under CAA section 110(k)(6), as described earlier. That is, in light of the flaws in the Texas PSD program, EPA is revising EPA's previous full approval to be a partial approval (to the extent of the pollutants regulated under the CAA that are subject to Texas's PSD program) and a partial disapproval (to the extent Texas's program does not provide assurances that it will apply to pollutants newly subject to regulation, including non-NAAQS pollutants).

D. Relationship of This Action to GHG PSD SIP Call

As noted previously, EPA has recently taken another action concerning Texas's PSD program as that program relates to GHGs: the GHG PSD SIP call, which we published by notice dated December 13, 2010, 75 FR 77698 (December 13, 2010). This section describes the relationship of this error-correction/partial-

disapproval/FIP action to the SIP call. For convenience, the background for the SIP call, although described in detail earlier in this preamble, is reiterated here.

EPA promulgated the SIP call under CAA section 110(k)(5), which provides:

> Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to * * * comply with any requirement of [the CAA], the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator * * * may establish reasonable deadlines (not to exceed 18 months after [notifying the state of the inadequacies] for the submission of such plan revisions.

In the SIP call, EPA made a finding that the PSD SIPs of each of 13 states, including Texas, do not apply to GHG-emitting sources and therefore are "substantially inadequate to * * * comply with [the PSD applicability] requirement[s]" of the CAA. Accordingly, EPA required each state, including Texas, to submit a corrective SIP revision. EPA established a deadline for the SIP submittal for each state as 12 months from the date of the SIP call, or December 1, 2011, unless the state indicated in its 30-day letter that it did not object to an earlier deadline. Each state for which EPA would finalize the SIP call submitted a 30-day letter, and each, except for Texas, indicated a date sooner than December 1, 2011. Texas did not indicate any particular date and, as a result, EPA established December 1, 2011 as Texas's deadline. In addition, EPA stated that if Texas or any of the other states failed to submit its corrective SIP revision by its deadline, EPA intended to promulgate a FIP immediately thereafter.

The timing of the SIP call—both the time that EPA promulgated the SIP call and the deadlines it established for SIP submittal—was driven by the fact that the affected states did not have authority to issue PSD permits to GHG-emitting sources and as a result, those sources could face delays in construction and modification when they became subject to PSD as early as January 2, 2011. EPA designed the SIP call to maximize the opportunity of each affected state to assure that its sources would have a permitting authority available as of that date or a later date, if the state concluded that a later date would not leave its sources facing delays. EPA did so by allowing each state flexibility for its SIP submittal deadline.

Each of the affected states except Texas responded with a plan that would assure that its sources would not confront permitting delays. Most states—seven of the 13—indicated they would not object to EPA's establishing a SIP submittal date of December 22, 2010, recognizing that as a practical matter, that meant that EPA would promulgate a FIP on December 23, 2010. The other five states indicated a later date, and again, one indicated a date as late as July 1, 2011. This means that purely as a legal matter, there will be no permitting authority in place in those states to issue GHG permits on January 2, 2011, when GHG-emitting sources become subject to PSD. Even so, the later dates were acceptable to each of the five states because (i) they intended to submit a SIP revision by their date, and (ii) they did not expect the lack of a permitting authority during the period before their deadline to place their sources at risk for delays in construction or expansion.

Texas responded differently than the other states. In its 30-day letter, Texas did not indicate a particular date for its SIP submittal, and as a result, EPA, as we had proposed, established Texas's deadline at December 1, 2011. But shortly before submitting its 30-day letter, Texas stated, in its 60-day letter, that "Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emission."[81] Texas has never qualified this statement, and as a result, EPA reads this statement to indicate that Texas does not intend to submit a SIP revision as required under the SIP call.

This means that a permitting authority for GHG-emitting sources would not be in place until EPA promulgated a FIP, no earlier than December 2, 2011. Importantly, Texas has indicated that this one-year delay in the availability of a permitting authority would, in fact, mean that under EPA's interpretation of the CAA, Texas's sources would face delays in constructing and modifying.[82] Moreover, Texas indicated that during 2011, some 167 construction or modification projects would be affected,[83] which are significantly more sources than any other state.

Moreover, Texas's indication that it does not intend to submit a SIP revision, and that it does not consider its PSD program as being required to apply to non-NAAQS pollutants, including GHGs, have cast a spotlight on underlying flaws in Texas's fully approved PSD SIP, and that, in turn, has brought into play the error-correction provision in CAA section 110(k)(6). All this is discussed in detail earlier in this preamble, but to reiterate for convenience: CAA section 110(k)(6) provides, "Whenever the Administrator determines that the Administrator's action approving * * * any [SIP] * * * was in error, the Administrator may * * * revise such action as appropriate.* * *" Here, the Texas SIP was flawed at the time EPA approved it because it did not address, or assure adequate legal authority for, application of the PSD program to pollutants newly subject to regulation, including non-NAAQS pollutants. As a result, EPA has the authority to determine that its full approval of the SIP was "in error" and to convert that action to a partial approval/partial disapproval; and as a result of that, EPA is authorized to promulgate a FIP immediately.

This is an important reason why EPA is proceeding with this error-correction/partial-disapproval rulemaking at this time. By allowing EPA to implement a FIP immediately, instead of waiting until December, 2011; EPA may act as the permitting authority in Texas beginning January 2, 2011, and in that capacity, allow Texas sources to avoid delays in construction or modification.

With the present rulemaking, EPA has both (i) promulgated a SIP call and established a SIP deadline of December 1, 2011 for Texas, under CAA section 110(k)(5); and (ii) corrected its error in previous fully approving Texas's PSD program by converting that action to a partial approval and partial disapproval, under CAA section 110(k)(6), and then promulgating a FIP immediately under CAA section 110(c)(1)(B). For the reasons just discussed, each of these actions is fully justified under the applicable CAA provisions.

Moreover, there is no preclusion against taking both of these actions with respect to Texas at this time, for the following reasons: First, the two actions are based on CAA provisions—CAA section 110(k)(5) (SIP call), and section 110(k)(6) (error correction)—that overlap, so that it is to be expected that circumstances may arise in which both apply. If EPA approves a flawed SIP, then circumstances could well arise under which EPA has a basis for concluding both that (i) the SIP is "substantially inadequate" to meet a CAA requirement, under CAA section 110(k)(5); and (ii) EPA's action in approving the SIP was "in error," under CAA section 110(k)(6). The same flaw in

[81] Texas's 60-day letter, p. 1.

[82] Texas 30-day letter, at 5, 6; Texas "Motion to Stay Three GHG Actions" 40–41, *Coalition for Responsible Regulation* v. *EPA,* No. 09–1322 (and consolidated cases).

[83] *See* Texas "Motion to Stay Three GHG Actions" 41, *Coalition for Responsible Regulation* v. *EPA,* No. 09–1322 (and consolidated cases).

the SIP would be the basis for each of those actions.[84]

This is case with EPA's two actions concerning Texas. As EPA stated in the SIP call, the basis for the finding of "substantial inadequacy" was the failure of Texas's approved SIP PSD program to apply to GHGs, which was rooted in the program's failure to apply pollutants newly subject to regulation. As EPA stated earlier in this preamble, the basis for the determination that EPA's previous full approval of Texas's SIP was "in error" was the gap in the SIP due to the SIP's failure to address, or assure that it has adequate legal authority for, the application to pollutants newly subject to regulation.[85]

Second, each provision, by its terms, is discretionary to EPA, and neither provision precludes the application of the other. CAA section 110(k)(5) applies "[w]henever the Administrator finds" that the SIP is substantially inadequate. CAA section 110(k)(6) applies "[w]henever the Administrator determines" that her previous action was in error. Neither provision references the other. Neither provision includes any requirement or limitation that constrains the application of the other at any time.

Third, each provision serves a different purpose and when applied to this case—including in conjunction with the FIP provision in CAA section 110(c)(1)—leads to a different outcome, but each outcome is neither dependent on, or compromised by, the other outcome. CAA section 110(k)(5), as applied in the current case, is focused on a present problem with the SIP, that is, a "substantial [ ] inadequacy" that presently exists. This provision mandates that EPA require a corrective SIP revision to address that inadequacy, but further provides that EPA must allow a reasonable deadline for the state to submit the SIP revision. In the GHG PSD SIP call, EPA allowed states to, in effect, choose within a range of deadlines. But if the state fails to submit the required SIP revision by its deadline, then EPA is required to promulgate a FIP under CAA section 110(c)(1)(A). CAA section 110(k)(6), as it applies in the current case, is focused on a past problem with SIP, that is, a flaw that existed at the time EPA approved the SIP, so that EPA's approval was "in error." This provision authorizes EPA to convert the approval to a disapproval, but does not mandate that the State submit a new SIP revision. This is because the state has already submitted a SIP revision, the one that is flawed, and EPA has acted on it. Instead, EPA is required to promulgate a FIP under CAA section 110(c)(1)(B), and EPA may do so immediately.

Viewing the two provisions as applied here together: (i) CAA section 110(k)(5) allows EPA to exercise its discretion to make a finding that Texas's SIP is "substantially inadequate," and then to establish a SIP submittal schedule for Texas, one that is consistent with whatever choice as to deadline Texas had available to it; and (ii) CAA section 110(k)(6) allows EPA to exercise its discretion to convert its previous approval of Texas's SIP, which EPA made "in error," to a disapproval, and then to promulgate a FIP immediately. The requirement that Texas submit a corrective SIP revision and do so by a date certain—a date that Texas exercised some control over—serves the useful function of establishing a mechanism and a timeframe for Texas to address the substantial inadequacy in its PSD SIP.[86] The immediate promulgation of a FIP serves the useful purpose of assuring the availability of a permitting authority as of January 2, 2011, so that Texas sources will not face delays in their plans to construct or modify. Importantly, the immediate promulgation of a FIP through this rulemaking does not compromise in any manner the SIP submittal deadline established for Texas through the SIP call. After EPA's promulgation of the FIP, Texas remains obligated to submit the corrective SIP revision by December 1, 2011. As soon as Texas does submit that SIP revision and EPA approves it, EPA will rescind the FIP. It is always the case that when EPA has promulgated a FIP of any type in a particular state, the state remains obligated to adopt a SIP revision. Nothing about a FIP impedes the state from doing so; and when the state does so and EPA approves the SIP revision, then EPA rescinds the FIP.

It is true that one of the purposes of the SIP call, as applied here, is to allow states to in effect select an early FIP—by selecting an early SIP submittal date and then not submitting a SIP by that date—so as to assure the availability of a permitting authority for their sources by that early date. And it is further true that Texas, in its 30-day letter, chose not to select such an early date and, on the contrary, stated its opposition to a FIP; yet, in this present rulemaking, EPA is promulgating an immediate FIP for Texas. But this does not mean that the present rulemaking has compromised the SIP call or any choices made available to Texas in the SIP call. The focus of the SIP call, as it related to Texas, was the finding of a substantial inadequacy in Texas's PSD program, the imposition of a requirement for Texas to submit a corrective SIP revision, and—based on Texas's choice—the establishment of a deadline of December 1, 2011 for Texas to do so. The promulgation of an immediate FIP through the present rulemaking does not disturb that. Texas remains subject to the December 1, 2011, SIP submittal schedule that EPA established for it, based on Texas's decision not to respond directly to EPA's request that Texas itself identify a deadline.[87] Texas's expressed opposition to a FIP does not preclude EPA from imposing one as justified through the present rulemaking.

It is also true that, as EPA stated in the SIP call, "federalism principles * * * underlie the SIP call process and the SIP system as a whole," and that means that "in the first instance, it is to the state to whom falls the responsibility of developing pollution controls through an implementation plan." 75 FR 77710/2. And it is further true that the immediate promulgation of a FIP through the present error-correction action means that a FIP will be in place in Texas before the December 1, 2011 deadline established under the SIP call for Texas to adopt its SIP. However, imposition of the FIP is fully justified under this error-correction action, as discussed previously, and is essential to assure that Texas sources will not face delays

[84] In contrast, situations could also arise in which EPA has a basis for imposing a SIP call but not issuing an error correction because the SIP currently has a substantial inadequacy but was not flawed at the time of its submittal and approval.

[85] In this case, the substantial inadequacy for which EPA issued the SIP call, which was the PSD program's failure to apply to GHGs, is narrower than the flaw in the SIP for which EPA is issuing the error correction, which is the PSD program's failure to address, or assure legal authority for, application of PSD to all pollutants newly subject to regulation. In another case, it is conceivable that the opposite would be true, that the substantial inadequacy would be broader than the flaw in the SIP for which EPA issues the error correction. In that case, if EPA imposed a FIP after the deadline for SIP submittal related to the SIP call, the FIP would be broader than the FIP imposed after the disapproval related to the error correction.

[86] We recognize that Texas has indicated that it does not intend to submit a SIP revision, but this does not eliminate the utility of establishing a SIP submittal schedule.

[87] In any event, to conclude that the promulgation of a FIP under this error-correction rulemaking compromised the SIP call rulemaking would be tantamount to concluding that the SIP call should somehow take priority over this error correction. There would be no basis for taking that position. Each action is fully justifiable in its own right. The process of completing one before the other does not give the first one a priority simply because it is first any more than that process would give the second a priority because the latter is more recent.

in construction or modification, a risk that Texas acknowledges will occur under EPA's interpretation of the applicable CAA requirements. In any event, Texas's statement that "Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emission," [88] as we read it, is tantamount to a direct statement that it does not intend to submit a GHG PSD SIP revision, and is a direct statement that it does not intend to require its sources to obtain permits for their GHG emissions. Accordingly, it is difficult to see how it could meaningfully be claimed that an early FIP, promulgated through this rulemaking, could displace any prerogatives Texas may have under the SIP call to develop its own SIP revision before the imposition of a FIP or to exercise control over the permitting of GHG emissions of its sources. Similarly, Texas has stated that it does not believe that EPA's FIP will be effective because, according to Texas, EPA will be unable to issue permits for a lengthy period due to uncertain over how to apply PSD requirements to GHG-emitting sources.[89] Accordingly, it is difficult to see how it could meaningfully be claimed that a FIP, which Texas considers ineffective, could adversely affect Texas's interests.

It is also true that under the principles of federalism that underlie the SIP system, states exercise some discretion over controls for their industry, so that a state may impose more stringent controls than minimum CAA requirements. CAA section 116. But this discretion does not mean that Texas is authorized to create the circumstances under which its sources face delays in constructing or modifying and EPA is precluded from promulgating a FIP—when justified under this rulemaking—for the purpose of protecting those sources against such delays. Absent this action, Texas sources would face delays in construction and modification resulting from Texas's decision during the course of the SIP call to neither adopt a SIP promptly nor facilitate an early FIP. Those delays do not result from Texas's decision to impose more stringent controls than the CAA requires. On the contrary, Texas's action is inconsistent with one of the purposes of the PSD provisions, which is "to insure that economic growth will occur in a manner consistent with the preservation of clean air resources." CAA section 160(3). EPA is justified in interpreting and applying CAA section 110(k)(6) to correct errors related to Texas's SIP PSD program in order to effectuate this purpose of PSD. The D.C. Circuit has held that the terms of the PSD provisions should be interpreted with the PSD purposes in mind, *New York* v. *EPA,* 413 F.3d 3, 23 (DC Cir.), *rehearing en banc den.,* 431 F.3d 801 (2005), and the same should be true of CAA section 110(k)(5) as applied to PSD requirements.

E. Relationship of This Rulemaking to Other States

EPA is not, at this time, undertaking a similar error-correction rulemaking for any of the other states that are subject to the SIP call. EPA has discretion as to whether and when to undertake such a rulemaking, and each of the other states has chosen a course of action that at present appears to assure that its large GHG-emitting sources will have a permitting authority available when the sources need one, and therefore will not face delays in constructing or modifying. As a result, EPA has not inquired into whether any of these other states have flaws in their SIP PSD programs as Texas does.

V. Federal Implementation Plan

A. Authority To Promulgate a FIP

In this rulemaking, EPA is promulgating a FIP to apply EPA's PSD regulatory program to GHG-emitting sources in Texas and to commit to take action as appropriate with respect to pollutants that become newly subject to regulation.

The CAA authority for EPA to promulgate a FIP is found in CAA section 110(c)(1), which provides—

> The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator * * * (B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such [FIP].

As indicated earlier in this notice, EPA is partially disapproving Texas's PSD program by correcting EPA's previous full approval to be a partial approval and disapproval. Accordingly, under CAA section 110(c)(1)(B), EPA is required to promulgate a PSD FIP for Texas.

The FIP must be designed to address the flaws in Texas's PSD program. As discussed earlier in this preamble, the Texas PSD program contains significant gaps: It does not address, or provide assurances of adequate legal authority for, application to pollutants newly subject to regulation, including non-NAAQS pollutants. As a practical matter, at present, the only pollutant the program does not address is GHGs. Accordingly, the FIP applies the EPA regulatory PSD program to GHGs. In addition, the FIP commits to address pollutants that become newly subject to regulation, as appropriate.

B. Timing of FIP

EPA is promulgating the FIP in this rulemaking, so that it takes effect immediately upon the partial disapproval. This timing for FIP promulgation is authorized under CAA section 110(c)(1), which authorizes us to promulgate a FIP "at any time within 2 years after" EPA disapproves a SIP submission in whole or in part. The quoted phrase, by its terms, establishes a two-year period within which EPA must promulgate the FIP, and provides no further constraints on timing. Accordingly, this provision gives EPA discretion to promulgate the FIP at any point in time within that two-year period, and in this rulemaking, EPA is promulgating the FIP immediately.

The reason why we are exercising our discretion to promulgate the FIP immediately is to minimize any period of time during which larger-emitting sources in Texas may be under an obligation to obtain PSD permits for their GHGs when they construct or modify, but no permitting authority is authorized to issue those permits. We believe that acting immediately is in the best interests of the regulated community. Note that for similar reasons, in EPA's recently promulgated SIP call, EPA stated that if a state failed to submit its required SIP revision by its deadline, EPA would immediately make a finding of failure to submit and immediately thereafter promulgate a FIP. 75 FR 53889/2.

The lack of constraints in CAA section 110(c)(1)(B) stands in contrast to other CAA provisions that do impose requirements for the timing of proposals. *See* CAA sections 109(a)(1)(A), 111(b)(1)(B). In light of the lack of constraints, EPA was free to promulgate the FIP concurrently with the disapproval action.

C. Substance of GHG PSD FIP

1. Components of FIP

The FIP consists of two components. The first mirrors the GHG PSD FIP that EPA is promulgating for seven states for which EPA issued the PSD GHG SIP call and, subsequently, issued a finding of failure to submit a required SIP submittal. Thus, this component of the FIP constitutes the EPA regulations found in 40 CFR 52.21, including the

[88] Texas 60-day letter, p. 1.

[89] Texas 30-day letter.

PSD applicability provisions, with a limitation to assure that, strictly for purposes of this rulemaking, the FIP applies only to GHGs. Under the PSD applicability provisions in 40 CFR 52.21(b)(50), the PSD program applies to sources that emit the requisite amounts of any "regulated NSR pollutant[s]," including any air pollutant "subject to regulation." However, Texas's partially approved SIP already applies PSD to other air pollutants. To appropriately limit the scope of the FIP, EPA amends 40 CFR 52.21(b)(50), as incorporated into the Texas FIP, to limit the applicability provision to GHGs.

We adopt this FIP because, as we stated in the proposed GHG PSD FIP—

> It would, to the greatest extent possible, mirror EPA regulations (as well as those of most of the states). In addition, this FIP would readily incorporate the phase-in approach for PSD applicability to GHG sources that EPA has developed in the Tailoring Rule and expects to develop further through additional rulemaking. As explained in the Tailoring Rule, incorporating this phase-in approach—including Steps 1 and 2 of the phase-in as promulgated in the Tailoring Rule—can be most readily accomplished through interpretation of the terms in the definition "regulated NSR pollutant," including the term "subject to regulation."
>
> In accordance with the Tailoring Rule, * * * the FIP would apply in Step 1 of the phase-in approach only to "anyway sources" (that is, sources undertaking construction or modification projects that are required to apply for PSD permits anyway due to their non-GHG emissions and that emit GHGs in the amount of at least 75,000 tpy on a CO_2e basis) and would apply in Step 2 of the phase-in approach to both "anyway sources" and sources that meet the 100,000/75,000-tpy threshold (that is, (i) sources that newly construct and would not be subject to PSD on account of their non-GHG emissions, but that emit GHGs in the amount of at least 100,000 tpy CO_2e, and (ii) existing sources that emit GHGs in the amount of at least 100,000 tpy CO_2e, that undertake modifications that would not trigger PSD on the basis of their non-GHG emissions, but that increase GHGs by at least 75,000 tpy CO_2e).
>
> Under the FIP, with respect to permits for "anyway sources," EPA will be responsible for acting on permit applications for only the GHG portion of the permit, and the state will retain responsibility for the rest of the permit. Likewise, with respect to permits for sources that meet the 100,000/75,000-tpy threshold, our preferred approach—for reasons of consistency—is that EPA will be responsible for acting on permit applications for only the GHG portion of the permit, that the state permitting authorities will be responsible for the non-GHG portion of the permit, and EPA will coordinate with the state permitting authority as needed in order to fully cover any non-GHG emissions that, for example, are subject to BACT because they exceed the significance levels.

75 FR 53889/3 to 53,890/1.

This formulation of the FIP is authorized because it is part of the "appropriate" action EPA is authorized to take as part of EPA's correction of its previous, erroneous full approval, under CAA section 110(k)(6).

The second component of the FIP consists of a commitment that EPA will take such action as is appropriate to ensure that pollutants that become newly subject to regulation are subject to the FIP. If a pollutant becomes newly subject to regulation in the future, and if Texas does not take steps to subject it to its PSD program, then EPA will take the appropriate action.

2. Dual Permitting Authorities

In the GHG PSD FIP proposal, commenters raised concerns about how having EPA issue the GHG portions of a permit while allowing states under a FIP to continue to be responsible for issuing the non-GHG portions of a PSD permit will work in practice. Commenters specifically identified the potential for a source to be faced with conflicting requirements and the need to mediate among permit engineers making BACT decisions.

We well recognize that dividing permitting responsibilities between two authorities—EPA for GHGs and the state for all other pollutants—will require close coordination between the two authorities to avoid duplication, conflicting determinations, and delays. We note that this situation is not without precedent. In many instances, EPA has been the PSD permitting authority but the state has accepted a delegation for parts of the PSD program, so that a source has had to go to both the state and EPA for its permit. In addition, all nonattainment areas in the nation are in attainment or are unclassifiable for at least one pollutant, so that every nonattainment area is also a PSD area. In some of these areas, the state is the permitting authority for nonattainment NSR and EPA is the permitting authority for PSD. As a result, there are instances in which a new or modifying source in such an area has needed a nonattainment NSR permit from the state and a PSD permit from EPA.

EPA is working expeditiously to develop recommended approaches for EPA regions and affected states to use in addressing the shared responsibility of issuing PSD permits for GHG-emitting sources.

In addition, we note that the concern over dual permitting authorities would become moot if Texas were either to submit and EPA approve a SIP revision that applies PSD to GHGs or request a delegation of permitting responsibility. If it did request and receive a delegation, it would be responsible for issuing both the GHG part and the non-GHG part of the permit, and that would moot concerns about split-permitting.

D. Period for GHG PSD FIP To Remain in Place

In the FIP proposal, we stated our intention to leave any promulgated FIP in place for as short a period as possible, and to process any corrective SIP revision submitted by the state to fulfill the requirements of the SIP call as expeditiously as possible. Specifically, we stated:

> After we have promulgated a FIP, it must remain in place until the state submits a SIP revision and we approve that SIP revision. CAA section 110(c)(1). Under the present circumstances, we will act on a SIP revision to apply the PSD program to GHG sources as quickly as possible. Upon request of the state, we will parallel-process the SIP submittal. That is, if the state submits to us the draft SIP submittal for which the state intends to hold a hearing, we will propose the draft SIP submittal for approval and open a comment period during the same time as the state hearing. If the SIP submittal that the state ultimately submits to us is substantially similar to the draft SIP submittal, we will proceed to take final action without a further proposal or comment period. If we approve such a SIP revision, we will at the same time rescind the FIP.

75 FR 53889/2–3.

We continue to have these same intentions. Thus, we reaffirm our intention to leave the GHG PSD FIP in place only as long as is necessary for the state to submit and for EPA to approve a SIP revision that includes PSD permitting for GHG-emitting sources. As discussed in more detail later in this preamble, EPA continues to believe that the states should remain the primary permitting authority.

Specifically, EPA will rescind the FIP, in full or in part, if (i) Texas submits, and EPA approves, a SIP revision to apply Texas's PSD program to GHG-emitting sources, (ii) Texas provides assurances that in the future, it will apply its PSD program to all pollutants newly subject to regulation, including non-NAAQS pollutants, and (iii) Texas provides "necessary assurances" under CAA section 110(a)(2)(E)(ii) that it "will have adequate * * * authority under State law" to apply its PSD program to such pollutants.

E. Primacy of Texas's SIP process

This action to partially approve and partially disapprove Texas's SIP PSD

program and to promulgate a FIP is secondary to our overarching goal, which is to assure that it will be Texas that will be the permitting authority. EPA continues to recognize that Texas is best suited to the task of permitting because the state and its sources have experience working together in the state PSD program to process permit applications. EPA seeks to remain solely in its primary role of providing guidance and acting as a resource for Texas as it makes the various required permitting decisions for GHG emissions.

Accordingly, we are prepared to work closely with Texas to help it promptly develop and submit to us a SIP revision that extends its PSD program to GHG-emitting sources and that assures that the program will apply to each pollutant newly subject to regulation in the future. If Texas submits such a SIP revision, we intend to promptly act on it, and if we approve it, then we intend to rescind the FIP immediately. Again, EPA's goal is to have in place in Texas the necessary permitting authority by the time businesses seeking construction permits need to have their applications processed and the permits issued—and to achieve that outcome by means of engaging with Texas directly through a concerted process of consultation and support.

EPA is taking up the additional task of partially disapproving Texas's PSD program and promulgating the FIP at this time only because the Agency believes it is compelled to do so by the need to assure businesses, to the maximum extent possible and as promptly as possible, that a permitting authority is available to process PSD permit applications for GHG-emitting sources once they become subject to PSD requirements on January 2, 2011. At the same time, we invite Texas to accept a delegation of authority to implement the FIP, so that it will still be the state that processes the permit applications, albeit operating under federal law.

VI. Interim Final Rule, Good Cause Exception

EPA is issuing this action as an interim final rule. As an interim final rule, this action is time-limited. It will be effective from the date of signature until the earlier of April 30, 2011 or the date that EPA promulgates final rules on its proposals for (i) a partial approval and partial disapproval of Texas's PSD SIP and (ii) a FIP for Texas's PSD program and those final rules take effect.

The present rule is effective upon publication, without first undergoing notice and comment. Under APA section 553, a federal agency generally must provide for public notice and comment prior to finalizing an agency rule. However, this obligation is excused, under APA section 553(b)(3)(B), "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." While the good cause exception is to be narrowly construed, *Utility Solid Waste Activities Group* v. *Environmental Protection Agency,* 236 F.3d 749, 754 (DC Cir. 2001), it is also "an important safety valve to be used where delay would do real harm." *U.S. Steel Corp.* v. *U.S. Environmental Protection Agency,* 595 F.2d 207, 214 (5th Cir. 1979). Notice and comment is impracticable where "an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required." *Utility Solid Waste Activities Group,* 236 F.3d at 754. Notice and comment is contrary to the public interest where "the interest of the public would be defeated by any requirement of advance notice." *Id.* at 755.

Notice and comment here would be contrary to the public interest. As discussed previously, major stationary sources of GHG emissions will be subject to PSD permitting requirements as of January 2, 2011, a date which is rapidly approaching. As of that date, no major stationary source emitting GHG at or above the levels set in the Tailoring Rule will be able to construct or modify without first obtaining a permit for its GHG emissions. In the absence of this rule, such sources will have no permitting authority from which to obtain such a permit. Without a permitting authority in place, sources would be subject to delays in construction or modification, causing economic harm to those sources and to others secondarily affected.

Specifically, the State of Texas has estimated that 167 sources will require GHG permits in 2011.[90] This is a substantial number of entities and the economic harm that they face as a result of permitting delays could affect a substantial number of related entities, employees, shareholders, and the public.

This rule serves the necessary function of ensuring that a permitting authority is available to issue permits for these sources, and thus that large sources in Texas do not face a long delay in their ability to construct or modify. The public interest would certainly be hindered if EPA did not act now to ensure that economic progress is not impeded by a lack of access to an authorized permitting authority.

The good cause exception also applies here because of the impracticability of notice and comment. EPA only recently became aware that no GHG PSD permitting authority would be authorized to issue permits to Texas sources on January 2, 2011, and thus had insufficient time to seek public comment before acting. As discussed previously, Texas submitted its 60-day letter to EPA on August 2, 2010; it submitted its Motion to Stay Three GHG Actions on September 15, 2010; and it submitted its 30-day letter to EPA on October 4, 2010. It was only after having received and analyzed all of these recent documents that it became clear that, due to underlying flaws in the Texas SIP PSD program and to Texas's position regarding amending its SIP or seeking a FIP, all as described earlier, no permitting authority had authority to issue GHG PSD permits as of January 2, 2011, and that there was no other way besides this rulemaking action to ameliorate that situation in a timely manner. The EPA's agency functions would be compromised if it must impose legal obligations on sources when sources have no legal means to fulfill those obligations. In light of the limited time frame and the harmful effects on sources if this action is delayed, notice and comment is impracticable.

In addition, the public has had and will have some opportunity to comment. The public was given the opportunity to comment on some of the issues in this action in response to proposals for the Tailoring Rule and the GHG PSD SIP call. This rule is also only an interim rule; the public will be given full opportunity to comment on the permanent rule that EPA is concurrently proposing, which mirrors this rule. By issuing this rule as an interim final rule, paired with a comment period on the proposal for more permanent action, EPA is providing as much opportunity for notice and comment as possible on the issues presented by this rule, and is striving to replace this rule with a rule encompassing that further comment as soon as is reasonably possible.

For the same reasons cited earlier, EPA finds that there is good cause for this rule to take immediate effect. In addition, since this is not a major rule under the Congressional Review Act, the 60-day delay in effective date

[90] "State Of Texas's Motion for Stay of EPA's Endangerment Finding, Time Rule and Tailpipe Rule," *Coalition for Responsible Regulation* v. *EPA,* No. 09–1322 (and consolidated cases) at 41.

required for major rules under the CRA does not apply.

EPA is taking this action to do an error correction under CAA section 110(k)(6) "in the same manner as [EPA's previous] approval" of the Texas PSD program. The term "in the same manner" is not defined by statute, and it therefore takes on its ordinary, everyday meaning. It is a broad term, and thus undergoing any proper type of rulemaking process should be considered to be "in the same manner" as undergoing a proper rulemaking process of any other type. Both the original approval of Texas's SIP and this action are rulemakings, conducted in accordance with the rulemaking process. It is immaterial that the original approval underwent notice and comment, and this action is subject to the good cause exception, since both of these processes are provided for by the prescribed agency rulemaking process.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The OMB has previously approved the information collection requirements contained in the existing regulations for PSD (*see, e.g.,* 40 CFR 52.21) under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0003. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

This interim final rule is not subject to the Regulatory Flexibility Act (RFA) which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the APA or any other statute. This rule is not subject to notice-and-comment requirements under the APA or any other statute because, although the rule is subject to the APA, the agency has invoked the "good cause" exemption under 5 U.S.C. 553(b); therefore, it is not subject to the notice and comment requirement.

Notwithstanding the previous conclusion, EPA is publishing a proposed rule in this **Federal Register** that mirrors this interim final rule, and the applicability of the RFA is addressed further in that proposed rule.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, 2 U.S.C. 1531–1538) for state, local or tribal governments or the private section. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. With this action, EPA is only revising its previous approval of the Texas PSD SIP to be a partial approval and partial disapproval and promulgating a FIP to address the deficiencies as authorized by the CAA. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This action 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.

E. Executive Order 13132—Federalism

This action does not have federalism implications. It will not have substantial direct effects on Texas, on the relationship between the national government and Texas, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. With this action, EPA is only revising its previous approval of the Texas PSD SIP to be a partial approval and partial disapproval and promulgating a FIP to address the deficiencies as authorized by the CAA. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA is specifically soliciting comment on the proposed rule also published in this **Federal Register** that mirrors this interim final rule.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). In this action, EPA is not addressing any tribal implementation plans. This action is limited to Texas's PSD SIP. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because EPA is only revising its previous approval of the Texas PSD SIP to be a partial approval and partial disapproval and promulgating a FIP to address the deficiencies as authorized by the CAA.

H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. With this action, EPA is only revising its previous approval of the Texas PSD SIP to be a partial approval and partial disapproval and promulgating a FIP to address the deficiencies as authorized by the CAA.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, 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 U.S.

EPA has determined that this interim 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. With this action, EPA is only revising its previous approval of the Texas PSD SIP to be a partial approval and partial disapproval and promulgating a FIP to address the deficiencies as authorized by the CAA.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801, *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary, or contrary to the public interest. This determination must be supported by a brief statement, 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of December 30, 2010. EPA will submit a report containing this rule 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 rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

VIII. Judicial Review

Section 307(b)(1) of the CAA specifies which Federal Courts of Appeal have jurisdiction to hear petitions for review of which final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) When the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

This rule is based on a determination of nationwide scope or effect. Texas's response to the SIP call—including Texas's statements that it does not intend to submit a SIP revision and its decision not to identify a SIP submittal deadline, which have placed its sources at risk for delays in construction or modification—led us to determine that we should examine whether there may be a flaw in Texas's SIP that was present at the time of our approval. We then conducted a closer inquiry and on the basis of that, we are concluding that in fact a flaw was present. As a result, we are authorized to undertake an error correction, as we are doing in this rulemaking. For all other states subject to the SIP call, their response to the SIP call—which did not raise the concerns Texas's did and which assured that their sources would not be at risk for delays in construction or modification—lead us to determine that it was not necessary to examine further whether their SIPs were flawed at the time we approved them. That determination—whether to examine the SIPs further—is a determination of nationwide scope or effect because it affected Texas and the 12 other states subject to the SIP call. Further indication that this determination of nationwide scope or effect is that EPA is making it as part of the complex of rules EPA has promulgated to implement the GHG PSD program for each of the states in the nation. Those rules include (i) the Tailoring Rule and the Johnson Memo Reconsideration, which revise EPA regulations to incorporate the Tailoring Rule thresholds, and which apply in each state that does not have an approved SIP PSD program, and therefore operates under EPA's regulations; (ii) the SIP call, which applies in each state that has an EPA-approved SIP PSD program but does not apply that program to GHG-emitting sources; and (iii) the PSD Narrowing rule, which applies in each state that has an EPA-approved SIP PSD program that does apply to GHG-emitting sources.

Thus, under section 307(b)(1) of the Act, judicial review of this final action is available by filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by February 28, 2011.

IX. Statutory Authority

The statutory authority for this action is provided by sections 101, 110, 114, 116, 160–169, and 301 of the CAA as amended (42 U.S.C. 7401, 7410, 7414, 7416, 7470–7479, and 7601).

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Carbon monoxide, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Incorporation by reference, Intergovernmental relations, Lead, Methane, Nitrogen dioxide, Nitrous oxide, Ozone, Particulate matter, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride, Sulfur oxides, Volatile organic compounds.

Dated: December 23, 2010.

Lisa P. Jackson,

Administrator.

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations 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. Section 52.2303 is amended by adding paragragh (d) to read as follows:

§ 52.2303 Significant deterioration of air quality.

* * * * *

(d)(1) The Texas PSD SIP is partially disapproved as of December 30, 2010 because the Texas PSD SIP fails to apply to pollutants newly subject to regulation, including the pollutant greenhouse gases (GHGs) from stationary sources described in § 52.21(b)(49)(iv).

(2) The requirements of sections 160 through 165 of the Clean Air Act are not met to the extent the plan, as approved, does not apply with respect to emissions of pollutants subject to regulation under the Clean Air Act, including the pollutant GHGs from certain stationary sources as of January 2, 2011. Therefore, from January 2, 2011 through April 30, 2011, the provisions of § 52.21 except paragraph (a)(1) are hereby made a part of the plan for the

pollutant GHGs from stationary sources described in § 52.21(b)(49)(iv). In addition, the United States Environmental Protection Agency shall take such action as is appropriate to assure the application of PSD requirements to any other pollutants that become subject to regulation under the federal Clean Air Act for the first time after January 2, 2011.

(3) For purposes of this section, the "pollutant GHGs" refers to the pollutant GHGs, as described in § 52.21(b)(49)(i).

[FR Doc. 2010–32786 Filed 12–29–10; 8:45 am]

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Thursday,
December 30, 2010

Part III

Department of Commerce

Bureau of Industry and Security

Yuri I. Montgomery, Respondent; Final Decision and Order; Notice

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 08–BIS–0004]

Yuri I. Montgomery, Respondent; Final Decision and Order

This matter is before me upon a Recommended Decision and Order ("RDO") issued by the Administrative Law Judge ("ALJ"), and a settlement proposal subsequently submitted by the parties.

In a charging letter filed on July 1, 2008, the Bureau of Industry and Security ("BIS") alleged that Respondent Yuri I. Montgomery ("Respondent" or "Montgomery") [1] had committed fourteen violations of the Export Administration Regulations (currently codified at 15 CFR parts 730–774 (2010) ("Regulations")), issued pursuant to the Export Administration Act of 1979, as amended (50 U.S.C. app. 2401–2420) (the "EAA" or "Act"),[2] by participating in transactions involving the export or attempted export from the United States of items subject to the Regulations, while knowing that he was subject to a BIS order denying his export privileges. On January 15, 2010, BIS unilaterally withdrew Charge 10, leaving thirteen charges for consideration by the ALJ.

Charges 1–7 of the Charging Letter allege that:

As described in further detail in the attached schedule of violations, which is incorporated herein by reference, on seven occasions between on or about July 2, 2003, and on or about October 8, 2003, Montgomery took actions prohibited by a BIS order denying export privileges under § 766.25 of the Regulations (Denial Order). Specifically, Montgomery carried on negotiations concerning, ordered, bought, sold and/or financed various items exported or to be exported from the United States that are subject to the Regulations, and/or benefited from transactions involving items exported or to be exported from the United States that are subject to the Regulations. At the time Montgomery engaged in the described actions, his export privileges had been denied under the Regulations by a Denial Order dated September 11, 2000, and published in the **Federal Register** on September 22, 2000 (65 FR 57,313). Under the terms of the Denial Order, Montgomery "may not directly or indirectly, participate in any way in any transaction involving any [item] exported or to be exported from the United States, that is subject to the Regulations, or in any other activity subject to the Regulations, including * * * [c]arrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or * * * [b]enefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations." That Denial Order is effective until January 22, 2009, and continued in force at the time of the aforementioned actions taken by Montgomery. In so doing, Montgomery committed seven violations of Section 764.2(k) of the Regulations.

Charges 8–9, and 11–14 allege that Montgomery acted with knowledge of violations of the Denial Order in connection with the items exported or to be exported from the United States to Macedonia, as follows:

As described in further detail in the attached schedule of violations, on seven occasions between on or about July 2, 2003, and or about October 8, 2003, Montgomery carried on negotiations concerning, ordered, bought, sold and on or financed various items subject to the Regulations with knowledge that a violation of an Order issued under the Regulations had occurred, was about to occur, or was intended to occur in connection with the items. Specifically, Montgomery carried on negotiations concerning, ordered, bought, sold and/or financed various items that were exported from the United States to a Macedonian company with knowledge that he was or would be violating a Denial Order imposed against him dated September 11, 2000, and published in the **Federal Register** on September 22, 2000 (65 FR 57,313). Montgomery knew that he was the subject of the Denial Order because, inter alia, he had been provided notice of the Denial Order when it issued in September 2000, and he had on October 24, 2000, written to then-BIS Under Secretary for Export Enforcement Reinsch to request reinstatement of his "export privileges denied on September 11, 2000 * * *." That request for reinstatement had been denied by the Under Secretary on December 21, 2000, and the Denial Order continued in force at the time of aforementioned actions taken by Montgomery. In so doing, Montgomery committed seven violations of § 764.2(e) of the Regulations.

The schedule of violations attached to the Charging Letter provided additional detail as to each of the seven transactions involved, including the dates of the transactions, the items involved and their values, and the consignee.

On October 28, 2010, the ALJ issued an RDO in accordance with § 766.17 of the Regulations. The RDO provides a detailed summary of the procedural background and pre-RDO case activity, including the seven stays or extensions of time sought or stipulated to by Respondent during the course of the litigation below. Montgomery filed his answer to the Charging Letter on April 2, 2009, and pursuant to part 766 of the Regulations was permitted to take discovery during the litigation and to present evidence and rebuttal evidence concerning the charges and the defenses he raised. Because no party had demanded a hearing as provided in § 766.6(c) of the Regulations, the RDO issued on the record by the ALJ in accordance with § 766.6(c) and § 766.15.

The ALJ served the RDO on the parties as required in § 766.17(b)(2). On November 10, 2010, however, the ALJ issued a Supplemental Certificate of Service, stating that the RDO initially served on the Respondent on October 28, 2010, via overnight carrier, had been returned as undeliverable, and that he was attempting service of the RDO a second time. On November 17, 2010, I received a delivery confirmation from the ALJ showing that Respondent received a copy of the RDO on November 11, 2010.

The delivery confirmation that I received on November 17, 2010, demonstrated that the ALJ had fulfilled his obligation under Section 766.17(b)(2) of the Regulations to certify the full record for my review in accordance with Section 766.22. As such, and in the interest of avoiding confusion and ensuring that the parties had the full time allotted to them by the Regulations to make any submissions, I ordered that the deadlines for the parties' various filings be established using the November 17, 2010 date as the date the RDO was issued. Thereafter, Respondent Montgomery retained new legal counsel and subsequently filed, and I granted, three unopposed motions seeking a stay of the proceedings to allow the parties to conduct settlement negotiations.

As part of the settlement agreement, Respondent Montgomery admits to the violations of the Regulations alleged in Charges 1–9 and 11–14 of the Charging Letter. In addition, Montgomery has consented to my affirming the RDO, as modified with regard to the RDO's Recommended Sanction in order, instead, to impose the sanctions agreed

[1] Montgomery is also known as "Yuri Malinkovski."

[2] Since August 21, 2001, the Act has been in lapse, and the President, through Executive Order 13,222 of August 17, 2001 (3 CFR 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 12, 2010 (75 FR 50681 (Aug. 16, 2010)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.* (2000)). The unlawful conduct at issue here occurred in 2003. The Regulations governing the violations at issue are found in the 2003 version of the Code of Federal Regulations (15 CFR parts 730–774 (2003)). The 2010 Regulations govern the procedural aspects of this case.

to by Montgomery and set forth in the parties' settlement proposal.

I have the authority, pursuant to § 766.22(c) of the Regulations, to affirm, modify or vacate the RDO. Where a case is pending before me pursuant to § 766.22, I also have the authority, under § 766.18(b)(2), to approve or reject a settlement proposal submitted to me by the parties.

Based on my review of the record, including the RDO and the settlement proposal submitted by the parties, I hereby affirm the RDO, including its findings of fact and conclusions of law concerning Respondent Montgomery's seven violations of Section 764.2(k) of the Regulations and his six violations of Section 764.2(e); except that I hereby modify the RDO's recommended sanctions such that the sanctions imposed against Montgomery are consistent with the parties' settlement proposal, which I hereby approve.

Accordingly, it is therefore ordered:

First, that a civil penalty of $340,000.00 is assessed against Montgomery. Of this civil penalty, $17,500 shall be paid by Montgomery to the U.S. Department of Commerce in 12 installments as follows: $1,458 no later than January 1, 2011; $1,458 no later than the first day of each month from February, 2011 through and including November, 2011; and $1,462 shall be due no later than December 1, 2011. Payment of the remaining $322,500 shall be suspended for a period of ten (10) years from the date of this Order, provided that during the period of suspension, Montgomery has committed no violation of the Act, or any regulation, order, or license issued thereunder, and has made full and timely payment of the $17,500 as set forth above. If any of the twelve installment payments is not fully and timely made, any remaining scheduled installment payments and the remaining $322,500 shall become due and owing immediately.

Second, pursuant to the Debt Collection Act of 1982, as amended (31 U.S.C. 3701–3720E (2000)), the civil penalty owed under this Order accrues interest as more fully described in the attached Notice, and, if payment is not made by the due dates specified herein, Montgomery will be assessed, in addition to the full amount of the civil penalty and interest, a penalty charge and administrative charge.

Third, for a period of thirty (30) years from the date of this Order, Yuri I. Montgomery, a/k/a Yuri Malinkovski, with a last known address of 2912 10th Place West, Seattle, WA 98119, and when acting for or on behalf of Montgomery, his representatives, assigns, agents or employees (hereinafter collectively referred to as "Denied Person"), may not participate, directly or indirectly, in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

Fourth, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Fifth, that, after notice and opportunity for comment as provided in § 766.23 of the Regulations, any person, firm, corporation, or business organization related to the Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of the Order.

Sixth, that this Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

Seventh, that Montgomery shall have an opportunity to request that the Under Secretary reinstate his export privileges after a period of ten (10) years from the date of the Order, provided that Montgomery has committed no violation of the Act, or any regulation, order, or license issued thereunder prior to the submission of his request for reinstatement. BIS shall in its sole unreviewable discretion determine whether to grant, or deny, in whole or in part Montgomery's request for reinstatement of his export privileges.

Eighth, that the final Decision and Order shall be served on Montgomery and on BIS and shall be published in the **Federal Register**. In addition, the ALJ's Recommended Decision and Order, except for the section related to the Recommended Order, shall also be published in the **Federal Register**.

This Order, which constitutes the final agency action in this matter, is effective immediately.

Dated: December 21, 2010.

Eric L. Hirschhorn,

Under Secretary of Commerce for Industry and Security.

Certificate of Service

I hereby certify that, on this 21st day of December, 2010, I have served the foregoing DECISION AND ORDER signed by Eric L. Hirschhorn, Under Secretary of Commerce for Industry and Security, in the matter of Yuri I. Montgomery (Docket No: 08–BIS–0004) to be sent via United Parcel Service postage pre-paid to:

Douglas N. Jacobson, Esq., Law Offices of Douglas N. Jacobson, PLLC, 1725 I Street, NW., Suite 300, Washington, DC 20006. Facsimile: 202–688–2782.

(By Facsimile and United Parcel Service.)

Eric Clark, Joseph Jest, John Masterson, Attorneys for Bureau of Industry and Security, Office of Chief Counsel for Industry and Security, U.S. Department of Commerce, Room HCHB 3839, 14th Street and Constitution Ave., NW., Washington, DC 20230. Facsimile: 202–482–0085. (Served via hand delivery.)

ALJ Docketing Center, Attention: Hearing Docket Clerk, 40 S. Gay Street, Room 412, Baltimore, MD 20212–4022. (By United Parcel Service.)

A copy of this Order has also been sent via United Parcel Service to:

Yuri I. Montgomery, 2912 10th Place West, Seattle, WA 98119. (By United Parcel Service.)

Andrea A. Monroe,

Office of the Under Secretary for Industry and Security.

Recommended Decision and Order [3]

Issued by: Hon. Walter J. Brudzinski, Administrative Law Judge.

Issued: October 28, 2010.

On behalf of Bureau of Industry and Security:

John T. Masterson, Esq., Chief Counsel for Industry and Security, Joseph V. Jest, Esq., Chief of Enforcement and Litigation, Parvin R. Huda, Esq., Senior Counsel, Eric Clark, Esq., Attorney Advisor, Attorneys for Bureau of Industry and Security, Office of Chief Counsel for Industry and Security, United States Department of Commerce, Room H–3839, 14th Street & Constitution Avenue, NW., Washington, DC 20230.

On behalf of Respondent:

Yuri I. Montgomery, *Pro se*, 2912 10th Place West, Seattle, WA 98119.

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Preliminary Statement

On July 1, 2008, the Bureau of Industry and Security (BIS) charged Respondent, Yuri Montgomery, with 14 counts of violating two (2) separate code sections of the Export Administration Regulations (EAR).[4] The EAR is issued under the authority of the Export Administration Act (EAA) of 1979.[5]

Charging Letter

The fourteen (14) Count Charging Letter alleges seven (7) violations of EAR code section 764.2(k), "Acting Contrary to the Terms of a Denial Order," and seven (7) violations of EAR code section 764.2(c), "Acting with Knowledge of a Violation" as follows:

Charges 1–7, 15 CFR 764.2(k): Acting Contrary to the Terms of a Denial Order

As described in further detail in the attached schedule of violations, which is incorporated herein by reference, on seven occasions between on or about July 2, 2003, and on or about October 8, 2003, Montgomery took actions prohibited by a BIS order denying export privileges under Section 766.25 of the Regulations (Denial Order). Specifically, Montgomery carried on negotiations concerning, ordered, bought, sold and/or financed various items exported or to be exported from the United States that are subject to the Regulations, and/or benefitted from transactions involving items exported or to be exported from the United States that are subject to the Regulations. At the time Montgomery engaged in the described actions, his export privileges had been denied under the Regulations by a Denial order dated September 11, 2000, and published in the **Federal Register** on September 22, 2000 (65 FR 57,313). Under the terms of the Denial Order, Montgomery: May not directly or indirectly, participate in any way in any transaction involving an (item) exported or to be exported from the United States, that is subject to the Regulations, or in any other activity subject to the Regulations, including * * * [c]arrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations; or * * * [b]enefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations." That Denial Order is effective until January 22, 2009, and continued in force at the time of the aforementioned actions taken by Montgomery. In so doing, Montgomery committed seven violations of Section 764.2(k) of the Regulations.

Charges 8–14, 15 CFR 764.2(e): Acting with Knowledge of a Violation

As described in further detail in the attached schedule of violations, on seven occasions between on or about July 2, 2003, and [on] or about October 8, 2003, Montgomery carried on negations concerning, ordered, bought, sold and/or financed various items subject to the Regulations with knowledge that a violation of an Order issued under the Regulations had occurred, was about to occur, or was intended to occur in connection with the items. Specifically, Montgomery carried on negotiations concerning, ordered, bought, sold and/or financed various items that were

[3] For proceedings involving violations not relating to Part 760 of the Export Enforcement Regulations, 15 CFR 766.17(b) and (b)(2) prescribe that the Administrative Law Judge's decision be a "Recommended Decision and Order." The violations alleged in this case are found in Part 764. Therefore, this is a "Recommended Decision and Order." That section also prescribes that the Administrative Law Judge make recommended findings of fact and conclusions of law that the Under Secretary for Export Administration, Bureau of Industry and Security, U.S. Department of Commerce, must affirm, modify or vacate. 15 CFR 766.22. The Under Secretary's action is the final decision for the U.S. Commerce Department. 15 CFR 766.22(e).

[4] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2008). The violations charged occurred in 2003. The Regulations governing the violations here are found in the 2003 version of the Code of Federal Regulations (15 CFR parts 730–774 (2003)). The 2008 Regulations govern the procedural aspects of this case.

[5] Title 50 U.S.C. app. 2401–2420 (2000). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR 2001) Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 15, 2007, 72 FR 46137 (Aug. 16, 2007), has continued the Regulations in effect under the Emergency Economic Powers Act (50 U.S.C. 1701–1706 (2000)) ("IEEPA").

exported from the United States to a Macedonian company with knowledge that he was or would be violating a Denial Order because, inter alia, he had been provided notice of the Denial Order when it issued in September 2000, and he had on October 24, 2000, written to then-BIS Under Secretary for Export Enforcement Reinsch to request reinstatement of his "export privileges denied on September 11, 2000 * * *." That request for reinstatement had been denied by the Under Secretary on December 21, 2000, and the Denial Order continued in force at the time of aforementioned actions by Montgomery. In so doing, Montgomery committed seven violations of Section 764.2(e) of the Regulations.

The Charging Letter further detailed Charges 1–7 as violations of 15 CFR 764.2(k) and Charges 8–14 as violations of 15 CFR 764.2(e) asfollows:

SCHEDULE OF VIOLATIONS—YURI MONTGOMERY

Date	Charges	Items	Value	Violation	Consignee
7/2/03	1, 8	61 prs Magnum boots	$3,355	764.2(k); 764.2(e)	Micei, Int'l
7/18/03	2, 9	2 firing range clearing Devices	$1,136	764.2(k); 764.2(e)	Micei, Int'l
8/5/03	3, 10[6]	10,800 pairs of boots	RFQ	764.2(k); 764.2(e)	Micei, Int'l
8/5/03	4, 11	45 pairs Oxford shoes, 5 Remote strobe tubes	$2,562	764.2(k); 764.2(e)	Micei, Int'l
8/13/03	5, 12	150 shirts	$1,744	764.2(k); 764.2(e)	Micei, Int'l
9/9/03	6, 13	2 load binder,1 ratchet strap, 1 binder chain, 1 safety shackle.	$147.53	764.2(k); 764.2(e)	Micei, Int'l
10/8/03	7, 14	Items in Order #25473620/017	$5,723.31	764.2(k); 764.2(e)	Micei, Int'l

The Charging Letter advised the maximum civil penalty is up to the greater of $250,000 per violation or twice the transaction value that forms the basis of the violation, plus a denial of export privileges and/or exclusion from practice before BIS. The Charging Letter concluded that failure to answer the charges within thirty (30) days will be treated as a default, and, although Respondent is entitled to an agency hearing, he must file a written demand for one with his answer.

Denial Order of September 11, 2000

The pleadings, discovery, and affidavits in the administrative record reflect that on January 22, 1999, Respondent, Yuri I. Montgomery, also known as Yuri I. Malinskovski, was convicted in U.S. District Court for the District of Columbia of knowingly and willfully exporting and causing the export of prohibited items to Macedonia and Slovenia without applying for and obtaining the required export licenses in violation of the International Emergency Economic Powers Act and the Export Administration Act of 1979.

Pursuant to Section 11(h) of the Export Administration Act and 5 CFR 766.25 (2000) the Director, Office of Exporter Services, Bureau of Export Administration, issued an order (Denial Order) on September 11, 2000 denying Respondent export privileges effective through January 22, 2009.[7]

The Denial Order states, in pertinent part, Respondent "may not, directly or indirectly, participate in any way in any transaction involving any * * * [item] exported or to be exported from the United States, that is subject to the Regulations, or in any other activity subject to the Regulations, or in any other activity subject to the Regulations." The Denial Order detailed non-exclusive examples of conduct included in the broad prohibition including "[c]arrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving an item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations." (65 FR 57,313 (Sept. 22, 2000)). Paragraph IV of the Denial Order states, "[t]his Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology." (*Id.*). Respondent's pleadings claim that the exported items in question fall into this exception.

Jurisdiction of U.S. Coast Guard Administrative Law Judges

The Charging Letter states the U.S. Coast Guard is providing Administrative Law Judge services for these proceedings. Accordingly, BIS forwarded the Charging Letter to the U.S. Coast Guard Administrative Law Judge Docketing Center for adjudication. The ALJ Docketing Center subsequently issued its Notice of Docket Assignment to the Respondent and BIS. The administrative file reflects that at the time of the Charging Letter and continuing to the present, Memoranda of Agreement (MOA) and Office of Personnel Management letters issued in accordance with 5 U.S.C. 3344 and 5 CFR 930.230 authorize the detail of U.S. Coast Guard Administrative Law Judges to adjudicate BIS cases involving export control regulations on a reimbursable basis.

Pre-Decisional Motion Practice

Throughout the course of this proceeding, Respondent filed dozens of motions, including numerous motions to stay. Respondent eventually filed his Answer "under protest, duress, and compulsion of the Order Denying Respondent's Motion for More Definite Statement." Respondent's Answer included 19 affirmative defenses. Neither Respondent nor BIS demanded a hearing. Therefore, the undersigned

[6] BIS withdrew Charge Ten on January 15, 2010.

[7] Through an internal organizational order, the Department of Commerce changed the name of Bureau of Export Administration to Bureau of Industry and Security. *See,* Industry and Security Programs: Change of Name, 67 FR 20,630 (Apr. 26, 2002). Pursuant to the Savings Provision of the Order, "Any actions undertaken in the name of or on behalf of the Bureau of Export Administration, whether taken before, on, or after the effective date of this rule, shall be deemed to have been taken in the name of or on behalf of the Bureau of Industry and Security." *Id.* at 20,631.

issued an Order stating the matter will be adjudicated on the record in accordance with 15 CFR 766.6(c). A summary of Respondent's motions, BIS' replies, and the undersigned's decisions on those motions is detailed in *Attachment A.*

Outstanding Motion

Respondent filed his Declaration in Support of Defenses on September 22, 2010, seven (7) months after the February 24, 2010 deadline for filing his evidence in support of his defenses. The Declaration included 43 attachments and a letter dated April 29, 2010 stating Respondent has suffered severe mental stress as a result of these proceedings. Respondent's Declaration explained his relationship with Micei International, summarized the events that occurred prior to the issuance of the Denial Order, and explanations of the attached exhibits. The majority of the evidence submitted supported Respondent's assertion that he did not violate the EAR because the country of origin for some of the items in question was China.

BIS filed its response on October 7, 2010, objecting to Respondent's Declaration. Specifically, the Agency argues that the submission of this Declaration along with its attachments are in direct violation of this court's discovery orders; that all exhibits except Ex. 7 are dated prior to the discovery deadline and are thus untimely and should not be considered. BIS also argues that several of the exhibits submitted by Respondent raise authenticity and accuracy concerns, including the fact that two of the e-mails sent by separate people contained identical wording and grammatical mistakes. Furthermore, the exhibits in question do not provide any probative value because the items' country of origin is not the issue because the items were exported from the United States. BIS requests the undersigned disregard Respondent's Declaration and the attached exhibits because the filling further demonstrates Respondent's refusal to comply with the ALJ's orders and the rules that govern this proceeding.

After careful review of Respondent's Declaration and BIS' response, the undersigned rejects Respondent's Declaration as untimely because it was filed approximately 7 months after his evidence was due and violates discovery procedures. Respondent was repeatedly accorded stays and additional time to file evidence and submissions. Respondent repeatedly ignored these deadlines. Even if the undersigned accepted Respondent's Declaration and exhibits, they would carry no probative value. As discussed in detail below, all items in question were shipped from the United States in violation of the EAR. Accordingly, Respondent's Declaration in Support of Defenses and its attached exhibits is *rejected.*

Determination on Respondent's Failure To Comply With Discovery

On June 19, 2009, BIS served all discovery requests on Respondent but Respondent replied only to BIS's Requests for Admission on July 6, 2009. He did not respond to BIS's Interrogatories and Requests for Production of Documents. Instead, Respondent asserted preliminary objections on June 30, 2009 and renewed objections on September 3, 2009. In my Order of August 20, 2009, Respondent was again ordered to respond to the interrogatories and document requests. To date, he has not replied to BIS's Interrogatories and Requests for Production of Documents, nor did he submit copies of his discovery requests as previously ordered to determine if enforcement is appropriate.

Authority for Sanction for Failure To Comply With Discovery

The Discovery Rules at 15 CFR 766.9 (d) provide as follows:

> *Enforcement.* The administrative law judge may order a party to answer designated questions, to produce specified documents or things or to take any other action in response to a proper discovery request. If a party does not comply with such an order, the administrative law judge may make a determination or enter any order in the proceeding as the judge deems reasonable and appropriate. *The judge may strike related charges or defenses in whole or in part or may take particular facts relating to the discovery request to which the party failed or refused to respond as being established for purposes of the proceeding in accordance with the contentions of the party seeking discovery.* [Emphasis added.] In addition, enforcement by a district court of the United States may be sought under section 12(a) of the EAA.

On October 26, 2009, BIS filed its Supplemental Submission in Response to the October 15, 2009 Order that the parties submit copies of their respective discovery requests to the undersigned to determine if enforcement pursuant to Section 766.9(d) of the Regulations is appropriate. In its Supplemental Submission, BIS claims, among other things, that Respondent's Answer to BIS's Motion for Summary Decision contained information and references to documents upon which Respondent is relying that should have been disclosed in BIS's discovery requests but were not disclosed. BIS avers that Respondent "should be barred from offering as evidence or otherwise seeking to make use of this material, as well as any other responsive material that he failed to produce, whether responsive documents or information that is responsive to any interrogatory." (BIS's October 26, 2009 Supplemental Submission in Response to October 15, 2009 Order, at 3.)

Specifically, the information in question is a Declaration from Sanja Milic of Micei and a purported e-mail from Range Systems. BIS argues that the e-mail contains information that was responsive to its discovery requests pertaining to Respondent's Defense No. 16 found in on page 3 of "Declaration of Yuri Montgomery in Opposition to Bureau of Industry and Security's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen" dated October 12, 2009. Defense No. 16 states, "[w]hen I contacted Maintenance Products, Inc. to inquire of the availability of the products which are listed in the [sic] charges 6 and 13 of the Charging Letter herein, I was informed by Maintenance Products, Inc. that all of the products Micei was interested in purchasing were made in China and were very cheap and I did not even inquire of their prices." BIS further averred that the Court should strike Respondent's defense number 16 and any argument or purported evidence related to that defense. BIS ended with the recommendation that the Court postpone ruling on any discovery sanction until after ruling on the Motion for Summary Decision because that Motion can be resolved without discovery sanctions. The undersigned also notes that Respondent's Affirmative Defense No. 16 filed on April 2, 2009 with his Corrected Answer to Charging Letter avers "[t]he goods subject to the Charging Letter are of foreign origin and are therefore not subject to the prohibitions of the purported Denial Order." Respondent's affirmative defense no. 11, filed in his original Answer, reads "[t]he goods subject to the Charging Letter are of foreign origin and are therefore not subject to the Charging Letter."

The undersigned denied BIS's Motion for Partial Summary Decision. BIS asked in its January 15, 2010 "Memorandum on Evidence Submitted in Support of Charges" that Respondent be barred from offering as evidence or otherwise seeking to make use of any responsive material that he failed to produce, whether the information is a responsive document or answer to an interrogatory. In addition, BIS asks the Court to strike Respondent's Defense No. 16 and any argument or purported evidence related

to that defense pursuant to 15 CFR 766.9(d).

The November 10, 2009 memorandum and Order stated that the undersigned will make a determination or enter an Order deemed reasonable and appropriate in accordance with 15 CFR 766.9(d) on the issue of Respondent's continued refusal to comply with BIS's Interrogatories and Requests for Production of Documents despite previous Orders to do so. That determination follows:

Sanction on Respondent's Refusal To Disclose Discovery Materials

Respondent's arguments, e-mail, and Declaration contain information that should have been disclosed during discovery. Respondent failed to disclose this information despite being ordered to do so and then used those undisclosed discovery materials in his defense against BIS's Motion for Summary Decision. His arguments that the items in question are foreign made and therefore excluded from the Denial Order still remain in his affirmative defense filed with his Answer. Therefore, in consideration of the forgoing and in accordance with 15 CFR 766.9(d), the following are stricken from the record: (1) Respondent's Defense No. 16 in his "Declaration of Yuri Montgomery in Opposition to Bureau of Industry and Security's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen" dated October 12, 2009; (2) the Declaration from Sanja Milic of Micei; (3) the e-mail from Range Systems; (4) Affirmative Defense No. 16 in Respondent's Corrected Answer to Charging Letter which states "[t]he goods subject to the Charging Letter are of foreign origin and are therefore not subject to the prohibitions of the purported Denial Order;" (5) Affirmative Defense No. 11 which states, "[t]he goods subject to the Charging Letter are of foreign origin and are therefore not subject to the Charging Letter;" and (6) any argument related to that basic defense.

Paragraph IV of the Denial Order

Even if Respondent complied with discovery as previously ordered, and if the arguments and documents were found credible and give appropriate weight, they do not show that the items in question fall into the Paragraph IV exception to the Denial Order based only on their purported foreign origin. Paragraph IV of the Denial Order states, "[t]his Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology." This language does not amend the specific language in Paragraph I of the Denial Order which prohibits any participation of any kind in the export from the United States of any items subject to the Regulations.

Paragraph I prohibits participation in transactions involving items exported or to be exported from the United States. Items located in the United States are subject to the Regulations, regardless of where they are produced. *See,* 15 CFR 734.3(a). Since the items in this case were located in the United States at the time of Respondent's transactions and were not subject to the exclusive jurisdiction of another agency, Respondent was prohibited from participating in those transactions. The items in question are subject to the EAR as shown below:

Respondent claims that the Paragraph IV exemption applies if the items in question were manufactured abroad. As shown above, items subject to the EAR include items located in the United States regardless of where they have been manufactured or produced. In this case, jurisdiction is based on the fact that the items in question were located in the United States at the time of the transactions or the attempted or intended transactions, regardless of their origin. Once jurisdiction of the items in question is established based on the location of the items in the United States, such as in this case, it is not necessary to consider any other basis. The origin of an item must be determined only if the item happens to be located abroad at the time of the transaction. In this case, the items were located in the United States.

In summary, Paragraph IV of the Denial Letter provides a narrow exception to transactions involving only items subject to the Regulations by reason of the foreign direct product rule which does not apply here because the items in question were not located abroad. In this case, jurisdiction over these items exists under Section 734.3. The items were subject to the Regulations and were exported or attempted or intended to be exported from the United States. Therefore, Respondent's affirmative defense that foreign origin of the goods exempts them from the Regulations is rejected even in the absence of sanction.

Time for Decision

Title 15 CFR 766.17(d) provides that administrative enforcement proceedings not involving Part 760 of the EAR shall be concluded within one year from submission of the Charging Letter unless the Administrative Law Judge extends such period for good cause shown. In light of the attached detailed activity in these proceedings evidencing several stays, the time consumed to adjudicate disputed discovery issues, and the additional time consumed to adjudicate numerous motions, the undersigned finds that good cause exists for not concluding these proceedings within the time prescribed and that these proceedings are extended to October 28, 2010. This matter is now ripe for decision.

As detailed in Attachment A, the parties have raised many issues and the undersigned has ruled on most of them in previously issued Orders. This Recommended Decision and Order also rules on the affirmative defenses and any outstanding issues. As noted above, BIS filed its Notice of Withdrawal of Charge 10, concerning the 10,800 pairs of boots described in the charging Letter's Schedule of Violations. Therefore, seven (7) counts of section 764.2(k) and six (6) counts of Section 764.2(e) of the Regulations remain for decision. After careful review of the entire record, I find that BIS has *proved,* by the preponderance of reliable, probative, and credible evidence, on seven (7) occasions, from July 2, 2003 and October 8, 2003, that Respondent violated EAR code Section 764.2(k), "Acting Contrary to the Terms of a Denial Order," and on six (6) occasions that Respondent violated EAR code Section 764.2(e), "Acting with Knowledge of a Violation."

Recommended Findings of Fact

The Findings of Fact and Conclusions of Law are based on a thorough and careful analysis of the documentary evidence, exhibits, and the entire record as a whole.

General Findings and Background

1. Respondent Yuri I. Montgomery, also known as Yuri I. Malinkovski was convicted in the U.S. District Court for the District of Columbia of violating the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (1991 & Supp. 2000) and the Export Administration Act of 1979, as amended (currently codified at 50 U.S.C. app. 2401–2420 (1991 & Supp. 2000)). (BIS Ex. B)

2. Specifically, Respondent's conviction was for knowingly and willingly exporting and causing the export of U.S.-origin stun guns to Macedonia and U.S. origin laser gun sights to Slovenia without applying for and obtaining the required export licenses from the Department of Commerce, and of knowingly and willfully exporting and causing the

export of U.S.-origin PAGST military helmets to Slovenia and U.S.-origin handcuffs, laser gun sights, and laser mountings to Macedonia without applying for and obtaining the required export licenses from the Department of Commerce. (BIS Ex. B)

3. Section 11(h) of the Export Administration Act of 1979 provides that, at the discretion of the Secretary of Commerce, no person convicted of violating the International Emergency Economic Powers Act or the Export Administration Act, or certain other provisions of the U.S. Code, shall be eligible to apply for or use any export license issued pursuant to, or provided by, the Export Administration Act or the Export Administration Regulations for a period of up to 10 years from the date of the conviction. (BIS Ex. B)

4. Pursuant to Sections 766.25 and 750.8(a) of the Regulations and upon notification that a person has been convicted of violating the International Emergency Economic Powers Act or the Export Administration Act, the Director, Office of Exporter Services, in consultation with the Director, Office of Export Enforcement, shall determine whether to deny that person's export privileges for a period up to 10 years from the date of conviction and shall also determine whether to revoke any license previously issued to such person. (BIS Ex. B)

5. Having received notice of Respondent's conviction and after providing Respondent with notice and opportunity to make written submission before issuing an Order denying his export privileges, the Director, Office of Exporter Services, Bureau of Export Administration, issued an Order (Denial Order) on September 11, 2000 denying Respondent export privileges effective through January 22, 2009 and publishing it in the **Federal Register**.[8] (65 FR 57,313 (Sept. 22, 2000) (BIS Ex. B))

6. Paragraph I of the Denial Order states that "Until January 22, 2009, Yuri I. Montgomery, also known as Yuri I. Malinkovski, [home address redacted] may not, directly or indirectly, participate in any way in any transaction involving any Commodity, software or technology (hereinafter collectively referred to as 'item') exported or to be exported from the United States, that is subject to the Regulations, or in any other activity subject to the Regulations * * *." (BIS Ex. B, at paragraph I)

7. The Denial Order specifically listed as non-exclusive examples of prohibited participation, "[c]arrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations * * *." (BIS Ex. B)

8. The Denial Order also provided that Respondent was prohibited from "[b]enefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations. (BIS Ex. B)

9. Respondent received actual notice of the Denial Order by letter on or about September 13, 2000 from BIS that included a copy of the Denial Order. (BIS Ex. E, page 4, Request/Response 3; BIS Ex. F)

10. On October 24, 2000, Respondent wrote to then Under Secretary William Reinsch requesting reinstatement of his "export privileges denied on September 11, 2000." (BIS Ex. E, page 4, Request/Response 5; BIS Ex. G)

11. Under Secretary Reinsch denied the request on Dec. 21, 2000. (BIS Ex. H)

12. Respondent had notice of the Denial Order no later than October 24, 2000. (BIS Ex. E, pages 4–16, Requests/Responses Nos. 2, 5, 7m, 8m, 9h, 10m, 11m, 12m, and 13m)

13. Respondent knew that the Denial Order was in effect at all times from September 11, 2000 until January 22, 2009. (BIS Ex. E, page 4, Request/Response 2)

14. Respondent knew that he was subject to the Denial Order at the time of each transaction at issue. (BIS Ex. E, pages 4–16, Requests/Responses Nos. 2, 5, 7m, 8m, 9h, 10m, 11m, 12m, and 13m)

15. Respondent encouraged Micei "to use my credit card for Micei purchases as much as possible as it would allow me to accumulate United Airline miles through the use of my United Visa credit card * * *" (October 12, 2009 Declaration of Yuri Montgomery in Opposition to BIS's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen, at paragraph 12)

16. On several occasions, Respondent "made inquiries for Micei of the availability on some of the products purchased for Micei." (*Id.* at paragraph 14)

17. Respondent benefited from all the purchases by stating, "[t]he charges made with my credit card directly attribute to the 'violations' alleged Micei in the Charging Letter herein amount to approximately $15,000, which allowed me to accumulate approximately $15,000 [sic] miles with United Airlines." (BIS Ex. J, page 3, paragraph 18; BIS Ex. E, page 6, admission 7j)

The preceding Findings of Fact are incorporated in the following, specific Findings of Fact as set for below:

Charges 1 and 8, 61 Pairs of Magnum boots

18. On or about June 9, 2003 Respondent placed an order for 61 pairs of Magnum boots with the Modesto, California Division of Hi-Tec Retail, Inc., manufacturer and retailer of footwear. (BIS Exhibit E, page 4, admission 7a; BIS Exhibits L and M)

19. The issuing bank declined Hi-Tec's initial attempt to charge Montgomery's credit card for the order which caused R. Uber at Hi-Tec to seek assistance from Respondent. (BIS Ex. O).

20. Micei employee Sanja Milic advised Hi-Tec via e-mail that according to Respondent, VISA had put a security block on its payment which he had already removed so that Hi-Tec can charge the amount without any problem. (BIS EX. P)

21. With the payment issue resolved, Respondent paid for the boots with his credit card. (BIS Ex. Q; BIS Ex. 5 at page 4, admission 7b)

22. Micei reimbursed Respondent for purchasing the boots. (BIS Ex. E, page 5, admission 7i(iii))

23. Respondent intended the boots, which are subject to the Regulations, to be exported to Macedonia. (BIS Ex. E at page 7, admission 7e; BIS Exhibits N, R, and S; BIS Ex. I, 15 CFR 734.3(a))

24. The boots were exported from the United States to Macedonia on or about July 2, 2003. (BIS Exhibits R and S)

25. The boots are items subject to the Regulations. (15 CFR 734.3(a); BIS Ex. I)

26. At the time of the transaction, Respondent knew he was subject to the Denial Order. (BIS Ex. E at Request/Response 7m)

Charges 2 and 9, Firing Range Clearing Devices

27. At Micei's request, Respondent telephonically contacted Range Systems, a New Hope, Minnesota manufacturer of firing range equipment, "to inquire of the availability and price

[8] Through an internal organizational order, the Department of Commerce changed the name of Bureau of Export Administration to Bureau of Industry and Security. *See,* Industry and Security Programs: Change of Name, 67 FR 20,630 (Apr. 26, 2002). Pursuant to the Savings Provision of the Order, "Any actions undertaken in the name of or on behalf of the Bureau of Export Administration, whether taken before, on, or after the effective date of this rule, shall be deemed to have been taken in the name of or on behalf of the Bureau of Industry and Security." *Id.* at 20,631.

for their product * * *." (October 12, 2009 Declaration of Yuri Montgomery in Opposition to BIS's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen, paragraph 20)

28. In a July 8, 2003 e-mail inquiry sent to Range Systems describing himself as Micei's regional office, Respondent stated that "currently we have one [bid] which calls for various products including 5–10 clearing traps such as your RRI Guardian (GDN) model * * *. Please quote the price of your RRR GUARDIAN (GDN) model and e/m me a complete price list if possible * * *." (BIS Ex. T, page 2)

29. Range Systems provided the requested price quote in a reply e-mail sent on July 11, 2003. (BIS Ex. T, page 1)

30. Respondent placed an order for two of the gun clearing devices via e-mail sent on July 15, 2003. (BIS Ex. E, page 6, admission 8a; BIS Exhibits T, U, and V)

31. Respondent paid Range Systems, Inc. for the gun clearing devices with his VISA credit card. (BIS Ex. T; BIS Ex. E, page 6, admission 8b)

32. Respondent directed Ranges Systems to export the gun clearing devices to Micei in Macedonia via their freight forwarder, requesting that he be advised of the weight and size of the boxes via e-mail with a copy to Micei representatives. (BIS Ex. T, page 1)

33. Micei reimbursed Respondent for the purchase of the gun clearing devices. (BIS Ex. E, page 7, admission 8i)

34. On or about July 18, 2003, Range Systems exported the gun clearing devices from the United States to Macedonia. (BIS Ex. E, page 7, admission 8e; BIS Ex. T; X, and W)

35. The gun clearing devices were manufactured in the United States. (BIS Ex. Y, Z, and AA)

36. The gun clearing devices are items subject to the Regulations. (BIS Ex. I; 15 CFR 734.3(a))

37. At the time of the transaction, Respondent knew he was subject to the Denial Order. (BIS Ex. E, page 8, admission 8k and 8m)

38. Respondent benefited from the purchase of the gun clearing devices. (BIS Ex. E, page 7, admission 8j)

Charge 3

39. On August 5, 2003, Respondent sent an e-mail to Galls, Inc., a Lexington, Kentucky based distributor of police equipment, military equipment, and apparel, identifying himself as "Micei Int'l U.S. Operations" and requesting a price quotation for 10,800 pairs of shoes and boots. (BIS Ex. E, page 8, admission 9a; BIS Ex. BB, EE, and FF)

40. Respondent intended to export the boots and shoes from the United States to Macedonia. (BIS Ex. E, page 8, admission 9d; BIS Ex. BB)

41. Respondent carried on negotiations concerning the shoes and boots, stating in an e-mail to Galls "our [Micei] HQ will be putting up the performance bond at 20% in cash. Therefore, please make sure you quote the best possible price so you can so we can win this one, too." (BIS Ex. BB)

42. The boots and shoes are items subject to the Regulations (BIS Ex. I; 15 CFR 734.3(a))

43. Respondent knew he was subject to the Denial Order on or about August 5, 2003, at or about the time he requested a quotation. (BIS Ex. E, page 9, admission 8f)

Charges 4 and 11

44. Micei's account number at Galls is 2547320. (BIS Ex. CC)

45. On or about August 5, 2003, Respondent contacted Galls to pay for order # 25473620/016, previously placed. (BIS Ex. DD)

46. The items in that order number consist of shoes and remote strobe tubes.[9] (BIS Ex. EE and FF)

47. In Respondent's August 5, 2003 e-mail to Galls, he provided his credit card account information to pay for the $2,562.44 order, stating that Micei advised him to pay for the items with his VISA card. (BIS Ex. DD and BIS Ex. E, page 9, admission 10b)

48. Micei reimbursed Respondent for purchasing the shoes and remote strobe tubes. (BIS Ex. E, page 10, admission 10i(iii))

49. Respondent intended to export the shoes and strobe tubes from the United States to Macedonia. (BIS Ex. E, page 9, admission 10e; BIS Exhibits EE, FF, and GG)

50. The shoes and remote strobe tubes were exported from Galls's Inc. in Lexington, Kentucky, United States to Macedonia on or about September 5, 2003. (BIS Exhibits EE and GG)

51. The shoes and remote strobe tubes are items subject to the Regulations. (BIS Ex. I; 15 CFR 734.3)

52. At the time of the transaction, Respondent knew he was subject to the Denial Order. (BIS Ex. E, page 11, admission 10m)

53. Respondent benefited from the VISA card purchase of the shoes and remote strobe tubes from Galls by earning credit towards the purchase of airline tickets. (BIS Ex. E, page 10, admission j and finding of fact 17 above)

Charges 5 and 12

54. On July 31, 2003, Respondent placed on order for 150 golf/polo shirts from Save On Promotional Products of Sandy, Oregon. (BIS Ex. HH and II)

55. Upon receiving Respondent's order, Save On ordered the shirts from its supplier, Tri-Mountain Gear Corp. of Baldwin Park, California. (BIS Ex. LL)

56. Respondent ordered the shirts for or on behalf of Micei and intended them to be exported from the United States to Macedonia. (Ex. E at Request/Response 11e); BIS Ex. HH: BIS Ex. II; BIS Ex. KK; BIS Ex. LL; BIS Ex. MM; BIS Ex. BIS NN)

57. Respondent paid for the order with his credit card. (BIS Ex. JJ; BIS Ex. E at Request/Response 11b)

58. Micei reimbursed Respondent for purchasing the shirts. (BIS Ex. E, page 12, admission 11i(iii))

59. The shirts were exported from the United States to Macedonia on or about August 13, 2003. (BIS Ex. MM; BIS Ex. NN)

60. The shirts are items subject to the Regulations. (BIS Ex. I; (15 CFR 734.3(a))

61. At the time of the transaction, Respondent knew he was subject to the Denial Order. (BIS Ex. E, page 12, admission 11m)

62. Respondent benefited from purchasing the shirts from a U.S. supplier using his VISA card by earning credit towards the purchase of airline tickets. (BIS Ex. E, page 12, admission 11j; Finding of Fact 17, above)

Charges 6 and 13

63. Respondent ordered two load binders, one ratchet strap, one binder chain, and one safety shackle from Maintenance Products, Inc. of Lowell, Indiana, on or about September 9, 2003. (BIS Ex. E, page 13, admission 12a; BIS Ex. OO and QQ)

64. Respondent paid Maintenance Products, Inc. for the load binders, ratchet strap, binder chain, and safety shackle, including freight charges of $21.52, with his VISA credit. (BIS Ex. E, page 13, admission 12b; BIS Ex. PP and QQ)

65. Micei reimbursed Respondent for purchasing the binder, ratchet strap, binder chain, and safety shackle. (BIS Ex. E, page 14, admission 12i(iii))

66. As Respondent intended, the load liners, ratchet strap, binder chain, and safety shackle exported from the United States to Macedonia on or about September 15, 2003. (BIS Ex. E, page 13, admission e; BIS Ex. RR and SS)

67. The load binders, binder chain, and safety shackle were manufactured

[9] Remote strobe tubes are components of the flashing emergency lights found on vehicles such as police cars.

in the United States. (BIS Ex. TT and UU)

68. The load binders, ratchet strap, binder chain and safety shackle are items subject to the Regulations. (BIS Ex. I and 49 CFR 734.3(a))

69. At the time of the transaction, Respondent knew he was subject to the Denial Order. (BIS Ex. E, page 14, admission 12m; BIS Ex. B, paragraph I and BIS Ex. F, paragraph I on page 3 of the Order Denying Export Privileges)

70. By charging the purchase from the U.S. supplier of the load binders, ratchet strap, binder chain and safety shackle on his VISA card, Respondent benefitted by earning credit towards the purchase of airline tickets. (BIS Ex. E, page 14, admission 12j; *see also,* Finding of Fact 17, above)

Charges 7 and 14

71. In October 2003, Respondent, describing himself as "Micei Int'l (N/America Op's), placed an order for uniform pants with Galls (Galls # 5473720/017). (BIS Ex. VV)

72. Again describing himself as representing Micei, Respondent paid for the order with his VISA credit card. (BIS Ex. E, page 14, admission 13b; BIS Ex. WW)

73. The uniform pants were to be shipped from Galls' supplier, Liberty Uniform of Spartanburg, South Carolina, to Micei in Macedonia. (BIS Ex. E, page 15, admission 13e; BIS Ex. XX)

74. Micei reimbursed Respondent for purchasing the uniform pants. (BIS Ex. E, pages 15 and 16, admission 13i(iii))

75. The uniform pants are items subject to the Regulations. (BIS Ex. I; 15 CFR 734.3(a))

76. At the time of the transaction, Respondent knew he was subject to the Denial Order. (BIS Ex. E, page 16, admission 13m)

77. Respondent benefitted from his purchase of the uniform pants with his VISA credit card by earning airline frequent flier miles. (BIS Ex. E, page 16, admission 13j; *see also,* Finding of Fact 17, above)

Discussion

Burden of Proof

The burden in this proceeding lies with the Bureau of Industry and Security to prove the charges instituted against the Respondents by a preponderance of reliable, probative, and substantial evidence. *Steadman* v. *SEC.,* 450 U.S. 91, 102 (1981); *In the Matter of Abdulmir Madi, et al,* 68 FR 57406 (October 3, 2003). In the simplest terms, the Agency must demonstrate that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products* v. *Construction Laborers Pension Trust,* 508 U.S. 602, 622 (1993).

Respondent's Prior Criminal Conviction

The evidence shows that on January 22, 1999, Respondent, Yuri I. Montgomery, also known as Yuri I. Malinkovski, was convicted in the U.S. District Court for the District of Columbia of knowingly and willingly exporting and causing the export of U.S. origin stun guns to Macedonia and U.S. origin laser gun sights to Slovenia without applying for and obtaining the required export licenses from the Department of Commerce, and of knowingly and willfully exporting and causing the export of U.S. origin PAGST military helmets to Slovenia and U.S. origin handcuffs, laser gun sights, and laser mountings to Macedonia without applying for and obtaining the required export licenses from the Department of Commerce, in violation of the International Emergency Economic Powers and the Export Administration Act of 1979.

Denial Order

The Export Administration Act of 1979 provides that no person convicted of violating the International Emergency Economic Powers Act or the Export Administration Act, among other provisions of the U.S. Code, shall be eligible for any export license for a period of up to 10 years from the date of the conviction. Therefore, pursuant to the Regulations at Sections 766.25 and 750.8(a) and upon notification to Respondent and an opportunity to be heard, the Director, Office of Exporter Services, Bureau of Export Administration, issued an Order (Denial Order) on September 11, 2000 denying Respondent export privileges effective through January 22, 2009.

In pertinent part, the Denial Order states at paragraph I that "Until January 22, 2009, Yuri I Montgomery, also known as Yuri I. Malinkovski * * * may not, directly or indirectly, participate in any way in any transaction involving any * * * [item] exported or to be exported from the United States, that is subject to the Regulations, or in any other activity subject to the Regulations." The Denial Order detailed that Respondent may not, directly or indirectly, participate in any way in any transaction involving any * * * [item] exported or to be exported from the United States, that is subject to the Regulations, or in any other activity subject to the Regulations or * * * [b]benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations."

The Denial Order detailed non-exclusive examples of conduct included in the broad prohibition including "[c]arrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving an item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations."

On October 24, 2000, Respondent requested that his exporting privileges be reinstated; the Under Secretary denied his request on December 21, 2000. Therefore, Respondent had notice of the Denial Order no later than October 24, 2000. He also knew it was in effect at all times from September 11, 2000 until January 22, 2009, which covers each transaction at issue.

Law

The Regulations define "Acting contrary to be terms of a denial order" at 15 CFR 764.2(k) as follows: "No person may take any action that is prohibited by a denial order. *See* § 764.3(a)(2) of this part." This is a strict liability offense.

The Regulations define "Acting with knowledge of a violation" at 15 CFR 764.2(e) as follows: "No person may order, buy, remove, conceal, store, use, sell, loan, dispose of, transfer, transport, finance, forward, or otherwise service, in whole or in part, any item exported or to be exported from the United States, or that is otherwise subject to the EAR, with knowledge that a violation of the EAA, the EAR, or any order, license or authorization issued thereunder, has occurred, is about to occur, or is intended to occur in connection with the item."

The Regulations define Knowledge at 15 CFR 772.1 under "Definitions of terms as used in the Export Administration Regulations (EAR)."

* * * * *

"*Knowledge.* Knowledge of a circumstance (the term may be a variant, such as "know," "reason to know," or "reason to believe") includes not only positive knowledge that the circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of facts. This definition does not apply to part 760 of the EAR

(Restrictive Trade Practices or Boycotts)."

Applying the Denial Order and the Law to the Findings of Fact

As detailed in the Findings of Fact, Charges 1 and 8 reflect that Respondent placed an order with Hi-Tec Retail, Inc. of Modesto, California Division, for 61 pairs of Magnum boots. He paid for the boots with his VISA credit card and had the boots, which are subject to the Regulations, exported from the United States to Micei, Inc. in Macedonia on July 2, 2003. Micei, Inc. reimbursed Respondent for the purchase of the boots. Respondent's purchase and reimbursement amounted to buying, selling or financing. Respondent benefited from the purchase of the boots by accumulating frequent flier miles with United Airlines. The Denial Order which prohibited these activities was in effect at the time and Respondent had knowledge of the Denial Order.

These activities show, by the preponderance of reliable, probative, and credible evidence that Respondent ordered the boots, carried on negotiations concerning the boots, bought, sold, and/or financed the boots, and benefited from the transactions for the boots, and that those actions violated the terms of his Denial Order, in violation of 15 CFR 764.2(k). Therefore, Charge 1 is *proved.*

These activities also show, by the preponderance of reliable, probative, and credible evidence that Respondent ordered the boots, carried on negotiations concerning the boots, bought, sold, and/or financed the boots with knowledge that a violation of his Denial Order had occurred, or was about to occur, or was intended to occur in connection with the boots, in violation of 15 CFR 764.2(e). Therefore, Charge 8 is *proved.*

As detailed in the Findings of Fact, Charges 2 and 9 reflect that at Micei's request, Respondent contacted Range Systems, a New Hope, Minnesota manufacturer of firing range equipment, to inquire of the availability and price for their product. In a July 8, 2003 e-mail inquiry sent to Range Systems describing himself as Micei's regional office, Respondent stated that "currently we have one [bid] which calls for various products including 5–10 clearing traps such as your RRI Guardian (GDN) model * * *. Please quote the price of your RRR GUARDIAN (GDN) model and e/m me a complete price list if possible * * *." Range Systems provided the requested price quote in a reply e-mail sent on July 11, 2003. Respondent placed an order for two of the gun clearing devices via e-mail sent on July 15, 2003. Respondent paid Range Systems, Inc. for the gun clearing devices with his VISA credit card. Respondent directed Range Systems to export the gun clearing devices to Micei in Macedonia via their freight forwarder and Micei reimbursed Respondent for the purchase of the gun clearing devices. Range systems exported the gun clearing devices from the United States to Macedonia on or about July 18, 2003. The gun clearing devices were also manufactured in the United States and subject to the Regulations. At the time of the transaction, Respondent knew he was subject to the Denial Order. Respondent also benefited from the purchase of the gun clearing devices.

These activities show, by the preponderance of reliable, probative, and credible evidence, Respondent ordered the gun clearing devices, carried on negotiations concerning the gun clearing devices, bought, sold, and/or financed the purchase of the gun clearing devices, and that those actions violated the terms of his Denial Order, in violation of 15 CFR 764.2(k). Therefore, Charge 2 is *proved.*

These activities also show, by the preponderance of reliable, probative, and credible evidence, Respondent ordered the gun clearing devices, carried on negotiations concerning the gun clearing devices, bought, sold, and/or financed the purchase of the gun clearing devices, with knowledge that a violation of his Denial Order had occurred, was about to occur, or was intended to occur, in connection with the gun clearing devices, in violation of 15 CFR 764.2(e). Therefore, Charge 9 is *proved.*

As detailed in the Findings of Fact, Charge 3 shows that on August 5, 2003, Respondent sent an e-mail to Galls, Inc., a Lexington, Kentucky based distributor of police and military equipment and apparel identifying himself as "Micei Int'l (U.S. Op's and requesting a price quotation for 10,800 pairs of shoes and boots. Respondent intended to export the boots and shoes from the United States to Macedonia. Respondent carried on negotiations concerning the shoes and boots, stating in an e-mail to Galls "our [Micei] HQ will be putting up the performance bond at 20% in cash. Therefore, please make sure you quote the best possible price so you can so we can win this one, too." The boots and shoes are items subject to the Regulations and he knew that he was subject to the Denial Order at the time he requested the quotation on or about August 5, 2003. Therefore, Respondent violated 15 CFR 764.2(k).

These activities show, by the preponderance of reliable, probative, and credible evidence, that Respondent carried on negotiations concerning the 10,800 pairs of shoes and that those actions violated the terms of his Denial Order which Respondent knew was in effect, in violation of 15 CFR 764.2(k). Therefore, Charge 3 is *proved.*

As detailed in the Findings of Fact, Charges 4 and 11 reflect that on August 5, 2003, Respondent contacted Galls to pay for order # 25473620/016, previously placed. The first eight (8) digits of that number is Micei's account number at Galls. The items in that order number consist of shoes and remote strobe tubes. Respondent provided his credit card account information to pay for the $2,562.44 order, stating that Micei advised him to pay for the items with his VISA card. Micei reimbursed Respondent for purchasing the shoes and remote strobe tubes. Respondent intended to export the shoes and strobe tubes from the United States to Macedonia and the shoes and remote strobe tubes were exported from Galls' Inc. in Lexington, Kentucky, United States to Macedonia on or about September 5, 2003. The shoes and remote strobe tubes are items subject to the Regulations. At the time of the transaction, Respondent knew he was subject to the Denial Order. Respondent benefited from the VISA card purchase of the shoes and remote strobe tubes from Galls by earning credit towards the purchase of airline tickets.

These activities show, by the preponderance of reliable, probative, and credible evidence, that Respondent, bought, sold, and/or financed the purchase of shoes and remote strobe tubes, and that those actions violated the terms of his Denial Order, in violation of 15 CFR 764.2(k). Therefore, Charge 4 is *proved.*

These activities also show, by the preponderance of reliable, probative, and credible evidence, that Respondent, bought, sold, and/or financed the purchase of shoes and remote strobe tubes with knowledge that a violation of his Denial Order had occurred, was about to occur, or was intended to occur in connection with the shoes and remote strobe tubes, in violation of 15 CFR 764.2(e). Therefore, Charge 11 is *proved.*

As detailed in the Findings of Fact, Charges 5 and 12 reflect that on July 31, 2003, Respondent placed an order for 150 golf/polo shirts from Save On Promotional Products of Sandy, Oregon. Upon receiving Respondent's order, Save On ordered the shirts from its supplier, Tri-Mountain Gear Corp. of Baldwin Park, California. Respondent

ordered the shirts for or on behalf of Micei to be exported from the United States to Macedonia. Respondent paid for the order with his credit card. Micei reimbursed Respondent for purchasing the shirts. The shirts were exported from the United States to Macedonia on or about August 13, 2003. The shirts are items subject to the Regulations. At the time of the transaction, Respondent knew he was subject to the Denial Order. Respondent benefited from purchasing the shirts from a U.S. supplier using his VISA card by earning credit towards the purchase of airline tickets.

These activities show, by the preponderance of reliable, probative, and credible evidence, that Respondent ordered the shirts, carried on negotiations concerning the shirts, bought, sold, and/or financed the shirts, and benefited from the transactions while his Denial Order was in effect, in violation of 15 CFR 764.2(k). Therefore, Charge 5 is *proved.*

These activities also show, by the preponderance of reliable, probative, and credible evidence, that Respondent ordered the shirts, carried on negotiations concerning the shirts, bought, sold, and/or financed the shirts, and benefited from the transactions with knowledge that a violation of his Denial Order had occurred, was about to occur, or was intended to occur in connection with the shirts, in violation of 15 CFR 764.2(e). Therefore, Charge 12 is *proved.*

As detailed in the Findings of Fact, Charges 6 and 13 reflect that Respondent ordered two load binders, one ratchet strap, one binder chain, and one safety shackle from Maintenance Products, Inc. of Lowell, Indiana, on or about September 9, 2003. Respondent paid Maintenance Products, Inc. for these items, including freight charges of $21.52, with his VISA credit card. Micei reimbursed Respondent for purchasing these items. As per Respondent's intent, these items were exported from the United States to Macedonia on or about September 15, 2003. The load binders, binder chain, and safety shackle were manufactured in the United States. The load binders, ratchet strap, binder chain and safety shackle are items subject to the Regulations. At the time of the transaction, Respondent knew he was subject to the Denial Order. By charging the purchase from the U.S. supplier of the load binders, ratchet strap, binder chain and safety shackle on his VISA card, Respondent benefited by earning credit towards the purchase of airline tickets.

These activities show, by the preponderance of reliable, probative, and credible evidence, that Respondent ordered two load binders, one ratchet strap, one binder chain, and one safety shackle, bought, sold, and/or financed them, and benefited from the transactions while his Denial Order was in effect, in violation of 15 CFR 764.2(k). Therefore, Charge 6 is *proved.*

These activities also show, by the preponderance or reliable, probative, and credible evidence, that Respondent ordered two load binders, one ratchet strap, one binder chain, and one safety shackle, bought, sold, and/or financed them, and benefitted from the transactions with knowledge that a violation of his Denial Order had occurred, was about to occur, or was intended to occur, in connection with the two load binders, one ratchet strap, one binder chain, and one safety shackle, in violation of 15 CFR 764.2(e). Therefore, Charge 13 is *proved.*

As shown in Findings of Fact, Charges 7 and 14 reflect that in October 2003, Respondent, describing himself as "Micei Int'l (N/America Op's), placed an order for uniform pants with Galls (Galls number 2547320/017). Again describing himself as representing Micei, Respondent paid for the order on October 8, 2003 with his VISA credit card. The uniform pants were to be shipped from Galls' supplier, Liberty Uniform of Spartanburg, South Carolina, to Micei in Macedonia. Micei reimbursed Respondent for purchasing the uniform pants. The uniform pants are items subject to the Regulations. At the time of the transaction, Respondent knew he was subject to the Denial Order. Respondent benefited from his purchase of the uniform pants with his VISA credit card by earning airline frequent flier miles.

These activities show, by the preponderance of reliable, probative, and credible evidence, that Respondent ordered the uniform pants, bought, sold, and/or financed them, and benefited from the transactions while his Denial Order was in effect, in violation of 15 CFR 764.2(k). Therefore, Charge 7 is *proved.*

These activities also show, by the preponderance of reliable, probative, and credible evidence, that Respondent ordered the uniform pants, bought, sold, and/or financed them, and benefited from the transactions, with knowledge that a violation of his Denial Order had occurred, was about to occur, or was intended to occur, in connection with the uniform pants, in violation of 15 CFR 764.2(e). Therefore, Charge 14 is *proved.*

Ultimate Findings of Fact and Conclusions of Law

1. Respondent and the subject matter of these proceedings are properly within the jurisdiction vested in BIS under the EAA, and the EAR, as extended by Executive Order and Presidential Notices.

2. At all times relevant in these proceedings, Coast Guard Administrative Law Judges have jurisdiction to adjudicate export control cases for the Bureau of Industry and Security.

3. The exhibits that BIS submitted are relevant and material to the charges in the Charging Letter.

4. At all times relevant, The Denial Order was in effect.

5. At all times relevant, Respondent was subject to the terms of a Denial Order.

6. At all times relevant, Respondent knew he was subject to the Denial Order.

7. All items in question were subject to the Regulations at Section 734.3(a).

8. All items in question were subject to the prohibitions in the Denial Order.

9. As detailed in the Findings of Fact, from on or about July 2, 2003 to on or about October 8, 2003, on seven occasions as described in Charges 1 through 7 in the Schedule of Violations, Respondent took actions specifically prohibited by the Denial Order in violation of 15 CFR 7343.2(k).

10. As detailed in the Findings of Fact, from on or about July 2, 2003 to on or about October 8, 2003, on six occasions as described in Charges 8, 9 and 11–14 in the Schedule of Violations, Respondent took actions prohibited by the Denial Order with knowledge that a violation of his Denial Order had occurred, were about to occur, or were intended to occur, in violation of 15 CFR 764.2(e).

Affirmative Defenses

In his February 24, 2010 Memorandum in Defense to Evidence Submitted by BIS in Support of the Charges in its Charging Letter, Respondent offers eleven (11) affirmative defenses. Affirmative Defense number one claims "that subject matter jurisdiction is lacking herein * * * because the general Denial Order * * * was "null, void, and of no effect *ab initio* because BIS did not have statutory authority to impose such an order * * *."

This affirmative defense is the same as affirmative defenses numbered two, nine, and fourteen filed with his Answer, affirmative defenses numbered 2, 4, 14, and 19 filed in the Corrected

Answer, and objection number 5 in Respondent's Opposition to BIS's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen. It is also essentially the same as Objection 5 raised in his "Renewed Objections to BIS's Interrogatories and Request for Production of Documents filed on September 3, 2009 and Point numbered 1 and 10 raised in Respondent's Memorandum of Points and Authorities in Opposition to BIS' Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen filed October 12, 2009.

The undersigned previously ruled Respondent's claim that BIS had no statutory authority to issue the Denial Order because the EAA was in lapse is without merit. BIS had authority to issue the Denial Order and is still operating under that authority. *See,* November 10, 2009, Memorandum and Order disposing of numerous motions that the parties submitted on pre-decisional issues at 13. As noted in the charging Letter and subsequent filings, subsequent Presidential Notices have extended the EAA's provisions and regulations up to the present. The Agency and the Courts have held that continuing the operation and effectiveness of the EAA and its regulations by issuing Executive Orders by the President is a valid exercise of authority. *In the Matter of Micei International,* 74 FR 24,788, 24,790 (May 26, 2009); *Wisconsin Project on Nuclear Arms Control* v. *U.S. Dep't of Commerce,* 317 F. 3d 275, 278–79, 282 (DC Cir. 2003). Therefore, affirmative defense number one is *rejected* as being without merit.

In affirmative defense number two, Respondent claims "[t]his Court lacks jurisdiction to adjudicate this proceeding because the purported assignment of the Administrative Law Judge herein has been made in violation of the statute and regulations regulating the assignment of administrative law judges to BIS's civil penalty proceedings." This defense is essentially the same as affirmative defense number one filed with his Answer and affirmative defenses numbers one (1) and three (3) in his "Corrected Answer to Charging Letter." It is also essentially the same as his "Objection 6, raised in his "Renewed Objections to BIS's Interrogatories and Request for Production of Documents filed on September 3, 2009 and essentially the same as Point Number 2 raised in Respondent's Memorandum of Points and Authorities in Opposition to BIS's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen filed October 12, 2009. The undersigned has previously ruled that at all relevant times in these proceedings, Memoranda of Agreement and an Office of Personnel Management authorization letters properly establish jurisdiction for U.S. Coast Guard Administrative Law Judges to adjudicate export control cases for BIS. *See,* November 10, 2009, Memorandum and Order disposing of numerous motions that the parties submitted on pre-decisional issues at 3, 13, and 14. Therefore, affirmative defense number two is *rejected* as being without merit.

In affirmative defense number three, Respondent claims "[t]his proceeding is defective and should be dismissed because it has been filed in violation of the prohibition against Double Jeopardy in the Constitution of the United States." This defense is the same as Respondent's affirmative defense number eight (8) raised in his Answer and affirmative defense number thirteen (13) raised in his Corrected Answer. It is also the same as Points numbered 3 and 6 in Respondent's Memorandum of Points and Authorities in Opposition to BIS's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen filed October 12, 2009. The undersigned has previously found that double jeopardy does not apply to these administrative proceedings in the November 18, 2009 Order Denying Respondent's Objections to Qualifications of Administrative Law Judge at 3, 4, but further clarification is necessary.

Respondent's double jeopardy argument is found on pages 15–17 of his Memorandum of Points and Authorities in Opposition to BIS's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen filed October 12, 2009 and his factual basis is found in his October 12, 2009 "Declaration of Yuri Montgomery in Opposition to BIS' Motion for Summary Decision as to Charges Two, Six, Nine and Thirteen" at paragraphs 32 to 38, and 50 to 54. He also includes this argument in his "Declaration of Yuri Montgomery in Support of Objection to Qualifications of ALJs and all Other Members of BIS' Decision making Body" of October 20, 2009 scattered throughout various paragraphs.

He states that in May 2005, criminal charges were initiated against him in the U.S. District of Columbia for alleged violations of this Denial Order. In 2006 that criminal action was dismissed and he was re-indicted on substantially identical charges in the U.S. District Court for the Western District of Washington at Seattle, and on April 30, 2008. The Second Superseding Indictment was filed in the same court. Respondent claims the criminal prosecution was based on his alleged violations of this Denial Order and that his subsequent trial resulted in a mistrial because the jurors could not agree. Respondent further claims that following the mistrial, he filed a motion for judgment of acquittal which the district judge granted. Respondent's statement is incorrect. Attached to his Declaration is the Second Superseding Indictment dated April 30, 2008, a Notice of Dismissal DATED October 10, 2008, dismissing the Indictment with prejudice against this Respondent, and the October 20, 2008 Order of Dismissal, signed by U.S. District Judge Ricardo S. Martinez, dismissing the Indictment with prejudice against this Respondent. The Order references Federal Rule of Criminal Procedure 48a which states "The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent." The District Judge did not enter an order of acquittal.

In his Memorandum of Points and Authorities in Opposition to BIS's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen at 16, Respondent claims "[t]he charges brought forth in this proceeding are based on the same facts of which respondent has already prevailed and obtained dismissal with prejudice, which is the equivalent to acquittal, after undergoing a trial in the criminal proceeding." In support of this claim, Respondent cites *Hudson* v. *United States,* 522 U.S. 93 (1997) as authority. In *Hudson,* the Office of the Comptroller of the Currency imposed civil monetary penalties and debarment on the defendants for causing two banks in which they were officials to make certain loans in a manner that unlawfully allowed them to receive the loans' benefits, in violation of the banking statutes. The government later indicted the defendants for essentially the same conduct so they moved to dismiss on double jeopardy grounds. The Supreme Court held that the double jeopardy clause of the Fifth Amendment is not a bar to the later criminal prosecution because the administrative proceedings were civil, not criminal. 522 U.S. at 95, 96. The Supreme Court found that the double jeopardy clause protects only against the imposition of multiple criminal punishments for the same offense. Moreover, Respondent was neither acquitted nor convicted. Therefore, affirmative defense number three is *rejected* as being without merit.

In affirmative defense number four, Respondent claims "[s]ubject matter

jurisdiction is lacking over [Respondent] because the BIS's claims are not colorable, *i.e.,* they are both, immaterial and made solely for the purpose of obtaining jurisdiction over [Respondent] and are wholly insubstantial and frivolous." This affirmative defense is essentially the same as affirmative defense number 10 in his Answer, affirmative defense number 15 in his Corrected Answer, and those raised in argument number 4 in his Memorandum of Points and Authorities in Opposition to BIS's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen of October 12, 2009. The undersigned previously ruled that "Respondent and the subject matter of these proceedings are properly within the jurisdiction vested in BIS under the EAA, and the EAR, as extended by Executive Order and Presidential Notices. *See,* November 10, 2009, Memorandum and Order disposing of numerous motions that the parties submitted on pre-decisional issues at 3. Therefore, Respondent's affirmative defense number four is *rejected* as being without merit.

In affirmative defense number five, Respondent claims "[t]he charges sought by BIS to be adjudicated by the instant Motion should be dismissed as barred by the doctrine of collateral estoppel." This affirmative defense is the same as affirmative defense number 5 in Respondent's Answer, affirmative defense number 8 and 9 in his Corrected Answer, and argument number 7 in his Memorandum of Points and Authorities in Opposition to BIS's Motion for Summary Decision as to charges Two, Six, Nine, and Thirteen of October 12, 2009. Simply put, collateral estoppel would prevent a party from relitigating an issue previously decided against the party. Respondent claims that the dismissal of his criminal case is the same as an acquittal. According to Black's Law Dictionary, 8th ed. (2004), an acquittal is a legal certification, usually by jury verdict, that an accused person is not guilty of the charged offense. According to Respondent, the jury could not agree on a verdict, and the proceedings ended in mistrial. On application of the government, the District Judge dismissed with prejudice. There there were no findings of "not guilty" of the counts in the Indictment and therefore no acquittal. Similarly, Black's defines *estoppel,* as raised by Respondent in his Answer at affirmative defense number 5 and in his Corrected Answer at affirmative defense number 8, as a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. Respondent was not convicted in the criminal case. Therefore, Respondent's affirmative defense number five is *rejected* as being without merit.

In affirmative defense number six, Respondent claims "[t]he charges sought by BIS to be adjudicated by the instant Motion should be dismissed as barred by the doctrine of *res judicata*." This is the same as affirmative defense number 4 in his Answer, affirmative defense number 7 in his Corrected Answer, and Argument number 8 in his Memorandum of Points and Authorities in Opposition to BIS's Motion for Summary Decision as to charges Two, Six, Nine, and Thirteen of October 12, 2009. Black's Law Dictionary, 8th ed. (2004), defines *res judicata* as an affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties. As stated in the above discussion on collateral estoppel, there was no decision in the criminal case. Therefore, further analysis of the elements is unnecessary. Respondent's affirmative defense number six is *rejected* as being without merit.

In defense number seven, Respondent claims "[t]he monetary penalty proposed by BIS should not be applied as violative of the Constitutional prohibition against cruel and unusual punishments." This affirmative defense is the same as affirmative defense number 9 in Respondent's October 16, 2009 "Memorandum of Points and Authorities in Opposition to BIS' Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen." These proceedings are civil administrative proceedings and not criminal proceedings. Under the Eighth Amendment of the Constitution of the United States, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Assuming Respondent is referring to the excessive fines clause, Congress has set the maximum penalty per violation in these civil proceedings at $250,000. International Emergency Economic Powers Enhancement Act of 2007, Public Law 110–96, 121 Stat. 1011 (Oct. 16, 2007). The criminal penalties were also raised from $50,000 and ten years of imprisonment to $1,000,000 and twenty years of imprisonment. Here, BIS proposes a civil monetary penalty in the amount of $340,000 for all thirteen violations. If the maximum civil penalty of $250,000 were assessed for each of the remaining 13 violations, Respondent would face civil penalties totaling $3,250,000. He has not offered any argument or case law supporting the notion that assessed civil penalties amounting to less than 10.5% of the congressionally established maximum violate the Eighth Amendment. Therefore, the monetary penalty BIS proposes does not violate the Constitutional prohibition against cruel and unusual punishments and affirmative defense number seven is *rejected* as being without merit.

In affirmative defense number eight, Respondent claims "[n]o denial order may be imposed upon Respondent, as IEEPA provides no statutory authorization for such penalty." This affirmative defense is the same as argument number 10 in Respondent's Memorandum of Points and Authorities in Opposition to BIS's Motion for Summary Decision as to charges Two, Six, Nine, and Thirteen of October 12, 2009. The undersigned previously ruled that BIS has the statutory authority to issue a Denial Order. *See,* November 10, 2009, Memorandum and Order disposing of numerous motions that the parties submitted on pre-decisional issues at 13. Therefore, affirmative defense number eight is *rejected* as being without merit.

In affirmative defense number nine, Respondent claims "[t]he charges of 'acting with knowledge of violations' should be dismissed because they are (a) duplicitous as interpreted by BIS and (b) unauthorized by IEEPA as amended in 2007." This is the same as argument number 11 in Respondent's Memorandum of Points and Authorities in Opposition to BIS's Motion for Summary Decision as to charges Two, Six, Nine, and Thirteen of October 12, 2009.

Concerning part (b) of Respondent's argument, the Regulations are maintained in force pursuant to the International Emergency Economic Powers Act. This Court's previous ruling that the Regulations are, in fact, maintained in force supports the validity of the knowledge charges. *See* Order of November 10, 2009 at 13. *See also, In the Matter of Ihsan Medhat Elashi,* 71 FR 38,843 (July 10, 2006) imposing a civil monetary penalty of $330,000 and a 50 year denial of export privileges for selling items with knowledge of a denial order. That case cites the IEEPA as statutory authority and 15 CFR 764.2(e) as regulatory authority. Therefore, Respondent's

affirmative defense that the charges of acting with knowledge of violations should be dismissed because they are unauthorized by IEEPA as amended in 2007, affirmative defense nine "b" is *rejected* as being without merit.

Concerning Respondent's claim that "acting with knowledge of violations should be dismissed because they are (a) duplicitous as interpreted by BIS is also rejected as being without merit. Under the *Elashi* case, "if an individual has a denied export license, violating the denial order is one violation and the act of knowingly violating the EAR is a separate violation." *Elashi* at 38,849. Therefore, Respondent's affirmative defense nine "a" that "[t]he charges of 'acting with knowledge of violations' should be dismissed because they are (a) duplicitous as interpreted by BIS" is *rejected* as being without merit.

In defense number ten, Respondent claims "[t]he penalty enhancement under IEEPA, as retroactively amended in 2007, cannot be applied herein because it is violative of the Ex Post Facto clause of the Constitution of the United States." This is the same as argument number 12 in Respondent's Memorandum of Points and Authorities in Opposition to BIS' Motion for Summary Decision as to charges Two, Six, Nine, and Thirteen of October 12, 2009.

Congress added the enhanced civil penalty as part of Section 206(b) of the International Emergency Economic Powers Act of 2007, Public Law 110–96, 121 Stat. 1011 (Oct. 16, 2007). Section 2 of that Act reads as follows:

(a) IN GENERAL.—Section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705) is amended to read as follows:

"SEC. 206. PENALTIES.

"(a) UNLAWFUL ACTS.—It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under this title.

"(b) CIVIL PENALTY.—A civil penalty may be imposed on any person who commits an unlawful act described in subsection (a) in an amount not to exceed the greater of—

"(1) $250,000; or

"(2) an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

"(c) CRIMINAL PENALTY.—A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of, an unlawful act described in subsection (a) shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.".

(b) EFFECTIVE DATE.—

(1) CIVIL PENALTIES.—Section 206(b) of the International Emergency Economic Powers Act, as amended by subsection (a), shall apply to violations described in section 206(a) of such Act with respect to which enforcement action is pending or commenced on or after the date of the enactment of this Act.

(2) CRIMINAL PENALTIES.—Section 206(c) of the International Emergency Economic Powers Act, as amended by subsection (a), shall apply to violations described in section 206(a) of such Act with respect to which enforcement action is commenced on or after the date of the enactment of this Act.

The above language shows that Congress intended to establish separate penalties for civil and criminal proceedings. Once it is established that Congress intended to enact a civil enforcement scheme, only the clearest proof will override that intent and transform what is clearly a civil penalty into what amounts to a criminal penalty. *See, Smith* v. *Doe,* 538 U.S. 84, 92 (2003). Respondent has not presented any evidence such proof.

The enhanced civil penalties apply to violations with respect to which enforcement action is pending or commended on or after the date of the enactment of the Act. The effective date of the Act was October 17, 2007. Since this enforcement proceeding commenced on July 1, 2008, a civil penalty of up to $250,000 per violation applies to this case since. Therefore, Respondent's affirmative defense ten that the penalty enhancement violates the Ex Post Facto clause of the United States Constitution is *rejected* as being without merit.

In defense number eleven, Respondent claims "[a]ll of the charges in the Amended Charging Letter should be dismissed because BIS has failed to allege in said Charging Letter and prove that any of the subject products were not 'the foreign-produced direct product of U.S.—origin technology' which has been expressly exempted from the prohibitions of the Denial Order." The undersigned has previously rejected this argument as stated in this Recommended Decision and Order. Therefore, affirmative defense number eleven is *rejected* as being without merit.

Respondent's Two Objections

In his February 24, 2010 Objections to Evidence Submitted by BIS in Support of the Charges in its Charging Letter, Respondent offers two Objections: (1) "Respondent hereby Objects to unsworn, unverified, unsubstantiated, and unauthenticated 'evidence' supporting its charges;" (2) "Objection is hereby made to the letter submitted by BIS as Exhibit I, as such letter does not constitute evidence but is inadmissible self-serving legal opinion."

Concerning objection #1, Respondent does not address any specific exhibit or show why they are not admissible under BIS's procedural rules at 15 CFR 766.13(b). BIS's exhibits are declarations provided under penalty of perjury; however, that section provides "[t]he rules of evidence prevailing in courts of law do not apply, and all evidentiary deemed by the administrative law judge to be relevant and material to the proceeding and not unduly repetitious will be received and given appropriate weight." Having so found, Respondent's objection #1 is Overruled.

Concerning objection #2, BIS routinely determines what items are subject to its regulations. Absent a showing that this Exhibit is not a valid exercise of BIS's authority and how it is not relevant or material to the Charges in the Charging Letter and therefore inadmissible under 15 CFR 766.13(b), this objection cannot be sustained. Therefore, Respondent's objection #2 is Overruled.

Respondent's Remaining Affirmative Defenses

The remaining affirmative defenses from Respondent's original nineteen (19) not included in his February 24, 2010 "Memorandum in Defense to Evidence Submitted by BIS in Support of the Charges in its Charging Letter" are addressed as follows:

6. "The Charging Letter herein and any of its allegations fail to state facts constituting a valid claim against Respondent herein." The undersigned previously ruled on this defense in the March 23, 2009 Order Denying Respondent's Motion for More Definite Statement. After detailing the parties' arguments, the undersigned held, "[t]he Charging Letter, together with the Schedule of Violations provides notice to Respondent sufficient to formulate his answer. To the extent Respondent requests additional information he may avail himself of the Discovery procedures under 15 CFR 766.9 *after* he files his Answer. Therefore, Respondent's motion for a more definite statement is denied." In consideration of the foregoing, Respondent's defense #6 is *rejected* as being without merit.

10. "This proceeding is barred by the doctrine of waiver. Waiver is a voluntary relinquishment or abandonment, either express or implied, of a legal right or advantage. Black's Law Dictionary, (8th ed. 2004). However, Respondent offers no evidence or authority on this defense. Therefore, this defense is *rejected* as being without merit.

11. "This proceeding is barred by the doctrine of release." Release is a liberation from an obligation, duty, or demand or the act of giving up a right or claim to the person against whom it could have been enforced. Black's law Dictionary, (8th ed. 2004). However, Respondent presents no evidence or authority on this defense. Therefore, Respondent's defense of "release" is *rejected* as being without merit.

12. "This proceeding is barred by settlement agreement." Respondent offers no evidence of a previous settlement agreement or authority in support of this defense. He apparently is referring to the criminal charges that resulted in a hung jury and subsequent dismissal in October 2008. In paragraph 24 of the "Declaration of Yuri Montgomery in Support of Objection to Qualifications of Administrative Law Judges and All Other Members of BIS Decisionmaking Body" Respondent states, "[s]hortly prior to July 3, 2008, my attorney apparently informed the prosecutor in said criminal action of my intention to file a motion to suppress my testimony given without the presence of counsel during my meetings and telephone interviews with BIS personnel and prosecutors in said criminal matter, as well as a motion to suppress some of my records obtained by BIS pursuant to a search warrant illegally obtained by BIS." He mentions "plea agreement" in the following paragraph 25 in which he states, "[o]n July 3, 2008, I filed a motion to suppress said testimony on the ground that I shared said information with the government based on my understanding that it was part of my obligation to cooperate with the government in exchange for immunity given to me pursuant to a plea agreement I entered into [on] or about 1999 and which resulted in the issuance of said Denial Order, as well as a motion to suppress evidence, including but not limited to copies of my e-mails, obtained under said search warrant, on the grounds that said warrant was stale and was obtained as a result of misleading statements made my BIS agents to a U.S. magistrate judge in eh affidavit in support of said search warrant." This is an affirmative defense in which Respondent bears the burden of going forward with producing the evidence in support of it. Respondent has not produced any plea agreement. Therefore, Respondent's claim is *rejected* as being without merit.

15. "The Charging letter herein is invalid as it alleges claims which are frivolous and insubstantial and made for the sole purpose of obtaining jurisdiction over Respondent herein." Defense #15 is *rejected* as being without merit for the reasons set forth in the ruling on defense #6, above.

17. "This administrative proceeding is barred by laches due to BIS's excessive delay in bringing the Charging Letter herein." Black's Law Dictionary 8th ed., 2004 defines "laches" as "unreasonable delay in pursuing a right or claim—almost always an equitable one—in a way that prejudices the party against whom relief is sought. "Section 2462 of Title 28 of the United States Code imposes a five-year statute of limitation on the commencement of enforcement proceedings brought by BXA [now BIS] under the Export Administration Act." *In the Matter of MK Technology Associates, Inc.,* Decision and Order (Dept. of Commerce), 64 FR 69,478, 69,481 (Dec. 13, 1999). Title 28 U.S.C. 2462 reads as follows:

§ 2462. Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. 2462

The Charging Letter of July 1, 2008 shows the claim first accrued on July 2, 2003, within the five-year year Statute of Limitations. Further, Respondent has not shown how the passage of time within the five-year statute of limitations has disadvantaged or prejudiced him. Therefore, Respondent's defense #17 is *rejected* as being without merit.

18. "This proceeding is barred as it violates the Due process clause of the Constitution of the United States." In the Memorandum and Order of November 10, 2009, the undersigned Overruled Respondent's objection #1 that the previous scheduling orders for discovery violated his due process rights. Here, Respondent makes no specific showing of due process violations but it is assumed that he objects to the entire proceedings. As the above detailed record of these proceedings shows, Respondent has been accorded reasonable notice and more than reasonable opportunity to be heard as provided for within the framework of BIS's procedural rules. Therefore, Respondent's defense #18 is *rejected* as being without merit.

Recommended Sanction

Under Section 764.3 of the Regulations, the applicable sanctions are: (1) A monetary penalty; (2) a denial of export privileges under the Regulations; and (3) exclusion from practice before BIS. Pursuant to the International Emergency Economic Powers Enhancement Act of 2007, Public Law 110–96, 121 Stat. 1011 (Oct. 16, 2007), as amended, "an amount not to exceed the greater of * * * $250,000; or * * * an amount that is twice the amount of the transaction that is the basis of the violation with respect to which enforcement action [was] pending or commenced on or after the date of the enactment of [the] Act." Since BIS initiated this enforcement action after October 16, 2007, the maximum penalty in this case is $250,000 per violation.

The Agency recommends a civil monetary penalty in the amount of $340,000 and a denial of export privileges for thirty (30) years. The undersigned agrees. This sanction is consistent with prior cases, including, *In the Matter of: Ishan Medhat Elashi,* 71 FR 38,843 (July 10, 2006). *Elashi* violated a Denial Order against him and acted with knowledge of these violations by exporting and conspiring to export computer equipment to Syria. For Elashi's thirty (30) violations, he received the maximum available civil monetary penalty available at the time ($11,000 per violation for a total civil monetary penalty of $330,000) as well as a denial of his export privileges for fifty (50) years.

The record is devoid of any acknowledgement of or acceptance of responsibility by Respondent for his actions. Respondent's conduct reflects a serious disregard for export compliance responsibilities.

Wherefore,

REDACTED SECTION (PAGES 55–58)

Accordingly, I am referring this Recommended Decision and Order to the Under Secretary for review and final action for the agency, without further notice to the Respondent, as provided in 15 CFR 766.22.

Done and dated October 28, 2010, in New York, New York.

Walter J. Brudzinski,
Administrative Law Judge.

Attachment A

Summary of Pre-Decision Motions Practice; Activity Prior to Respondent's Answer to Charging Letter

On July 28, 2008, Peter Offenbecher, Esq., of Skellenger Bender, PS, entered his appearance on behalf of Respondent and requested an extension of time to file Answer. On August 5, 2008, the Chief Administrative Law Judge granted Respondent's request and extended the time to file Answer until August 18, 2008.

On August 14, 2008, Respondent filed an unopposed motion to stay the instant proceedings pending a parallel criminal trial in U.S. District Court for the Western District of Washington.[10]

On August 15, 2008, the Chief Administrative Law Judge assigned this case to the undersigned for adjudication and on August 18, 2008, the undersigned granted Respondent's unopposed motion to stay.

On October 28, 2008, BIS filed a Stipulated Motion to Stay Proceedings for 30 Days Due to Settlement Negotiations. The Motion advised that the parallel criminal action concluded on October 21, 2008 and that counsel for Respondent and counsel for BIS desire to engage in settlement negotiations.[11] Accordingly, on October 30, 2008, the undersigned issued an Order Granting the Motion to Stay until December 1, 2008. Counsel for Respondent filed his Notice of Attorney Withdrawal on December 2, 2008, since that time Respondent has been self-represented.

On January 7, 2009, Respondent filed his Notice to Stay Administrative Proceeding advising that he and counsel for BIS have agreed to extend the date for his responsive Answer until January 31, 2009. On January 9, 2009, the undersigned issued an Order Granting Respondent's request staying the proceedings until January 31, 2009 at which time the Respondent shall file his Answer. Respondent did not file his Answer on January 31, 2009. Instead, on February 3, 2009, the undersigned received via facsimile Respondent's Motion for More Definite Statement and Demand for Hearing on the Motion for More Definite Statement, which he dated January 31, 2009. BIS received that Motion via facsimile on February 18, 2009.

On March 9, 2009, BIS filed its opposition to Respondent's Motion averring, among other things, that the mutually agreed upon extension of time to file Answer did not include any extension of time to file a motion for more definite statement. Moreover, the regulations do not provide for the filing of a more definite statement.

On March 23, 2009, the undersigned denied Respondent's Motion for More Definite Statement and ordered Respondent to Answer the Charging Letter and *Any Demand for Hearing* [emphasis added] by April 2, 2009.

Respondent filed his Answer "under protest, duress, and compulsion of the Order Denying Respondent's Motion for More Definite Statement." He denied each and every allegation in the Charging Letter but did not demand a hearing. He also asserted fourteen (14) Affirmative Defenses:

1. Neither this Court nor any of the administrative law judges herein have jurisdiction to adjudicate the instant administrative proceeding.
2. The Department of Commerce, Bureau of Industry and Security, has no jurisdiction over this administrative proceeding.
3. The Charging Letter herein and any of its allegations fail to state facts constituting a valid claim against Respondent.
4. This administrative proceeding is barred by the doctrine of res judicata.
5. This administrative decision is barred by the doctrine of estoppel.
6. This administrative proceeding is barred by the doctrine of waiver.
7. This administrative proceeding is barred by the doctrine of release.
8. This administrative proceeding is barred by the double jeopardy clause of the Constitution of the United States.
9. This administrative proceeding is unauthorized in that the Export Control Regulations used as a basis for the Charging Letter herein lack proper statutory authorization and are thus invalid.
10. The Charging Letter herein is invalid as it alleges claims which are frivolous and insubstantial and made for the sole purpose of obtaining jurisdiction over Respondent.
11. The goods subject to the Charging Letter are of foreign origin and are therefore not subject to the Charging Letter.
12. This administrative proceeding is barred by laches due to BIS's excessive delay in bringing the Charging Letter.
13. This administrative proceeding is violative of the Due Process clause of the Constitution of the United States.
14. This administrative proceeding is unauthorized by law in that the statute under which the pertinent Export Control Regulations have been promulgated has expired.

Respondent subsequently filed a "Corrected Answer to Charging Letter," again denying each allegation and also objecting to among other things, the form of the Charging Letter. He did not demand a hearing but included the following amended affirmative defenses:

1. This Court and any and all of the administrative law judges herein have no subject matter jurisdiction over this proceeding.
2. The Department of Commerce, Bureau of Industry and Security, has no subject matter jurisdiction over this proceeding.
3. This Court and any and all of the administrative law judges herein have no personal jurisdiction over Respondent herein.
4. The Department of Commerce, Bureau of Industry and Security, has no personal jurisdiction to adjudicate this proceeding.
5. This Court and any and all of the administrative law judges herein lack statutory authorization to adjudicate this proceeding.
6. The Charging Letter herein and any of its allegations fail to state facts constituting a valid claim against Respondent herein.
7. This proceeding is barred by the doctrine of res judicata.
8. This proceeding is barred by the doctrine of estoppel.
9. This proceeding is barred by the doctrine of collateral estoppel.
10. This proceeding is barred by the doctrine of waiver.
11. This proceeding is barred by the doctrine of release.
12. This proceeding is barred by settlement agreement.
13. This proceeding is barred by the double jeopardy clause of the Constitution of the United States.
14. This proceeding is unauthorized by law in that the Regulations used as a basis for the Charging Letter herein lack statutory authorization and are thus invalid.
15. The Charging Letter herein is invalid as it alleges claims which are frivolous and insubstantial and made for the sole purpose of obtaining jurisdiction over Respondent herein.
16. The goods subject to the Charging Letter are of foreign origin and are therefore not subject to the prohibitions of the purported Denial Order;
17. This administrative proceeding is barred by laches due to BIS's excessive delay in bringing the Charging Letter herein;
18. This proceeding is barred as it violates the Due Process clause of the Constitution of the United States;
19. This proceeding is unauthorized by law in that the statute under which the Regulations have been promulgated has expired.

Activity After Respondent's Answer to Charging Letter; Case To Be Adjudicated on the Record

Since neither party filed a demand for hearing, the undersigned issued a Scheduling Order on June 5, 2009 stating the matter will be adjudicated on the record in accordance with 15 CFR 766.6(c). The Order set July 6, 2009 as the deadline to complete discovery; August 5, 2009 as the deadline for the Agency to file evidence in support of charges; September 2, 2009 as the deadline for Respondent to reply and file evidence in support of his defenses; and September 16, 2009 as the deadline for the Agency to file rebuttal.

On June 19, 2009, BIS served its "Requests for Admissions and Interrogatories" and "Requests for Production of Documents" on Respondent and on June 30, 2009, Respondent filed his "Preliminary Objections to BIS's Interrogatories and Requests for Production of Documents"

[10] Out of the eleven Counts in the Indictment, four Counts concerned conduct corresponding to Charges in the Charging Letter. The Charging Letter alleged violations of 15 CFR 764.2(e) and (k). The Indictment alleged violations of 15 CFR 764(a) and (b), as well as 18 U.S.C. 2 and 50 U.S.C. 1705.

[11] Respondent was neither convicted nor acquitted. The criminal trial ended in mistrial due to "hung jury" and the District Judge granted leave to dismiss the Indictment with prejudice.

as well as his "Objections to BIS's Interrogatories and Requests for Production of Documents," the latter of which contained Respondent's Answers to BIS's Requests for Admission.

On July 6, 2010 Respondent filed his "Requests for Admissions and Requests for Production of Documents." These requests were followed by the parties' "Stipulation to Stay Discovery Response Deadlines and Extending Remaining Deadlines" and on July 30, 2010, the undersigned issued an Amended Scheduling Order extending the deadlines.

That Order was followed by another Order on August 20, 2009 setting September 3, 2009 as the deadline for BIS to respond to Respondent's "Requests for Admission and Request for Production of Documents" and for Respondent to respond to BIS's "Interrogatories and Requests for Production of Documents."

Respondent did not file responsive pleadings pursuant to the August 20, 2009 Order but instead filed "Renewed Objections to BIS's Interrogatories and Requests for Production of Documents" on September 3, 2009. Respondent's Objections are as follows:

1. The Order Setting Deadlines and Compelling Discovery Responses on BIS' Motion to Set Deadline and Compel Discovery Responses is null, void, and of no effect because it was issued by the Administrative Law Judge in manifest violation of Respondent's constitutional right to due process, as it was issued on the same day said motion was served on Respondent and even before Respondent received said motion which deprived Respondent of notice and opportunity to be heard required by the due process clause of the Constitution of the United States.

2. The Order Setting Deadlines and Compelling Discovery Responses on BIS's Motion to Set Deadline and Compel Discovery Responses is null, void, and of no effect because it was issued by the Administrative Law Judge in violation of the pertinent responses.

3. The Order Setting Deadlines and Compelling Discovery Responses on BIS's Motion to Set Deadline and Compel Responses is null, void, and of no effect because it implicitly required that responses be sent "via facsimile and mail", while pursuant to 15 CFR 766.5(b) service by facsimile is deemed acceptable but could be in no way required by the Regulations.

4. The Order Setting Deadlines and Compelling Discovery Responses on BIS's Motion to Set Deadline and Compel Discovery Responses is null, void, and of no effect because it implicitly required that responses be "produced * * * to Eric Clark" at a specified address, while 15 CFR 766.9(b) provides for "requests for production of documents for inspection and copying", and has no provision for such responses to be provided by other means.

5. The Order Setting Deadlines and Compelling Discovery Responses on BIS's Motion to Set Deadline and Compel Discovery Responses is null, void, and of no effect because this tribunal has no subject matter jurisdiction over respondent, as the general denial order imposed against Yuri Montgomery was void because BIS did not have statutory authority to impose such an order against Yuri Montgomery due to EAA being in lapse when said denial order was issued and/or when the alleged violations by Yuri Montgomery occurred.

6. The Order Setting Deadlines and Compelling Discovery Responses on BIS's Motion to Set Deadline and Compel Discovery Responses is null, void, and of no effect because this Administrative Law Judge had no jurisdiction to issue said Order, as his assignment in this matter was made in violation of the Administrative Procedure Act, 5 U.S.C. Section 3344, and the regulations issued under said statute, 5 CFR 930.213.

Therefore, on September 4, 2009, the undersigned issued an Order for BIS to file its evidence in support of charges by September 30, 2009 as previously provided. The undersigned overruled the above Objections in the Memorandum and Order of November 10, 2009.

On September 18, 2009, BIS requested a temporary stay in the Scheduling Order and proposed a revised Scheduling Order and, on the same day, filed a "Motion for Summary Decision on Charges Two, Six, Nine, and Thirteen."

On September 23, 2009, the undersigned issued an Order temporarily staying the July 30, 2009 Scheduling Order pending resolution of the Agency's "Motion for Summary Decision on Charges Two, Six, Nine, and Thirteen." The Order also set October 16, 2009 for Respondent to Answer the Agency's Motion for Summary Decision and fifteen (15) days thereafter as the date for the BIS to Reply.

On October 13, 2009, Respondent filed his "Motion for an Immediate Temporary Stay of Further Running of the Court's Scheduling Order Issued on September 23, 2009, Pending the Outcome of Respondent's Motion that Requests for Admission be Deemed Admitted and that the Matters Therein Be Conclusively Established and Motion to Compel Production of Documents." He also filed his "Motion That Requests for Admission be Deemed Admitted and That the Matters Therein be Conclusively Established," and his "Memorandum of Points and Authorities in Support of Respondent's Motion That Requests for Admission be Deemed Admitted and That the Maters Therein be Conclusively Established." Further, he filed "Respondent's Motion to Compel Production of Documents," and "Memorandum of Points and Authorities in Support of Respondent's Motion to Compel Production of Documents."

On October 15, 2009, BIS filed its Opposition to Respondent's above motions and on the same day the undersigned issued an Order Denying Respondent's Motion for Immediate Stay and further ordered Respondent to Answer the Motion for Summary Decision on Charges Two, Six, Nine, and Thirteen by October 16, 2009, as previously ordered. The Order further stated that the parties are to submit copies of their respective discovery requests by October 26, 2009 so that the Judge can determine if enforcement pursuant to Section 766.9(d) of the regulations is appropriate.

On October 16, 2009 the undersigned received the "Declaration of Yuri Montgomery in Opposition to BIS's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen," his "Memorandum of Points and Authorities in Opposition to BIS's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen," and "Declaration of Sanja Milic in Opposition to BIS's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen," all dated October 12, 2009. Respondent's "Memorandum of Points and Authorities in Opposition to BIS's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen" contain twelve (12) affirmative defenses, some of which are the same as Respondent's affirmative defenses included with his Answer, Corrected Answer, and "Renewed Objections to BIS's Interrogatories and Requests for Production of Documents" of September 3, 2009. His objections and affirmative defenses to BIS's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen are as follows:

1. Subject matter jurisdiction is lacking herein over Yuri Montgomery because the general Denial Order imposed against Yuri Montgomery which he is alleged to have violated was null, void, and of no effect *ab initio* because BIS did not have statutory authority to impose such an order against Yuri Montgomery.

2. This Court lacks jurisdiction to adjudicate this proceeding because the purported assignment of the Administrative Law Judge has been made in violation of the statute and regulations regulating assignment of administrative law judges to BIS's civil penalty proceedings.

3. This proceeding is defective and should be dismissed because it has been filed in violation of the prohibition against Double Jeopardy in the Constitution of the United States.

4. Subject matter jurisdiction is lacking herein over Yuri Montgomery because the BIS's claims are not colorable, *i.e.,* they are both, immaterial and made solely for the purpose of obtaining jurisdiction over Yuri Montgomery *and* are wholly insubstantial and frivolous.

5. Summary adjudication as to each of the charges should be denied because, based on the evidence presented by Respondent, disputed issues of material fact are present as to each of the issues presented by the Motion for Summary Adjudication.

6. The charges sought by BIS to be adjudicated by the instant Motion should be dismissed as barred by the Double Jeopardy provision in the Constitution of the United States.

7. The charges sought by BIS to be adjudicated by the instant Motion should be dismissed as barred by the doctrine of *collateral estoppel.*

8. The charges sought by BIS to be adjudicated by the instant Motion should be dismissed as barred by the doctrine of *res judicata.*

9. The monetary penalty proposed by BIS should not be applied as violative of the Constitutional prohibition against cruel and unusually punishments.

10. No denial order may be imposed upon Respondent, as IEEPA provides no statutory authorization for such penalty.

11. The charges of "acting with knowledge of violation" should be dismissed because they are a) duplicitous as interpreted by BIS and b) unauthorized by IEEPA as amended in 2007.

12. The penalty enhancement under IEEPA, as retroactively amended in 2007, cannot be applied herein because it is violative of the Ex Post Facto clause of the Constitution of the United States.

On October 20, 2009, the undersigned received Respondent's "Objections to Qualifications of Administrative Law Judges and All Members of the Bureau of Industry and Security Decisionmaking Body." Among other things, Respondent claims that he has filed a civil suit against various BIS officials and members of this Court. To date, the undersigned has not been served with the Complaint nor has any other Coast Guard Administrative Law Judge. The undersigned also received "Respondent's Declaration in Support of Objections to Qualifications of ALJs and all Other Members of Bureau of Industry and Security Decisionmaking Body."

On October 26, 2009, BIS submitted its response to the Order of October 15, 2009 directing the parties to submit copies of their respective discovery requests by October 26, 2009 so that the Judge can determine whether enforcement pursuant to Section 766.9(d), noted above, is appropriate. BIS claimed that Respondent did not answer or produce any documents in response to BIS's Interrogatories and Requests for Production of Documents despite being ordered to do so. BIS also filed a Supplemental Submission on October 26, 2009 in response to the October 15, 2009 Order stating Respondent's reply papers to BIS's Motion for Summary Decision on Charges Two, Six, Nine, and Thirteen included material that "clearly is responsive to BIS's discovery requests and thus should have been, but was not, provided to BIS, first in response to its discovery requests and then, most importantly, in response to the Court's Order of August 20, 2009." The items in question that Respondent did not disclose in response to BIS's Request for Production of Documents is a Declaration from Sanja Milic of Micei and a purported e-mail from Range Systems.

On November 2, 2009, BIS filed its Reply to Respondent's Opposition to Motion for Summary Decision and on November 6, 2009, filed its Response to Respondent's Objection to the Qualifications of Administrative Law Judges and All Other Members of Bureau of Industry and Security Decisionmaking Body.

The November 10, 2009 Memorandum and Order

On November 10, 2009, the undersigned issued a Memorandum and Order disposing of numerous motions that the parties submitted on pre-decisional issues. In summary, the Memorandum and Order found that U.S. Coast Guard Administrative Law Judges have jurisdiction to adjudicate cases for BIS involving export control regulations; that Respondent is not entitled to 20 days notice prior to service of a discovery request; that the deadline to complete discovery is not the deadline to make discovery requests; that documents are due on the dates specified, not simply mailed on the due dates; that Respondent's Requests for Admissions to BIS which he claims were mailed on July 6, 2009 but not received until July 13, 2009, are Not Timely; and that BIS timely filed its Answers to Respondent's Requests for Admission and Requests for Production of Documents on September 3, 2009.

The November 10, 2009 Memorandum and Order further Overruled the following numbered Respondent's objections: (1) That the undersigned's Order Setting Deadlines and Compelling Discovery Responses is null, void, and of no effect; (2) that the above-referenced Order is null, void, and of no effect because it was issued by the Administrative Law Judge in violation of minimum notice provisions required by 15 CFR 766.9(b) which is reasonably interpreted by Respondent to require at least a 20 day notice for service of the pertinent responses; (3) that the above-referenced Order is null, void, and of no effect because it implicitly requires that responses be sent via facsimile and mail while pursuant to 15 CFR 766.5(b) service by facsimile is deemed acceptable but could not be required by the Regulations; (4) that the above-referenced Order is null, void, and of no effect because it implicitly requires that responses be produced to Eric Clark at a specified address, while 15 CFR 766.9(b) provides for requests for production of documents for inspection and copying; (5) that the above-referenced Order is null, void, and of no effect because this tribunal has no subject matter jurisdiction; (6) that the above-referenced Order is null, void, and of no effect because the Administrative Law Judge had no jurisdiction to issue said Order as his assignment in this matter was made in violation of the Administrative Procedure Act, 5 U.S.C. Section 3344, and the regulations issued under said statute, 5 CFR 930.213.

The November 10, 2009 Memorandum and Order stayed the previous Order of September 4, 2009 directing BIS to submit its evidence in support of its charges by September 30, 2009 pending adjudication of BIS's Motion for Summary Decision on Charges Two, Six, Nine, and Thirteen. The November 10, 2009 Memorandum and Order Denied Respondent's October 13, 2009 Motion that Requests for Admission be Deemed Admitted and That Matters Therein be Conclusively Established. The November 10, 2009 Memorandum and Order also Granted Respondent's request for production of certain Memoranda of Agreement and Office of Personnel Management letters of authorization establishing the jurisdiction of U.S. Coast Guard Administrative Law Judges. It further stated that the undersigned will make a determination or enter an Order deemed reasonable and appropriate in accordance with 15 CFR 766.9(d) on the issue of Respondent's continued refusal to comply with BIS's Interrogatories and Requests for Production of Documents despite previous Orders to do so.

The November 10, 2009 Memorandum and Order referenced BIS's October 26, 2009 Response to the October 15, 2009 Order wherein it claimed Respondent's Answer to BIS's Motion for Summary Decision on Charges Two, Six, Nine, and Thirteen contained information and references to documents that Respondent is relying on which should have been disclosed in BIS's discovery requests but were not disclosed. BIS's Response requested

Respondent's defense number 16 and any argument or purported evidence related to that defense be stricken in accordance with 15 CFR 766.9(d) but recommended that the decision be postponed until after ruling on the Motion for Summary Decision on Charges Two, Six, Nine, and Thirteen because that Motion can be resolved without discovery sanctions.[12] Therefore, the undersigned ruled that any decision on discovery sanctions will be made after the decision on BIS's Motion for Summary Decision.

On November 16, 2009, the undersigned Denied the Motion for Summary Decision on Charges Two, Six, Nine, and Thirteen finding that a genuine issue of material fact exists concerning whether the items in the Charging Letter are "the foreign-produced direct product of U.S.-origin technology." The undersigned also found Respondent's claim that BIS had no statutory authority to issue the Denial Order because the EAA was in lapse is without merit.

On November 18, 2009, the undersigned issued an "Order Denying Objections to Qualifications of Administrative Law Judges and All Other Members of Bureau of Industry and Security Decisionmaking Body" finding that Respondent's bare claims and use of other, unrelated and unsubstantiated allegations pertaining to another agency fail to overcome the presumption of honesty and integrity that accompanies administrative adjudicators. Among those arguments the undersigned rejected as being unsupported by any evidence was Respondent's bare claim that the undersigned and BIS initiated this administrative proceeding in retaliation for Respondent's prevailing in a BIS criminal proceeding.

On November 20, 2009, the undersigned issued a Scheduling Order setting January 15, 2010 as the deadline for BIS to file evidence in support of charges; February 16, 2010 as the deadline for Respondent to reply and file evidence in support of his defenses; and March 3, 2010 as the deadline for BIS to file its rebuttal.

On January 15, 2010, BIS filed its Notice of Withdrawal of Charge Ten citing Section 766.3(a) of the regulations which provides that "BIS may unilaterally withdraw charging letters at any time, by notifying the respondent and the administrative law judge." The Notice further states, "[i]n authorizing BIS to unilaterally withdraw all of the charges in a charging letter, Section 766.3(a) also at least impliedly authorizes BIS to unilaterally withdraw fewer than all of the charges in a charging letter by providing notice to the presiding administrative law judge and the respondent in the matter." The undersigned views this interpretation as reasonable and consistent with procedures followed by other agencies.

The undersigned received BIS's "Submission of Evidence in Support of Charges" on January 15, 2010 and its separate "Memorandum on Evidence Submitted in Support of Charges."

On February 16, 2010, Respondent filed his "Application for Extension of Time to File a Reply and Evidence in Support of his Defenses" and on February 19, 2010, Respondent filed his "Emergency Application for Extension of Time to File a Reply and Evidence in Support of his Defenses" asking that the deadline be extended from February 16, 2010 to February 24, 2010.

On February 22, 2010, BIS filed its "Response to Respondent's Applications for Extension of Time to File a Reply and Evidence in Support of his Defenses." In its Response, BIS noted that it has been five (5) months since Montgomery was ordered to respond to BIS's discovery requests and, as noted in the September 4, 2009 Order, Respondent's intentional refusal to comply is evident. BIS asked that if Respondent's request is extended to February 24, 2010, then the time for BIS to file its reply ought to be extended to March 16, 2010.

On February 23, 2010, the undersigned issued an "Order Granting Respondent's Request for an Extension of Time to File Reply and Evidence in Support of His Defenses" to February 24, 2010 and that BIS's reply is due March 16, 2010.

On February 24, 2010, Respondent filed his "Objections to Evidence Submitted by BIS in Support of the Charges in its Charging Letter" and on February 25, 2010, he filed his "Memorandum in Defense to Evidence Submitted by BIS in Support of the Charges in its Charging Letter." Also on February 25, 2010 Respondent filed his "Motion for Immediate Stay of This Civil Penalty." His reason for an immediate stay was to await a decision from the DC Circuit in *Micei International* v. *United States,* Nos. 09–1155 and 09–1186, and "Respondent's intention to file suit in U.S. District Court to enjoin this civil penalty proceeding and transfer this matter to the U.S. District Court due to futility of this proceeding and institutional bias as has been continuously demonstrated throughout this proceeding and the proceeding before this tribunal in the matter of Micei International."

Respondent's "Objections to Evidence Submitted by BIS in Support of the Charges in its Charging Letter" lists two Objections: (1) That he objects to BIS's unsworn, unverified, unsubstantiated, and unauthenticated "evidence" supporting its charges; and (2) that he objects to the letter submitted to BIS as Exhibit I, as such letter does not constitute evidence but is inadmissible self-serving legal opinion.

Respondent's "Memorandum in Defense to Evidence Submitted by BIS in Support of the Charges in its Charging Letter" lists the following eleven (11) affirmative defenses:

1. Subject matter jurisdiction is lacking herein over Yuri Montgomery because the general Denial Order imposed against Yuri Montgomery which he is alleged to have violated was null, void, and of no effect *ab initio* because BIS did not have statutory authority to impose an order against Yuri Montgomery at the time said Denial Order was issued.

2. This Court lacks jurisdiction to adjudicate this proceeding because the purported assignment of the Administrative Law Judge herein has been made in violation of the statute and regulations regulating assignment of administrative law judges to BIS's civil penalty proceedings.

3. This proceeding is defective and should be dismissed because it has been filed in violation of the prohibition against Double Jeopardy in the Constitution of the United States.

4. Subject matter jurisdiction is lacking herein over Yuri Montgomery because the BIS's claims are not colorable, *i.e.,* they are both immaterial and made solely for the purpose of obtaining jurisdiction over Yuri Montgomery and are wholly insubstantial and frivolous.

5. The charges sought by BIS to be adjudicated by the instant Motion should be dismissed as barred by the doctrine of collateral estoppel.

6. The charges sought by BIS to be adjudicated by the instant Motion should be dismissed as barred by the doctrine of res judicata.

7. The monetary penalty proposed by BIS should not be applied as violative of the Constitutional prohibition against cruel and unusual punishments.

[12] Respondent's defense number 16 in his "Declaration of Yuri Montgomery in Opposition to BIS's Motion for Summary Decision as to Charges Two, Six, Nine, and Thirteen" states, "[w]hen I contacted Maintenance Products, Inc. to inquire of the availability of the products which are listed in the [sic] charges 6 and 13 of the Charging Letter herein, I was informed by Maintenance Products, Inc. that all of the products Micei was interested in purchasing were made in China and were very cheap and I did not even inquire of their prices." Affirmative defense No. 16 in Respondent's "Corrected Answer" is, "[t]he goods subject to the Charging Letter are of foreign origin and are therefore not subject to the prohibitions of the purported Denial Order." Affirmative defense No. 11 in his original Answer is, "[t]he goods subject to the Charging Letter are of foreign origin and are therefore not subject to the Charging Letter."

8. No denial order may be imposed upon Respondent, as IEEPA provides no statutory authorization for such penalty.

9. The charges of "acting with knowledge of violation" should be dismissed because they are a) duplicitous as interpreted by BIS and b) unauthorized by IEEPA as amended in 2007.

10. The penalty enhancement under IEEPA, as retroactively amended in 2007, cannot be applied herein because it is violative of the Ex Post Facto clause of the Constitution of the United States.

11. All of the charges in the Amended Charging Letter should be dismissed because BIS has failed to allege in said Charging Letter and prove that any of the subject products were not "the foreign-produced direct product of U.S.-origin technology" which has been expressly exempted from the prohibitions of the Denial Order.

On March 5, 2010, BIS filed its Opposition to Respondent's Motion for Immediate Stay and on the same day the undersigned issued an Order denying Respondent's Motion. However, Respondent eventually received his requested Stay on March 16, 2010 when the parties submitted their "Stipulation to Stay Proceedings and Extend Time so that the Parties Can Engage in Settlement Negotiations." Among other things, the parties asked for a thirty (30) day stay. On that same day, the undersigned issued an Order Granting the Stipulated Motion for a thirty (30) day stay and also directed BIS to file its rebuttal to Respondent's evidence in support of his defenses ten (10) days after the stay terminates.

On April 22, 2010, BIS filed its "Rebuttal to Respondent's Objections to Evidence and His Memorandum in Defense to Evidence Submitted by BIS."

As previously ordered on June 5, 2009, this matter is adjudicated on the record since neither party has demanded a hearing in writing. BIS has submitted its evidence in support of the charges in the Charging Letter consisting of approximately fifty (50) exhibits as well as its "Memorandum on Evidence Submitted in Support of Charges." Respondent submitted his "Memorandum in Defense to Evidence Submitted by BIS in Support of its Charges in the Charging Letter," and BIS submitted its "Rebuttal to Respondent's Objections to Evidence and His Memorandum in Defense to Evidence Submitted by BIS."

Attachment B

List of Exhibits

Agency Exhibits

Exhibits Supporting All Charges

A. Charging Letter of July 1, 2008 with copy of signed and dated certified mail receipt.

B. Denial Order of September 11, 2000 as published in the **Federal Register** of September 22, 2000, 65 FR 57,313, 57314.

C. BIS Requests for Admission.

D. Respondent's Response to BIS Requests for Admission.

E. Copy of BIS's Requests for Admission combined with Respondent's corresponding responses.

F. September 13, 2000 Letter to Respondent from Eileen Albanese, Director, Office of Exporter Services, Bureau of Export Administration (subsequently renamed Bureau of Industry and Security).

G. October 24, 2000 Letter from Respondent to under Secretary Reinsch.

H. December 21, 2000 Letter from Under Secretary Reinsch to Respondent.

I. August 21, 2009 Certified BIS Licensing Determination.

J. Respondent's Declaration filed In the Matter of Micei International (Docket No. 08–BIS–0005).

K. [Blank].

Exhibits Supporting Charges 1 and 8

L. June 9, 2003 e-mail message from Respondent to R. Uber at Hi-Tec Retail, Inc. with the subject line "New Order (received today)."

M. June 18, 2003 invoice from Hi-Tec Retail, Inc.

N. June 17, 2003 e-mail message from Respondent to R. Uber at Hi-Tec Retail, Inc. with the subject line "Fw: Attn: Regina."

O. June 24, 2003 e-mail message from R. Uber to Respondent with the subject line "RE: C/C Info for Orders."

P. June 24, 2003 e-mail message from S. Milic at Micei International to R. Uber at Hi-Tec Retail, Inc. with the subject line "Order status."

Q. June 24, 2003 Hi-Tec receipt.

R. July 2, 2003 Kuehne & Nagel invoice for the shipment of "Magnum boots" from Hi-Tec Sports to Micei International.

S. July 2, 2003 Kuehne & Nagel air waybill for the shipment of "Magnum boots" from Hi-Tec Sports to Mecei International.

Evidence Supporting Charges 2 and 9

T. Series of 3 e-mail messages, the first on July 8, 2003 from Respondent to Steve Thomas at Range Systems, the second on July 11, 2003 from Steve Thomas to Respondent, and the third on July 15, 2003 from Respondent to Steve Thomas and Mitch Petrie at Range Systems.

U. July 15, 2003 Range Systems invoice from the sale of two gun clearing devices to Micei International, Inc./Yuri Montgomery.

V. July 15, 2003 Range systems sales order billing Respondent for the purchase of two gun clearing devices.

W. July 18, 2003 air waybill issued to Range Systems by Kuehne and Nagel.

X. July 18, 2003 Kuehne & Nagel invoice for the shipment of "Guardian Clearing" from Range Systems to Micei International.

Y. October 24, 2008 facsimile from Range Systems to Special Agent Poole of annotated e-mail stating that the gun clearing devices were manufactured in the United States.

Z. November 2, 2009 Declaration of Steve Thomas.

AA. October 29, 2009 Declaration of Tiffany Godfrey.

Evidence Supporting Charge 3

BB. August 5, 2003 e-mail message from Respondent to F. Corsi at Galls, Inc., with the subject "Fw: Shoe/Boot Request (Attn: Francesca Corsi)."

Evidence Supporting Charges 4 & 11

CC. February 24, 2003 e-mail message from K. Taylor at Galls, Inc. with the subject "Lead for you * * *"

DD. August 5, 2003 e-mail message Respondent to F. Corsi at Galls, Inc. with the subject "Payment of $2562.44."

EE. September 5, 2003 Kuehne & Nagel air waybill for the shipment of "Oxford athletic shoes" and "Remote strobe tubes" from Galls, Inc. to Micei International.

FF. August 8, 2003 Ekopak invoice for the shipment of "Oxford athletic shoes" and "Remote strobe tubes" from Galls, Inc. to Micei International.

GG. September 5, 2003 Kuehne & Nagel invoice for the shipment of "Oxford athletic shoes" from Galls, Inc. to Micei International.

Evidence Supporting Charges 5 & 12

HH. July 31, 2003 e-mail message from Respondent to A. McCabe at Save On Promotional Products, Inc. with the subject "Fw: Polo/golf Shirts by TriMountain #138 Navy Blue (ATTN: MS. ANNE)."

II. August 1, 2003 Save On Promotional Products, Inc. invoice.

JJ. August 1, 2003 Save On Promotional Products, Inc. credit card authorization form completed by Respondent.

KK. August 4, 2003 e-mail message from Respondent to A. McCabe Art Save On Promotional Products, Inc. with the subject "info for text on boxes/ paperwork."

LL. August 4, 2003 Mountain Gear Corp. sales order.

MM. August 13, 2003 Kuehne & Nagel air waybill for the shipment of "accessories" from Mountain Gear Corp. to Micei International.

NN. August 13, 2003 Kuehne & Nagel invoice for the shipment of "accessories" from Mountain Gear Corp. to Micei International.

Evidence Supporting Charges 6 & 13

OO. September 9, 2003 picking ticket from Maintenance Products, Inc.

PP. September 9, 2003 credit card receipt from Maintenance Products, Inc.

QQ. September 9, 2003 invoice from Maintenance Products, Inc.

RR. September 15, 2003 air waybill issued to first Chain Supply Company, a Division of Maintenance Products, Inc. by Kuehne and Nagel.

SS. September 15, 2003 invoice from Kuehne and Nagel, Inc./from Elk Grove Village, IL, to Kuehne and Nagel D.O.O.E.L. in Skipje, Macedonia.

TT. August 27, 2009 Affidavit of Gary Jones.

UU. October 28, 2003 declaration of Gary Jones.

Evidence Supporting Charges 7 & 15

VV. October 8, 2003 e-mail message from Respondent to F. Corsi at Galls, Inc. with the subject line "Payment for order #25473620/017—pls release/ship ASAP."

WW. October 8, 2003 e-mail message from Respondent to F. Corsi to F. Corsi at Galls, Inc. with the subject "VISA Authorisation."

XX. October 16, 2003 Estes Express Lines bill of lading.

Respondent's Exhibits

Respondent offered the Declaration from Sanja Milic of Micei and a purported e-mail from Range Systems. Since Respondent had not complied with Discovery, the Administrative Law Judge struck both proposed exhibits from the record in accordance with 15 CFR 766.9(d).

Attachment C

Rulings on Proposed Findings of Fact

Agency's Proposed Findings of Fact

Since neither party filed a demand for hearing, the Administrative Law Judge adjudicated this matter on the record in accordance with 15 CFR 766.6(c). The Respondent offered no proposed findings of fact and conclusions of law and did not dispute any of the Agency's proposed findings. Instead, Respondent offered many affirmative defenses which the Administrative Law Judge ruled on in this Recommended Decision and Order.

The Agency's proposed findings of fact submitted in support of the Charges in the Charging Letter are reliable, probative, and credible. They prove by the preponderance of the evidence that Respondent committed the violations alleged in the Charging Letter. Therefore, they are all Accepted and Incorporated into the Recommended Decision. The footnotes are accepted but not necessarily incorporated herein. The Agency's Proposed Findings of Fact are as follows:

Facts Relating to All Charges

1. The Denial Order issued against Montgomery on Sept. 11, 2000. Exh. B.

2. The Denial Order was in effect at all times from September 11, 2000 through and including January 22, 2009. Exh. B; Exh. E at Request/Response No. 2.

3. Montgomery received actual notice of the Denial Order via a letter on or about September 13, 2000 from BIS informing him of, and including a copy of, the Denial Order. Exh. F; *see also* Exh. E at Request/Response No. 3.

4. The Denial Order was published in the **Federal Register** on September 22, 2000 (65 FR 57,313). Exh. B.

5. The following month, by letter dated October 24, 2000, Montgomery wrote to then-Under Secretary William Reinsch requesting reinstatement of his "export privileges denied on September 11, 2000." Oct. 24, 2000 Letter, attached as Exh. G hereto; *see also* Exh. E at Request/Response No. 5.

6. Montgomery's request to reinstate his export privileges was denied by Under Secretary Reinsch on December 21, 2000. Dec. 12, 2000 Letter, attached as Exh. H hereto.

7. Montgomery had notice of the Denial Order no later than October 24, 2000, he knew that it was in effect at all times from September 11, 2000 until January 22, 2009, and he knew that he was subject to the Denial Order at the time of each of the transactions at issue. Exh. E at Requests/Responses Nos. 2, 5, 7m, 8m, 9h, 10m, 11m, 12m, and 13m.

8. Paragraph I of the Denial Order states that "Until January 22, 2009, Yuri I. Montgomery, also known as Yuri I. Malinkovski, 518 Howard Avenue, N.E., Olympia, Washington 98506, may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as 'item') exported or to be exported from the United States, that is subject to the Regulations, or in any other activity subject to the Regulations * * *." Exh. B, at Paragraph I.

9. The Denial Order specifically listed as non-exclusive examples of prohibited participation, "*[c]arrying on negotiations concerning,* or *ordering, buying,* receiving, using, *selling,* delivering, storing, disposing of, forwarding, transporting, *financing,* or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations * * *." Exh. B. (Emphasis added.)

10. The Denial Order similarly provided specifically that Montgomery was prohibited from "[b]enefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations." Exh. B.

11. Montgomery encouraged Micei "to use my credit card for Micei purchases as much as possible as it would allow me to accumulate United Airline miles through the use of my United Visa credit card * * *." Oct. 12, 2008 Montgomery Declaration, at ¶ 12.

12. On several occasions, Montgomery "made inquiries for Micei of the availability on some of the products" purchased for Micei. *Id.,* at ¶ 14.

Additional Facts Relating to Charges 1 and 8

13. On or about June 9, 2003, Montgomery placed an order with the Modesto, CA, division of Hi-Tec Retail, Inc. ("Hi-Tec"), a manufacturer and retailer of footwear, for 61 pair of Magnum boots. *See* June 9, 2009 e-mail message from Montgomery to Hi-Tec, attached as Exh. L hereto; June 18, 2003 invoice from Hi-Tec, attached as Exh. M hereto; Exh. E at Request/Response No. 7a.

14. Hi-Tec's initial attempt to charge Montgomery's credit card for the order was declined by the issuing bank, causing R. Uber at Hi-Tec to seek assistance from Montgomery. *See* June 24, 2003 e-mail message from R. Uber to Montgomery, attached as Exh. O hereto.

15. Because Montgomery had just arrived in Macedonia, he subsequently informed Hi-Tec through Sanja Milic (an employee of Micei) that the issue with his credit card had been resolved. June 24, 2003 e-mail message from S. Milic to R. Uber, attached as Exh. P hereto.

16. With the payment issue resolved, Montgomery paid for the boots with his credit card. Hi-Tec receipt, attached as Exh. Q hereto; Exh. E at Request/Response No. 7b.

17. Montgomery was reimbursed by Micei for the purchase of the boots. *See* Exh. E at Request/Response No. 7i.

18. The boots were intended to be exported to Macedonia. *See* June 17, 2003 e-mail from Montgomery to R. Uber, attached as Exh. N hereto; freight forwarder Kuehne & Nagel invoice, attached as Exh. R hereto; Kuehne &

Nagel air waybill, attached as Exh. S hereto; Exh. E at Request/Response No. 7e.

19. The boots were exported from the United States to Macedonia on or about July 2, 2003. *See* Exh. R; Exh. S.

20. Montgomery benefitted from the purchase of the boots, stating that, "[t]he charges made with my credit card directly attributable to the 'violations' alleged against Micei in the Charging Letter herein amount to approximately $15,000, which allowed me to accumulate approximately $15,000 miles with United Airlines."[13] Montgomery Declaration attached as Exh. J hereto, at ¶ 18; *see also* Exh. E at Request/Response No. 7j.

21. The boots are items subject to the Regulations. Section 734.3(a); *see also* BIS Licensing Determination, attached as Exh. I hereto.

22. At the time of the transaction, Montgomery knew he was subject to the Denial Order. *See* Exh. E at Request/Response No. 7m.

Additional Facts Relating to Charges 2 and 9

23. At Micei's request, Montgomery contacted Range Systems, a New Hope, MN-based manufacturer of firing range equipment, by telephone "to inquire of the availability and price for their product * * *." Oct. 12, 2008 Montgomery Declaration, at ¶ 20.

24. In a July 8, 2003 e-mail inquiry Montgomery sent to Range Systems, Montgomery, describing himself as Micei's regional office, stated that "Currently we have one [bid] which calls for various products including 5–10 clearing traps such as your RRI Guardian (GDN) model. * * * Please quote the price of your RRR GUARDIAN (GDN) model and e/m me a complete price list if possible * * *" Series of e-mail messages between Montgomery and S. Thomas at Range Systems, attached as Exh. T hereto.

25. Range Systems provided the requested price quote in a reply e-mail sent on July 11, 2003. *Id.*

26. Montgomery placed an order for two of the gun clearing devices via an e-mail sent on July 15, 2003. *Id.; see also* Range Systems invoice, attached as Exh. U hereto; Range Systems sales order, attached as Exh. V hereto; Exh. E at Request/Response No. 8a.

27. Montgomery paid Range Systems, Inc. for the gun clearing devices with his VISA credit card. Exh. T; *see also* Exh. E at Request/Response No. 8b.

28. In his e-mail, Montgomery directed Range Systems to export the gun clearing devices to Micei in Macedonia and also requested that Range Systems e-mail shipping information concerning the weight and size of the boxes to him, and to two representatives (Iki Malinkovski and Sanja Milic) of Micei. Exh. T.

29. Montgomery was reimbursed by Micei for the purchase of the gun clearing devices. Exh. E at Request/Response No. 8i.

30. The gun clearing devices were intended to be, and were in fact, exported from the United States to Macedonia on or about July 18, 2003. *See* Exh. T; *see also* Air waybill issued to Range Systems, attached as Exh. W hereto; Kuehne and Nagel invoice, attached as Exh. X hereto; Exh. E at Request/Response No. 8e.

31. The gun clearing devices were manufactured in the United States. *See* Oct. 24, 2008 facsimile from Range Systems, attached as Exh. Y hereto. Range Systems' director of sales, who sent the Oct. 2008 facsimile to BIS, emphatically confirmed the country of origin for the gun clearing devices in a subsequent declaration, stating that each of the components used to manufacture the devices are of U.S. origin and that "[t]he Guardian clearing device has always been manufactured by Range Systems in Minnesota." Nov. 2, 2009 declaration of S. Thomas, attached as Exh. Z hereto; *see also* Oct. 29, 2009 declaration of T. Godfrey, attached as Exh. AA hereto.

32. The gun clearing devices are items subject to the Regulations. Section 734.3(a); *see also* BIS Licensing Determination, attached as Exh. I hereto.

33. At the time of the transaction, Montgomery knew he was subject to the Denial Order. *See* Exh. E at Request/Response No. 8m.

34. Montgomery benefitted from the purchase of the gun clearing devices. *See supra* text accompanying note 8; *See also* Exh. E at Request/Response No. 8j.

Additional Facts Relating to Charge 3

35. On August 5, 2003, Montgomery sent an e-mail to Galls, Inc. ("Galls"), a Lexington, KY-based distributor of police and military equipment and apparel, identifying himself as Micei's U.S. operations and requesting a price quotation for 10,800 pair of shoes and boots. *See* Aug. 5, 2003 e-mail message from Montgomery to Francesca Corsi at Galls, attached as Ex. BB hereto; Exh. E at Request/Response 9a.

36. The boots and shoes were intended for export from the United States to Macedonia. In the e-mail requesting a quotation, Montgomery states that "the samples need to have arrived at our HQ in Macedonia by [August 14]." Exh. BB; *see also* Exh. E at Request/Response 9d.

37. Montgomery carried on negotiations concerning the shoes and boots, stating in an e-mail to Galls that Micei "will be putting up the performance bond at 20% in cash. Therefore, please make sure you quote the best possible price you can so we can win this one, too." Exh. BB.

38. The boots and shoes are items subject to the Regulations. Section 734.3(a); *see also* BIS Licensing Determination, attached as Exh. I hereto.

39. At the time the request for quotation was made, Montgomery knew he was subject to the Denial Order. *See* Exh. E at Request/Response No. 9m.

Additional Facts Relating to Charges 4 and 11

40. Micei's account number at Galls is 25473620. Feb. 24, 2003 e-mail from K. Taylor at Galls to F. Corsi, attached as Exh. CC hereto.

41. On or about August 5, 2003, Montgomery contacted Galls to pay for a previously-placed order—order number 25473620/016. *See* Aug. 5, 2003 e-mail from Montgomery to F. Corsi, attached as Exh. DD hereto.

42. The items in that order number consist of shoes and remote strobe tubes.[14] *See* Kuehne & Nagel air waybill, attached as Exh. EE hereto; *see also* Ekopak invoice, attached as Exh. FF hereto.

43. In Montgomery's August 5, 2003 e-mail to Galls, Montgomery stated that he was advised to pay for the items with his credit card by Micei and he provided his credit card information to pay $2,562.44 for the order. Exh. DD; *see also* Exh. E at Request/Response No. 10b.

44. Montgomery was reimbursed by Micei for the purchase of the shoes and remote strobe tubes. *See* Exh. E at Request/Response No. 10i.

45. The shoes and remote strobe tubes were intended to be exported from the United States to Macedonia. *See* Exh. EE; Exh. FF; Exh. GG; Exh. E at Request/Response No. 10e.

46. The shoes and remote strobe tubes were exported from the United States to Macedonia on or about September 5, 2003. *See* Exh. EE; Exh. GG.

47. The shoes and remote strobe tubes are items subject to the Regulations. Section 734.3(a); *see also* BIS Licensing Determination, attached as Exh. I hereto.

48. At the time of the transaction, Montgomery knew he was subject to the

[13] Montgomery's statement concerning the $15,000 in airline frequent flier miles relates to all seven transactions alleged in the Charging Letter.

[14] Remote strobe tubes are components of the flashing emergency lights found on vehicles such as police cars.

Denial Order. *See* Exh. E at Request/Response No. 10m.

49. Montgomery benefitted from the purchase of the oxford shoes and remote strobe tubes. *See supra* text accompanying note 8; *See also* Exh. E at Request/Response No. 10j.

Additional Facts Relating to Charges 5 and 12

50. On July 31, 2003, Montgomery placed an order for 150 shirts from Save On Promotional Products ("Save On"), located in Sandy, OR. *See* July 31, 2003 e-mail from Montgomery to A. McCabe at Save On, attached as Exh. HH hereto.

51. Upon receiving Montgomery's order, Save On, in turn, ordered the shirts from its supplier, Tri-Mountain/Mountain Gear Corp., located in Baldwin Park, CA. Mountain Gear sales order, attached as Exh. LL hereto.

52. Montgomery ordered the shirts for or on behalf of Micei and the shirts were intended for export from the United States to Macedonia. *See* Exh. HH; Exh. LL; Aug. 4, 2003 e-mail message from Montgomery to A. McCabe at Save On, attached as Exh. KK hereto; Save On invoice, attached as Exh. II hereto; Kuehne & Nagel air waybill, attached as Exh. MM hereto; Kuehne & Nagel invoice attached as Exh. NN hereto; *see also* Exh. E at Request/Response No. 11e.

53. Montgomery paid for the order with his credit card. Save On credit card authorization form, attached as Exh. JJ hereto; Exh. E at Request/Response No. 11b.

54. Montgomery was reimbursed by Micei for the purchase of the shirts. *See* Exh. E at Request/Response No. 11i.

55. The shirts were exported from the United States to Macedonia on or about Aug. 13, 2003. *See* Exh. MM; Exh. NN.

56. The shirts are items subject to the Regulations. Section 734.3(a); *see also* BIS Licensing Determination, attached as Exh. I hereto.

57. At the time of the transaction, Montgomery knew he was subject to the Denial Order. *See* Exh. E at Request/Response No. 11m.

58. Montgomery benefited from the purchase of the shirts. *See supra* text accompanying note 8; *See also* Exh. E at Request/Response No. 11j.

Additional Facts Relating to Charges 6 and 13

59. Montgomery ordered two load binders, one ratchet strap, one binder chain, and one safety shackle, from Maintenance Products, Inc., located in Lowell, Indiana, on or about September 9, 2003. *See* Maintenance Products picking ticket, attached as Exh. OO hereto and Maintenance Products invoice, attached as Exh. QQ hereto; *see also* Exh. E at Request/Response No. 12a.

60. Montgomery paid Maintenance Products, Inc. for the load binders, ratchet strap, binder chain, and safety shackle with his VISA credit card. Credit card receipt, attached as Exh. PP hereto; *see also* Exh. E at Request/Response No. 12b.[15]

61. Montgomery was reimbursed by Micei for the purchase of the load binders, ratchet strap, binder chain and safety shackle. *See* Exh. E at Request/Response No. 12i.

62. The load binders, ratchet strap, binder chain, and safety shackle were intended to be, and were in fact, exported from the United States to Macedonia on or about September 15, 2003. *See* Air waybill issued to First Chain Supply Co., attached as Exh. RR hereto; Invoice from Kuehne and Nagel, attached as Exh. SS hereto; *see also* Exh. E at Request/Response No. 12e.

63. The load binders, binder chain, and safety shackle were manufactured in the United States. Aug. 27, 2009 affidavit of Gary Jones, attached Exh. TT hereto.[16] Maintenance Products' owner subsequently provided a declaration reaffirming that the load binders, binder chain, and safety shackle were manufactured in the United States and demonstrating that those items were manufactured in the United States and marked accordingly. Oct. 28, 2009 declaration of Gary Jones, attached as Exh. UU hereto.[17]

64. The load binders, ratchet strap, binder chain and safety shackle are items subject to the Regulations. Section 734.3(a); *see also* BIS Licensing Determination, attached as Exh. I hereto.

65. At the time of the transaction, Montgomery knew he was subject to the Denial Order. Exh. E at Request/Response No. 12m.

66. Montgomery benefited from the purchase of the load binders, ratchet strap, binder chain and safety shackle. *See supra* text accompanying note 8; *See also* Exh. E at Request/Response No. 12j.

Additional Facts Relating to Charges 7 and 14

67. In October 2003, Montgomery, describing himself as Micei's North American operations, placed an order for uniform pants with Galls (Galls number 25473720/017). *See* Oct. 8, 2003 e-mail message from Montgomery to F. Corsi at Galls referring to "payment," attached as Exh. VV hereto.

68. Montgomery, again describing himself as representing Micei, paid for the order with his credit card. Oct. 8 2003 e-mail message from Montgomery to F. Corsi at Galls referring to "VISA authorization," attached as Exh. WW hereto; *see also* Exh. E at Request/Response No. 13b.

69. A bill of lading from freight forwarder Estes Express Lines states that the uniform pants were to be shipped from Liberty Uniform in Spartanburg, SC (Galls' supplier) to Micei in Macedonia. Estes bill of lading, attached as Exh. XX hereto; *see also* Exh. E at Request/Response No. 13e.

70. Montgomery was reimbursed by Micei for the purchase of the uniform pants. *See* Exh. E at Request/Response No. 13i.

71. The uniform pants are items subject to the Regulations. Section 734.3(a); *see also* BIS Licensing Determination, attached as Exh. I hereto.

72. At the time of the transaction, Montgomery knew he was subject to the Denial Order. *See* Exh. E at Request/Response No. 13m.

73. Montgomery benefited from the purchase of the uniform pants by earning airline frequent flier miles by making the purchase on his credit card. *See supra* text accompanying note 8; *See also* Exh. E at Request/Response No. 13j.

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[15] The invoice states that $21.52 of the $169.05 that Montgomery paid is for "freight." This fact demonstrates the inaccuracy of Montgomery's statement that he "never paid any shipping charges * * *" Oct. 12, 2008 Montgomery Declaration, at ¶ 30. The invoice and credit card receipt also contradict Montgomery's claim that the total amount charged to his credit card for the Maintenance Products transaction was $147.53 (which is, not coincidentally, the total amount minus the freight charge). *See* Oct. 12, 2008 Montgomery Declaration, at ¶ 18; Exh. PP; Exh. OO; Exh. K, at 6.

[16] According to Gary Jones, the ratchet strap was manufactured in China.

[17] This declaration demonstrates the inaccuracy of the assertion made in the Oct. 16, 2009 declaration by Sanja Milic, filed with Montgomery's opposition to BIS's motion for partial summary decision, that when the items Micei purchased from Maintenance Products arrived in Macedonia, all of the items were marked as being made in China.

Attachment D

Notice to the Parties Regarding Review by the Under Secretary

TITLE 15—COMMERCE AND FOREIGN TRADE

SUBTITLE B—REGULATIONS RELATING TO COMMERCE AND FOREIGN TRADE

CHAPTER VII—BUREAU OF INDUSTRY AND SECURITY, DEPARTMENT OF COMMERCE

SUBCHAPTER C—EXPORT ADMINISTRATION REGULATIONS

PART 766—ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

Section 766.22 Review by Under Secretary

(a) *Recommended decision.* For proceedings not involving violations relating to part 760 of the EAR, the administrative law judge shall immediately refer the recommended decision and order to the Under Secretary. Because of the time limits provided under the EAA for review by the Under Secretary, service of the recommended decision and order on the parties, all papers filed by the parties in response, and the final decision of the Under Secretary must be by personal delivery, facsimile, express mail or other overnight carrier. If the Under Secretary cannot act on a recommended decision and order for any reason, the Under Secretary will designate another Department of Commerce official to receive and act on the recommendation.

(b) *Submissions by parties.* Parties shall have 12 days from the date of issuance of the recommended decision and order in which to submit simultaneous responses. Parties thereafter shall have eight days from receipt of any response(s) in which to submit replies. Any response or reply must be received within the time specified by the Under Secretary.

(c) *Final decision.* Within 30 days after receipt of the recommended decision and order, the Under Secretary shall issue a written order affirming, modifying or vacating the recommended decision and order of the administrative law judge. If he/she vacates the recommended decision and order, the Under Secretary may refer the case back to the administrative law judge for further proceedings. Because of the time limits, the Under Secretary's review will ordinarily be limited to the written record for decision, including the transcript of any hearing, and any submissions by the parties concerning the recommended decision.

(d) *Delivery.* The final decision and implementing order shall be served on the parties and will be publicly available in accordance with Sec. 766.20 of this part.

(e) *Appeals.* The charged party may appeal the Under Secretary's written order within 15 days to the United States Court of Appeals for the District of Columbia pursuant to 50 U.S.C. app. Sec. 2412(c)(3).

Certificate of Service

I hereby certify that I have served the foregoing *recommended decision & order* via overnight carrier to the following persons and offices:

Under Secretary for Export Administration, Bureau of Industry and Security, U.S. Department of Commerce, Room H–3839, 14th & Constitution Avenue, NW., Washington, DC 20230. *Telephone:* (202) 482–5301.

John T. Masterson, Jr., Esq., Chief Counsel for Industry and Security, Joseph V. Jest, Esq., Chief, Enforcement and Litigation, Parvin R. Huda, Esq., Senior Counsel, Eric Clark, Esq., Attorney Advisor, Attorneys for Bureau of Industry and Security, Office of Chief Counsel for Industry and Security, U.S. Department of Commerce, Room H–3839, 14th Street & Constitution Avenue, NW., Washington, DC 20230. *Telephone:* (202) 482–5301.

Yuri I. Montgomery, 2912 10th Place West, Seattle, WA 98119. *Telephone:* (202) 283–4955.

Hearing Docket Clerk, USCG, ALJ Docketing Center, 40 S. Gay Street, Room 412, Baltimore, Maryland 21202–4022. *Phone:* 410–962–5100.

Done and dated October 28, 2010, in New York, New York.

Regina V. Maye,

Paralegal Specialist to the Administrative Law Judge.

[FR Doc. 2010–32563 Filed 12–29–10; 8:45 am]

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Federal Register

Thursday,
December 30, 2010

Part IV

Securities and Exchange Commission

17 CFR Parts 240 and 249

Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b–4 and Form 19b–4 Applicable to All Self-Regulatory Organizations; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–63557; File No. S7–44–10]

RIN 3235–AK87

Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b–4 and Form 19b–4 Applicable to All Self-Regulatory Organizations

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: In accordance with Section 763(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), the Securities and Exchange Commission ("Commission") is proposing rules under the Securities Exchange Act of 1934 ("Exchange Act") to specify the process for a registered clearing agency's submission for review of any security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing, the manner of notice the clearing agency must provide to its members of such submission and the procedure by which the Commission may stay the requirement that a security-based swap is subject to mandatory clearing while the clearing of the security-based swap is reviewed. The Commission also is proposing to specify that when a security-based swap is required to be cleared, the submission of the security-based swap for clearing must be for central clearing to a clearing agency that functions as a central counterparty. In addition, the Commission is proposing rules to define and describe when notices of proposed changes to rules, procedures or operations are required to be filed by designated financial market utilities in accordance with Section 806(e) of Title VIII of the Dodd-Frank Act and to set forth the process for filing such notices with the Commission. Furthermore, the Commission is proposing rules to make conforming changes as required by the amendments to Section 19(b) of the Exchange Act contained in Section 916 of the Dodd-Frank Act.

DATES: Comments should be received on or before February 14, 2011.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form(*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–44–10 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–44–10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments also are 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. All comments 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: Kim Allen, Attorney Fellow, Catherine Moore, Senior Special Counsel, Kenneth Riitho, Special Counsel or Andrew Bernstein, Attorney-Advisor, at (202) 551–5710; Office of Clearance and Settlement, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Dodd-Frank Act seeks to ensure that, wherever possible and appropriate, derivatives contracts formerly traded exclusively in the over-the-counter ("OTC") market be cleared.[1] One key way in which the Dodd-Frank Act promotes clearing of such contracts is by setting forth a process by which the Commission would determine whether a security-based swap is required to be cleared; if the Commission makes a determination that a security-based swap is required to be cleared, then parties may not engage in such security-based swap without submitting it for clearing unless an exception applies.

The Commission may determine that a security-based swap is required to be cleared based on a review of a clearing agency's submission regarding a security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing (*i.e.,* a Security-Based Swap Submission (as defined below)).[2] If the Commission determines that a security-based swap is not required to be cleared, such security-based swap may still be cleared on a non-mandatory basis by the clearing agency if the clearing agency has rules that permit it to clear such security-based swap.[3] In addition, paragraph (b)(1) of new Section 3C of the Exchange Act, as added by Section 763(a) of the Dodd-Frank Act ("Exchange Act Section 3C") provides that "[t]he Commission on an ongoing basis shall review each security-based swap, or any group, category, type, or class of security-based swaps to make a determination that such security-based swap, or group, category, type, or class of security-based swaps should be required to be cleared" ("Commission-initiated Review").[4]

Consistent with the policy objective of the Dodd-Frank Act to bring security-based swaps into a central clearing environment where appropriate, the Commission is proposing to amend Rule 19b–4 under the Exchange Act to incorporate two new requirements applicable to clearing agencies under Exchange Act Section 3C, and under Section 806(e) of the Dodd-Frank Act ("Section 806(e)"). The proposed amendments to Rule 19b–4 would mandate that submissions required under Exchange Act Section 3C for a security-based swap, or any group, category, type or class of security-based swaps, that a clearing agency plans to accept for clearing ("Security-Based Swap Submissions") and advance notices required under Section 806(e) of proposed changes to rules, procedures

[1] *See, e.g.,* Report of the Senate Committee on Banking, Housing, and Urban Affairs regarding The Restoring American Financial Stability Act of 2010, S. Rep. No. 111–176 at 34 (stating that "[s]ome parts of the OTC market may not be suitable for clearing and exchange trading due to individual business needs of certain users. Those users should retain the ability to engage in customized, uncleared contracts while bringing in as much of the OTC market under the centrally cleared and exchange-traded framework as possible.").

[2] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(2)(C)) ("[t]he Commission shall * * * review each submission made under subparagraphs (A) and (B), and determine whether the security-based swap, or group, category, type, or class of security-based swaps, described in the submission is required to be cleared.").

[3] *See* 15 U.S.C. 78s(b) and 12 U.S.C. 5465(e).

[4] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(1)). The Dodd-Frank Act does not require rulemaking with respect to Commission-initiated Reviews.

or operations of financial market utilities ("Advance Notices") be filed with the Commission on Form 19b–4. The proposed amendments to Rule 19b–4 also would specify the manner of notice the clearing agency must provide to its members of Security-Based Swap Submissions.

Additionally, the Commission is proposing two related rules under Exchange Act Section 3C. Proposed Rule 3Ca–1 would establish the procedure by which the Commission, at the request of a counterparty or on its own initiative, may stay the requirement that a security-based swap is subject to mandatory clearing. Proposed Rule 3Ca–2 is intended to prevent evasions of the clearing requirement by specifying that security-based swaps required to be cleared must be submitted for central clearing to a clearing agency that functions as a central counterparty. Finally, the Commission is proposing technical, conforming and clarifying amendments to Rule 19b–4 and Form 19b–4 to conform the rule and form with new deadlines and approval, disapproval and temporary suspension standards with respect to proposed rule changes filed under Section 19(b) of the Exchange Act, as modified by Section 916 of the Dodd-Frank Act ("Exchange Act Section 19(b)").

I. Introduction

On July 21, 2010, the President signed the Dodd-Frank Act into law.[5] The Dodd-Frank Act was enacted to, among other purposes, promote the financial stability of the United States by improving accountability and transparency in the financial system and by providing for enhanced regulation and oversight of institutions designated as systemically important.[6] Title VII and Title VIII of the Dodd-Frank Act are intended to further these goals and to mitigate systemic risk in part by imposing new requirements with respect to clearance and settlement systems.

Title VII of the Dodd-Frank Act ("Title VII") provides the Commission and the Commodity Futures Trading Commission ("CFTC") with enhanced authority to regulate OTC derivatives following the recent financial crisis.[7] The Dodd-Frank Act is intended to bolster the existing regulatory structure and provide regulatory tools to oversee the OTC derivatives market, which has grown exponentially in recent years and is capable of affecting significant sectors of the U.S. economy. Title VII provides that the CFTC will regulate "swaps," the Commission will regulate "security-based swaps," and the CFTC and the Commission will jointly regulate "mixed swaps."[8]

The OTC derivatives markets traditionally have been characterized by privately negotiated transactions entered into by two counterparties, in which each assumes the credit risk of the other counterparty.[9] Clearing of swaps and security-based swaps was at the heart of Congressional reform of the derivatives markets in Title VII of the Dodd Frank Act.[10] Clearing agencies are broadly defined under the Exchange Act and undertake a variety of functions.[11] One such function is to act as a central counterparty ("CCP"), which is an entity that interposes itself between the counterparties to a trade.[12] For example, when an OTC derivatives contract between two counterparties that are members of a CCP is executed and submitted for clearing, it is typically replaced by two new contracts—separate contracts between the CCP and each of the two original counterparties. At that point, the original counterparties are no longer counterparties to each other. Instead, each acquires the CCP as its counterparty, and the CCP assumes the counterparty credit risk of each of the original counterparties that are members of the CCP.[13] Structured and operated appropriately, CCPs may improve the management of counterparty risk and may provide additional benefits such as multilateral netting of trades.

Exchange Act Section 3C sets forth a mandatory clearing requirement for security-based swaps. This section requires the Commission to adopt rules for submissions for review of security-based swaps that a clearing agency plans to accept for clearing for a determination by the Commission of whether the security-based swap (or group, category, type or class of security-based swaps) is required to be cleared, *i.e.,* is subject to mandatory

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[5] The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, H.R. 4173).

[6] *See* Public Law 111–203, Preamble.

[7] *See, e.g,* Report of the Senate Committee on Banking, Housing, and Urban Affairs regarding The Restoring American Financial Stability Act of 2010, S. Rep. No. 111–176 at 29 (2010) (stating that "[m]any factors led to the unraveling of this country's financial sector and the government intervention to correct it, but a major contributor to the financial crisis was the unregulated [OTC] derivatives market.")

[8] Section 712(d) of the Dodd-Frank Act provides that the Commission and the CFTC, in consultation with the Board of Governors of the Federal Reserve System, shall jointly further define the terms "swap," "security-based swap," "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," "eligible contract participant," and "security-based swap agreement." These terms are defined in Sections 721 and 761 of the Dodd-Frank Act and, with respect to the term "eligible contract participant," in Section 1a(18) of the Commodity Exchange Act, 7 U.S.C. 1a(18), as re-designated and amended by Section 721 of the Dodd-Frank Act. Further, Section 721(c) of the Dodd-Frank Act requires the CFTC to adopt a rule to further define the terms "swap," "swap dealer," "major swap participant," and "eligible contract participant," and Section 761(b) of the Dodd-Frank Act permits the Commission to adopt a rule to further define the terms "security-based swap," "security-based swap dealer," "major security-based swap participant," and "eligible contract participant," with regard to security-based swaps, for the purpose of including transactions and entities that have been structured to evade Title VII of the Dodd-Frank Act. Finally, Section 712(a) of the Dodd-Frank Act provides that the Commission and CFTC, after consultation with the Board, shall jointly prescribe regulations regarding "mixed swaps" as may be necessary to carry out the purposes of Title VII. To assist the Commission and CFTC in further defining the terms specified above, and to prescribe regulations regarding "mixed swaps" as may be necessary to carry out the purposes of Title VII, the Commission and the CFTC have requested comment from interested parties. *See* Securities Exchange Act Release No. 62717 (Aug. 13, 2010), 75 FR 51429 (Aug. 20, 2010) (Advance Joint Notice of Proposed Rulemaking Regarding Definitions Contained in Title VII of the Dodd-Frank Act).

[9] *See, e.g.,* Financial Stability Board, *Implementing OTC Derivatives Market Reforms* (Oct. 25, 2010) available at *http://www.financialstabilityboard.org/publications/r_101025.pdf.*

[10] As previously noted, the Dodd-Frank Act seeks to ensure that, wherever possible and appropriate, derivatives contracts formerly traded exclusively in the OTC market be cleared. *See* Letter from Christopher Dodd, Chairman, Committee on Banking, Housing and Urban Affairs, United States Senate and Blanche Lincoln, Chairman, Committee on Agriculture, Nutrition, and Forestry, United States Senate, to Barney Frank, Chairman, Financial Services Committee, United States House of Representatives and Colin Peterson, Chairman, Committee on Agriculture, United States House of Representatives (June 30, 2010) (on file with the United States Senate).

[11] The term "clearing agency" means any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities or who provides facilities for the comparison of data regarding the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or the allocation of securities settlement responsibilities. Such term also means any person, such as a securities depository, who (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates. 15 U.S.C. 78c(a)(23)(A).

[12] *See id.* An entity that acts as a CCP for securities transactions is a clearing agency as defined in the Exchange Act and is required to register with the Commission.

[13] *See* Cecchetti, Gyntelberg and Hollanders, *Central counterparties for over-the-counter derivatives,* BIS Quarterly Review, September 2009, available at *http://www.bis.org/publ/qtrpdf/r_qt0909f.pdf.*

clearing.[14] The Commission is proposing amendments to Rule 19b–4 under the Exchange Act to implement the requirement in Exchange Act Section 3C that a clearing agency submit for Commission review each security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing and provide notice to its members of such Security-Based Swap Submission. The Commission also is proposing new Rules 3Ca–1 and 3Ca–2 under the Exchange Act. Proposed Rule 3Ca–1 specifies the procedure for staying the clearing requirement applicable to a security-based swap, based either on an application of a counterparty to a security-based swap or on the Commission's own initiative, until the Commission completes a review of the terms of the security-based swap and the clearing arrangement. Proposed Rule 3Ca–2 establishes a rule designed to prevent evasions of the clearing requirement by specifying that security-based swaps required to be cleared must be submitted for central clearing to a clearing agency that functions as a central counterparty.

The Commission also is proposing rules to implement a filing requirement applicable to certain clearing agencies under Title VIII of the Dodd-Frank Act ("Title VIII"). Title VIII provides for enhanced regulation of financial market utilities, which include clearing agencies, that manage or operate a multilateral system for the purpose of transferring, clearing or settling payments, securities or other financial transactions among financial institutions or between financial institutions and the financial market utility.[15] The regulatory regime in Title VIII will only apply, however, to financial market utilities that the Financial Stability Oversight Council ("Council") designates as systemically important.[16]

Section 806(e)(1)(A) of Title VIII requires any financial market utility designated by the Council under Section 804 of the Dodd-Frank Act as systemically important to file 60 days advance notice of changes to its rules, procedures or operations that could materially affect the nature or level of risk presented by the financial market utility.[17] In addition, Section 806(e)(1)(B) requires each Supervisory Agency [18] to adopt rules, in consultation with the Board of Governors of the Federal Reserve System ("Board"), that define and describe when designated financial market utilities are required to file Advance Notices with their Supervisory Agency.[19]

Clearing agencies registered with the Commission are financial market utilities, as defined in Section 803(6) of Title VIII; [20] thus, the Commission may be the Supervisory Agency of a clearing agency that is designated as systemically important by the Council ("designated clearing agency").[21] A clearing agency must begin filing Advance Notices pursuant to Section 806(e) once the Council designates the clearing agency as systemically important.[22] The Commission is proposing to implement the Section 806(e) filing requirement by amending Rule 19b–4 to define and determine when Advance Notices must be filed by designated clearing agencies and to require that Advance Notices be filed on Form 19b–4.

The Commission is proposing that Security-Based Swap Submissions and Advance Notices be filed with the Commission on Form 19b–4 using the existing Electronic Form 19b–4 Filing System ("EFFS"). Currently, EFFS is used by self-regulatory organizations ("SROs"), which include registered clearing agencies,[23] to file proposed rule changes electronically with the Commission pursuant to Exchange Act Section 19(b).[24] The Commission is proposing to require clearing agencies to use EFFS for the filing of Security-Based Swap Submissions and Advance Notices because registered clearing agencies already use EFFS for Exchange Act Section 19(b) filings and because there are similarities between the requirement to file proposed rule changes under Exchange Act Section 19(b) and the new requirements under the Dodd-Frank Act to file Security-Based Swap Submissions and Advance Notices. For example, a proposed rule change under Exchange Act Section 19(b) includes a change in a "stated policy, practice, or interpretation" of an SRO rule. A "stated policy, practice, or interpretation" is defined in Exchange Act Section 19(b) as "any material aspect of the operation of the facilities of the SRO; or any statement made generally available to the membership of, to all participants in, or to persons having or seeking access * * * to facilities of, the self-regulatory organization ("specified persons"), or to a group or category of specified persons, that establishes or changes any standard, limit, or guideline with respect to (1) the rights, obligations, or privileges of specified persons * * *; or (2) the meaning, administration, or enforcement of an existing rule." [25] In cases where accepting a security-based swap (or group, category, type or class of security-based swaps) for clearing constitutes a change in a "stated policy, practice, or interpretation" of the clearing agency, the clearing agency also

[14] Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(2)(C)).

[15] The definition of "financial market utility" in Section 803(6) of the Dodd-Frank Act contains a number of exclusions including but not limited to certain designated contract markets, registered futures associations, swap data repositories, swap execution facilities, national securities exchanges, national securities associations, alternative trading systems, security-based swap data repositories, security-based swap execution facilities, brokers, dealers, transfer agents, investment companies and futures commission merchants. 12 U.S.C. 5462(6)(B).

[16] Pursuant to Section 803(9) of the Dodd-Frank Act, a financial market utility is systemically important if the failure of or a disruption to the functioning of such financial market utility could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States. 12 U.S.C. 5462(9). Under Section 804 of the Dodd-Frank Act, the Council has the authority, on a non-delegable basis and by a vote of not fewer than two-thirds of the members then serving, including the affirmative vote of its chairperson, to designate those financial market utilities that the Council determines are, or are likely to become, systemically important. The Council may, using the same procedures as discussed above, rescind such designation if it determines that the financial market utility no longer meets the standards for systemic importance. Before making either determination, the Council is required to consult with the Board and the relevant Supervisory Agency (as determined in accordance with Section 803(8) of the Dodd-Frank Act). Finally, Section 804 of the Dodd-Frank Act sets forth the procedures for giving entities a 30-day notice and the opportunity for a hearing prior to a designation or rescission of the designation of systemic importance. 12 U.S.C. 5463.

[17] 12 U.S.C. 5465(e)(1)(A).

[18] Section 803(8) of the Dodd-Frank Act defines the term "Supervisory Agency" in reference to the primary regulatory authority for the financial market utility. For example, Section 803(8) of the Dodd-Frank Act provides that the Commission is the Supervisory Agency for any financial market utility that is a Commission-registered clearing agency. *See* 12 U.S.C. 5462(8). To the extent that an entity is both a Commission-registered clearing agency and registered with another agency, such as a CFTC-registered derivatives clearing organization, the statute requires the two agencies to agree on one agency to act as the Supervisory Agency, and if the agencies cannot agree on which agency has primary jurisdiction, the Council shall decide which agency is the Supervisory Agency for purposes of the Dodd-Frank Act. 12 U.S.C. 5462(8).

[19] 12 U.S.C. 5465(e)(1)(B).

[20] 12 U.S.C. 5462(6).

[21] *See* supra note 18 discussing the definition of "Supervisory Agency" under the Dodd-Frank Act.

[22] Pursuant to Section 814 of the Dodd Frank Act, Title VIII took effect on the date of enactment.

[23] The definition of SRO in Section 3(a)(26) of the Exchange Act includes any registered clearing agency. 15 U.S.C. 78c(a)(26). All SROs are required to file proposed rule changes with the Commission under Exchange Act Section 19(b). 15 U.S.C. 78s(b).

[24] SROs are required to file with the Commission, in accordance with rules prescribed by the Commission, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of the SRO (collectively referred to as a "proposed rule change"). 15 U.S.C. 78s(b)(1).

[25] 17 CFR 240.19b–4(c).

would be required to file a proposed rule change. Similarly, if a change that a designated clearing agency proposes to make that would require an Advance Notice would also constitute a change in a "stated policy, practice, or interpretation" of the clearing agency, the clearing agency would be required to file a proposed rule change in addition to the Advance Notice.

The Commission also is proposing to amend Rule 19b–4 and Form 19b–4 to conform to the requirements specified in Exchange Act Section 19(b), as amended by Section 916 of the Dodd Frank Act.[26] Section 916 provides new deadlines by which the Commission must publish and act upon proposed rule changes submitted by SROs and new standards for approval, disapproval and temporary suspension of proposed rule changes.[27] In addition, the Commission is proposing a number of technical and clarifying amendments to Rule 19b–4 and Form 19b–4.

In proposing these rules, the Commission is mindful that there are differences between the security-based swap market and the other securities markets that the Commission regulates. The Commission also is mindful that over time and as a result of Commission proposals to implement the Dodd-Frank Act, further development of the security-based swap market may alter the policy objectives and considerations relating to the clearing of security-based swaps. During the process of implementing the Dodd-Frank Act and beyond, the Commission therefore will closely monitor developments in the security-based swap market, including how the Security-Based Swap Submission and clearing processes interact with the evolving business and practices of security-based swap clearing agencies and other entities.

II. Discussion of the Proposed Rules

The Commission is proposing to adopt rules to implement the new requirements imposed by Title VII and Title VIII discussed above. In accordance with the requirements set forth in Exchange Act Section 3C (found in Title VII), the Commission is proposing amendments to Rule 19b–4 and Form 19b–4 and new Rule 3Ca–1 under the Exchange Act to establish processes for (i) clearing agencies registered with the Commission to submit for review each security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing for a determination by the Commission of whether the security-based swap (or group, category, type or class of security-based swaps) is required to be cleared, and to determine the manner of notice the clearing agency must provide to its members of such submission and (ii) how the Commission may stay the requirement that a security-based swap is subject to mandatory clearing. The Commission also is proposing new Rule 3Ca–2 to prevent evasions of the clearing requirement. In addition, the Commission is proposing amendments to Rule 19b–4 and Form 19b–4 to implement the requirement, pursuant to Section 806(e), that any designated clearing agency for which the Commission is the Supervisory Agency will be required to provide advance notice to the Commission of changes to its rules, procedures or operations that could materially affect the nature or level of risks presented by the designated clearing agency. This release also discusses the filing requirements in Exchange Act Section 19(b), Exchange Act Section 3C, and Section 806(e) and a clearing agency's obligation to fully comply with and seek a determination pursuant to each separate statutory requirement, when applicable.

A. Security-Based Swap Submissions

Exchange Act Section 3C creates, among other things, a clearing requirement with respect to security-based swaps. Specifically, the section provides that "[i]t shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under this Act or a clearing agency that is exempt from registration under this Act if the security-based swap is required to be cleared."[28]

Exchange Act Section 3C requires the Commission, not later than one year after the date of the enactment of the Dodd-Frank Act, to adopt rules for a clearing agency's Security-Based Swap Submissions and to determine the manner of notice the clearing agency must provide to its members of such Security-Based Swap Submission.[29] In connection with rulemaking related to Security-Based Swap Submissions, the Commission is proposing rules related to (i) the process for making Security-Based Swap Submissions to the Commission, (ii) the substance of Security-Based Swap Submissions and (iii) the timing related to Security-Based Swap Submissions. The Commission also is proposing a process and timing for clearing agencies to provide notice to their members of Security-Based Swap Submissions.

1. Process for Making Security-Based Swap Submissions to the Commission

A clearing agency that plans to accept a security-based swap for clearing must file a Security-Based Swap Submission with the Commission for a determination by the Commission of whether a security-based swap, or a group, category, type or class of security-based swaps, is required to be cleared. As discussed in Section I, in cases where accepting a security-based swap (or group, category, type or class of security-based swaps) for clearing constitutes a change in a "stated policy, practice, or interpretation" of the clearing agency, the clearing agency also would be required to file a proposed rule change. In such cases, the Commission must determine (i) whether to approve the clearing agency's proposed rule change to clear the applicable security-based swap and (ii) whether the security-based swap would be subject to the mandatory clearing requirement.

The Commission is proposing to require clearing agencies to use EFFS and Form 19b–4 for Security-Based Swap Submissions. Clearing agencies, as SROs, are already required to file proposed rule changes on Form 19b–4 on EFFS. Using the same filing process for Security-Based Swap Submissions would leverage existing technology and reduce the resources clearing agencies would have to expend on meeting Commission filing requirements. In addition, the Commission anticipates that a submission to clear a security-based swap, or any group, category, type or class of security-based swaps, may be required to be filed under both

[26] Public Law 111–203, section 916 (amending Exchange Act Section 19(b)(2)).

[27] *Id.*

[28] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(a)(1)). The requirement that a security-based swap be cleared stems from a determination by the Commission. Such determination may be made in connection with the review of a clearing agency's submission regarding a security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing (*i.e.*, a Security-Based Swap Submission). *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(2)(C)) ("[t]he Commission shall * * * review each submission made under subparagraphs (A) and (B), and determine whether the security-based swap, or group, category, type, or class of security-based swaps, described in the submission is required to be cleared."). In addition, Exchange Act Section 3C(b)(1) provides that "[t]he Commission on an ongoing basis shall review each security-based swap, or any group, category, type, or class of security-based swaps to make a determination that such security-based swap, or group, category, type, or class of security-based swaps should be required to be cleared."

[29] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(2)(A)).

Exchange Act Section 19(b) and Exchange Act Section 3C. This is because a submission that must be filed with the Commission for a determination under new Exchange Act Section 3C also may qualify as a proposed rule change that must be filed with the Commission under Exchange Act Section 19(b).[30] In other words, the two filing requirements are not mutually exclusive. Because a clearing agency may be required to file the same proposal under Exchange Act Section 3C and Exchange Act Section 19(b), the Commission preliminarily believes that the most efficient use of the Commission's and clearing agencies' resources would be to require clearing agencies to use the existing Form 19b–4 filing process for both types of filings. Accordingly, the proposed rules related to the Security-Based Swap Submission process would be added to existing Rule 19b–4, which currently governs the process for filing proposed rule changes.

The Commission's proposed approach would eliminate the need for multiple submissions to the Commission and could be accomplished by adding a box to Form 19b–4 that clearing agencies would check to indicate that they are making a Security-Based Swap Submission. As a practical matter, the Commission believes that when a security-based swap is submitted for review under Exchange Act Section 3C and concurrently filed under Exchange Act Section 19(b) as a proposed rule change, the two reviews will be carried out in tandem. In circumstances where no proposed rule change filing would be required, such as a case where a clearing agency's rules already permit it to clear the security-based swap in question, EFFS and Form 19b–4 still would be used for the Security-Based Swap Submission.

a. Substance of Security-Based Swap Submissions: Consistency With Exchange Act Section 17A

In reviewing a Security-Based Swap Submission, the Commission is required to review whether the submission is consistent with Exchange Act Section 17A.[31] Accordingly, the Commission is proposing that each Security-Based Swap Submission contain a statement regarding how the submission is consistent with Exchange Act Section 17A.[32] Exchange Act Section 17A specifies, among other things, that the Commission is directed, having due regard for the public interest, the protection of investors, the safeguarding of securities and funds and maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents, to use its authority to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities.[33]

The Commission must review whether a proposed rule change filed by an SRO pursuant to Exchange Act Section 19(b) is consistent with Exchange Act Section 17A.[34] In connection with proposed rule changes, an SRO is required to "explain why the proposed rule change is consistent with the requirements of the [Exchange] Act and the rules and regulations thereunder applicable to the [SRO]. A mere assertion that the proposed rule change is consistent with those requirements is not sufficient."[35] Presently, in complying with this requirement, registered clearing agencies, among other things, specify how the proposed rule change is consistent with the requirements under Exchange Act Section 17A(b)(3). All registered clearing agencies must comply with the standards in Exchange Act Section 17A, which include requirements under Exchange Act Section 17A(b)(3) to maintain rules for promoting the prompt and accurate clearance and settlement of securities transactions, assuring the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, fostering cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, removing impediments to and perfecting the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, protecting investors and the public interest.[36] A registered clearing agency is also required under Exchange Act Section 17A(b)(3) to provide fair access to clearing and to have the capacity to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible, as well as to safeguard securities and funds in its custody or control or for which it is responsible.[37] Under the proposed amendments to Rule 19b–4, a clearing agency would be required to specify how the Security-Based Swap Submission is consistent with Exchange Act Section 17A and specifically the requirements applicable under subsection 17A(b)(3).

b. Substance of Security-Based Swap Submissions: Quantitative and Qualitative Factors

The Dodd-Frank Act requires the Commission to take into account several factors in addition to consistency with Exchange Act Section 17A in reviewing a clearing agency's Security-Based Swap Submission.[38] The Commission is proposing to require clearing agencies to provide information relevant to these factors through the proposed amendments to Rule 19b–4 and Form 19b–4. Specifically, clearing agencies would be required to submit quantitative and qualitative information to assist the Commission in the consideration of the five factors Exchange Act Section 3C requires the Commission to take into account in reviewing a Security-Based Swap Submission, which include:

(i) The existence of significant outstanding notional exposures, trading liquidity and adequate pricing data.

(ii) The availability of a rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contact is then traded.

(iii) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the clearing agency available to clear the contract.

(iv) The effect on competition, including appropriate fees and charges applied to clearing.

(v) The existence of reasonable legal certainty in the event of the insolvency of the relevant clearing agency or one or

[30] A clearing agency rule is defined broadly in the Exchange Act to include the constitution, articles of incorporation, by-laws, and rules, or instruments corresponding to the foregoing. 15 U.S.C. 78c(a)(27). The Commission anticipates that a proposal to clear a new type, category or class of security-based swap will in many cases also be a change to the rules of a registered clearing agency that must be filed with the Commission for approval pursuant to Exchange Act Section 19(b).

[31] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(4)(A)).

[32] Proposed Rule 19b–4(o)(3)(i).

[33] 15 U.S.C. 78q–1.

[34] *See* 15 U.S.C. 78s(b)(2)(C)(i), which provides that the Commission shall approve a proposed rule change of an SRO if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations issued thereunder that are applicable to such organization.

[35] Item 3(b) of Form 19b–4. 17 CFR 240.819. Exchange Act Section 19(b) has a similar but not identical requirement. It requires that an SRO provide a statement of the basis of the proposed rule change and provides that the Commission shall only approve a proposed rule change if it finds that it is consistent with the requirements of the Exchange Act and the rules and regulations thereunder. 15 U.S.C. 78s(b).

[36] *See* 15 U.S.C. 78q–1(b)(3)(F).

[37] 15 U.S.C. 78q–1(b)(3)(A), (B) and (F).

[38] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(4)(B)(i)–(v)).

more of its clearing members with regard to the treatment of customer and security-based swap counterparty positions, funds, and property.[39]

Each Security-Based Swap Submission would be required to address the factors listed above to the extent they are applicable to the security-based swap, the clearing agency and the market.

For example, in connection with the discussion responsive to factor (i) above, the clearing agency could address pricing sources, models and procedures demonstrating an ability to obtain price data to measure credit exposures in a timely and accurate manner, as well as measures of historical market liquidity and trading activity, and expected market liquidity and trading activity if the security-based swap is required to be cleared (including information on the sources of such measures). With respect to the discussion of factor (ii) above, the statement describing the availability of a rule framework could include a discussion of the rules, policies or procedures applicable to the clearing of the relevant security-based swap. Additionally, the discussion of credit support infrastructure could include the methods to address and communicate requests for, and posting of, collateral. With respect to factor (iii) above, the discussion of systemic risk could include a statement on the clearing agency's risk management procedures, including among other things the measurement and monitoring of credit exposures, initial and variation margin methodology, methodologies for stress testing and back testing, settlement procedures and default management procedures. With respect to factor (iv) above, the discussion of fees and charges could address any volume incentive programs that may apply or impact the fees and charges. With respect to factor (v) above, the discussion could address segregation of accounts and all other customer protection measures under insolvency.

In describing the security-based swap, or any group, category, type or class of security-based swaps, that a clearing agency plans to accept for clearing, the clearing agency could include the relevant product specifications, including copies of any standardized legal documentation, generally accepted contract terms,[40] standard practices for managing and communicating any life cycle events associated with the security-based swap and related adjustments,[41] and the manner in which the information contained in the confirmation of the security-based swap trade is transmitted. The clearing agency also could discuss its financial and operational capacity to provide clearing services to all customers subject to the clearing requirements as applicable to the particular security-based swap. Finally, the clearing agency could include an analysis of the effect of a clearing requirement on the market for the group, category, type, or class of security-based swaps, both domestically and globally, including the potential effect on market liquidity, trading activity, use of security-based swaps by direct and indirect market participants and any potential market disruption or benefits. This analysis could include whether the members of the clearing agency are operationally and financially capable of absorbing clearing business (including indirect access market participants) that may result from a determination that the security-based swap (or group, category, type or class of security-based swaps) is required to be cleared.

c. Substance of Security-Based Swap Submissions: Open Access

New Exchange Act Section 3C also requires that the rules of a clearing agency that clears security-based swaps subject to the clearing requirement provide for open access.[42] In the course of reviewing a Security-Based Swap Submission, the Commission may assess whether a clearing agency's rules provide for open access, particularly with respect to the relevant Security-Based Swap Submission. Accordingly, the proposed rule provides that the Security-Based Swap Submission must include a statement regarding how a clearing agency's rules:

(i) Prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are economically equivalent within the clearing agency and may be offset with each other within the clearing agency; and

(ii) Provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the rules of an unaffiliated national securities exchange or security-based swap execution facility.[43]

In making a determination, the Commission proposes to take into account the factors specified in Exchange Act Section 3C and any additional information the Commission determines to be appropriate. The proposed rule also requires a clearing agency to provide any additional information requested by the Commission as necessary to make a determination.[44] The Commission believes that such a requirement would provide appropriate flexibility to facilitate our regulatory responsibilities. In making a determination of whether or not the clearing requirement would apply to the security-based swap, or any group, category, type, or class of security-based swaps, described in the submission, the Commission may require such terms and conditions as the Commission determines to be appropriate in the public interest.[45]

d. Timing Related to Security-Based Swap Submissions

Under Exchange Act Section 3C, as added by Section 763(a) of the Dodd-Frank Act, the Commission is required to make its determination of whether a security-based swap described in a clearing agency's Security-Based Swap Submission is required to be cleared not later than 90 days after receiving such Security-Based Swap Submission.[46] The 90-day determination period may be extended with the consent of the clearing agency making such Security-Based Swap Submission.[47] The Commission is required to make available to the public any Security-Based Swap Submission it receives and to provide at least a 30-day public comment period "regarding its

[39] Proposed Rule 19b–4(o)(3)(ii).

[40] For example, for some security-based swaps, industry standard documentation would include the applicable International Swaps and Derivatives Association, Inc. Master Agreement and any related asset-class-specific definitions.

[41] The Commission has proposed Regulation SBSR, which contains a definition of "life cycle event." *See* Exchange Act Release No. 63346 (Nov. 19, 2010), 75 FR 75208 (Dec. 2, 2010) ("Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information").

[42] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(a)(2) ("[t]he rules of a clearing agency described in paragraph (1) shall—(A) prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are economically equivalent within the clearing agency and may be offset with each other within the clearing agency; and (B) provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the rules of an unaffiliated national securities exchange or security-based swap execution facility.").

[43] Proposed Rule 19b–4(o)(3)(ii).

[44] Proposed Rule 19b–4(o)(6)(i).

[45] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(4)(C)) and Proposed Rule 19b–4(o)(6)(ii).

[46] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(3)). Further, pursuant to proposed Rule 19b–4(o)(2), if any information submitted to the Commission by a clearing agency on Form 19b–4 were not complete or otherwise in compliance with Rule 19b–4 and Form 19b–4, such information would not be considered a Security-Based Swap Submission and the Commission would be required to inform the clearing agency within twenty-one business days of such submission.

[47] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(3)).

determination whether the clearing requirement shall apply to the submission."[48] This 30-day comment period enables the public to have an opportunity to comment on the Security-Based Swap Submission and to provide information for the Commission to consider as part of making its determination whether the clearing requirement should apply to the submission. Accordingly, the Commission proposes to make the Security-Based Swap Submission available for a 30-day public comment period within the 90-day determination period. The Commission would publish notice of the Security-Based Swap Submission in the **Federal Register** and publish notice on the Commission's publicly-available Web site at *http://www.sec.gov.* Such notice would include the solicitation of public comment. This proposed publication process would be consistent with the current process that is in place for proposed rule changes under Exchange Act Section 19(b)(2) and Rule 19b–4.

e. Notice to Clearing Agency Members

New Exchange Act Section 3C requires that a clearing agency provide notice to its members, in a manner determined by the Commission, of its Security-Based Swap Submissions.[49] To meet the requirement of providing notice of Security-Based Swap Submissions to members, the Commission is proposing amendments to Rule 19b–4 that would require clearing agencies to post on their Web sites such submissions to the Commission, and any amendments thereto.[50] This public posting would be required to be completed within two business days following the Security-Based Swap Submission to the Commission. This timeframe is consistent with the notice requirement that currently applies to proposed rule changes,[51] and the Commission believes that such timeframe would provide members of the clearing agency and the public with timely notice of the submission. The clearing agency would be required to maintain such material on its Web site until the Commission makes a determination regarding the Security-Based Swap Submission, the clearing agency withdraws the Security-Based Swap Submission or the clearing agency is notified that the Security-Based Swap Submission is not properly filed.[52] These requirements should help ensure that submissions that are being actively considered by the Commission are readily available to the members of the clearing agency and the public and help provide for a more transparent process.

The Commission notes that the current instructions for Form 19b–4 require an SRO to file with the Commission copies of notices issued by the SRO soliciting comment on the proposed rule change and copies of all written comments on the proposed rule change received by the SRO (whether or not comments were solicited) from its members or participants. Any correspondence the SRO receives after it files a proposed rule change, but before the Commission takes final action on the proposed rule change, also is required to be filed with the Commission.[53] The SRO is required to summarize the substance of all such comments received and respond in detail to any significant issues raised in the comments about the proposed rule change.[54] The Commission is proposing that in connection with Security-Based Swap Submissions, clearing agencies would be subject to these same requirements. The Commission preliminarily believes that its proposal to apply such requirements in the instructions to Form 19b–4 to Security-Based Swap Submissions would provide the Commission with an opportunity to consider the various viewpoints expressed by commenters by making sure relevant comments are included in the materials provided to the Commission.

f. Submissions of a Group, Category, Type or Class of Security-Based Swaps

The proposed amendments to Rule 19b–4 and Form 19b–4 would require that clearing agencies submit security-based swaps for review by group, category, type, or class to the extent it is practicable and reasonable to do so.[55] Any aggregation would be required to be clearly described in a Security-Based Swap Submission so that market participants and the public know which security-based swaps may be subject to a clearing requirement. The Commission preliminarily believes that including multiple security-based swaps in each submission—to the extent that such groupings are practicable and reasonable (*e.g.,* by taking into consideration appropriate risk management issues applicable to the aggregation)—would streamline the submission process for Commission staff and the clearing agencies. This in turn would allow more security-based swaps to be reviewed in a timely manner.

Request for Comments

The Commission generally requests comments on all aspects of the proposed amendments to Rule 19b–4 that would incorporate the process for making Security-Based Swap Submissions. In addition, the Commission requests comments on the following specific issues:

- Are there specific considerations that the Commission should weigh more heavily in reviewing whether a Security-Based Swap Submission is consistent with Exchange Act Section 17A? If so, what are such considerations?
- Should the information included in this release as examples of the kinds of information the clearing agency should include in its Security-Based Swap Submission be required in all cases and incorporated into the rules?
- To describe the security-based swap, or any group, category, type or class of security-based swaps, that a clearing agency plans to accept for clearing, should a clearing agency be required to include in its Security-Based Swap Submissions specific product specifications, including copies of any standardized legal documentation, generally accepted contract terms, standard practices for managing and communicating any life cycle events associated with the security-based swap and related adjustments, and the manner in which the information contained in the confirmation of the security-based swap trade is transmitted? If not, why not? Is there other information relating to the description of the security-based swaps that clearing agencies should be required to provide? If so, what information and why? Should this

[48] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(2)(C)).

[49] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(2)(A)).

[50] Proposed Rule 19b–4(o)(5).

[51] Commission rules currently require SROs to post on their Web sites a copy of any proposed rule change the SRO filed with the Commission, and any amendments thereto. Such posting is required within two business days after filing the proposed rule change with the Commission. *See* 17 CFR 240.19b–4(l). In adopting this rule, the Commission stated that all market participants, investors and other interested parties should have access to proposed rule changes filed with the Commission, and any amendments, as soon as practicable, and that it did not believe that a two-business-day timeframe would be impractical or unduly burdensome on SROs. *See* Securities Exchange Act Release No. 50486 (Oct. 4, 2004), 69 FR 60287 (Oct. 8, 2004) (Final Rules Regarding Proposed Rule Changes of Self-Regulatory Organizations).

[52] Proposed Rule 19b–4(o)(5).

[53] *See* Items 5 and 9 (Exhibit 2) of Form 19b–4. 17 CFR 240.819.

[54] Item 5 of Form 19b–4. 17 CFR 240.819.

[55] Proposed Rule 19b–4(o)(4). In its release proposing rules to implement Section 723 of the Dodd-Frank Act, the CFTC has proposed a similar rule. 75 FR 67277 (November 2, 2010).

information be required in all cases and incorporated into the rules?

• What specific information should a clearing agency be required to include in its Security-Based Swap Submissions regarding pricing sources, models and procedures demonstrating an ability to obtain price data to measure credit exposures in a timely and accurate manner, as well as measures of historical market liquidity and trading activity, and expected market liquidity and trading activity if the security-based swap is required to be cleared (including information on the sources of such measures)? Is there other information relating to pricing that clearing agencies should be required to provide? If so, what information and why? Should this information be required in all cases and incorporated into the rules?

• What specific information should a clearing agency be required to include in its Security-Based Swap Submissions pertaining to the rules, policies or procedures applicable to the clearing of the relevant security-based swap? Is there other information relating to rule framework, capacity, operational expertise and resources the clearing agency should be required to provide? If so, what information and why? Should this information be required in all cases and incorporated into the rules?

• Is there specific information a clearing agency should be required to include in its Security-Based Swap Submissions regarding the methods to address and communicate requests for, and posting of, collateral? Is there other information relating to collateral that the clearing agency should be required to provide? If so, what information and why? Should this information be required in all cases and incorporated into the rules?

• What specific information should a clearing agency be required to include in its Security-Based Swap Submissions regarding the clearing agency's risk management procedures, pertaining to among other things the measurement and monitoring of credit exposures, initial and variation margin methodology, methodologies for stress testing and back testing, settlement procedures and default management procedures? Is there other information relating to risk management that the clearing agency should be required to provide? If so, what information and why? Should this information be required in all cases and incorporated into the rules?

• Should a clearing agency, in connection with each submission or in some circumstances, be required to include an independent validation of its margin methodology and its ability to maintain sufficient financial resources? Why or why not, or in which circumstances? If independent validation is required, how should the Commission assess the independence and technical expertise of the party providing the independent validation? What are the critical techniques, risk factors and components that should be covered by the model validation and why? If the clearing of the security-based swap described in the Security-Based Swap Submission would not require a change in the clearing agency's margin methodology, do commenters believe it would be sufficient for the Commission to permit the clearing agency to refer to an applicable independent validation of the clearing agency's margin methodology previously provided to the Commission with a statement explaining why the existing methodology does not require a change in connection with clearing the new security-based swap and how the current validation is still applicable in the context of the security-based swap the clearing agency plans to clear? If not, why not?

• What information should a clearing agency be required to include in its Security-Based Swap Submissions regarding fees and charges and address any volume incentive programs that may apply or impact the fees and charges? Is there other information relating to fees and charges that the clearing agency should be required to provide? If so, what information and why? Should this information be required in all cases and incorporated into the rules?

• Should a clearing agency be required to include in its Security-Based Swap Submission information regarding segregation of accounts and all other customer protection measures under insolvency? If not, why not? Is there other information relating to insolvency of the clearing agencies' members the clearing agency should be required to provide? If so, what information and why? Should this information be required in all cases and incorporated into the rules?

• Should a clearing agency be required to include in its Security-Based Swap Submission information on whether cross-margining is available to the clearing agency's members with respect to their positions at other clearing agencies? If not, why not? What types of effects on competition are such cross-margining arrangements likely to have? Is there any specific information regarding cross-margining arrangements that the Commission should collect? If not, why not? If so, what information and why? Should this information be required in all cases and incorporated into the rules?

• What information should a clearing agency be required to include in its Security-Based Swap Submission regarding its financial and operational capacity to provide clearing services to all customers subject to the clearing requirements as applicable to the particular security-based swap? Should this information be required to include an analysis of the effect of a clearing requirement on the market for the group, category, type, or class of security-based swaps, both domestically and globally, including the potential effect on market liquidity, trading activity, use of security-based swaps by direct and indirect market participants and any potential market disruption or benefits? Should it be required to include an analysis of whether the members of the clearing agency are operationally and financially capable of absorbing clearing business (including indirect access market participants) that may result from a determination that the security-based swap (or group, category, type or class of security-based swaps) is required to be cleared? If not, why not? Is there other information relating to capacity that the clearing agency should be required to provide? If so, what information and why? Should this information be required in all cases and incorporated into the rules?

• Is the process for notice to clearing agency members by posting on the clearing agency Web site, as proposed by the Commission, adequate as a notice mechanism for members? If not, what should change? Is the two-day posting requirement appropriate to provide timely notice to members? Would a shorter or longer period be appropriate?

• What other method of notice to clearing agency members could or should be required rather than Web site posting?

• Should the Commission utilize the proposed rule change filing system for Security-Based Swap Submissions? What other methods of submitting Security-Based Swap Submissions to the Commission should the Commission consider and why?

• What alternatives should the Commission consider to requiring clearing agencies to submit security-based swaps for review by group, category, type, or class, to the extent it is practicable and reasonable to do so?

• Should the Commission consider consolidating multiple Security-Based Swap Submissions from one clearing agency into a group, category, type, or class of Security-Based Swap Submissions, or subdividing a clearing

agency's submission of a group, category, type, or class of security-based swaps, as appropriate, for review?

• What information should the clearing agency include in its Security-Based Swaps Submissions to identify the scope of the group, category, type or class of security-based swaps it plans to clear that will provide sufficient parameters to put people on notice that a security-based swap may be required to be cleared?

• What characteristics of security-based swaps should be common among security-based swaps in order to aggregate them by group, category, type or class? Would these characteristics be the same across asset classes such as security-based equities derivatives, credit derivatives and loan-based swaps? Should the Commission specify those attributes in the rule?

• Are there any factors that would make aggregation more difficult? Would these be the same or different across asset classes?

• Are there factors that may be clearing-agency specific with respect to aggregation? If so, what are those factors?

As discussed above, Exchange Act Section 3C provides, among other things, for a determination by the Commission of whether security-based swaps are required to be cleared.[56] The Commission may determine that a security-based swap is required to be cleared based on a review of a clearing agency's submission regarding a security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing (*i.e.,* a Security-Based Swap Submission).[57] Consistent with proposal, if the Commission determines that a security-based swap is not required to be cleared, such security-based swap may still be cleared on a non-mandatory basis by the clearing agency if the clearing agency has rules that permit it to clear such security-based swap.[58] In addition, Exchange Act Section 3C(b)(1) provides that "[t]he Commission on an ongoing basis shall review each security-based swap, or any group, category, type, or class of security-based swaps to make a determination that such security-based swap, or group, category, type, or class of security-based swaps should be required to be cleared" (*i.e.,* a Commission-initiated Review).[59]

The proposed addition of paragraph (o) to Rule 19b–4 and related amendments to Form 19b–4 are intended to provide a process for Security-Based Swap Submissions. The Commission is required under the Dodd-Frank Act to adopt rules specifying the process for Security-Based Swap Submissions. As part of the process of review of each Security-Based Swap Submission (and in each Commission-initiated Review), the Commission must take into account the five factors specified in Exchange Act Section 3C(b)(4)(B):

(i) The existence of significant outstanding notional exposures, trading liquidity and adequate pricing data.

(ii) The availability of a rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded.

(iii) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the clearing agency available to clear the contract.

(iv) The effect on competition, including appropriate fees and charges applied to clearing.

(v) The existence of reasonable legal certainty in the event of the insolvency of the relevant clearing agency or one or more of its clearing members with regard to the treatment of customer and security-based swap counterparty positions, funds, and property.[60]

Proposed Rule 19b–4(o) and related amendments for Form 19b–4 would require clearing agencies to include in their Security-Based Swap Submissions information that will assist the Commission in the quantitative and qualitative assessment of the statutory factors listed above. The proposal also set forth examples of the information clearing agencies should include in addressing these five factors.[61]

Promoting clearing is a critical component of the reform mandated by the Dodd-Frank Act, which seeks to bring transactions and counterparties into a robust, conservative and transparent risk management framework.[62] Exchange Act Section 3C(b)(4)(B)[63] sets forth the factors the Commission is required to take into account in determining whether a security-based swap is required to be cleared or should be required to be cleared in connection with a Security-Based Swap Submission or Commission-initiated Review, respectively. The Commission recognizes that in interpreting and applying these factors, it should be guided by the general principles underlying the Dodd-Frank Act, including in particular the goal of promoting clearing where appropriate. At the same time, the Commission is mindful that its application of these factors may have a significant effect on the market for individual security-based swaps. In addition, an overly broad or narrow application of the mandatory clearing requirement could undermine the policy objectives of the Dodd-Frank Act. For example, a premature determination that a security-based swap is subject to mandatory clearing may, in certain circumstances, limit the ability of certain market participants to utilize that product (including for risk management purposes) which in turn could ultimately result in less clearing and more limited use of the security-based swap than might otherwise have been the case if it had been permitted to trade without being subject to a mandatory clearing requirement for a longer period of time.

On the other hand, an overly narrow application of the mandatory clearing requirement would undermine the potential benefits of centralized clearing for counterparties and the marketplace generally that Exchange Act Section 3C

[56] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(a)(1)).

[57] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(2)(C)) ("[t]he Commission shall * * * review each submission made under subparagraphs (A) and (B), and determine whether the security-based swap, or group, category, type, or class of security-based swaps, described in the submission is required to be cleared.").

[58] *See* 15 U.S.C. 78s(b) (proposed rule changes) and 12 U.S.C. 5465(e) (Advance Notices).

[59] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(1)). The Dodd-Frank Act does not require rulemaking with respect to Commission-initiated Reviews.

[60] Proposed Rule 19b–4(o)(3)(ii).

[61] *See* Section II.A.1.b for a discussion of the types of information that should be included in a Security-Based Swap Submission.

[62] *See* Letter from Christopher Dodd, Chairman, Committee on Banking, Housing, and Urban Affairs, United States Senate and Blanche Lincoln, Chairman, Committee on Agriculture, Nutrition, and Forestry, United States Senate, to Barney Frank, Chairman, Financial Services Committee, United States House of Representatives and Collin Peterson, Chairman, Committee on Agriculture, United States House of Representatives (June 30, 2010) (on file with the United States Senate) ("Congress determined that clearing is at the heart of reform—bringing transactions and counterparties into a robust, conservative and transparent risk management framework. Congress also acknowledged that clearing may not be suitable for every transaction or every counterparty. End users who hedge their risks may find it challenging to use a standard derivative contract to exactly match up their risks with counterparties willing to purchase their specific exposures. Standardized derivative contracts may not be suitable for every transaction."). Additionally, and as discussed herein in Section II.A.1.a, Exchange Act Section 3C(b)(4)(A) requires the Commission to review whether a Security-Based Swap Submission is consistent with Exchange Act Section 17A.

[63] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(4)(B)).

was intended to provide. Moreover, because security-based swaps that are subject to the clearing requirement also are required to be executed on a national securities exchange or a swap execution facility if such an exchange or facility makes the security-based swap available to trade, imposing a clearing requirement could have a substantial impact generally on the trading environment of the relevant instruments, which in turn could affect the relative transparency and liquidity of those instruments in ways that may promote, or detract from, the overall goals of the Dodd-Frank Act.

In short, the Commission recognizes, as did Congress, that a determination that clearing is required could have ancillary consequences. The Dodd-Frank Act includes an exception from the mandatory clearing requirement to help address concerns regarding circumstances when clearing may not be appropriate.[64]

However, because the Commission must still apply the statutory factors, in light of the policy goals of the Dodd-Frank Act, to determine whether clearing is required, the Commission is seeking comment generally on how the factors identified in the statute should be applied in making determinations as to whether particular security-based swaps are or should be required to be cleared.

Request for Comments

- Are there specific considerations that the Commission should weigh more heavily in making a determination that a security-based swap is, or should be, required to be cleared? If so, what are such considerations and why should they be given greater weight?
- In a Commission-initiated review, should the Commission consider information that is different from the information the Commission has proposed for a clearing agency to provide in a Security-Based Swap Submission to enable the Commission to make a determination regarding a clearing requirement? If so, what information should be considered and why?
- How should the Commission measure "significant outstanding notional exposures"? Should the Commission consider a threshold or a range for what qualifies as "significant outstanding notional exposures"? If so, should this threshold or range vary depending on the asset class?
- How should the Commission analyze whether pricing data is adequate?
- In taking into account the effect of requiring a security-based swap (or group, category, type or class of security-based swaps) to be cleared on the mitigation of systemic risk, how should the Commission evaluate the resources of the clearing agency available to clear the security-based swaps?
- In considering the existence of legal certainty in the event of the insolvency of the relevant clearing agency or one or more of its clearing members, are there specific factors that the Commission should take into account? Would seeking information from third-party sources such as legal opinions be appropriate? Are there any cross-border considerations that should be considered?
- How should the Commission analyze the pool of potential counterparties to a security-based swap (or group, category, type or class of security-based swaps) subject to the clearing requirement?
- How should the Commission analyze the potential effect, including the potential effect on liquidity, trading activity, use of security-based swaps by direct and indirect market participants and any potential disruption or benefit to the market for a security-based swap (or group, category, type, or class of security-based swaps) required to be cleared?
- Is there information reported to the swap data repository that is otherwise not available to the public that a clearing agency would require to prepare its Security-Based Swap Submission? If so, what information would be required, and why?

2. Prevention of Evasion of the Clearing Requirement.

Exchange Act Section 3C directs the Commission to prescribe rules (and interpretations of rules) the Commission determines to be necessary to prevent evasions of the clearing requirements.[65] The term "clearing agency" is defined broadly under the Exchange Act,[66] and clearing agencies may offer a spectrum of clearing services. Specifically, the Commission has identified the following entities and activities as falling within the definition of clearing agency: (i) Clearing corporations; (ii) securities depositories; and (iii) matching services.[67] As a result, there may be entities that operate as registered clearing agencies for security-based swaps that do not provide central clearing and act as a CCP. The Commission preliminarily believes that the broad definition of the term "clearing agency" could be used by market participants to evade the clearing requirement of Exchange Act Section 3C(a)(1), which states that "[i]t shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under this Act or a clearing agency that is exempt from registration under this Act if the security-based swap is required to be cleared."[68] For example, market participants seeking to evade the requirement to clear a security-based swap set forth in Exchange Act Section 3C(a)(1) could submit the security-based swap for matching services (rather than for central clearing) to a clearing agency that is either registered with the Commission or exempt from registration under the Exchange Act.

The Commission preliminarily believes that other types of clearing functions and services offered by clearing agencies would not achieve the goal of central clearing contemplated under the Dodd-Frank Act—improving the management of counterparty risk.[69] The Commission preliminarily believes

[64] *See* S. Rep. No. 111–176 at 34 (stating that "[s]ome parts of the OTC market may not be suitable for clearing and exchange trading due to individual business needs of certain users. Those users should retain the ability to engage in customized, uncleared contracts while bringing in as much of the OTC market under the centrally cleared and exchange-traded framework as possible. Also, OTC (contracts not cleared centrally) should still be subject to reporting, capital, and margin requirements so that regulators have the tools to monitor and discourage potentially risky activities, except in very narrow circumstances. These exceptions should be crafted very narrowly with an understanding that every company, regardless of the type of business they are engaged in, has a strong commercial incentive to evade regulatory requirements.").

[65] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(d)(1), which states that "[t]he Commission shall prescribe rules under this section (and issue interpretations of rules prescribed under this section), as determined by the Commission to be necessary to prevent evasions of the mandatory clearing requirements under this Act.").

[66] *See supra* note 11 discussing the definition of "clearing agency" pursuant to Exchange Act Section 3(a)(23)).

[67] *See* Securities Exchange Act Release Nos. No. 20221 (Sept. 23, 1983), 48 FR 45167 (October 3, 1983), (Order Approving the Clearing Agency Registration of Four Depositories and Four Clearing Corporations) and 39829 (April 6, 1998), 63 FR 17943 (April 13, 1998) (Confirmation and Affirmation of Securities Trades; Matching).

[68] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(a)(1)).

[69] The Commission has identified the following entities and activities as falling within the definition of clearing agency: (i) Clearing corporations; (ii) securities depositories; and (iii) matching services. Structured and operated appropriately, CCPs may improve the management of counterparty risk and may provide additional benefits such as multilateral netting of trades. *See supra* note 67 and Section I.A.

that proposed Rule 3Ca–2 would prevent potential evasions of the clearing requirement by requiring market participants to submit security-based swaps to a clearing agency for central clearing as opposed to other clearing functions or services. Accordingly, proposed Rule 3Ca–2 would clarify the reference to "submits such security-based swap for clearing to a clearing agency" in Exchange Act Section 3C(a)(1) to mean that the security-based swap must be submitted for central clearing to a clearing agency that functions as a CCP.[70] Submission to a clearing agency for clearing services other than central clearing as a CCP would not meet the clearing requirement.

Request for Comments

The Commission generally requests comments on all aspects of proposed Rule 3Ca–2. In addition, the Commission requests comments on the following specific issues:

- Should the Commission require security-based swaps to be submitted for central clearing to a clearing agency that acts as a CCP to meet the clearing requirement?
- Are there clearing agency functions or services that are not CCP functions performed by a clearing agency but that may provide comparable benefits to those of a CCP? If so, please identify such functions or services and the benefits they provide.

B. Stay of the Clearing Requirement and Review by the Commission

Exchange Act Section 3C states that, after making a determination that a security-based swap (or group, category, type or class of security-based swaps) is required to be cleared, the Commission, on application of a counterparty to a security-based swap or on the Commission's own initiative, may stay the clearing requirement until the Commission completes a review of the terms of the security-based swap and the clearing arrangement.[71] In connection with a stay of the clearing requirement and subsequent review of the terms of the security-based swap and the clearing arrangement, the Commission is required to adopt rules for reviewing a clearing agency's clearing of a security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency has accepted for clearing.[72] Proposed Rule 3Ca–1 would establish a procedure for staying the clearing requirement and the Commission's subsequent review of the terms of the security-based swap and the clearing arrangement.

Under proposed Rule 3Ca–1, a counterparty to a security-based swap subject to the clearing requirement wishing to apply for a stay of the clearing requirement would be required to submit a written statement to the Commission that includes (i) a request for a stay of the clearing requirement, (ii) the identity of the counterparties to the security-based swap and a contact at the counterparty requesting the stay, (iii) the identity of the clearing agency clearing the security-based swap, (iv) the terms of the security-based swap subject to the clearing requirement and a description of the clearing arrangement and (v) the reasons a stay should be granted and the security-based swap should not be subject to a clearing requirement, specifically addressing the same factors a clearing agency must address in its Security-Based-Swap Submission pursuant to proposed Rule 19b–4(o).[73] The Commission preliminarily believes that such information would assist the Commission in determining whether to grant the stay. Under proposed Rule 3Ca–1, the counterparty's statement to the Commission requesting the stay of the clearing requirement would be made available to the public on the Commission's Web site in order to provide the public with notice of the submission of the stay. A stay of the clearing requirement may be applicable to the counterparty requesting the stay or more broadly, to the security-based swap, or any group, category, type or class of security-based swaps, subject to the clearing requirement. The Commission would provide notice to the public regarding a stay of the clearing requirement that is generally applicable.

Pursuant to Exchange Act Section 3C, in undertaking its review of the clearing requirement subsequent to granting a stay, the Commission would consider the clearing agency's clearing of the security-based swap (or group, category, type of class of security-based swaps) for consistency with the determination criteria under Exchange Act Section 3C(b)(4).[74] The Commission also may take into consideration the clearing agency's rules for open access as related to the security-based swap (or group, category, type or class of security-based swaps) subject to review.[75] The Commission may determine that it requires additional information in the possession of the clearing agency (as distinguished from the information it received from the counterparty). Accordingly, proposed Rule 3Ca–1 requires the application for the stay to identify the clearing agency that is clearing the security-based swap[76] and also requires that any clearing agency that has accepted for clearing the security-based swap, or any group, category, type or class of security-based swaps, subject to the stay, provide information requested by the Commission in the course of its review during the stay.[77] Exchange Act Section 3C also requires the Commission to complete such clearing review not later than 90 days after issuance of the stay, unless the clearing agency that clears the security-based swap agrees to an extension of the time limit.[78]

Proposed Rule 3Ca–1 provides that, upon completion of its review, the Commission may determine unconditionally, or subject to such terms and conditions as the Commission determines to be appropriate in the public interest, that the security-based swap (or group, category, type or class of security-based swaps) must be cleared.[79] Alternatively, the Commission may determine that the clearing requirement does not apply to the security-based swap (or group, category, type or class of security-based swaps).[80] If the Commission were to make a determination that the clearing requirement does not apply to a security-based swap (or group, category, type or class of security-based swaps), the proposed rule makes clear that clearing may continue on a non-mandatory basis.[81] As previously noted, moving security-based swaps into clearing in a gradual manner through non-mandatory clearing may in certain circumstances be appropriate. For example, a premature determination that a product is subject to mandatory clearing may, in certain circumstances,

[70] Proposed Rule 3Ca–2. The definitional section of the Exchange Act provides that defined terms may have different meanings in different contexts. *See* Exchange Act Section 3(a) ("When used in this title, unless the context otherwise requires * * * ."). 15 U.S.C. 78c(a).

[71] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(c)(1)).

[72] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(c)(4)).

[73] Proposed Rule 3Ca–1(b).

[74] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(c)(3)(A)).

[75] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(a)(2)).

[76] Proposed Rule 3Ca–1(b)(3).

[77] Proposed Rule 3Ca–1(d).

[78] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(c)(2)).

[79] Proposed Rule 3Ca–1(e)(1) and Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(c)(3)(A)).

[80] Proposed Rule 3Ca–1(e)(2) and Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(c)(3)(B)).

[81] *See* proposed Rule 3Ca–1(e)(2).

limit the ability of certain market participants to utilize that product (including for risk management purposes) which in turn could ultimately result in less clearing and more limited use of the product than might otherwise have been the case if it had been permitted to trade without being subject to a mandatory clearing requirement for a longer period of time.

Request for Comments

The Commission generally requests comments on all aspects of proposed Rule 3Ca–1. In addition, the Commission requests comments on the following specific issues:

- Does the proposal provide sufficient guidance regarding the process for a stay? Are there any alternative approaches the Commission should consider?
- Should the Commission require a counterparty applying for a stay to provide information that is broader or in addition to the information the Commission has proposed? If so, what information should be added to the requirement?
- Should the informational requirement imposed on a counterparty applying for a stay be narrower than that which the Commission has proposed? If so, what information should be eliminated from the requirement?
- Are there any terms or conditions that the Commission should generally consider imposing as part of a stay?
- Under what circumstances would it be reasonable for the Commission to determine that clearing is not required after making an initial determination that clearing is required?
- Should a Commission determination to allow clearing of a securities-based swap on a non-mandatory basis be subject to ongoing review or limited by a certain timeframe? What type of timeframe may be appropriate?

C. Title VIII Notice Filing Requirements for Designated Clearing Agencies

The Commission is proposing to add a new paragraph (n) to Rule 19b–4 to implement the filing requirement in Section 806(e). New paragraph (n) would require that an Advance Notice be submitted to the Commission electronically on Form 19b–4. In addition, new paragraph (n) would define when a proposed change to a clearing agency's rules, procedures or operations could materially affect the nature or level of risks presented by the designated financial market utility. This definition would determine when an Advance Notice under Section 806(e) must be filed with the Commission. The Commission also is proposing corresponding amendments to Form 19b–4 as discussed in more detail in Section II.D.

As with Security-Based Swap Submissions filed pursuant to Exchange Act Section 3C, the Commission anticipates that in many cases a proposed change may be required to be filed as an Advance Notice under Section 806(e) and as a proposed rule change under Exchange Act Section 19(b).[82] This is because a proposal that qualifies as a proposed change to a rule, procedure or operation that materially affects the nature or level of risk presented by the designated clearing agency under Section 806(e) may also qualify as a proposed rule change under Exchange Act Section 19(b). As a result, a designated clearing agency may be required to file a proposal as an Advance Notice and as a proposed rule change. Designated clearing agencies, as SROs, will already be required to file proposed rule changes on Form 19b–4 using EFFS.[83] Accordingly, and similar to the proposal for Security-Based Swap Submissions, the Commission is proposing to require clearing agencies to use the existing filing system, EFFS, and Form 19b–4 for the filing of Advance Notices under Section 806(e). This would allow designated clearing agencies to comply with the notice requirement in Section 806(e) using the same system they use for submitting proposed rule changes under Exchange Act Section 19(b) and, as applicable, Security-Based Swap Submissions under Exchange Act Section 3C. Leveraging the existing filing system, EFFS, for the submission of Advance Notices is intended to utilize efficiently Commission and designated clearing agency resources.

1. Standards for Determining When Advance Notice Is Required

Section 806(e)(1)(A) requires a designated financial market utility to provide 60 days advance notice to its Supervisory Agency of any proposed change to its rules, procedures or operations that could materially affect the nature or level of risks presented by the designated financial market utility.[84] The Commission is proposing that for purposes of this requirement, the phrase "materially affect the nature or level of risks presented"[85] would be defined to mean the existence of a reasonable possibility that the change could affect the performance of essential clearing and settlement functions or the overall nature or level of risk presented by the designated clearing agency.[86] The proposed definition is designed to include all changes that would affect the risk management functions performed by the clearing agency that are related to systemic risk, as well as changes that could affect the clearing agency's ability to continue to perform its core clearance and settlement functions.[87]

In order to help designated clearing agencies determine whether an Advance Notice is required, the Commission is proposing to include in the rule a list of categories of changes to rules, procedures or operations that the Commission preliminarily believes could materially affect the nature or level of risks presented by a designated clearing agency. The proposed list of such changes may include, but are not limited to, changes that materially affect participant and product eligibility, daily or intraday settlement procedures, default procedures, system safeguards, governance or financial resources of the designated clearing agency, or otherwise generally affect risk management processes or capabilities.[88] The Commission preliminarily believes that changes in these areas pertain to core functions of a clearing agency and, as a result, may affect the ability of a designated clearing agency to manage its risks appropriately and to continue to conduct systemically important clearance and settlement services. For example, participant and product eligibility requirements of a designated clearing agency are designed to ensure that the clearing agency's members have sufficient financial resources and operational capacity to meet obligations arising from participation in the clearing agency, and to ensure that the products cleared by the clearing agency are

[82] If the proposed change is related to clearing a type, group, class, or category of security-based swap, it may also be required to be filed as a Security-Based Swap Submission under Exchange Act Section 3C.

[83] As discussed below in Section I.F., the processes under Exchange Act Section 19(b) and Section 806(e) may not always overlap. For example, certain changes to the operations of a designated clearing agency may not require a rule filing under Exchange Act Section 19(b), which does not specifically apply to changes in operations. Such changes may, however, trigger a requirement to file an Advance Notice if they would materially affect the nature or level of risks presented by the designated clearing agency. Nevertheless, the two processes are sufficiently similar as to warrant using the same method for filing.

[84] 12 U.S.C. 5465(e)(1)(A).

[85] *Id.*

[86] Proposed Rule 19b–4(n)(2)(i).

[87] Core clearance and settlement functions may include, but are not limited to, the processing, comparison, netting, or guaranteeing of securities transactions as well as any processes or procedures, such as internal risk management controls, that support these functions.

[88] Proposed Rule 19b–4(n)(2)(ii).

sufficiently liquid and adequate pricing data is available. In addition, a designated clearing agency's default procedures exist to ensure that, should a default occur, the clearing agency has the financial resources, liquidity and operational abilities to continue to make payments to non-defaulting participants on time. Additional examples of the types of matters that would fall within the categories listed above include changes to the methods for making margin calculations, liquidity arrangements and significant new services of the clearing agency.

Moreover, while a broad interpretation of the materiality threshold is consistent with the underlying principles of Title VIII and desirable to permit a review of all matters that impact the risks presented by clearing agencies, not every change to a designated clearing agency's rules, procedures or operations will be material. Accordingly, the Commission has included two broad categories of examples in the proposed rule of changes to rules, procedures or operations that the Commission preliminarily believes would not materially affect the nature or level or risks presented by a designated clearing agency and therefore, would not require the filing of an Advance Notice. The first category includes, but is not limited to, changes to an existing procedure, control, or service that do not modify the rights or obligations of the designated financial market utility or persons using its payment, clearing, or settlement services and that do not adversely affect the safeguarding of securities, collateral, or funds in the custody or control of the designated financial market utility or for which it is responsible. The second category includes, but is not limited to, changes concerned solely with the administration of the designated clearing agency or related to the routine, daily administration, direction and control of employees.[89]

The Commission preliminarily believes that the proposed definition of "materially affect the nature or level of risks presented" provides sufficient information for designated clearing agencies to know when advance notice under Section 806(e) is required while allowing flexibility to capture all relevant proposed changes as specific circumstances warrant. However, as this would be a new requirement, the Commission expects that designated clearing agencies may discuss, at least initially, proposed changes with Commission staff prior to determining if advance notice under Section 806(e) is required to be filed with respect to a proposed change to the clearing agency's rules, procedures or operations.

2. Providing Notice of the Matters Included in an Advance Notice to the Board and Interested Persons

Given the role of clearing agencies in supporting financial markets, the Commission recognizes that members of the public may have an interest in proposed changes to the rules, procedures or operations of systemically important clearing agencies. Accordingly, new paragraph (n) of Rule 19b–4 would provide that, upon the filing of any Advance Notice by a designated clearing agency, the Commission would publish notice thereof in the **Federal Register**, together with the terms of the substance of the proposed change to the rules, procedures, or operations of the designated clearing agency and a description of the subjects and issues involved.[90] This requirement is consistent with the existing procedures for proposed rule changes under Exchange Act Section 19(b) and the proposed procedures for Security-Based Swap Submissions under Exchange Act Section 3C. In addition, the Commission is proposing that designated clearing agencies post Advance Notices and any amendments thereto on their Web sites within two business days of filing the notice or amendments in order to ensure that interested parties have timely and transparent access to the matters discussed therein, particularly in circumstances where a proposed change is not required to be filed under Exchange Act Section 19(b) and, as a result, would not otherwise be published for comment.[91] Consistent with the use and proposed use of Form 19b–4, the purpose of this proposed rule would be to allow the Commission to give interested persons an opportunity to review and to submit written data, views and arguments concerning the matters referred to in the Advance Notice.[92] Comments and other information received would be considered by the Commission in determining whether to object to an Advance Notice.

Section 806(e)(3) requires that the Commission provide the Board with a complete copy of any information it receives in connection with the Advance Notice.[93] To satisfy this requirement, new paragraph (n) would require a designated clearing agency to provide to the Board copies of all materials submitted to the Commission relating to an Advance Notice contemporaneously with such submission to the Commission.[94] Such copies would be provided to the Board in triplicate and in hard copy format, pursuant to proposed changes to the instructions of Form 19b–4.

The Commission also is proposing that a designated clearing agency be required to post a notice on its Web site that the proposed change described in an Advance Notice has been permitted to take effect within two business days of such date as determined in accordance with the timeframe set forth in Section 806(e).[95] The purpose of this proposed rule is to provide a means for public notice when a proposed change under Title VIII is permitted to become effective, since the Commission will not affirmatively approve an Advance Notice under Section 806(e)—*i.e.,* it will not issue a public order granting approval as it does with proposed rule changes under Exchange Act Section 19(b). As a result, there will not be a Commission action to indicate when an Advance Notice has been permitted to take effect. Moreover, the designated clearing agency also would be required to post notice on its Web site of the time at which the proposed change becomes effective if that date is different from the date on which the proposed change is permitted to become effective. To be consistent with the notice requirements applicable to proposed rule changes under Exchange Act Section 19(b) and to give interested parties timely notice of the change, this notice would be required to be posted within two business days of the effective date.[96] Once the notice of the effectiveness of the proposed change has been posted, the designated clearing agency would be permitted to remove its original posting of the Advance Notice and any amendments thereto from its Web site. A designated clearing agency also could remove the Advance Notice from its Web site if it withdrew the notice or if it was notified that such notice was not properly filed.[97]

[89] Proposed Rule 19b–4(n)(2)(iii).

[90] Proposed Rule 19b–4(n)(1).

[91] Proposed Rule 19b–4(n)(3).

[92] Under the Commission's current practice with respect to Exchange Act Section 19(b), proposed rule changes are generally published with a twenty-one day comment period. The Commission expects that Advance Notices will be published for the same comment period.

[93] 12 U.S.C. 5465(e)(3). In addition, the Commission is required to provide the Board with any information it issues or submits in connection therewith.

[94] Proposed Rule 19b–4(n)(5).

[95] Proposed Rule 19b–4(n)(4)(i).

[96] Proposed Rule 19b–4(n)(4)(ii).

[97] Proposed Rule 19b–4(n)(3).

3. Timing and Determination of Advance Notices Pursuant to Section 806(e)

Section 806(e) does not require the Commission to approve affirmatively a proposed change referred to in the Advance Notice; however, Section 806(e) requires that the Commission notify the designated clearing agency of any objection to the proposed change. Section 806(e)(1)(E) provides that an objection must be made within 60 days of the Commission's receipt of the Advance Notice, unless the Commission requests additional information in consideration of the notice, in which case the 60-day period will recommence on the date such information is received by the Commission.[98] Additionally, pursuant to Section 806(e)(1)(H), the Commission may extend the review period for an additional 60 days for proposed changes that raise novel or complex issues, subject to the Commission providing the designated clearing agency with prompt written notice of the extension.[99] Finally, Section 806(e)(4) requires that the Commission consult with the Board before taking any action on, or completing its review of, the change referred to in the Advance Notice.[100] The timeframes set forth in Section 806(e) determine when a proposed change to a designated clearing agency's rules, procedures or operations will become effective, and the Commission is not proposing any rules related to these timeframes.

4. Implementation of Proposed Changes and Emergency Changes Pursuant to Section 806(e)

Section 806(e)(1)(F) provides generally that a designated clearing agency may not implement a proposed change filed as an Advance Notice if the Commission notifies it of an objection during the applicable review period.[101] Section 806(e), however, provides two exceptions to this prohibition. First, Section 806(e)(1)(I) permits the designated clearing agency to implement a change before the 60-day review period (or such longer period as extended in accordance with the statute) expires if the Commission notifies the designated clearing agency in writing that it does not object to the proposed change to the designated clearing agency's rules, procedures or operations and authorizes the designated clearing agency to implement the change on an earlier date, subject to any conditions imposed by the Commission.[102] As noted above, however, before taking any action on, or completing its review of, a change proposed by a designated clearing agency in an Advance Notice, the Commission is required to consult with the Board.[103]

Second, Section 806(e)(2) allows a designated clearing agency to implement a change that would otherwise require providing an Advance Notice if it determines that (i) an emergency exists and (ii) immediate implementation of the change is necessary for the designated clearing agency to continue to provide its services in a safe and sound manner.[104] If a designated clearing agency determines to implement an emergency change, it must provide notice to the Commission as soon as practicable, and in no event later than 24 hours after implementation of the relevant change.[105] Such emergency notice must contain all of the information otherwise required to be in an Advance Notice as well as a description of (i) the nature of the emergency and (ii) the reason the change was necessary in order for the designated clearing agency to continue to provide its services in a safe and sound manner.[106] In reviewing the emergency notice, the Commission may require modification or rescission of the relevant change if it determines that the change is not consistent with the purposes of Title VIII, including all applicable rules, orders, or the risk management standards prescribed under Section 805(a) of Title VIII.[107] The procedures for implementing a proposed change to a designated clearing agency's rules, procedures or operations before the expiration of the standard review period or on an emergency basis are set forth in Section 806(e). The Commission is not proposing any rules related to these implementation procedures.

Request for Comments

The Commission generally requests comments on all aspects of the proposed amendments to Rule 19b–4 to incorporate the process for designated clearing agencies to file Advance Notices with the Commission pursuant to Section 806(e). In addition, the Commission requests comments on the following specific issues:

- Do the proposed rules sufficiently define and describe when advance notice of proposed changes to rules, procedures or operations are required to be filed by designated financial market utilities in accordance with Section 806(e)?
- Is the proposed definition for the term "materially affect the nature or level of risks presented" by a designated clearing agency broad enough to capture all types of changes that could materially affect the nature or level of risks presented by a designated clearing agency? Alternatively, should the definition include a greater degree of specificity regarding the proposed changes that must be filed as Advance Notices with the Commission?
- Should additional examples be provided regarding the categories of changes that may materially affect the nature or level of risks presented by a designated clearing agency and, as a result, would be required to be filed with the Commission under Section 806(e)? Should additional examples be provided regarding the categories of changes that may not materially affect the nature or level of risks presented by a designated clearing agency and, as a result, would not be required to be filed with the Commission under Section 806(e)? If so, what additional examples should be provided?
- Should the Commission utilize the proposed rule change filing system under Rule 19b–4 for Advance Notices required to be filed by designated clearing agencies under Section 806(e)? Do commenters have suggestions for other methods of filing Advance Notices with the Commission?
- Should the Commission specify any additional requirements to those already in Section 806(e) with respect to Advance Notices implemented on an emergency basis? If so, please specify such requirements. Is the proposed rule's requirement for proposed changes implemented on an emergency basis too onerous? If so, please specify changes that should be made.
- Is there any specific additional information that should be included in the Advance Notice filing requirement regarding the nature or level of risks presented by the designated clearing agency?

D. Amendments to Form 19b–4

In conjunction with the proposed Rule 19b–4 amendments, the Commission is proposing to amend Form 19b–4 to include Security-Based Swap Submissions and Advance

[98] 12 U.S.C. 5465(e)(1)(E).

[99] 12 U.S.C. 5465(e)(1)(H).

[100] 12 U.S.C. 5465(e)(4).

[101] 12 U.S.C. 5465(e)(1)(F).

[102] 12 U.S.C. 5465(e)(1)(I).

[103] 12 U.S.C. 5465(e)(4).

[104] 12 U.S.C. 5465(e)(2)(A).

[105] 12 U.S.C. 5465(e)(2)(B).

[106] 12 U.S.C. 5465(e)(2)(C).

[107] 12 U.S.C. 5465(e)(2)(D). Pursuant to Section 806(e)(3), the Commission is required to provide the Board concurrently with a complete copy of any notice, request or other information it receives. However, the Commission is proposing that the designated clearing agency file copies of any such notice, requests or other information with the Board in order to help meet this requirement.

Notices. Specifically, the Commission is proposing to amend the cover page of Form 19b–4 to add additional checkboxes so that a clearing agency may indicate that the filing is being submitted as a Security-Based Swap Submission or an Advance Notice (in the case of a designated clearing agency) as well as a proposed rule change under Exchange Act Section 19(b). A clearing agency would be able to select more than one filing type, check the appropriate box or boxes to indicate the filing type and submit all related information as a single filing. In other words, in cases where a proposed change must be filed pursuant to more than one filing requirement, the clearing agency would be able to meet all applicable filing requirements by submitting a single Form 19b–4 electronically on the existing filing system, EFFS, to the Commission.

The Commission also is proposing to amend the General Instructions for Form 19b–4 regarding the filing requirements for Security-Based Swap Submissions and Advance Notices. The Commission is proposing to amend the instructions to include specific information that is required to be filed as part of a Security-Based Swap Submission or an Advance Notice.

With respect to Security-Based Swap Submissions, the proposed amendments to the Form 19b–4 General Instructions would require clearing agencies to include a statement that includes, but is not limited to: (i) How the submission is consistent with Exchange Act Section 17A; (ii) information that will assist the Commission in the quantitative and qualitative assessment of the factors specified in Exchange Act Section 3C; and (iii) how the rules of the clearing agency meet the criteria for open access. Additionally, in order to facilitate the Commission's review of a Security-Based Swap Submission, the proposed instructions provide examples of the types of information the clearing agency should provide relating to product specifications; pricing sources, models and procedures; risk management procedures; measures of market liquidity and trading activity; credit support; the effect of a clearing requirement on the market for the swap; applicable rules, policies, or procedures; terms and trading conventions on which the swap is currently traded; and financial and operational capacity.

With respect to Advance Notices, the proposed amendments to the Form 19b–4 General Instructions would require the designated clearing agency to provide a description of the nature of the proposed change and the expected effects on risks to the designated clearing agency, its participants, or the market and it must provide a description of how the designated clearing agency will manage any identified risks. A designated clearing agency also would be instructed to provide any additional information requested by the Commission necessary to assess the effect the proposed change would have on the nature or level of risks associated with the designated clearing agency's payment, clearing or settlement activities and the sufficiency of any proposed risk management techniques.

The Commission is proposing to provide a new Exhibit 1A to the General Instructions for the **Federal Register** notice template used by clearing agencies as an exhibit to the Form 19b–4 filing. New Exhibit 1A would be used only by clearing agencies. All other SROs would continue to use the current Exhibit 1 to prepare the **Federal Register** notice for proposed rule changes. The Commission is proposing a separate exhibit for clearing agencies because the proposed rule to require notice of Security-Based Swap Submissions and Advance Notices to be published in the **Federal Register** would apply only to clearing agencies. Instructions on preparing a **Federal Register** notice for Security-Based Swap Submissions and Advance Notices would be unnecessary for all other SROs. In order to avoid any confusion, the Commission is proposing to provide clearing agencies with Exhibit 1A to use to prepare a **Federal Register** notice for a proposed rule change, Security-Based Swap Submission, or Advance Notice, or any combination of the three. The proposed amendments to the General Instructions for Form 19b–4 also would incorporate the statutory timeframes and other procedural requirements that are in Exchange Act Section 3C and Section 806(e).

Moreover, pursuant to existing Rule 19b–4(j), SROs are required to sign Form 19b–4 electronically in connection with filing a proposed rule change and to retain a copy of the signature page in accordance with Rule 17a–1. Under the proposed rules, Rule 19b–4(j) would be modified such that it would apply also to Security-Based Swap Submissions filed in accordance with Exchange Act Section 3C and Advance Notices filed in accordance with Section 806(e).

In addition, the proposed changes to the General Instructions for Form 19b–4 would reflect the new deadlines by which the Commission must publish and act upon proposed rule changes submitted by SROs and the new standards for approval, disapproval or suspension of proposed rule changes pursuant to the amendments to Exchange Act Section 19(b) contained in Section 916 of the Dodd-Frank Act. The Commission is proposing a number of technical and clarifying amendments to Rule 19b–4 and Form 19b–4 to make the instructions consistent with the new requirements in Section 916 of the Dodd-Frank Act and with current practices of SRO filers.[108]

Section 916 of the Dodd-Frank Act also modified Exchange Act Section 19(b)(3)(A), which permits certain types of proposed rule changes to take effect immediately upon filing with the Commission and without the notice and approval procedures required by Exchange Act Section 19(b)(2), to make clear that any rule establishing or changing a fee, due or other charge imposed by the SRO qualifies for this designation, regardless of whether the fee, due or other charge is applicable only to a member.[109] The General Instructions for Form 19b–4 have been modified to reflect this clarification.

The Commission requests comment on all aspects of the proposed amendments to Form 19b–4. In addition, the Commission requests comments on the following specific issues:

- Do the proposed amendments to Form 19b–4 adequately capture the filing requirements in Exchange Act Section 3C and Section 806(e) while allowing clearing agencies to meet the requirements for filing notice of proposed rule changes under Exchange Act Section 19(b)? If not, why not?
- Would additional changes to Rule 19b–4 or Form 19b–4 be useful in order to accommodate the filing of Advance Notices under Section 806(e)? If so, what specific changes should the Commission consider?

E. Amendments to Rule 19b–4 Relating to Section 916 of the Dodd-Frank Act

Under Exchange Act Section 19(b)(2)(E),[110] as amended by the Dodd-Frank Act, the Commission is required to send the SRO notice to the **Federal Register** for publication thereof within 15 days of the date on which the SRO's Web site publication is made. The Commission is proposing to amend Rule 19b–4 to provide that if a SRO does not post a proposed rule change on its Web site on the same day that it files the proposal with the Commission, then the SRO shall inform the Commission of the date on which it posted such proposal on its Web site. The purpose of this

[108] *See* proposed amendments to the General Instructions for Form 19b–4.

[109] 15 U.S.C. 78s(b)(3)(A).

[110] 15 U.S.C. 78s(b)(2)(E).

change is to advise the Commission of the date the SRO posted the proposed rule change filing to its Web site, as such posting initiates the timing for the requirement of the Commission to send notice of the proposed rule change to the **Federal Register**.

The Commission requests comment on all aspects of the proposed amendments to Rule 19b–4 relating to Section 916 of the Dodd-Frank Act. In addition, the Commission requests comments on the following specific issues:

- Should the Commission specify the manner and form by which the SRO should inform the Commission of the date on which it posted the proposed rule change on its Web site? If so, what manner and form should the notification take?

F. New Requirements Under Exchange Act Section 3C and Section 806(e) and the Existing Filing Requirement in Exchange Act Section 19(b)

The proposed amendments to Rule 19b–4 and Form 19b–4 incorporate two new requirements under the Dodd-Frank Act that are similar to the existing filing requirement for proposed rule changes under Exchange Act Section 19(b). The first is the requirement to file Security-Based Swap Submissions under new Exchange Act Section 3C. The second is the requirement to file Advance Notices under new Section 806(e). As discussed previously, the Commission anticipates that in many cases a clearing agency may take an action that would trigger more than one of these filing requirements [111] and it seeks to streamline the filing processes for Exchange Act Section 3C, Section 806(e) and Exchange Act Section 19(b) by proposing that all such filings be made electronically on Form 19b–4.

The amendments to Rule 19b–4 and to Form 19b–4 are being proposed to avoid duplicative filings and to streamline the process and burden on clearing agencies and the Commission. However, the filing requirements of Exchange Act Section 3C, Section 806(e) and Exchange Act Section 19(b) are distinct from each other and subject to different statutory standards for Commission review. As a result, a clearing agency that files a proposal pursuant to more than one of these sections must meet the requirements of each applicable regulatory scheme before the applicable change may become effective.

Accordingly, it is likely that many proposals made by clearing agencies may be filed and require review under more than one of the three Commission review procedures discussed herein. For example, a designated clearing agency may be required to submit an Advance Notice in connection with its Security-Based Swap Submission if the requirement to clear the security-based swap described in the submission would materially affect the nature or level of risks presented by the designated clearing agency. Moreover, if the designated clearing agency did not have existing authority under its rules to clear the relevant security-based swap, such action likely also would require a proposed rule change filing under Exchange Act Section 19(b).

In other cases, only one of the three Commission-review procedures may apply because the scope of proposals requiring review under each of Section 806(e) and Exchange Act Section 3C is in some ways broader and in other ways narrower in comparison to Exchange Act Section 19(b). There is, for example, the potential that certain changes to the operations of a designated clearing agency may not require a proposed rule change filing under Exchange Act Section 19(b) or a Security-Based Swap Submission under Exchange Act Section 3C, but may trigger a requirement to file an Advance Notice under Section 806(e). By contrast, because the notice requirement under Section 806(e) applies only to matters that materially affect the nature or level of risk presented by a designated clearing agency, it is also possible that a rule change filing would be required under Exchange Act Section 19(b) but not trigger the advance notice requirement under Section 806(e).

When a clearing agency submits a filing for more than one purpose (*i.e.,* proposed rule change, Security-Based Swap Submission and/or Advance Notice), the Commission will endeavor to evaluate such filings in tandem as part of a parallel process. Although the timing for review under each of Exchange Act Section 3C, Section 806(e) and Exchange Act Section 19(b) is different,[112] all three processes contain some degree of flexibility, and the Commission will attempt to streamline the review processes to avoid any unnecessary delays or duplicative requests for information.

However, each of the three processes would remain distinct from the other processes. Each proposed rule change filing, Security-Based Swap Submission and Advance Notice would be reviewed and evaluated independently by the Commission in accordance with the applicable statute and regulatory authority. Moreover, the proposed imposition of new requirements to file Advance Notices with the Commission and to make Security-Based Swap Submissions would not replace Exchange Act Section 19(b) notice process provision, nor will a filing made under one of the two new requirements eliminate the need to satisfy the requirements of the other process to the extent they are applicable. The Commission review required by Exchange Act Section 3C is different from the review required under Section 806(e), which in turn is different from the review required under Exchange Act Section 19(b).

Section 806(e) requires an analysis of the risk management issues that may impact the clearing agency, its participants, or the market. Exchange Act Section 19(b), by contrast, requires a broader evaluation and an analysis as to whether the proposed rule change meets the requirements of the Exchange Act and the rules thereunder. Finally, Exchange Act Section 3C only applies when a clearing agency plans to accept for clearing a security-based swap (or a group, category, type or class of security-based swaps), and the standard

[111] Title VII contains a clause, which provides in pertinent part, that "[u]nless otherwise provided by its terms, [Subtitle B] does not divest * * * the Securities and Exchange Commission * * * of any authority derived from any other provision of applicable law." *See* Section 771 of the Dodd-Frank Act. Similarly, Section 811 of the Dodd-Frank Act provides that "[u]nless otherwise provided by its terms, this title does not divest any appropriate financial regulator, any Supervisory Agency, or any other Federal or State agency, of any authority derived from any other applicable law, except that any [risk management] standards prescribed by the [Board] under section 805 shall supersede any less stringent requirements established under other authority to the extent of any conflict." Accordingly the new requirements under Titles VII and VIII do not supersede the existing requirements under the Exchange Act that would require clearing agencies (which are all SROs) to file a proposed rule change when the change proposed in a Security-Based Swap Submission or Advance Notice also meets the criteria for a proposed rule change.

[112] Assuming the Commission utilizes its maximum allotment of time under Exchange Act Section 19(b)(2), including with respect to any extensions of time requiring the consent of the SRO, the Commission must either approve, disapprove or institute proceedings with respect to a proposed rule change filing within approximately 105 days after receipt. *See* Public Law 111–203, section 916 (amending Exchange Act Section 19(b)(2)). 15 U.S.C. 78s(b)(2). Similarly, the Commission must make its determination on a Security-Based Swap Submission within 90 days after receipt, unless the clearing agency agrees to an extension of this time limitation. *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(b)(3)). The Commission is not required to approve affirmatively a proposed change filed as an Advance Notice under Section 806(e), but it must notify the designated clearing agency of any objection to the proposed change within 60 days after receiving the notice filing, unless the Commission requests additional information in consideration of the notice, in which case the 60-day period will recommence on the date such information is received by the Commission. 12 U.S.C. 5465(e)(1)(G).

for review is based on a number of specified factors, including but not limited to: (i) How the submission is consistent with Exchange Act Section 17A and (ii) the factors specified in Exchange Act Section 3C relating to the security-based swap, the market for the security-based swaps, and the clearing agency.

The Commission preliminarily believes that these distinct reviews make it possible for a submission made on Form 19b–4 to be acceptable under the standards for review for one of the three purposes but not under the others.[113] Accordingly, under the proposal, where a proposed change is required to be filed pursuant to more than one filing requirement, the change would not become effective until determinations are obtained under each of the other applicable statutory provisions. In cases where only the requirements of one of Exchange Act Section 19(b), Exchange Act Section 3C or Section 806(e) are implicated, only the applicable process would need to be completed before the proposal could become effective.

III. General Request for Comment

The Commission seeks comment generally on all aspects of the proposed amendments to Rule 19b–4 and Form 19b–4 and proposed Rules 3Ca–1 and 3Ca–2. Commenters are encouraged to provide empirical data or economic studies to support their views and arguments related to the proposed rules. In addition to the questions above, commenters are welcome to offer their views on any other matter raised by the proposed rules. With respect to any comments, we note that they are of greatest assistance to the Commission if accompanied by supporting data and analysis of the issues addressed in those comments and if accompanied by alternative suggestions to our proposal where appropriate.

In addition, Title VII requires that the Commission consult and coordinate to the extent possible with the CFTC for the purposes of assuring regulatory consistency and comparability, to the extent possible,[114] and states that in adopting rules, the CFTC and Commission shall treat functionally or economically similar products or entities in a similar manner.[115]

The CFTC is required to adopt rules related to the process for review of swaps for mandatory clearing as required under Section 723 of the Dodd-Frank Act.[116] Understanding that the Commission and the CFTC regulate different products and markets, and as such, appropriately may be proposing alternative regulatory requirements, we request comments on the impact of any differences between the Commission and CFTC approaches to the process for submissions for review of security-based swaps and swaps for mandatory clearing. Specifically, do the regulatory approaches under the Commission's proposed rulemaking pursuant to Exchange Act Section 3C and the CFTC's proposed rulemaking pursuant to Section 723 of the Dodd-Frank Act result in duplicative or inconsistent efforts on the part of market participants subject to both regulatory regimes or result in gaps between those regimes? If so, in what ways do commenters believe that such duplication, inconsistencies, or gaps should be minimized? Do commenters believe the approaches proposed by the Commission and the CFTC to regulate the process for review of security-based swaps and swaps for mandatory clearing are comparable? If not, why not? Do commenters believe there are approaches that would make the regulation of the process for review of security-based swaps for mandatory clearing more comparable? If so, what are they? Do commenters believe that it would be appropriate for us to adopt an approach proposed by the CFTC that differs from our proposal? Is so, which one? We request commenters to provide data, to the extent possible, supporting any such suggested approaches.

Similarly, the CFTC is required to adopt rules related to the process, pursuant to Section 806(e), by which any financial market utility designated by the Council as systemically important (and for which the CFTC is the Supervisory Agency) will be required to provide advance notice to the CFTC of changes to its rules, procedures or operations that could materially affect the nature or level of risks presented by such financial market utility.[117] The Commission requests comments on the impact of any differences between the Commission and CFTC approaches to the process for submitting proposed changes to rules, procedures or operations for review pursuant to Section 806(e). Specifically, do the regulatory approaches under the Commission's proposed rulemaking and the CFTC's proposed rulemaking pursuant to Section 806(e) result in duplicative or inconsistent efforts on the part of market participants subject to both regulatory regimes or result in gaps between those regimes? If so, in what ways do commenters believe that such duplication, inconsistencies, or gaps should be minimized? Do commenters believe the approaches proposed by the Commission and the CFTC with respect to the process for submitting advance notice of proposed changes to rules, procedures or operations for review pursuant to Section 806(e) are comparable? If not, why not? Do commenters believe there are approaches that would make the regulation of the process for submitting for advance review notices of proposed changes to rules, procedures or operations pursuant to Section 806(e) more comparable? If so, what are they? Do commenters believe that it would be appropriate for us to adopt an approach proposed by the CFTC that differs from our proposal? Is so, which one? We request commenters to provide data, to the extent possible, supporting any such suggested approaches.

IV. Paperwork Reduction Act

Rule 19b–4, Form 19b–4 and Rule 3Ca–1 contain "collection of information requirements" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[118] Accordingly, the Commission has submitted the information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. The Commission is proposing to submit the current collection of information titled "Rule 19b–4 Filings with Respect to Proposed Rule Changes by Self-Regulatory Organizations" (OMB Control No. 3235–0045). The Commission is proposing to submit the current collection of information titled "Form 19b–4 under the Securities Exchange Act of 1934" (OMB Control No. 3235–0045). The Commission also is proposing to submit a new collection of information titled "Rule 3Ca–1 Stay of Clearing Requirement and Review by the Commission under the Securities Exchange Act of 1934". 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. Any information submitted to the Commission will be made publicly available.

[113] For example, a rule proposal may provide for sound risk management practices but have an anticompetitive aspect that would not satisfy the requirements of the Exchange Act.

[114] Public Law 111–203, section 712(a)(7).

[115] *Id.*

[116] *See* Public Law 111–203, section 723 (amending Section 2 of the Commodity Exchange Act). *See also supra* note 55 discussing the CFTC's proposed rules pursuant to Section 723 of the Dodd-Frank Act.

[117] 75 FR 67282 (November 2, 2010).

[118] 44 U.S.C. 3501 *et seq.*

A. Summary of Collection of Information

1. Proposed Amendments to Rule 19b–4 and Form 19b–4

Rule 19b–4 currently requires an SRO seeking Commission approval for a proposed rule change to provide the information stipulated in Form 19b–4. Form 19b–4 currently requires a description of the terms of a proposed rule change, the proposed rule change's impact on various market segments and the relationship between the proposed rule change and the SRO's existing rules. Form 19b–4 also requires an accurate statement of the authority and statutory basis for, and purpose of, the proposed rule change, the proposal's impact on competition and a summary of any written comments received by the SRO from SRO members. An SRO also is required to submit Form 19b–4 to the Commission electronically, post a proposed rule change on its Web site within two business days of its filing, and to post and maintain a current and complete set of its rules on its Web site.

The Commission is proposing to require two new collections of information on Form 19b–4 related to new filing requirements applicable to clearing agencies under the Dodd-Frank Act. The proposed amendments would not otherwise change the collection of information requirements currently in Rule 19b–4 and Form 19b–4. These new reporting requirements are in addition to the information currently required by Rule 19b–4 and Form 19b–4.

The proposed rule would require clearing agencies to file information with the Commission under Exchange Act Section 3C and Section 806(e) on Form 19b–4. Exchange Act Section 3C requires clearing agencies to submit for a Commission determination of whether mandatory clearing applies, any security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing and provide notice to its members of such submission. Section 806(e) requires that a clearing agency designated as systemically important by the Council file with the Commission advance notice of proposed changes to its rules, procedures or operations that could materially affect the nature or level of risk presented by the designated clearing agency.

The Commission anticipates that in many cases, a clearing agency would be required to file a proposal under Exchange Act Section 3C or Section 806(e) when it is already required to file a proposed rule change under Exchange Act Section 19(b). Accordingly, clearing agencies would be able to submit on a Form 19b–4, proposals under Exchange Act Section 3C or Section 806(e) that they are already required to submit under Exchange Act Section 19(b). In some cases, however, a clearing agency would be required to file a proposal under Exchange Act Section 3C or Section 806(e) and not under Exchange Act Section 19(b), for example where a proposal materially affects the nature or level of risks presented by the clearing agency but does not change the rules of the clearing agency.

In addition, Exchange Act Section 3C and Section 806(e) each require information to be provided as part of the filing that is in addition to the information required to be filed with a proposed rule change under Exchange Act Section 19(b). A clearing agency would be required to include as part of the Security-Based Swap Submission a statement that includes, but is not limited to: (i) How the submission is consistent with Exchange Act Section 17A; (ii) information that will assist the Commission in the quantitative and qualitative assessment of the factors specified in Exchange Act Section 3C; and (iii) how the rules of the clearing agency meet the criteria for open access.

Section 806(e) provides that the Advance Notice include a description of the nature of the proposed change and the expected effects on risks to the designated clearing agency, its participants, or the market and it must provide a description of how the designated clearing agency will manage any identified risks. A designated clearing agency also would be required to provide any additional information requested by the Commission necessary to assess the effect the proposed change would have on the nature or level of risks associated with the designated clearing agency's payment, clearing or settlement activities and the sufficiency of any proposed risk management techniques.

The proposed amendments to Rule 19b–4 also would require a clearing agency to post certain information on its Web site, and require a SRO that does not post a proposed rule change on its Web site on the same day that it filed the proposal with the Commission to inform the Commission of the date on which it posted such proposal on its Web site.[119] Security-Based Swap Submissions and Advance Notices, and any amendments thereto, would be required to be posted on the clearing agency's Web site within two business days of filing the information with the Commission. The information generally shall remain posted on the clearing agency's Web site until a determination is made with respect to the Security-Based Swap Submission or the Advance Notice becomes effective. A clearing agency also would be required to post notice on its Web site of the effectiveness of any change to its rules, procedures, or operations referred to in an Advance Notice within two business days of the effective date determined in accordance with Section 806(e).

2. Stay of Clearing Requirement

Proposed Rule 3Ca–1 provides that the Commission, on application of a counterparty to a security-based swap, or on the Commission's own initiative, may stay the clearing requirement until the Commission completes a review of the terms of the security-based swap (or group, category, type, or class of security-based swaps) and the clearing of the security-based swap (or group, category, type, or class of security-based swaps) that the clearing agency has accepted for clearing. A counterparty to a security-based swap that applies for a stay of the clearing requirement for a security-based swap, or any group, category, type, or class of security-based swaps, would be required to submit to the Commission the information set forth in proposed Rule 3Ca–1(b).

Any clearing agency that has accepted for clearing a security-based swap, or any group, category, type or class of security-based swaps, that is subject to the stay of the clearing requirement would be required to provide information requested by the Commission as it determines to be necessary and appropriate to assess any of the factors in the course of the Commission's review. The Commission preliminarily believes such information would likely include updates to the information the clearing agency provided in the Security-Based Swap Submission relating to the security-based swap then subject to the stay under review.

B. Proposed Use of Information

1. Proposed Amendments to Rule 19b–4 and Form 19b–4

The information currently required under Rule 19b–4 and reported on Form 19b–4 is used by the Commission to review rule change proposals filed by SROs pursuant to Exchange Act Section 19(b)(1)[120] and to provide notice of the proposals to the general public. The Commission relies upon the information received in SRO filings, as well as public comment regarding the information, in reviewing and reaching

[119] Proposed Rule 19b–4(l).

[120] 15 U.S.C. 78s(b)(1).

decisions about whether to approve a proposed rule change.

The information to be provided by clearing agencies pursuant to the proposed amendments to Rule 19b–4 and Form 19b–4 would be used by the Commission to evaluate Security-Based Swap Submissions and Advance Notices. The Commission would use the information filed on Form 19b–4 related to Security-Based Swap Submissions to determine whether the security-based swap, or any group, category, type or class of security-based swaps, described in the Security-Based Swap Submission is required to be cleared pursuant to Exchange Act Section 3C(1).

The Commission would use the information on Form 19b–4 related to Advance Notices filed under Section 806(e) to determine the effect on the nature or level of risks that would be presented by a designated clearing agency based on a proposed change to its rules, procedures or operations, and the expected effects on risk to the designated clearing agency, its participants and the market and to determine whether the Commission should make an objection to the proposed change. In addition, the information on the form would be provided to the Board because the Commission is required to provide copies of all Advance Notices and any additional information provided by the designated clearing agency relating to the Advance Notice and to consult with the Board before taking any action on or completing its review of the Advance Notice.[121] In some instances, the Commission also may use the information on the form to determine whether to allow a proposed change to take effect in less than 60 days following the receipt of the Advance Notice and to determine whether a change made on an emergency basis is warranted or whether it should be modified or rescinded.

The information proposed to be filed on Form 19b–4 relating to Exchange Act Section 3C and Section 806(e) also would be used by participants of the clearing agency, market participants, other clearing agencies, or the general public to comment on the proposal, as the Commission is proposing to require that a clearing agency post the information on its Web site. In addition, pursuant to Exchange Act Section 3C, a clearing agency would be required to provide its members with notice of the Security-Based Swap Submission. As with proposed rule changes under Exchange Act Section 19(b), the Commission would solicit comment from interested parties on proposals filed under Exchange Act Section 3C and Section 806(e). Interested parties could use the information to comment on the proposed change and to provide feedback on the development of the clearing agency's service offerings and the rules, procedures and operations of the clearing agency.

The information collected by the Commission with respect to the date on which the SRO posted a proposed rule change on its Web site (if such posting date is not the same as the filing date) would be used to inform the Commission of the date by which the Commission must send the SRO notice to the **Federal Register** for publication.

2. Stay of Clearing Requirement

The information provided as required by proposed Rule 3Ca–1 would be used by the Commission to determine whether to grant the stay of the clearing requirement sought by a counterparty and to review whether the clearing requirement would continue to apply to such security-based swap, or any group, category, type, or class of security-based swaps.

C. Respondents

1. Proposed Amendments to Rule 19b–4 and Form 19b–4

There are currently 25 SROs subject to the collection of information under Rule 19b–4 and Form 19b–4, although that number may vary owing to the consolidation of SROs or the introduction of new entities. In fiscal year 2009, these SRO respondents filed 1,405 rule change proposals subject to the current collection of information, of which 1,071 proposed rule changes ultimately became effective.

Although Rule 19b–4 and Form 19b–4 apply to all SROs, the new collection of information requirements in the proposed rules would apply to clearing agencies and, in certain limited circumstances, to other SROs. The proposed amendments relating to Exchange Act Section 3C would apply to clearing agencies that clear security-based swaps. Currently, four clearing agencies are authorized to clear credit default swaps, which include security-based swaps,[122] pursuant to temporary conditional exemptions under Exchange Act Section 36.[123] The obligation to centrally clear security-based swap transactions is a new requirement under Title VII, and it is anticipated that clearing agencies operating under temporary conditional exemptions will register or will become registered security-based swap clearing agencies.[124] Based on the fact that there are currently four clearing agencies authorized to clear security-based swaps and that there could conceivably be a few more in the foreseeable future,[125] the Commission preliminarily estimates that four to six clearing agencies may plan to centrally clear security-based swaps and be subject to the information collection requirements in the proposed rules relating to Exchange Act Section 3C. The Commission is using the higher estimate (six) for the PRA analysis.

The amendments to Rule 19b–4 and Form 19b–4 relating to the Section 806(e) advance notice requirement of changes to rules, procedures or operations would only apply to clearing agencies that are registered with the Commission, designated by the Council as systemically important, and for which the Commission is the Supervisory Agency. There are currently six clearing agencies registered with the Commission; however, only four of these clearing agencies are currently clearing securities transactions. In addition, it is anticipated that several more clearing agencies will be registered with the Commission following the effectiveness of Title VII to clear security-based swaps. For purposes of the PRA analysis, the Commission estimates that the four registered securities clearing agencies that are currently clearing securities and the six estimated clearing agencies that may clear security-based swaps would be subject to the applicable collection of information requirements.

[121] 12 U.S.C. 5465(e)(3) and (4).

[122] The Commission authorized five entities to clear credit default swaps. *See* Securities Exchange Act Release Nos. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009) and 61973 (April 23, 2010), 75 FR 22656 (April 29, 2010) (CDS clearing by ICE Clear Europe Limited); 60373 (July 23, 2009), 74 FR 37740 (July 29, 2009) and 61975 (April 23, 2010), 75 FR 22641 (April 29, 2010) (CDS clearing by Eurex Clearing AG); 59578 (March 13, 2009), 74 FR 11781 (March 19, 2009), 61164 (December 14, 2009), 74 FR 67258 (December 18, 2009) and 61803 (March 30, 2010), 75 FR 17181 (April 5, 2010) (CDS clearing by Chicago Mercantile Exchange Inc.); 59527 (March 6, 2009), 74 FR 10791 (March 12, 2009), 61119 (December 4, 2009), 74 FR 65554 (December 10, 2009) and 61662 (March 5, 2010), 75 FR 11589 (March 11, 2010) (CDS clearing by ICE Trust US LLC); 59164 (December 24, 2008), 74 FR 139 (January 2, 2009) (temporary CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.) (collectively, "CDS Clearing Exemption Orders"). LIFFE A&M and LCH.Clearnet Ltd. allowed their order to lapse without seeking renewal.

[123] 15 U.S.C. 78mm. Of the four clearing agencies granted temporary exemptions from registration, only three have cleared products that likely are classified as security-based swaps under Title VII.

[124] *See* Public Law 111–203, section 763(b).

[125] The Commission does not expect there to be a large number of clearing agencies that clear security-based swaps, based on the significant level of capital and other financial resources necessary for the formation of a clearing agency.

2. Stay of Clearing Requirement

The Commission preliminarily estimates that six security-based swap clearing agencies' activities associated with security-based swap clearing requirements would potentially be subject to the collection of information under proposed Rule 3Ca–1 in connection with any counterparty requesting a stay of clearing requirement.

D. Total Annual Reporting and Recordkeeping Burden

1. Background

The proposed amendments to Rule 19b–4 and Form 19b–4 are designed to facilitate the processes for providing the Commission with Security-Based Swap Submissions and Advance Notices and to make these processes efficient by utilizing the existing infrastructure for proposed rule changes, thereby conserving both clearing agency and Commission resources. When amended, Form 19b–4 would enable clearing agencies to submit Security-Based Swap Submissions and Advance Notices electronically with the Commission. The proposed amendments to Rule 19b–4 also would require a clearing agency to post on its Web site any Security-Based Swap Submissions and any Advance Notices, and any amendments thereto, submitted to the Commission within two business days of submission. A further amendment to Rule 19b–4 would require an SRO that filed a proposed rule change with the Commission to inform the Commission of the date on which it posted such proposal on its Web site if the posting did not occur on the same day that the SRO filed the proposal with the Commission. Finally, proposed Rule 3Ca–1 would specify the process for a security-based swap counterparty to apply to the Commission for a stay of the clearing requirement.

2. Rule 19b–4 and Form 19b–4

In order to estimate the collection of information, the Commission received informal comments from a few clearing agencies that would be subject to the new requirements in the proposed amendments to Rule 19b–4 and Form 19b–4. Clearing agencies would have to train personnel and develop policies and procedures to implement the proposed new filing requirements under Rule 19b–4 and Form 19b–4 in connection with Security-Based Swap Submissions and Advance Notices. In addition, clearing agencies indicated they would have to submit additional information to the Commission, either as separate filings or as part of filings also submitted as proposed rule changes under Exchange Act Section 19(b).

The clearing agencies emphasized that the estimated burdens would depend in large part on the rules ultimately adopted by the Commission to define and determine how frequently Security-Based Swap Submissions and Advance Notices would be required to be filed and the nature and extent of information that would be required with each filing. In addition, the clearing agencies stated that the burden per filing could vary widely, depending on the complexity of each individual filing. For example, some clearing agency proposals may require more information or analysis to be submitted as part of the filing. The clearing agencies also stated that the annual burden also could vary widely from year to year depending on the number of new proposals the clearing agency makes in a particular year. As a result, the estimates provided as part of the survey are preliminary and may change after clearing agencies have the opportunity to review and closely evaluate the proposed rules.

The estimates varied among clearing agencies, which may reflect the different internal processes, training programs, and review procedures for new projects currently in place at the different clearing agencies. In addition, some clearing agencies are currently registered with the Commission while others are not. Clearing agencies registered with the Commission already file proposed rule changes under Exchange Act Section 19(b) and have more familiarity with the collection of information requirements related to Rule 19b–4 and Form 19b–4, while clearing agencies that are not registered with the Commission are not as familiar with these requirements and may incur a greater burden in connection with learning EFFS and training personnel.

The Commission heard from staff of eight clearing agencies. The estimates varied among clearing agencies, and therefore the Commission is using conservative numbers in developing its estimates for the PRA. In addition, in order to provide a conservative estimate, the Commission has calculated the burden for the requirements related to Advance Notices assuming that they would apply to all ten clearing agencies and the burden for the requirements related to Security-Based Swap Submissions assuming they would apply to six clearing agencies.

Finally, the Commission recognizes that there would likely to be some substantive and procedural overlap with respect to the processes for preparing and submitting Security-Based Swap Submissions, Advance Notices and proposed rule changes that relate to the same subject matter. For example, in connection with a decision to clear a new type of security-based swap that was not previously permitted under the clearing agency's rules, a clearing agency could be required to make a filing as a Security-Based Swap Submission, an Advance Notice and a proposed rule change. In this case, because these submissions all relate to the same underlying issue, the amount of time required to prepare a single Form 19b–4 for all three purposes is likely to be less than the aggregate amount of time ordinarily required to prepare and submit an unrelated Security-Based Swap Submission, Advance Notice and proposed rule change. Nevertheless, the Commission is calculating the PRA burden for each process individually without accounting for any reduction due to the anticipated overlap. The Commission has decided to calculate the burdens in this manner in order to provide the most conservative estimates possible. Additionally, the estimates of each of the following burdens are derived from discussions between the Commission's staff and personnel of the clearing agencies, as described above.

a. Internal Policies and Procedures

The Commission preliminarily believes that newly-registered clearing agencies could incur some one-time costs associated with training their personnel about the procedures for submitting Security-Based Swap Submissions and/or Advance Notices in electronic format through EFFS. Based on staff discussions with the clearing agencies, the Commission preliminarily estimates that each newly registered clearing agency will spend approximately 20 hours training all staff members who will use EFFS to submit Security-Based Swap Submissions, Advance Notices and/or proposed rule changes electronically. Accordingly, the Commission estimates that the total one-time burden of training staff members of newly-registered clearing agencies to use EFFS will be 120 hours (six clearing agencies × 20 hours).

Going forward, the Commission preliminarily estimates that each existing SRO (including currently-registered clearing agencies) will spend approximately 10 hours annually training new staff members and updating the training of existing staff members to use EFFS, resulting in a total annual burden of 310 hours ((six newly-registered clearing agencies × 10 hours) + (25 SROs × 10 hours)). The Commission preliminarily believes that only a minimal amount of EFFS training

will be submission-specific and that training a person to submit either a proposed rules change, Security-Based Swap Submission or Advance Notice will generally be sufficient to allow such person to make one or more of the other types of submissions.

Based on staff discussions with the clearing agencies, the Commission preliminarily estimates that there would be a one-time paperwork burden of 130 hours for each newly-registered clearing agency to draft and implement internal policies and procedures relating to using EFFS to submit Security-Based Swap Submissions, Advance Notices and proposed rule changes with the Commission, for a total of 780 hours (130 hours × six newly-registered clearing agencies). In addition, the Commission preliminarily estimates that there will be a one-time paperwork burden of 30 hours for each currently-registered clearing agency to draft and implement modifications to existing internal policies and procedures for using EFFS in order to update them for submitting Security-Based Swap Submissions and/or Advance Notices with the Commission for a total of 120 hours (30 hours × four currently-registered clearing agencies).

b. Proposed Rule Changes

An SRO rule change proposal is generally filed with the Commission after an SRO's staff has obtained approval of its board of directors. The time required to complete a filing varies significantly and is difficult to separate from the time an SRO spends in developing internally the proposed rule change. In a PRA analysis conducted in 2004 in connection with amendments to Rule 19b–4 and Form 19b–4, the Commission estimated that 34 hours is the amount of time that would be required to complete an average proposed rule change filing and 129 hours is the amount of time required to complete a novel or complex proposed rule change filing.[126] Based on the filings it currently receives from SROs, the Commission preliminarily believes that these estimates remain valid and has relied on these figures to prepare the analysis discussed below.[127]

In fiscal year 2009, 25 SRO respondents filed 1,405 rule change proposals subject to the current collection of information. Of this total, the Commission estimates that 60 proposed rule changes could be characterized as novel or complex and 1,345 proposed rule changes could be characterized as average. The Commission preliminarily estimates that the total annual reporting burden for filing proposed rule changes with the Commission under the proposed amendments to Rule 19b–4 and Form 19b–4 will be 66,303 hours (((1,345/25) × 31[128] average rule change proposals × 34 hours) + ((60/25) × 31 complex rule change proposals × 129 hours)). Thus, on average, the reporting burden for filing proposed rule changes is 38.06 hours (66,303 hours/(1668 average rule change proposals + 74 complex rule change proposals)).

c. Security-Based Swap Submissions

The time required by clearing agencies to prepare, review and submit Security-Based Swap Submissions to comply with proposed Rule 19b–4(o)(1) likely will vary significantly based on the unique characteristics of each Security-Based Swap Submission and the submitting clearing agency. Based on staff discussions with the clearing agencies, the Commission preliminarily estimates that the amount of time that a clearing agency would require to internally prepare, review and submit a Security-Based Swap Submission is 140 hours. The Commission also estimates that each clearing agency will submit 20 Security-Based Swap Submissions annually. Accordingly, the Commission estimates that the total annual reporting burden for clearing agencies submitting Security-Based Swap Submissions electronically with the Commission under the proposed amendments to Rule 19b–4 and Form 19b–4 will be 16,800 hours (20 Security-Based Swap Submissions × 140 hours × six respondents).

The Commission also preliminarily estimates that a clearing agency would require 60 hours of outside legal work to prepare, review and submit a Security-Based Swap Submission, based on staff discussions with the clearing agencies. Assuming an hourly cost of $354 for an outside attorney,[129] the total annual cost in the aggregate for the six respondent clearing agencies to meet these requirements would be $2,548,800 (60 hours × $354 per hour for an outside attorney × 20 Security-Based Swap Submissions × six respondent clearing agencies).

d. Advance Notices

With respect to Advance Notices, the Commission preliminarily estimates that the amount of time that designated clearing agency representatives will require to internally prepare, review and electronically file each Advance Notice with the Commission to comply with proposed Rule 19b–4(n)(1) is 90 hours. This figure is based on the staff's discussions with the clearing agencies. The Commission also estimates that two hours should be added to the time required to prepare each Advance Notice to comply with the requirement contained in proposed Rule 19b–4(n)(5) to provide to the Board copies of all materials submitted to the Commission relating to an Advance Notice contemporaneously with such submission to the Commission. The Commission preliminarily estimates that each designated clearing agency will submit 35 Advance Notices to the Commission annually. Accordingly, the Commission estimates that the total annual reporting burden on designated clearing agencies submitting Advance Notices electronically with the Commission under the proposed amendments to Rule 19b–4 and Form 19b–4 will be 32,200 hours (35 Advance Notices × 92 hours × ten respondents).

Based on staff discussions with the clearing agencies, the Commission also preliminarily estimates that a designated clearing agency will require 40 hours of outside legal work to prepare, review and electronically file each Advance Notice with the Commission. Assuming an hourly cost of $354 for an outside attorney,[130] the total annual cost in the aggregate for the ten respondent clearing agencies to meet these requirements would be $4,956,000 (40 hours × $354 per hour for an outside attorney × 35 Advance Notices × ten respondents).

[126] *See* Exchange Act Release No. 50486, 69 FR 60287, *supra* note 51.

[127] In 2008, the Commission submitted to OMB a request for approval of an extension of the existing collection of information provided for in Rule 19b–4 and Form 19b–4. 73 FR 5245 (January 29, 2008) (Submission for OMB review; comment request). The PRA analysis conducted in 2008 estimated that the average time to complete a proposed rule change filing was 23.22 hours, without differentiating between average and complex rule filings. In light of the changes made to Exchange Act Section 19(b) pursuant to Section 916 of Dodd-Frank, which provides for new deadlines by which the Commission must publish and act upon proposed rule changes, the Commission has decided to revert to the figures contained in the PRA analysis conducted in 2004. Specifically, the shortened time period by which proposed rule changes will be reviewed by the Commission is likely to cause the SROs to spend additional time preparing and checking the filing, as there will be less time for them to correct a filing after it has been made, justifying the use of the more conservative estimates.

[128] The number of projected SROs is equal to 31 (25 currently registered SROs + six newly-registered clearing agencies).

[129] The hourly rate for an attorney is from *SIFMA's Management & Professional Earnings in the Securities Industry 2010,* modified by the Commission's staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[130] *See id.*

e. Summary

The Commission preliminarily estimates that the total annual reporting burden for clearing agencies to internally prepare, file and submit Security-Based Swap Submissions, proposed rule changes and Advance Notices electronically with the Commission under the Rule 19b–4 and Form 19b–4 will be 115,303 hours (16,800 hours for Security-Based Swap Submissions + 32,200 hours for Advance Notices + 66,303 hours for proposed rule changes). The Commission also preliminarily estimates that the total annual cost in the aggregate for the respondent clearing agencies to internally prepare, file and submit Security-Based Swap Submissions, proposed rule changes and Advance Notices electronically with the Commission under the Rule 19b–4 and Form 19b–4 will be $7,504,800 ($2,548,800 for Security-Based Swap Submissions + $4,956,000 for Advance Notices).

3. Posting of Security-Based Swap Submissions, Advance Notices and Proposed Rule Changes on Clearing Agency Web Sites

The Commission preliminarily believes that newly-registered clearing agencies could incur some one-time costs associated with posting Security-Based Swap Submissions, Advance Notices and proposed rule changes on their Web sites. The Commission preliminarily estimates that each newly-registered clearing agency will spend approximately 15 hours creating or updating its existing Web site in order to provide the capability to post these submissions online resulting in a total one-time burden of 90 hours (six clearing agencies × 15 hours).

With respect to annual burdens, the Commission preliminarily estimates that four hours would be required by a clearing agency to post a Security-Based Swap Submission on its Web site to comply with proposed Rule 19b–4(o)(5). This figure is based on the staff's discussions with the clearing agencies. The Commission estimates that the total annual reporting burden for clearing agencies to post Security-Based Swap Submissions on their Web sites will be 480 hours (20 Security-Based Swap Submissions × four hours × six respondents).

The Commission preliminarily estimates that four hours would be required by a designated clearing agency to post an Advance Notice on its Web site to comply with proposed Rule 19b–4(n)(3). The Commission preliminarily estimates that the total annual reporting burden for designated clearing agencies to post Advance Notices on their Web sites will be 1,400 hours (35 Advance Notices × four hours × 10 respondents).

To comply with proposed Rule 19b–4(n)(4), the Commission estimates that four hours would be required by a designated clearing agency to post notice on its Web site of any change to its rules, procedures or operations referred to in an Advance Notice once it has been permitted to take effect. The Commission therefore estimates that the total annual reporting burden for designated clearing agencies to post notice on their Web sites of any changes to their rules, procedures or operations referred to in Advance Notices would be 1,400 hours (35 Advance Notices × four hours × 10 respondents).

The Commission previously estimated that an SRO would take four hours to post proposed rule change proposals under Exchange Act Section 19(b) and amendments on its Web site and four hours to update the posted SRO rules on its Web site once the proposed rules become effective.[131] The Commission preliminarily believes that these estimates remain valid. In addition, of the 1,405 proposed rule changes filed in fiscal year 2009, 1,071 were approved or non-abrogated. Accordingly, the total annual reporting burden for SROs to post proposed rule change proposals on their Web sites and to update their posted rules on their Web sites once the proposed rules become effective will be 12,280 hours ((1,071/25) × 31 SRO respondents) approved or non-abrogated rules × four hours) + ((1,405/25) × 31 SRO respondents) rule change proposals × four hours)).

In summary, the Commission preliminarily estimates that the total annual reporting burden for all clearing agencies to post submitted Security-Based Swap Submissions, Advance Notices, notices of changes to rules, procedures or operations referred to in Advance Notices once they take effect and proposed rule changes on their Web sites under Rule 19b–4 and Form 19b–4 will be 15,560 hours (480 hours for Security-Based Swap Submissions + 1,400 hours for Advance Notices + 1,400 hours for posting notices of changes to rules, procedures or operations referred to in Advance Notices + 12,280 hours for proposed rule changes). The Commission requests comment on all of the above estimates.

4. Rule 3Ca–1

Commission staff communicated with certain clearing agencies that likely would be subject to a stay of the clearing requirement and related review under proposed Rule3Ca–1 in order to estimate the collection of information. The clearing agencies emphasized that the estimated burdens would depend in large part on the number of stays requested annually and the scope of the information requested by the Commission in the course of the related review.

The Commission staff communicated with staff of three entities, representing four clearing agencies total, as two clearing agencies are subsidiaries of the same holding company. As the responses varied among clearing agencies, the Commission has generally used conservative responses in developing its estimates for the PRA.

Based on staff discussions with the clearing agencies, the Commission preliminarily estimates that a clearing agency will spend approximately 18 hours to retrieve, review and submit the information associated with the stay of the clearing requirement. The Commission preliminarily estimates that each clearing agency will be required to provide information requested by the Commission in the course of its reviews of five requests for a stay of the clearing requirement, resulting in a total annual reporting burden of 540 hours (five stay applications × 18 hours to retrieve, review and submit the information × six clearing agencies). The Commission also preliminarily estimates that a clearing agency will require seven hours of outside legal work to retrieve, review and submit the information associated with the stay of the clearing requirement. This figure is based on the staff's discussions with the clearing agencies. Assuming an hourly cost of $354 for an outside attorney,[132] the total estimated annual cost in the aggregate for the six respondent clearing agencies to meet these requirements would be $74,340 (seven hours × $354 per hour for an outside attorney × five stay of clearing applications × six respondents). The Commission requests comment on these estimates.

Finally, based on its estimates with respect to the preparation Security-Based Swap Submissions, the Commission preliminarily estimates that 100 hours would be required by a counterparty to a security-based swap to prepare and submit an application requesting a stay of the clearing requirement. The Commission preliminarily estimates that counterparties to security-based swaps transactions will submit 30 applications requesting stays of the clearing

[131] *See supra* note 127.

[132] *See supra* note 129.

requirement. Assuming an hourly cost of $354 for an outside attorney,[133] the total annual cost in the aggregate for the respondent counterparties to meet these requirements would be $1,062,000 (100 hours × $354 per hour for an outside attorney × 30 stay of clearing applications).

The Commission requests comment on all of the above estimates.

4. Amendment To Conform to Section 916 of the Dodd-Frank Act

The Commission preliminarily estimates that the requirement that an SRO inform the Commission of the date on which it posted a proposed rule change on its Web site (if the posting did not occur on the same day that the SRO filed the proposal with the Commission) will impose only a minimal burden, if any, on an SRO. The Commission preliminarily believes that SROs currently post their proposed rule changes on their Web site on the same day on which they file them with the Commission. Further, it is in the interest of an SRO to continue to do so, since prompt Web site posting triggers the requirement on the Commission to publish notice of the proposal. The new notice requirement would only be applicable in a situation where the SRO is unable to post its proposed rule change on the same day that it files with the Commission, which the Commission expects would be an unlikely occurrence. However, because the deadline applicable to Commission publication is tied to SRO Web site posting, and the Commission has no means of ascertaining when Web site posting was made other than receiving that information from the SRO itself, the Commission is proposing this requirement to capture necessary information to allow it to comply with Exchange Act Section 19, as amended by Section 916 of the Dodd-Frank Act.

Based on its experience receiving and reviewing proposed rule changes filed by SROs, the Commission preliminarily estimates that SROs will fail to post proposed rule changes on their Web sites on the same day as the filing was made with the Commission in 1% of all cases, or 14 times each year. Further, the Commission preliminarily estimates that each SRO will spend approximately one hour preparing and submitting notice to the Commission of the date on which it posted the proposed rule change on its Web site, resulting in a total annual burden of 14 hours.

Thus, the Commission preliminarily estimates that the total annual reporting burden under Rule 19b–4 and Form 19b–4 will be 131,987 hours in the initial year and 131,187 hours thereafter.[134] Additionally, the Commission preliminarily estimates that the total annual reporting burden under proposed Rule 3Ca–1 will be 540 hours. The Commission requests comment on all of the above estimates.

E. Retention Period of Recordkeeping Requirements

Clearing agencies will be required to retain records of the collection of information (the manually signed signature page of the Form 19b–4, a file available to interested persons for public inspection and copying, of all Security-Based Swap Submissions, Advance Notices and proposed rule changes made pursuant to Rule 19b–4) and all correspondence and other communications reduced to writing (including comment letters) to and from such SROs concerning any Security-Based Swap Submissions, Advance Notices and proposed rule changes, for a period of not less than five years, the first two years in an easily accessible place, according to the current recordkeeping requirements set forth in Exchange Act Rule 17a–1.[135]

The Commission preliminarily believes that maintaining the physical signature page, Security-Based Swap Submissions, Advance Notices, proposed rule changes and all related correspondence and other communications would enable interested parties, including the Commission, to access a record of the authority under which a particular Security-Based Swap Submission, Advance Notice or proposed rule change was made. The Commission notes that the retention of the physical signature page is an existing maintenance requirement for SROs.[136] The Commission further notes that a similar manual signature retention requirement exists for EDGAR filers.[137]

F. Collection of Information Is Mandatory

Any collection of information pursuant to Rule 19b–4 and Form 19b–4 to require electronic submission of security-based swaps, Advance Notices and proposed rule changes with the Commission is a mandatory collection of information. Any collection of information pursuant to Rule 19b–4 to require Web site posting by clearing agencies of their Security-Based Swap Submissions, Advance Notices and proposed rules changes also is a mandatory collection of information. Any collection of information pursuant to the proposed Rule 3Ca–1 in connection with the application for the stay of the clearing requirement is a mandatory collection of information. Any collection of information pursuant to Rule 19b–4 to require SROs to inform the Commission of the date on which it posted a proposed rule change on its Web site (if such date is not the same day that it filed the proposal with the Commission) also is a mandatory collection of information.

G. Responses to Collection of Information Will Not Be Kept Confidential

The collection of information pursuant to Rule 19b–4, Form 19b–4 and proposed Rule 3Ca–1 would not be

[133] *See supra* note 129.

[134] In the initial year, the paperwork burden is calculated as follows: 120 Hours (one-time paperwork burden to train newly-registered clearing agency staff members to use EFFS) + 780 hours (one-time paperwork burden for each newly-registered clearing agency to draft and implement policies and procedures relating to using EFFS to submit proposed rule changes, Security-Based Swap Submissions and Advance Notices) + 120 hours (one-time paperwork burden for each currently-registered clearing agency to draft and implement policies and procedures relating to using EFFS to submit Security-Based Swap Submissions and/or Advance Notices) + 90 hours (one-time paperwork burden for each newly-registered clearing agency to create or update their existing Web sites in order to provide the capability to post proposed rule changes, Security-Based Swap Submissions and Advance Notices online) + 115,303 hours (the total annual reporting burden for all SROs to prepare, review and submit Security-Based Swap Submissions, proposed rule changes and Advance Notices with the Commission) + 15,560 hours (the total annual burden for all SROs to post Security-Based Swap Submissions, Advance Notices, notices of changes to rules, procedures or operations referred to in Advance Notices and proposed rule changes (including updates to the posted SRO rules) on their Web sites + 14 hours for SROs to notify the Commission of the date on which it posted a proposed rule change on its Web site = 131,987 hours. After the initial year, the paperwork burden is calculated as follows: 115,303 Hours (the total annual reporting burden for all SROs to prepare, review and submit Security-Based Swap Submissions, proposed rule changes and Advance Notices with the Commission) + 15,560 hours (the total annual burden for all SROs to post Security-Based Swap Submissions, Advance Notices, notices of changes to rules, procedures or operations referred to in Advance Notices and on their Web sites) + 310 hours (the total annual burden of training new staff members and updating the training of existing staff members to use EFFS) + 14 hours for SROs to notify the Commission of the date on which it posted a proposed rule change on its Web site = 131,187 hours.

[135] SROs may also destroy or otherwise dispose of such records at the end of five years according to Rule 17a–6 of the Act. 17 CFR 240.17a–6.

[136] Rule 19b–4(j) currently requires SROs to sign Form 19b–4 electronically in connection with filing a proposed rule change and to retain a copy of the signature page in accordance with Rule 17a–1. Under the proposed rules, Rule 19b–4(j) would be modified such that it would apply also to Security-Based Swap Submissions and Advance Notices.

[137] 17 CFR 232.302(b).

kept confidential.[138] The posting of Security-Based Swap Submissions, Advance Notices and proposed rule changes would be publicly available on the SRO's Web site.

H. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to:

(1) Evaluate whether the proposed collection of information is necessary for the performance of the functions of the agency, including whether the information shall 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 collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons wishing to submit comments on the collection of information requirements should direct them to the following persons: (1) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503; and (2) Elizabeth Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090 with reference to File No. S7–44–10. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The Commission has submitted the proposed collection of information to OMB for approval. Requests for the materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7–44–10, and be submitted to the Securities and Exchange Commission, Records Management, Office of Investor Education and Advocacy, Station Place, 100 F Street, NE., Washington, DC 20549–0213.

[138] While there is a general requirement that information be made publicly available, SROs may request confidential treatment of certain information in accordance with the provisions of the Freedom of Information Act. 5 U.S.C. 552.

V. Consideration of Costs and Benefits

A. Processes for Security-Based Swap Submissions for Review and Staying a Clearing Requirement While the Clearing of the Security-Based Swap Is Reviewed

Under Exchange Act Section 3C, Congress mandated that the Commission adopt rules: (i) For a clearing agency's submission for review of any security-based swap, or a group, category, type or class of security-based swaps, that the clearing agency seeks to accept for clearing, and the manner of notice the clearing agency must provide to its members of such submission; and (ii) for the procedure by which the Commission may stay a clearing requirement while the clearing of a security-based swap is reviewed. The proposed rule relating to Security-Based Swap Submissions specifies the content of Security-Based Swap Submissions, how such Security-Based Swap Submissions shall be submitted, and the manner of notice the clearing agency must provide to its members regarding such submissions. The Commission also is proposing a rule to specify the procedure for staying the clearing requirement applicable to a security-based swap, based either on an application of a counterparty to a security-based swap or on the Commission's own initiative, until the Commission completes a review of the terms of the security-based swap and the clearing arrangement. The Commission is sensitive to the costs and benefits that would result from the proposed rules and has identified certain costs and benefits of the proposal, which are discussed more fully below.

1. Processes for Security-Based Swap Submissions for Review

Pursuant to Exchange Act Section 3C, a clearing agency must submit to the Commission each security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing. The Commission is required to review each Security-Based Swap Submission and determine whether the security-based swap, or any group, category, type or class of security-based swaps, described in the submission is required to be cleared. In reviewing a Security-Based Swap Submission, the Commission is required to review whether the Security-Based Swap Submission is consistent with Exchange Act Section 17A, and must take into account the following factors:

(i) The existence of significant outstanding notional exposures, trading liquidity and adequate pricing data.

(ii) The availability of a rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contact is then traded.

(iii) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the clearing agency available to clear the contract.

(iv) The effect on competition, including appropriate fees and charges applied to clearing.

(v) The existence of reasonable legal certainty in the event of the insolvency of the relevant clearing agency or one or more of its clearing members with regard to the treatment of customer and security-based swap counterparty positions, funds, and property.

Additionally, Exchange Act Section 3C requires, in general, that the rules of a clearing agency provide for open access, specifically requiring that the rules:

(a) Prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are economically equivalent within the clearing agency and may be offset with each other within the clearing agency; and

(b) Provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the rules of an unaffiliated national securities exchange or security-based swap execution facility.

Pursuant to Exchange Act Section 3C, the Commission is required to make available to the public any Security-Based Swap Submission and provide at least a 30-day public comment period. The Commission is required to make its determination not later than 90 days after receiving the Security-Based Swap Submission, unless the submitting clearing agency agrees to an extension.

The proposed rule would require that the clearing agency include in each Security-Based Swap Submission information that will assist the Commission in reviewing the Security-Based Swap Submission for consistency with Section 17A and meeting the statutory requirements set forth above in items (i)–(v). Additionally, the proposed rule would require that the clearing agency specify how the clearing agency's rules for open access (set forth in items (a) and (b) above) are applicable to the security-based swap described in the Security-Based Swap Submission.

The proposed rule would specify that a clearing agency submit security-based swaps to the Commission for review by group, category, type or class to the extent reasonable and practicable to do so.

In addition, the Commission is proposing how Security-Based Swap Submissions shall be submitted by clearing agencies. Because the Commission preliminarily believes that there likely will be significant overlap between filings under Exchange Act Section 19(b) and Rule 19b–4 regarding proposed rule changes and Security-Based Swap Submissions, the Commission is proposing that Security-Based Swap Submissions be filed on Form 19b–4. In many cases, a Security-Based Swap Submission also will be a proposed rule change for purposes of Exchange Act Section 19(b).[139]

The proposed rule provides that a clearing agency must provide notice to its members of a Security-Based Swap Submission and any amendments thereto, by posting the submission on its Web site within two business days. The proposed rule further requires the clearing agency to maintain this information on its Web site until the Commission makes a determination regarding the Security-Based Swap Submission, the clearing agency withdraws the submission, or the clearing agency is notified that the submission was not properly filed.

a. Benefits

The proposed rule is designed to implement the submission and notice requirements in Exchange Act Section 3C. The Commission anticipates that the proposed rule would further the purposes of Exchange Act Section 3C by facilitating the filing and regulatory review of Security-Based Swap Submissions and reduce costs to filers by utilizing a format that clearing agencies may be familiar with or, as they become registered clearing agencies, that they will be required to use for all proposed rule changes, Form 19b–4. In addition, the proposed rule would further reduce costs to filers by avoiding a duplication of efforts in providing notice to members of the clearing agency, as well as other interested persons, such as counterparties to security-based swaps, through requiring posting of the Security-Based Swap Submission on the clearing agency's Web site within two business days of filing with the Commission. The Commission anticipates this prompt notice would provide the clearing agency members and other interested persons with the opportunity to comment on the submission with the potential for providing new information about the suitability of the security-based swap for clearing.

The Commission anticipates the proposed rule requiring the clearing agency to provide information the Commission requires to review Security-Based Swap Submissions would reduce the cost of acquiring necessary information. Requiring the clearing agency to provide necessary information would ensure that the information used by the Commission to evaluate the security-based swap for mandatory clearing is correct and complete, reducing the likelihood that further information requests will be required.

Proposed Rule 19b–4(o)(4) requires a clearing agency to submit security-based swaps to the Commission for review by group, category, type or class of security-based swaps, to the extent reasonable and practicable to do so. The Commission preliminarily believes a broad interpretation of what constitutes a group, category, type or class of security-based swaps is likely to provide benefits to clearing agencies and the Commission. Specifically, it would likely lower the costs associated with the Security-Based Swap Submission process since clearing agencies would be burdened with preparing fewer Security-Based Swap Submissions, and the Commission would be required to process and review fewer submissions.

b. Costs

Form 19b–4 is currently used by registered clearing agencies to file notice of proposed rule changes under Exchange Act Section 19(b) and any clearing agency that becomes registered will be required to use Form 19b–4 for all proposed rule changes. Accordingly, clearing agencies would be familiar with the electronic filing process in place for Form 19b–4 and their staffs would not be required to learn a new filing system. In addition, clearing agencies would be able to submit a change that is both a proposed rule change under Exchange Act Section 19(b) and a Security-Based Swap Submission in the same filing. Although there are additional information requirements for a Security-Based Swap Submission, clearing agencies would be able to provide the required information as part of the Form 19b–4 submission.

More importantly, the Commission preliminarily believes much of the information the clearing agency provides in a Security-based Swap Submission would be the same as information the clearing agency collected and analyzed in making its business decision to plan to accept the security-based swap, or any group, category, type, or class of security-based swaps, for clearing. The Commission preliminarily believes that the clearing agency may incur costs in presenting this information in a clear and coherent manner in the format as required under the proposed rule.

As previously discussed in the PRA analysis in Section IV, the proposed amendments to Rule 19b–4 and Form 19b–4 will require a clearing agency to submit for a Commission determination, any security-based swap, or any group, category, type or class of security-based swaps that the clearing agency plans to accept for clearing. The Commission preliminarily estimates that the total annual reporting burden for clearing agencies to internally prepare, review and submit Security-Based Swap Submissions electronically with the Commission under the proposed amendments to Rule 19b–4 and Form 19b–4 will be 24,000 hours; this figure includes 7,200 hours of outside legal work. Assuming an hourly cost of $320 for an in-house compliance attorney,[140] and an hourly cost of $354 for an outside attorney,[141] these requirements

[139] As discussed in section II.A.1 of this release, the Commission anticipates that registered clearing agencies, as SROs, often will be required to file a proposed rule change pursuant to Exchange Act Section 19(b) in connection with clearing a security-based swap, or any group, type, category or class of security-based swaps, and, at the same time, will be required to make a related Security-Based Swap Submission for a determination by the Commission of whether such security-based swap (or group, category, type or class of security-based swaps) is required to be cleared. A proposed rule change constitutes a change in a "stated policy, practice, or interpretation" of an SRO rule. The definition of a "stated policy, practice, or interpretation" in Exchange Act Section 19(b) includes, among other things, "any material aspect of the operation of the facilities of the SRO; or any statement made generally available to the membership of, to all participants in, or to persons having or seeking access * * * to facilities of, the self-regulatory organization ("specified persons"), or to a group or category of specified persons, that establishes or changes any standard, limit, or guideline with respect to (1) the rights, obligations, or privileges of specified persons * * *; or (2) the meaning, administration, or enforcement of an existing rule." 17 CFR 240.19b–4(b). In cases where accepting a security-based swap (or group, category, type or class of security-based swaps) for clearing constitutes a change in a "stated policy, practice, or interpretation" of the clearing agency, the clearing agency also would be required to file a proposed rule change.

[140] The hourly rate for a compliance attorney is from SIFMA's *Management & Professional Earnings in the Securities Industry 2010,* modified by the Commission's staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[141] *See supra* note 129.

would result in a total annual cost of $7,924,800 in the aggregate for the six respondent clearing agencies (16,800 hours × $320 per hour for a compliance attorney) + (7,200 hours × $354 per hour for an outside attorney).

The Commission preliminarily estimates that there would be a one-time burden of 780 hours for all newly-registered clearing agencies to draft and implement internal policies and procedures related to using EFFS to submit Security-Based Swap Submissions, Advance Notices and proposed rule changes with the Commission. Assuming an hourly cost of $320 for an in-house compliance attorney,[142] these requirements would result in a total one-time cost of $249,600 in the aggregate for the six respondent clearing agencies (780 hours × $320 per hour for an in-house compliance attorney).

The Commission also preliminarily estimates that there would be a one-time burden of 120 hours for all currently-registered clearing agencies to draft and implement modifications to existing internal policies and procedures for using EFFS in order to update them for the submission of Security-Based Swap Submissions and/or Advance Notices with the Commission. Assuming an hourly cost of $320 for an in-house compliance attorney,[143] these requirements would result in a one-time cost of $38,400 in the aggregate for the four respondent clearing agencies (120 hours × $320 per hour for an in-house compliance attorney).

The Commission preliminarily believes that newly-registered clearing agencies could incur some one-time costs associated with training their personnel about the procedures for submitting Security-Based Swap Submissions and/or Advance Notices in electronic format through EFFS. The Commission preliminarily estimates that six newly-registered clearing agencies would incur a one-time upfront burden of 120 hours to train clearing agency staff members to use EFFS to submit Security-Based Swap Submissions, Advance Notices and/or proposed rule changes electronically. The Commission preliminarily estimates that after the initial year, existing SROs (including currently-registered clearing agencies) would spend approximately 290 hours annually training new staff members and updating the training of existing staff members to use EFFS. Assuming an hourly cost of $259 for a senior systems analyst,[144] these requirements would result in an overall estimated initial annual cost of $31,080 in the aggregate for the six newly-registered clearing agencies (120 hours × $259 per hour for a senior systems analyst) and an annual cost after the initial year of $75,110 thereafter in the aggregate for all SROs (290 hours × $259 per hour for a senior systems analyst).

Pursuant to existing Rule 19b–4(l), each SRO is required to post on its Web site a copy of any proposed rule change the SRO filed with the Commission and any amendments thereto. The proposed rule to implement the submission and notice requirements in Exchange Act Section 3C includes a similar posting requirement for Security-Based Swap Submissions. The Commission preliminary estimates that the total annual reporting burden for clearing agencies to post Security-Based Swap Submissions on their Web sites would be 480 hours. Assuming an hourly cost of $225 for a Webmaster,[145] these requirements would result in a total estimated annual cost of $108,000 in the aggregate for the six respondent clearing agencies (480 hours × $225 per hour for a Webmaster).

Some Security-Based Swap Submissions would be required to be filed only as Security-Based Swap Submissions under Exchange Act Section 3C and not as proposed rule changes under Exchange Act Section 19(b), for example where a clearing agency's rules already permit it to clear the security-based swap in question. As a result, clearing agencies would incur additional costs by filing a greater number of forms than they do currently under Exchange Act Section 19(b).

2. Staying a Clearing Requirement While the Clearing of the Security-Based Swap Is Reviewed

Under Exchange Act Section 3C, after making a determination that a security-based swap (or group, category, type or class of security-based swaps) is required to be cleared, the Commission, on application of a counterparty to a security-based swap or on the Commission's own initiative, may stay the clearing requirement until the Commission completes a review of the terms of the security-based swap and the clearing arrangement.[146] In connection with a stay of the clearing requirement, the Commission is required to adopt rules for reviewing a clearing agency's clearing of a security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency has accepted for clearing.

Under proposed Rule 3Ca–1, a counterparty to a security-based swap subject to the clearing requirement who applies for a stay of the clearing requirement would be required to submit a written statement to the Commission that includes a request for a stay of the clearing requirement; the identity of the counterparties to the security-based swap and a contact at the counterparty requesting the stay; the identity of the clearing agency clearing the security-based swap; the terms of the security-based swap subject to the clearing requirement and a description of the clearing arrangement; and the reasons why a stay should be granted and why the security-based swap should not be subject to a clearing requirement, specifically addressing the same factors a clearing agency must address in its Security-Based-Swap Submission pursuant to proposed Rule 19b–4(o).[147] The proposed rule also provides that any clearing agency that has accepted for clearing a security-based swap that is subject to the stay shall provide information requested by the Commission necessary to assess any of the factors it determines to be appropriate in the course of its review.

a. Benefits

The Commission preliminarily believes that the proposed rule provides benefits in creating an efficient mechanism for collecting information to be used in the Commission's determination to grant the requested stay and subsequent review of the clearing requirement. Specifically, the counterparty will provide information specifically within its possession—reasons why the stay should be granted and why the security-based swap should not be subject to a clearing requirement. Additionally, any information requested from the clearing agency likely will include information unique to the clearing agency and will facilitate the Commission's review of the clearing requirement subject to the stay.

[142] *See supra* note 140.

[143] *See supra* note 140.

[144] The hourly rate for a senior systems analyst is from SIFMA's *Management & Professional Earnings in the Securities Industry 2010,* modified by the Commission's staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[145] The hourly rate for a Webmaster is from SIFMA's *Management & Professional Earnings in the Securities Industry 2010,* modified by the Commission's staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[146] *See* Public Law 111–203, section 763(a) (adding Exchange Act Section 3C(c)(1)).

[147] Proposed Rule 3Ca–1(b).

b. Costs

The proposed rule requires a counterparty requesting a stay provide basic identifying information and information supporting its request for a stay and its position that the security-based swap should not be subject to a clearing requirement. With respect to the proposed rule's requirement that a clearing agency shall provide information requested by the Commission necessary to assess any of the factors it determines to be appropriate in the course of its review, the Commission preliminarily believes this information will likely be information the clearing agency has in its possession, including updates of information provided in the related Security-Based Swap Submission. The Commission preliminarily estimates that each clearing agency would receive five applications per annum to stay the clearing requirement. The Commission also preliminarily estimates that the total annual reporting burden for the six respondent clearing agencies to compile and provide the information requested by the Commission in connection with the review of the stay of clearing applications would be 750 hours; this figure includes 210 hours of outside legal work. Assuming an hourly cost of $320 for an in-house compliance attorney,[148] and an hourly cost of $354 for an outside attorney,[149] these requirements would result in a total estimated annual cost of $247,140 in the aggregate for the six respondent clearing agencies (540 hours × $320 per hour for a compliance attorney) + (210 hours × $354 per hour for an attorney).

Finally, the Commission preliminarily estimates that 100 hours would be required by a counterparty to a security-based swap to prepare and submit an application requesting a stay of the clearing requirement. The Commission also preliminarily estimates that counterparties to security-based swaps transactions would submit 30 applications requesting stays of the clearing requirement. Assuming an hourly cost of $354 for an outside attorney, the total annual cost in the aggregate for the respondent counterparties to meet these requirements would be $1,062,000 (100 hours × $354 per hour for an outside attorney × 30 stay of clearing applications).

The Commission requests that commenters provide views and supporting information regarding the costs and benefits associated with the proposed rules relating to Security-Based Swap submissions and stay of the clearing requirement and related review. The Commission seeks estimates of these costs and benefits, as well as any costs and benefits not already identified. The Commission also requests comment on whether other provisions of the Dodd-Frank Act for which Commission rulemaking is required are likely to have an effect on the costs and benefits of the proposed rules.

B. Advance Notices Required Under Section 806(e)

Congress has mandated that the Commission adopt rules to define when proposed changes to a designated clearing agency's rules, procedures or operations could materially affect the nature or level of risks presented by the clearing agency. The proposed rule would determine when notice of such changes must be filed with the Commission and would prescribe how such notices shall be filed. The Commission is sensitive to the costs and benefits that would result from the proposed rule and has identified certain costs and benefits of the proposal, which are discussed more fully below.

1. Benefits

Pursuant to Section 806(e), any registered clearing agency designated as a systemically important financial market utility and for which the Commission is the Supervisory Agency will be required to file with the Commission advance notice of proposed changes to its rules, procedures or operations that could materially affect the nature or level of risks presented by the clearing agency. The proposed rule would reduce regulatory uncertainty pertaining to the filing requirement in Section 806(e) by defining the term "materially affect the nature or level of risks presented" with respect to a change to rules, procedures, or operations. The term would be defined as a matter as to which there is a reasonable possibility that the change could affect the performance of essential clearing and settlement functions or the overall nature or level of risk presented by the designated clearing agency. Such changes would include, but are not limited to, changes that materially affect participant and product eligibility, risk management, daily or intraday settlement procedures, default procedures, system safeguards, governance or financial resources of the designated financial market utility. However, such changes generally would exclude changes to an existing procedure, control, or service that do not modify the rights or obligations of the designated financial market utility or persons using its payment, clearing, or settlement services and that do not adversely affect the safeguarding of securities, collateral, or funds in the custody or control of the designated financial market utility or for which it is responsible, or changes concerned solely with the administration of the designated financial market utility or related to the routine, daily administration, direction, and control of employees.[150]

The Commission also is proposing to facilitate the compliance with the filing requirement in Section 806(e) by prescribing how Advance Notices of proposed changes to rules, procedures or operations shall be filed by designated clearing agencies. Because the requirement to file notice under Section 806(e) is similar to the filing requirement for proposed rule changes under Exchange Act Section 19(b), the Commission is proposing that Advance Notices be filed on Form 19b–4. In many cases, it is likely that a proposed change for purposes of Section 806(e) will also be a proposed rule change for purposes of Exchange Act Section 19(b), reducing costs associated with multiple filings.

The proposed rule is designed to implement the filing requirement in Section 806(e) and to establish criteria for designated clearing agencies regarding when notices shall be filed and the method for filing such notices. The Commission preliminarily believes that the proposed rule would lower the costs of filing and regulatory review of proposed changes that could materially affect the nature or level of risks presented by systemically important clearing institutions. In addition, the proposed rule is intended to provide the public with the opportunity to comment on such proposals by designated clearing agencies. The Commission preliminarily believes the proposed rule would help to assure that the additional information required under Section 806(e) is provided through amendments to the existing Form 19b–4. However, a filing submitted under both Section 806(e) and Exchange Act Section 19(b) would be required to satisfy the standards under both sections in order to become effective.

2. Costs

The Commission preliminarily believes the costs associated with the proposed rule should not be significant for designated clearing agencies. Form 19b–4 is currently used by registered clearing agencies to file notice of

[148] *See supra* note 140.

[149] *See supra* note 129.

[150] Proposed Rule 19b–4(n)(2)(iii).

proposed rule changes under Exchange Act Section 19(b). Accordingly, designated clearing agencies would be familiar with the filing process in Form 19b–4, and staffs would not be required to learn a new filing system. In addition, clearing agencies would be able to submit a change that is both a proposed rule change under Exchange Act Section 19(b) and a proposed change under Section 806(e) in the same filing. Although there are additional information requirements for a Section 806(e) filing, designated clearing agencies would be able to provide the required information as part of the Form 19b–4 submission.

Some proposed changes may be required to be filed only as Advance Notices under Section 806(e) and not as proposed rule changes under Exchange Act Section 19(b). As a result, the Commission preliminarily believes clearing agencies will incur additional costs by filing a greater number of forms than they do currently under Exchange Act Section 19(b). Based on informal comments from clearing agencies, the Commission preliminarily estimates that each designated clearing agency will file 35 Advance Notices with the Commission annually at a cost of $3,200 per submission (10 hours × compliance attorney at $320 per hour) or $1,120,000 ($3200 × 35 Advance Notices × 10 respondent clearing agencies) in the aggregate for the ten respondent clearing agencies.

Proposed Rule 19b–4(n)(3) requires designated clearing agencies to post copies of Advance Notices filed with the Commission on their Web sites. The Commission estimates that the total annual reporting burden for designated clearing agencies to post Advance Notices on their Web sites would be 1400 hours. Assuming an hourly cost of $225 for a Webmaster,[151] these requirements would result in an estimated annual cost of $315,000 in the aggregate for the ten respondent clearing agencies (1400 hours × $225 per hour for a Webmaster).

Proposed Rule 19b–4(n)(4) requires a designated clearing agency to post notice on its Web site of any change to its rules, procedures or operations referred to in an Advance Notice once it has been permitted to take effect. The Commission estimates that the total annual reporting burden for designated clearing agencies to post notice on their Web sites of any change to their rules, procedures or operations referred to in Advance Notices once they take effect would be 1400 hours. Assuming an hourly cost of $225 for a Webmaster,[152] these requirements would result in an estimated annual cost of $315,000 in the aggregate for the ten respondent clearing agencies (1400 hours × $225 per hour for a Webmaster).

C. Amendment To Conform to Section 916 of the Dodd-Frank Act

The Commission preliminarily estimates that the requirement that an SRO inform the Commission of the date on which it posted a proposed rule change on its Web site (if the posting did not occur on the same day that the SRO filed the proposal with the Commission) will impose only a minimal burden, if any, on an SRO. As discussed in Section IV.B.4., the Commission preliminarily believes that SROs currently post their proposed rule changes on their Web site on the same day on which they file them with the Commission. It would be an unlikely occurrence for an SRO to fail to post its proposed rule change on the same day that it files with the Commission, since prompt Web site posting triggers the requirement on the Commission to publish notice of the proposed rule change.

The Commission preliminarily estimates that SROs will fail to post proposed rule changes on their Web sites on the same day as the filing was made with the Commission in 1% of all cases, or 14 times each year, and that each SRO will spend approximately one hour preparing and submitting notice to the Commission of the date on which it posted the proposed rule change on its Web site, resulting in a total annual burden of 14 hours. Assuming an hourly cost of $320 for an in-house compliance attorney,[153] this requirement would result in a total estimated annual cost of $4,480 in the aggregate for all SROs (14 hours × $320 per hour for a compliance attorney) in the aggregate for all SROs.

The Commission requests that commenters provide views and supporting information regarding the costs and benefits associated with the proposals. The Commission seeks estimates of these costs and benefits, as well as any costs and benefits not already identified. The Commission also requests comment on whether other provisions of the Dodd-Frank Act for which Commission rulemaking is required are likely to have an effect on the costs and benefits of the proposed rules.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Exchange Act Section 23(a)[154] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 2(b) of the Securities Act of 1933[155] and Exchange Act Section 3(f)[156] require the Commission, when engaging in rulemaking that requires it to consider whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. Below, the Commission addresses these issues for the amendments to Rule 19b–4 and Form 19b–4 to reflect the use of these forms for filing Security-Based Swap Submissions and Advance Notices, and proposed Rule 3Ca–1 to facilitate the process for staying the clearing requirement applicable to a security-based swap until the Commission completes a review of the terms of the security-based swap and the clearing arrangement.

A. Proposed Amendments to Rule 19b–4 and Form 19b–4

The proposed amendments to Rule 19b–4 and Form 19b–4 are designed to facilitate the statutorily mandated processes for submitting Security-Based Swap Submissions and Advance Notices to the Commission, and to make each process efficient by utilizing the existing process and EFFS infrastructure for proposed rule changes. Using an existing process to accomplish an additional legislative requirement would conserve both clearing agency and Commission resources. If amended, Form 19b–4 would enable clearing agencies to submit Security-Based Swap Submissions, and any amendments thereto, and any Advance Notices electronically to the Commission. Submitting Security-Based Swap Submissions and Advance Notices in this manner would impose fewer costs on clearing agencies and the Commission when compared to requiring clearing agencies to use new infrastructure or business processes to

[151] *See supra* note 145.

[152] *See supra* note 145.

[153] *See supra* note 140.

[154] 15 U.S.C. 78w(a).

[155] 15 U.S.C. 77b(b).

[156] 15 U.S.C. 78c(f).

make Security-Based Swap Submissions or Advance Notices.

The proposed requirement that the clearing agency aggregate security-based swaps into groups, categories, types or classes to the extent reasonable and practicable to do so, in each Security-Based Swap Submission likely would appropriately streamline the submission process for Commission staff and clearing agencies (*i.e.,* such aggregations would decrease the number of Security-Based Swap Submissions each clearing agency would prepare and submit, and accordingly, the Commission would review). This requirement is intended to make the Security-Based Swap Submission process more efficient.

The proposed amendments to Rule 19b–4 and Form 19b–4 also are intended to improve the transparency of security-based swaps transactions. The proposed amendments to Rule 19b–4 would require a clearing agency to post on its Web site any Security-Based Swap Submissions and any amendments thereto, it submitted to the Commission within two business days of submission to the Commission, to fulfill the statutory requirement that clearing agencies provide notice to their members of such submissions. The Commission preliminarily believes that public Web site posting of Security-Based Swap Submissions may promote competition among security-based swap clearing agencies because it will make it easier (and more timely) for clearing agencies to be able to determine the security-based swaps their competitors intend to clear and analyze whether they too wish to clear such security-based swap.

Similarly, the proposed amendments to Rule 19b–4 would require a designated clearing agency to post on its Web site proposed changes to its rules, procedures, or operations that trigger the Section 806(e) advance notice requirement and a description of the subjects and issues involved within two business days of the submission of an Advance Notice to the Commission. A designated clearing agency also will be required to post a notice on its Web site of the effectiveness of any change to its rules, procedures, or operations referred to in an Advance Notice within two business days of the effective date, as monitored by the designated clearing agency and determined in accordance with Section 806(e). The Commission preliminarily believes that public Web site posting of this information may promote competition and transparency among clearing agencies by giving interested persons an opportunity to submit written data, views, and arguments concerning proposed changes that could materially affect the nature or level of risks presented by a designated clearing agency.

The proposed amendments to Rule 19b–4 and Form 19b–4 with respect to the information that clearing agencies are required to provide are intended to facilitate the Commission's review process for Security-Based Swap Submissions and Advance Notices and to make the process efficient by requiring information the clearing agency is uniquely qualified to provide and likely may already have available.

The Commission preliminarily believes none of the proposed amendments to Rule 19b–4 and Form 19b–4 would have an adverse impact on competition or capital formation, but instead should increase confidence in the robustness of the security-based swap market, encouraging participation and allowing better risk management practices. To the extent that security-based swaps mitigate the risk associated with capital raising activities, increased investor confidence and use of security-based swaps should foster more efficient capital formation and thereby benefit issuers and investors.

Proposed Rule 3Ca–1 is designed to facilitate the statutorily mandated process for staying the clearing requirement applicable to a security-based swap until the Commission completes a review of the terms of the security-based swap and the clearing arrangement. The proposed rule is designed to create an efficient mechanism for collecting information to be used in the Commission's determination to grant the requested stay and subsequent review of the clearing requirement.

The Commission has not identified any effects on competition or capital formation of the process specified in proposed Rule 3Ca–1. The Commission preliminarily believes proposed Rule 3Ca–1 would not have an adverse impact on competition or capital formation.

The Commission generally requests comment on the competitive or anticompetitive effects of the proposed amendments to Rule 19b–4 and Form 19b–4 on any market participants if adopted as proposed. The Commission also requests comment on what impact the amendments, if adopted, would have on efficiency and capital formation. The Commission requests that commenters provide analysis and empirical data, if available, to support their views regarding any such effects. The Commission notes that such effects may be difficult to quantify. The Commission also requests comment regarding the competitive effects of pursuing alternative regulatory approaches that are consistent with Exchange Act Section 3C, as added by Section 763(a) of the Dodd-Frank Act. In addition, the Commission requests comment on how the other provisions of the Dodd-Frank Act for which Commission rulemaking is required, will interact with and influence the competitive effects of the proposed amendments to Rule 19b–4 and Form 19b–4.

VII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[157] the Commission must advise the OMB as to whether the proposed rule constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in: (i) An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease); (ii) a major increase in costs or prices for consumers or individual industries; or (iii) significant adverse effect on competition, investment or innovation. If a rule is "major," its effectiveness will generally be delayed for sixty days pending Congressional review.

The Commission requests comment on the potential impact of the amendments to Rule 19b–4 and Form 19b–4 and new Rules 3Ca–1 and 3Ca–2 on the economy on an annual basis, any potential increase in costs or prices for consumers or individual industries, and any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

VIII. Regulatory Flexibility Certification

The Regulatory Flexibility Act ("RFA") [158] requires the Commission, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) [159] of the Administrative Procedure Act,[160] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules to determine the impact of such rulemaking on "small entities." [161]

[157] Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[158] 5 U.S.C. 601 *et seq.*

[159] 5 U.S.C. 603(a).

[160] 5 U.S.C. 551 *et seq.*

[161] Section 601(b) of the RFA permits agencies to formulate their own definitions of "small entities." The Commission has adopted definitions for the term "small entity" for the purposes of rulemaking

Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule which, if adopted, would not have a significant economic impact on a substantial number of small entities.[162]

A. Clearing Agencies

The amendments to Rule 19b–4 would apply to (i) all clearing agencies that clear security-based swaps and (ii) all designated clearing agencies. Proposed Rules 3Ca–1 and 3Ca–2 would apply to all security-based swap clearing agencies. Four entities are currently exempt from registration as a clearing agency under Exchange Act Section 17A to provide central clearing services for CDS, a class of security-based swaps.[163] The Commission preliminarily believes, based on its understanding of the market, that likely no more than six security-based swap clearing agencies could be subject to the requirements of the proposed amendments to Rule 19b–4 and proposed Rules 3Ca–1 and 3Ca–2. In addition, the Commission preliminarily believes that approximately ten registered clearing agencies could be designated by the Council as systemically important (and for which the Commission will be the Supervisory Agency), which includes the four existing securities clearing agencies and the six estimated clearing agencies that may clear security-based swaps.

For the purposes of Commission rulemaking in connection with the RFA, a small entity includes, when used with reference to a clearing agency, a clearing agency that: (i) Compared, cleared and settled less than $500 million in securities transactions during the preceding fiscal year; (ii) had less than $200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or at any time that it has been in business, if shorter); and (iii) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[164] Under the standards adopted by the Small Business Administration, small entities in the finance industry include the following: (i) For entities engaged in investment banking, securities dealing and securities brokerage activities, entities with $6.5 million or less in annual receipts; (ii) for entities engaged in trust, fiduciary and custody activities, entities with $6.5 million or less in annual receipts; and (iii) funds, trusts and other financial vehicles with $6.5 million or less in annual receipts.[165]

Based on the Commission's existing information about the entities likely to register to clear security-based swaps, the Commission preliminarily believes that such entities will not be small entities, but rather part of large business entities that exceed the thresholds defining "small entities" set out above. Additionally, while other clearing agencies may become eligible to operate as central counterparties for security-based swaps, the Commission preliminarily does not believe that any such entities would be "small entities" as defined in Exchange Act Rule 0–10.[166] Furthermore, we believe it is unlikely that clearing agencies acting as central counterparties for security-based swaps would have annual receipts of less than $6.5 million. Accordingly, the Commission believes that any clearing agencies clearing security-based swaps by acting as central counterparties for such transactions will exceed the thresholds for "small entities" set forth in Exchange Act Rule 0–12.

B. Security-Based Swap Counterparties

Proposed Rule 3Ca–1 would apply to any counterparty to a security-based swap subject to the clearing requirement that applies for a stay of the clearing requirement. For the purposes of Commission rulemaking and as applicable to this proposed Rule 3Ca–1, a small entity includes: (i) When used with reference to a clearing agency, a clearing agency that (a) compared, cleared and settled less than $500 million in securities transactions during the preceding fiscal year, (b) had less than $200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or at any time that it has been in business, if shorter) and (c) is not affiliated with any person (other than a natural person) that is not a small business or small organization;[167] (ii) when used as reference to an "issuer" or a "person," other than an investment company, an "issuer" or a "person" that, on the last day of its most recent fiscal year, had total assets of $5 million or less;[168] or (iii) when used as reference to broker-dealer, a broker-dealer (a) with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the Exchange Act, or, if not required to file such statements, a broker-dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in that time that it has been in business, if shorter) and (b) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[169] Under the standards adopted by the Small Business Administration, small entities in the finance industry include the following: (i) For entities engaged in investment banking, securities dealing and securities brokerage activities, entities with $6.5 million or less in annual receipts; (ii) for entities engaged in trust, fiduciary and custody activities, entities with $6.5 million or less in annual receipts; and (iii) funds, trusts and other financial vehicles with $6.5 million or less in annual receipts.[170]

With regard to security-based swap transactions that have counterparties that may meet the definition of a "small entity" under Exchange Act Rule 0–10 and, under proposed Rule 3Ca–1, apply to the Commission for a stay of the clearing requirement, the Commission believes that it is unlikely that the stay application process of proposed Rule 3Ca–1 would have a significant economic impact upon such an entity. Given that the proposed stay application process entails the submission of a written statement to the Commission setting forth information about the security-based swap transaction for which the stay is sought, the Commission believes the impact of the application process on a counterparty would be minimal. Furthermore, even if the stay application process were to have a significant economic impact upon such non-clearing agency counterparty, the Commission believes that the number of entities so impacted would be no more than 30, based on the informal discussions between the staff and the clearing agencies, in terms of number of stay requests and number of small entities making such requests. Accordingly, in respect of non-clearing agency counterparties to security-based swap transactions, the Commission preliminarily believes that proposed Rule 3Ca–1 would not have a significant economic impact on a substantial number of small entities.

in accordance with the RFA. These definitions, as relevant to this proposed rulemaking, are set forth in Rule 0–10, 17 CFR 240.0–10.

[162] *See* 5 U.S.C. 605(b).

[163] *See* CDS Clearing Exemption Orders, *supra* note 122.

[164] 17 CFR 240.0–10(d).

[165] 13 CFR 121.201, Sector 52.

[166] *See* 17 CFR 240.0–10(d).

[167] 17 CFR 240.0–10(d).

[168] 17 CFR 240.0–10(a).

[169] 17 CFR 240.0–10(c).

[170] 13 CFR 121.201, Sector 52.

C. Certification

For the reasons stated above, the Commission certifies that the proposed amendments to Rule 19b–4 and proposed Rules 3Ca–1 and 3Ca–2 would not have a significant economic impact on a substantial number of small entities for the purposes of the RFA. The Commission encourages written comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities, including clearing agencies eligible to clear security-based swaps, designated clearing agencies and counterparties to security-based swap transactions, and provide empirical data to support the extent of the impact.

IX. Statutory Authority

Pursuant to the Exchange Act, and particularly Sections 3C, 17A and 19(b) thereof, 15 U.S.C. 78c–3, 78q–1 and 78s(b) and Section 806(e) of the Dodd-Frank Act, 12 U.S.C 5465(e), the Commission proposes to amend Rule 19b–4 and Form 19b–4 and add new Rules 3Ca–1 and 3Ca–2, as set forth below.

List of Subjects in 17 CFR Parts 240 and 249

Brokers, Reporting and recordkeeping requirements, Securities.

Text of the Proposed Rule

In accordance with the foregoing, Title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The general authority citation for part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78*o,* 78*o*–4, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.;* 18 U.S.C. 1350 and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

Section 240.19b–4 is also issued under 12 U.S.C. 5465(e).

2. Sections 240.3ca–1 and 240.3ca–2 are added following § 240.3b–19 to read as follows:

§ 240.3ca–1 Stay of clearing requirement and review by the Commission.

(a) After making a determination pursuant to a clearing agency's security-based swap submission that a security-based swap, or any group, category, type or class of security-based swaps, is required to be cleared, the Commission, on application of a counterparty to a security–based swap or on the Commission's own initiative, may stay the clearing requirement until the Commission completes a review of the terms of the security-based swap (or group, category, type, or class of security-based swaps) and the clearing of the security-based swap (or group, category, type, or class of security-based swaps) by the clearing agency that has accepted it for clearing.

(b) A counterparty to a security-based swap applying for a stay of the clearing requirement for a security-based swap (or group, category, type, or class of security-based swaps) shall submit a written statement to the Commission that includes:

(1) A request for a stay of the clearing requirement;

(2) The identity of the counterparties to the security-based swap and a contact at the counterparty requesting the stay;

(3) The identity of the clearing agency clearing the security-based swap;

(4) The terms of the security-based swap subject to the clearing requirement and a description of the clearing arrangement; and

(5) Reasons why such stay should be granted and why the security-based swap should not be subject to a clearing requirement, specifically addressing the same factors a clearing agency must address in its security-based-swap submission pursuant to § 240.19b–4(o)(3) of this chapter.

(c) A stay of the clearing requirement may be granted with respect to a security-based swap, or the group, category, type, or class of security-based swaps, as determined by the Commission.

(d) The Commission's review shall include, but need not be limited to, a quantitative and qualitative assessment of the factors specified in § 240.19b–4(o)(3) of this chapter. Any clearing agency that has accepted for clearing a security-based swap, or any group, category, type or class of security-based swaps, that is subject to the stay of the clearing requirement shall provide information requested by the Commission necessary to assess any of the factors it determines to be appropriate in the course of its review.

(e) Upon completion of its review, the Commission may:

(1) Determine, subject to any terms and conditions that the Commission determines to be appropriate in the public interest, that the security-based swap, or group, category, type, or class of security-based swaps must be cleared; or

(2) Determine that the clearing requirement will not apply to the security-based swap, or group, category, type, or class of security-based swaps, but clearing may continue on a non-mandatory basis.

§ 240.3ca–2 Submission of security-based swaps for clearing.

Pursuant to section 3C(a)(1) of the Act (15 U.S.C. 78c–3(a)(1)), it shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under this Act or a clearing agency that is exempt from registration under the Act if the security-based swap is required to be cleared. The phrase *submits such security-based swap for clearing to a clearing agency* in the clearing requirement of Section 3C(a)(1) of the Act shall mean that the security-based swap will be submitted for central clearing to a clearing agency that functions as a central counterparty.

3. § 240.19b–4 is amended by:

a. Removing paragraph (b);

b. Redesignating paragraph (a) as paragraph (b);

c. Adding new paragraph (a);

d. In paragraph (i), by revising the phrase "of all filings made pursuant to this section" to read "of all filings, notices and submissions made pursuant to this section 240.19b–4";

e. In paragraph (i), adding the words "notice or submission," after the phrase "any such filing,";

f. In paragraph (i), removing the phrase "the filing of the proposed rule change." and adding in its place "the filing, notice or submission of the proposed rule change, advance notice or security-based swap submission, as applicable.";

g. In paragraph (j), first sentence, removing the words "with respect to proposed rule changes";

h. In paragraph (k) adding "240.19b–4" after the words "this section";

i. Revising paragraph (l), introductory paragraph;

j. In paragraph (l)(4), replacing the phrase "website" to read "Web site";

k. In paragraph (m)(1), replacing the phrase "website" to read "Web site";

l. In paragraph (m)(2), replacing the phrase "website" to read "Web site";

m. In paragraph (m)(3), replacing the phrase "website" to read "Web site";

n. Adding paragraph (n); and

o. Adding paragraph (o).

3. The additions and revisions read as follows:

§ 240.19b–4 Filings with respect to proposed rule changes by self-regulatory organizations.

* * * * *

(a) *Definitions.* As used in this § 240.19b–4:

(1) The term *advance notice* means a notice required to be made by a designated clearing agency pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act (12 U.S.C. 5465);

(2) The term *designated clearing agency* means a clearing agency that is registered with the Commission, and for which the Commission is the Supervisory Agency (as determined in accordance with section 803(8) of the Payment, Clearing and Settlement Supervision Act), that has been designated by the Financial Stability Oversight Council pursuant to section 804 of the Payment, Clearing and Settlement Supervision Act (12 U.S.C. 5463) as systemically important or likely to become systemically important;

(3) The term *Payment, Clearing and Settlement Supervision Act* means Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (124 Stat. 1802, 1803, 1807, 1809, 1811, 1814, 1816, 1818, 1820, 1821; 12 U.S.C. 5461 *et seq.*);

(4) The term *proposed rule change* has the meaning set forth in Section 19(b)(1) of the Act (15 U.S.C. 78s(b)(1));

(5) The term *security-based swap submission* means a submission required to be made by a clearing agency pursuant to section 3C(b)(2) of the Act (15 U.S.C. 78c–3(b)(2)) for each security-based swap, or any group, category, type or class of security-based swaps, that such clearing agency plans to accept for clearing;

(6) The term *stated policy, practice, or interpretation* means:

(i) Any material aspect of the operation of the facilities of the self-regulatory organization; or

(ii) Any statement made generally available to the membership of, to all participants in, or to persons having or seeking access (including, in the case of national securities exchanges or registered securities associations, through a member) to facilities of, the self-regulatory organization ("specified persons"), or to a group or category of specified persons, that establishes or changes any standard, limit, or guideline with respect to:

(A) The rights, obligations, or privileges of specified persons or, in the case of national securities exchanges or registered securities associations, persons associated with specified persons; or

(B) The meaning, administration, or enforcement of an existing rule.

* * * * *

(l) The self-regulatory organization shall post each proposed rule change, and any amendments thereto, on its Web site within two business days after the filing of the proposed rule change, and any amendments thereto, with the Commission. If a self-regulatory organization does not post a proposed rule change on its Web site on the same day that it filed the proposal with the Commission, then the self-regulatory organization shall inform the Commission of the date on which it posted such proposal on its Web site. Such proposed rule change and amendments shall be maintained on the self-regulatory organization's Web site until:

* * * * *

(n)(1) A designated clearing agency shall provide an advance notice to the Commission of any proposed change to its rules, procedures, or operations that could materially affect the nature or level of risks presented by such designated clearing agency. Such advance notice shall be submitted to the Commission electronically on Form 19b–4 (referenced in 17 CFR 249.819). The Commission shall, upon the filing of any advance notice, provide for prompt publication thereof.

(2)(i) For purposes of this paragraph (n), the phrase *materially affect the nature or level of risks presented,* when used to qualify determinations on a change to rules, procedures, or operations at the designated clearing agency, means matters as to which there is a reasonable possibility that the change could affect the performance of essential clearing and settlement functions or the overall nature or level of risk presented by the designated clearing agency.

(ii) Changes to rules, procedures or operations that could materially affect the nature or level or risks presented by a designated clearing agency utility may include, but are not limited to, changes that materially affect participant and product eligibility, risk management, daily or intraday settlement procedures, default procedures, system safeguards, governance or financial resources of the designated clearing agency.

(iii) Changes to rules, procedures or operations that may not materially affect the nature or level or risks presented by a designated clearing agency include, but are not limited to:

(A) Changes to an existing procedure, control, or service that do not modify the rights or obligations of the designated financial market utility or persons using its payment, clearing, or settlement services and that do not adversely affect the safeguarding of securities, collateral, or funds in the custody or control of the designated financial market utility or for which it is responsible; or

(B) Changes concerned solely with the administration of the designated financial market utility or related to the routine, daily administration, direction, and control of employees;

(3) The designated clearing agency shall post the advance notice, and any amendments thereto, on its Web site within two business days after the filing of the advance notice, and any amendments, thereto the Commission. Such advance notice and amendments shall be maintained on the designated clearing agency's Web site until the earlier of:

(i) The date the designated clearing agency withdraws the advance notice or is notified that the advance notice is not properly filed; or

(ii) The date the designated clearing agency posts a notice of effectiveness as required by paragraph (n)(4)(ii) of this section.

(4)(i) The designated clearing agency shall post a notice on its Web site within two business days of the date that any change to its rules, procedures, or operations referred to in an advance notice has been permitted to take effect as such date is determined in accordance with Section 806(e) of the Payment, Clearing and Settlement Supervision Act (12 U.S.C. 5465)

(ii) The designated clearing agency shall post a notice on its Web site within two business days of the effectiveness of any change to its rules, procedures, or operations referred to in an advance notice.

(5) A designated clearing agency shall provide copies of all materials submitted to the Commission relating to an advance notice with the Board of Governors of the Federal Reserve System contemporaneously with such submission to the Commission.

(o)(1) A clearing agency shall submit to the Commission a security-based swap submission and provide notice to its members of such security-based swap submission.

(2) Every clearing agency that is registered with the Commission that plans to accept a security-based swap, or any group, category, type or class of security-based swaps for clearing shall submit to the Commission electronically on Form 19b–4 (referenced in CFR 249.819) the information required to be submitted for a security-based swap submission, as provided in § 240.19b–4 of this chapter and Form 19b–4. Any information submitted to the Commission electronically on Form 19b–4 that is not complete or otherwise in compliance with § 240.19b–4 of this chapter and Form 19b–4, shall not be

considered a security-based swap submission and the Commission shall so inform the clearing agency within twenty-one business days of the submission on Form 19b–4.

(3) A security-based swap submission submitted by a clearing agency to the Commission shall include a statement that includes, but is not limited to:

(i) How the security-based swap submission is consistent with Section 17A of the Act (15 U.S.C. 78q–1); and

(ii) Information that will assist the Commission in the quantitative and qualitative assessment of the factors specified in Section 3C of the Act (15 U.S.C. 78c–3), including, but not limited to:

(A) The existence of significant outstanding notional exposures, trading liquidity and adequate pricing data;

(B) The availability of a rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded;

(C) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the clearing agency available to clear the contract;

(D) The effect on competition, including appropriate fees and charges applied to clearing;

(E) The existence of reasonable legal certainty in the event of the insolvency of the relevant clearing agency or one or more of its clearing members with regard to the treatment of customer and security-based swap counterparty positions, funds, and property;

(F) How the rules of the clearing agency prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are economically equivalent within the clearing agency and may be offset with each other within the clearing agency, as applicable to the security-based swaps described in the security-based swap submission.

(G) How the rules of the clearing agency provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the rules of an unaffiliated national securities exchange or security-based swap execution facility, as applicable to the security-based swaps described in the security-based swap submission.

(4) A clearing agency shall submit security-based swaps to the Commission for review by group, category, type or class of security-based swaps, to the extent reasonable and practicable to do so.

(5) A clearing agency shall post each security-based swap submission, and any amendments thereto, on its Web site within two business days after the submission of the security-based swap submission, and any amendments thereto, with the Commission. Such security-based swap submission and amendments shall be maintained on the clearing agency's Web site until the Commission makes a determination regarding the security-based swap submission or the clearing agency withdraws the security-based swap submission, or is notified that the security-based swap submission is not properly filed.

(6) Upon receipt of a security-based swap submission pursuant to this section, the Commission shall review the security-based swap submission and determine whether the security-based swap, or group, category, type or class of security-based swaps, described in the submission is required to be cleared.

(i) When making a determination, the Commission will take into account the factors addressed in the security-based swap submission and any additional factors the Commission determines to be appropriate. The clearing agency shall provide any additional information requested by the Commission as necessary to assess any of the factors it determines to be appropriate in order to make the determination of whether the clearing requirement applies.

(ii) In making a determination that the clearing requirement shall apply, the Commission may include such terms and conditions to the requirement as the Commission determines to be appropriate in the public interest.

(7) Notices of orders issued pursuant to Section 3C of the Act (15 U.S.C. 78c–3), regarding security-based swap submissions will be given by prompt publication thereof, together with a statement of written reasons therefor.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

4. The general authority citation for part 249 is revised to read as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Section 249.819 is also issued under 12 U.S.C. 5465(e).

5. Revise § 249.819 to read as follows:

§ 249.819 Form 19b–4, for electronic filings with respect to proposed rule changes, advance notices and security-based swap submissions by all self-regulatory organizations.

This form shall be used by all self-regulatory organizations, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(26)), to file electronically proposed rule changes with the Commission pursuant to Section 19(b) of the Act and § 240.19b–4 of this chapter, advance notices with the Commission pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act (12 U.S.C. 5465) and § 240.19b–4 of this chapter and security-based swap submissions with the Commission pursuant to Section 3C(b)(2) of the Act (15 U.S.C. 78c–3(b)(2)) and § 240.19b–4 of this chapter.

6. Form 19b–4 (referenced in § 249.819) is revised to read as follows:

Note: The text of Form 19b–4 does not and the amendments will not appear in the Code of Federal Regulations.

BILLING CODE P

OMB APPROVAL OMB	
Number:	3235-0045
Expires:	Estimated average burden hours per response..... 32

Page 1 of ☐

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

Form 19b-4

File No. SR - ☐ - ☐

Amendment No. ☐

Filing by: Select SRO

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial ☐ Amendment ☐ Withdrawal ☐

Section 19(b)(2) ☐ Section 19(b)(3)(A) ☐ Section 19(b)(3)(B) ☐

Pilot ☐

Extension of Time Period for Commission Action ☐ Date Expires ☐

Rule

☐ 19b-4(f)(1) ☐ 19b-4(f)(4)
☐ 19b-4(f)(2) ☐ 19b-4(f)(5)
☐ 19b-4(f)(3) ☐ 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing and Settlement Act of 2010

Section 806(e)(1) Section 806(e)(2)

Security-Based Submission pursuant to Securities Exchange Act of 1934

Section 3C(b)(2)

Exhibit 2 Sent As Paper Document ☐ Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the action (limit 250 characters).

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name ☐ Last Name ☐

Title ☐

E-mail ☐

Telephone ☐ Fax ☐

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date ☐

By ☐

(Name)

☐

(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed

Digitally Sign and Lock Form

BILLING CODE C

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the SRTS Online Filing website.

Form 19b-4 Information

Add Remove View

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include thecorresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3).

Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Noitce by Clearing Agencies

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include thecorresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3).

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

Add Remove View

Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

Add Remove View

Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

Add Remove View

The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

General Instructions for Form 19b–4

A. Use of the Form

All self-regulatory organization proposed rule changes, except filings with respect to proposed rule changes by self-regulatory organizations submitted pursuant to Section 19(b)(7) of the Securities Exchange Act of 1934 (“Act”), security-based swap submissions, and advance notices shall be filed in an electronic format through the Electronic Form 19b–4 Filing System (“EFFS”), a secure Web site operated by the Commission. This form shall be used for filings of proposed rule changes by all self-regulatory organizations pursuant to Section 19(b) of the Act, except filings with respect to proposed rule changes by self-regulatory organizations submitted pursuant to Section 19(b)(7) of the Act.[171] National securities exchanges, registered securities associations, registered clearing agencies, and the Municipal Securities Rulemaking Board are self-regulatory organizations for purposes of

[171] Because Section 19(b)(7)(C) of the Act states that filings abrogated pursuant to this Section should be re-filed pursuant to paragraph (b)(1) of Section 19 of the Act, SROs are required to file electronically such proposed rule changes in accordance with this form.

this form. This form shall be used for all security-based swap submissions and advance notices filed by registered clearing agencies. A proposed change that is required to be filed with the Commission under more than one of these three processes (a proposed rule change, security-based swap submission, or advance notice) shall be submitted on the same Form 19b–4.

B. Need for Careful Preparation of the Completed Form, Including Exhibits

This form, including the exhibits, is intended to elicit information necessary for the public to provide meaningful comment on the proposed rule change, security-based swap submission, or advance notice and for the Commission to determine whether the proposed rule change, security-based swap submission, or advance notice is consistent with the requirements of the Act and the rules and regulations thereunder or the Payment, Clearing and Settlement Supervision Act and the rules and regulations thereunder applicable to the self-regulatory organization. The self-regulatory organization must provide all the information called for by the form, including the exhibits, and must present the information in a clear and comprehensible manner.

The proposed rule change, security-based swap submission, or advance notice shall be considered filed on the date on which the Commission receives the proposed rule change, security-based swap submission, or advance notice if the filing complies with all requirements of this form. Any filing that does not comply with the requirements of this form may be returned to the self-regulatory organization. Any filing so returned shall for all purposes be deemed not to have been filed with the Commission. *See also* Rule 0–3 under the Act (17 CFR 240.0–3).

C. Documents Comprising the Completed Form

The completed form filed with the Commission shall consist of the Form 19b–4 Page 1, numbers and captions for all items, responses to all items, and exhibits required in Item 11. In responding to an item, the completed form may omit the text of the item as contained herein if the response is prepared to indicate to the reader the coverage of the item without the reader having to refer to the text of the item or its instructions. Each filing shall be marked on the Form 19b–4 with the initials of the self-regulatory organization, the four-digit year, and the number of the filing for the year (*e.g.,* SRO–YYYY–XX). If the SRO is filing Exhibits 2 or 3 via paper, the exhibits must be filed within 5 calendar days of the electronic submission of all other required documents.

D. Amendments

If information on this form is or becomes inaccurate before the Commission takes action on the proposed rule change or the security-based swap submission, or prior to the expiration of the statutory review period with respect to advance notices (as determined in accordance with 806(e) of the Payment, Clearing and Settlement Supervision Act), the self-regulatory organization shall correct any such inaccuracy. Amendments shall be filed as specified in Instruction F.

Amendments to a filing shall include the Form 19b–4 Page 1 marked to number consecutively the amendments, numbers and captions for each amended item, amended response to the item, and required exhibits. The amended response to Item 3 shall explain the purpose of the amendment and, if the amendment changes the purpose of or basis for the proposed rule change, security-based swap submission, or advance notice, the amended response shall also provide a revised purpose and basis statement. Exhibit 1 or Exhibit 1A, as applicable, shall be re-filed if there is a material change from the immediately preceding filing in the language of the proposed rule change or in the information provided relating to the proposed rule change, security-based swap submission, or advance notice.

If the amendment alters the text of an existing rule, the amendment shall include the text of the existing rule, marked in the manner described in Item 1(a) using brackets to indicate words to be deleted from the existing rule and underscoring to indicate words to be added. The purpose of this marking requirement is to maintain a current copy of how the text of the existing rule is being changed.

If the amendment alters the text of the proposed rule change as it appeared in the immediately preceding filing (even if the proposed rule change does not alter the text of an existing rule), the amendment shall include, as Exhibit 4, the entire text of the rule as altered. This full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (*i.e.,* partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

If, after the Form 19b–4 is filed but before the Commission takes final action on it, the self-regulatory organization receives or prepares any correspondence or other communications reduced to writing (including comment letters) to and from such self-regulatory organization concerning the proposed rule change, security-based swap submission, or advance notice, the communications shall be filed as Exhibit 2. If information in the communication makes the filing inaccurate, the filing shall be amended to correct the inaccuracy. If such communications cannot be filed electronically in accordance with Instruction F, the communications shall be filed in accordance with Instruction G.

E. Completion of Action by the Self-Regulatory Organization on the Proposed Rule Change

The Commission will not approve a proposed rule change or make a determination regarding a security-based swap submission or raise no objection to an advance notice before the self-regulatory organization has completed all action required to be taken under its constitution, articles of incorporation, bylaws, rules, or instruments corresponding thereto (excluding action specified in any such instrument with respect to (i) compliance with the procedures of the Act or (ii) the formal filing of amendments pursuant to State law).

F. Signature and Filing of the Completed Form

All proposed rule changes, security-based swap submissions, advance notices, amendments, extensions, and withdrawals of proposed rule changes, security-based swap submissions, and advance notices shall be filed through the EFFS. In order to file Form 19b–4 through EFFS, self-regulatory organizations must request access to the SEC's External Application Server by completing a request for an external account user ID and password. Initial requests will be received by contacting the Trading and Markets Administrator located on our Web site (*http://www.sec.gov*). An e-mail will be sent to the requestor that will provide a link to

a secure Web site where basic profile information will be requested.

A duly authorized officer of the self-regulatory organization shall electronically sign the completed Form 19b–4 as indicated on Page 1 of the Form. In addition, a duly authorized officer of the self-regulatory organization shall manually sign one copy of the completed Form 19b–4, and the manually signed signature page shall be maintained pursuant to Section 17 of the Act. A registered clearing agency for which the Commission is not the appropriate regulatory agency also shall file with its appropriate regulatory agency three copies of the form, one of which shall be manually signed, including exhibits. A clearing agency that also is a designated clearing agency shall file with the Board of Governors of the Federal Reserve System three copies of the form, one of which shall be manually signed, including exhibits. The Municipal Securities Rulemaking Board also shall file copies of the form, including exhibits, with the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation.

G. Procedures for Submission of Paper Documents for Exhibits 2 and 3

To the extent that Exhibits 2 and 3 cannot be filed electronically in accordance with Instruction F, four copies of Exhibits 2 and 3 shall be filed with the Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549. Page 1 of the electronic Form 19b–4 shall accompany paper submissions of Exhibits 2 and 3. If the SRO is filing Exhibits 2 and 3 via paper, they must be filed within five calendar days of the electronic filing of all other required documents.

H. Withdrawals of Proposed Rule Changes, Security-Based Swap Submissions or Advance Notices

If a self-regulatory organization determines to withdraw a proposed rule change, security-based swap submission, or advance notice, it must complete Page 1 of the Form 19b–4 and indicate by selecting the appropriate check box to withdraw the filing.

I. Procedures for Granting an Extension of Time for Commission Final Action

After the Commission publishes notice of a proposed rule change or security-based swap submission, if a self-regulatory organization wishes to grant the Commission an extension of the time to take final action as specified in Section 19(b)(2) or Section 3C, the self-regulatory organization shall indicate on the Form 19b–4 Page 1 the granting of said extension as well as the date the extension expires.

Information To Be Included in the Completed Form ("Form 19b–4 Information")

1. Text of the Proposed Rule Change

(a) Include the text of the proposed rule change, security-based swap submission, or advance notice. Text of the proposed rule change also should be included either in Exhibit 5 or Exhibit 1 (or Exhibit 1A in the filing of a clearing agency). Changes in, additions to, or deletions from, any existing rule shall be set forth with brackets used to indicate words to be deleted and underscoring used to indicate words to be added.

If any form, report, or questionnaire is

(i) Proposed to be used in connection with the implementation or operation of the proposed rule change, security-based swap submission, or advance notice, or

(ii) Prescribed or referred to in the proposed rule change, security-based swap submission, or advance notice;

then the form, report, or questionnaire must be attached to and shall be considered as part of the proposed rule change, security-based swap submission, or advance notice. If completion of the form, report, or questionnaire is voluntary or is required pursuant to an existing rule of the self-regulatory organization, then the form, report, or questionnaire, together with a statement identifying any existing rule that requires completion of the form, report, or questionnaire, shall be attached as Exhibit 3. If the form, report, or questionnaire cannot be filed electronically in accordance with Instruction F, the documents shall be filed in accordance with Instruction G.

(b) If the self-regulatory organization reasonably expects that the proposed rule change, security-based swap submission, or advance notice will have any direct effect, or significant indirect effect, on the application of any other rule of the self-regulatory organization, set forth the designation or title of any such rule and describe the anticipated effect of the proposed rule change, security-based swap submission, or advance notice on the application of such other rule.

(c) Include the file numbers for prior filings with respect to any existing rule specified in response to Item 1(b).

2. Procedures of the Self-Regulatory Organization

Describe action on the proposed rule change, security-based swap submission, or advance notice taken by the members or board of directors or other governing body of the self-regulatory organization. *See* Instruction E.

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Provide a statement of the purpose of the proposed rule change and its basis under the Act and the rules and regulations thereunder applicable to the self-regulatory organization. With respect to proposed rule changes filed pursuant to Section 19(b)(1) of the Act, except for proposed rule changes that have been abrogated pursuant to Section 19(b)(7)(C) of the Act, the statement should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the self-regulatory organization. With respect to proposed rule changes filed pursuant to Section 19(b)(1) of the Act that have been abrogated pursuant to Section 19(b)(7)(C) of the Act, the statement should be sufficiently detailed and specific to support a finding under Section 19(b)(7)(D) of the Act that the proposed rule change does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public interest or the protection of investors. At a minimum, the statement should:

(a) Describe the reasons for adopting the proposed rule change, any problems the proposed rule change is intended to address, the manner in which the proposed rule change will operate to resolve those problems, the manner in which the proposed rule change will affect various persons (*e.g.,* brokers, dealers, issuers, and investors), and any significant problems known to the self-regulatory organization that persons affected are likely to have in complying with the proposed rule change; and

(b) Explain why the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the self-regulatory organization. A mere assertion that the proposed rule change is consistent with those requirements is not sufficient. With respect to a proposed rule change filed pursuant to Section 19(b)(1) of the Act that has been abrogated pursuant to Section

19(b)(7)(C) of the Act, explain why the proposed rule change does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public interest and the protection of investors, in accordance with Section 19(b)(7)(D) of the Act. A mere assertion that the proposed rule change satisfies these requirements is not sufficient. In the case of a registered clearing agency, also explain how the proposed rule change will be implemented consistently with the safeguarding of securities and funds in its custody or control or for which it is responsible. Certain limitations that the Act imposes on self-regulatory organizations are summarized in the notes that follow.

Failure to describe and justify the proposed rule change in the manner described above may result in the Commission not having sufficient information to make an affirmative finding that the proposed rule change is consistent with the Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization.

Note 1. *National Securities Exchanges and Registered Securities Associations.* Under Sections 6 and 15A of the Act, rules of a national securities exchange or registered securities association may not permit unfair discrimination between customers, issuers, brokers, or dealers, and may not regulate, by virtue of any authority conferred by the Act, matters not related to the purposes of the Act or the administration of the self-regulatory organization. Rules of a registered securities association may not fix minimum profits or impose any schedule of or fix rates of commissions, allowances, discounts, or other fees to be charged by its members.

Under Section 11A(c)(5) of the Act, a national securities exchange or registered securities association may not limit or condition the participation of any member in any registered clearing agency.

Note 2. *Registered Clearing Agencies.* Under Section 17A of the Act, rules of a registered clearing agency may not permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency, may not regulate, by virtue of any authority conferred by the Act, matters not related to the purposes of Section 17A of the Act or the administration of the clearing agency, and may not impose any schedule of prices, or fix rates or other fees, for services rendered by its participants.

Note 3. *Municipal Securities Rulemaking Board.* Under Section 15B of the Act, rules of the Municipal Securities Rulemaking Board may not permit unfair discrimination between customers, issuers, municipal securities brokers, or municipal securities dealers, may not fix minimum profits, or impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by municipal securities brokers or municipal securities dealers, and may not regulate, by virtue of any authority conferred by the Act, matters not related to the purposes of the Act with respect to municipal securities or the administration of the Board.

4. Self-Regulatory Organization's Statement on Burden on Competition

State whether the proposed rule change will have an impact on competition and, if so, (i) state whether the proposed rule change will impose any burden on competition or whether it will relieve any burden on, or otherwise promote, competition and (ii) specify the particular categories of persons and kinds of businesses on which any burden will be imposed and the ways in which the proposed rule change will affect them. If the proposed rule change amends an existing rule, state whether that existing rule, as amended by the proposed rule change, will impose any burden on competition. If any impact on competition is not believed to be a significant burden on competition, explain why. Explain why any burden on competition is necessary or appropriate in furtherance of the purposes of the Act. In providing those explanations, set forth and respond in detail to written comments as to any significant impact or burden on competition perceived by any person who has made comments on the proposed rule change to the self-regulatory organization. A mere assertion that the proposed rule change satisfies these requirements is not sufficient. The statement concerning burdens on competition should be sufficiently detailed and specific to support a Commission finding that the proposed rule change does not impose any unnecessary or inappropriate burden on competition. Failure to describe and justify the proposed rule change in the manner described above may result in the Commission not having sufficient information to make an affirmative finding that the proposed rule change is consistent with the Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

If written comments were received (whether or not comments were solicited) from members of or participants in the self-regulatory organization or others, summarize the substance of all such comments received and respond in detail to any significant issues that those comments raised about the proposed rule change. If an issue is summarized and responded to in detail under Item 3 or Item 4, that response need not be duplicated if appropriate cross-reference is made to the place where the response can be found. If comments were not or are not to be solicited, so state.

6. Extension of Time Period for Commission Action

State whether the self-regulatory organization consents to an extension of the time period specified in Section 19(b)(2) or Section 19(b)(7)(D) of the Act and the duration of the extension, if any, to which the self-regulatory organization consents.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)

(a) If the proposed rule change is to take, or to be put into, effect, pursuant to Section 19(b)(3), state whether the filing is made pursuant to paragraph (A) or (B) thereof.

(b) In the case of paragraph (A) of Section 19(b)(3), designate that the proposed rule change:

(i) Is a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule,

(ii) Establishes or changes a due, fee, or other charge,

(iii) Is concerned solely with the administration of the self-regulatory organization,

(iv) Effects a change in an existing service of a registered clearing agency that (A) does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible and (B) does not significantly affect the respective rights or obligations of the clearing agency or persons using the service, and set forth the basis on which such designation is made,

(v) Effects a change in an existing order-entry or trading system of a self-regulatory organization that (A) does not significantly affect the protection of investors or the public interest; (B) does not impose any significant burden on competition; and (C) does not have the effect of limiting the access to or availability of the system, or

(vi) Effects a change that (A) does not significantly affect the protection of investors or the public interest; (B) does not impose any significant burden on competition; and (C) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of

investors and the public interest; provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. If it is requested that the proposed rule change become operative in less than 30 days, provide a statement explaining why the Commission should shorten this time period.

(c) In the case of paragraph (B) of Section 19(b)(3), set forth the basis upon which the Commission should, in the view of the self-regulatory organization, determine that the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities and funds requires that the proposed rule change should be put into effect summarily by the Commission.

Note: The Commission has the power under Section 19(b)(3)(C) of the Act to summarily temporarily suspend within sixty days of its filing any proposed rule change which has taken effect upon filing pursuant to Section 19(b)(3)(A) of the Act or was put into effect summarily by the Commission pursuant to Section 19(b)(3)(B) of the Act. In exercising its summary power under Section 19(b)(3)(B), the Commission is required to make one of the findings described above but may not have a full opportunity to make a determination that the proposed rule change otherwise is consistent with the requirements of the Act and the rules and regulations thereunder. The Commission will generally exercise its summary power under Section 19(b)(3)(B) on condition that the proposed rule change to be declared effective summarily shall also be subject to the procedures of Section 19(b)(2) of the Act. Accordingly, in most cases, a summary order under Section 19(b)(3)(B) shall be effective only until such time as the Commission shall enter an order, pursuant to Section 19(b)(2)(A) of the Act, to approve such proposed rule change or, depending on the circumstances, until such time as the Commission shall institute proceedings to determine whether to disapprove such proposed rule change or, alternatively, such time as the Commission shall, at the conclusion of such proceedings, enter an order, pursuant to Section 19(b)(2)(B), approving or disapproving such proposed rule change.

(d) If accelerated effectiveness pursuant to Section 19(b)(2) or Section 19(b)(7)(D) of the Act is requested, provide a statement explaining why there is good cause for the Commission to accelerate effectiveness.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

State whether the proposed rule change is based on a rule either of another self-regulatory organization or of the Commission, and, if so, identify the rule and explain any differences between the proposed rule change and that rule, as the filing self-regulatory organization understands it. In explaining any such differences, give particular attention to differences between the conduct required to comply with the proposed rule change and that required to comply with the other rule.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

(a) A clearing agency shall submit to the Commission on this Form 19b–4, a security-based swap submission for any security-based swap, or any group, category, type or class of security-based swaps that the clearing agency plans to accept for clearing.

(b) The clearing agency shall include in the security-based swaps submission a statement that includes, but is not limited to:

(i) How the security-based swap submission is consistent with Section 17A of the Act (15 U.S.C. 78q–1);

(ii) Information that will assist the Commission in the quantitative and qualitative assessment of the factors specified in Section 3C of the Act (15 U.S.C. 78c–3), including, but not limited to:

(A) The existence of significant outstanding notional exposures, trading liquidity and adequate pricing data;

(B) The availability of a rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded;

(C) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the clearing agency available to clear the contract;

(D) The effect on competition, including appropriate fees and charges applied to clearing;

(E) The existence of reasonable legal certainty in the event of the insolvency of the relevant clearing agency or one or more of its clearing members with regard to the treatment of customer and security-based swap counterparty positions, funds, and property;

(F) How the rules of the clearing agency prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are economically equivalent within the clearing agency and may be offset with each other within the clearing agency, as applicable to the security-based swaps described in the security-based swap submission.

(G) How the rules of the clearing agency provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the rules of an unaffiliated national securities exchange or security-based swap execution facility, as applicable to the security-based swaps described in the security-based swap submission.

Note: In connection with the factor specified in Item 9(b)(ii)(A) above, the clearing agency could address pricing sources, models and procedures demonstrating an ability to obtain price data to measure credit exposures in a timely and accurate manner, as well as measures of historical market liquidity and trading activity, and expected market liquidity and trading activity if the security-based swap is required to be cleared (including information on the sources of such measures). With respect to the discussion of the factor specified in Item 9(b)(ii)(B) above, the statement describing the availability of a rule framework could include a discussion of the rules, policies or procedures applicable to the clearing of the relevant security-based swap. Additionally, the discussion of credit support infrastructure specified in Item 9(b)(ii)(B) above could include the methods to address and communicate requests for, and posting of, collateral. With respect to the factor specified in Item 9(b)(ii)(C) above, the discussion of systemic risk could include a statement on the clearing agency's risk management procedures, including among other things the measurement and monitoring of credit exposures, initial and variation margin methodology, methodologies for stress testing and back testing, settlement procedures and default management procedures. With respect to the factor specified in Item 9(b)(ii)(D) above, the discussion of fees and charges could address any volume incentive programs that may apply or impact the fees and charges. With respect to the factor specified in Item 9(b)(ii)(E) above, the discussion could address segregation of accounts and all other customer protection measures under insolvency.

In describing the security-based swap, or any group, category, type or class of security-based swaps, that a clearing agency plans to accept for clearing, the clearing agency could include the relevant product specifications, including copies of any standardized legal documentation, generally accepted contract terms, standard practices for managing and communicating any life cycle events associated with the security-based swap and related adjustments, and the manner in which the information contained in the confirmation of the security-based swap trade is transmitted. The clearing agency also could discuss its financial and operational capacity to provide clearing services to all

customers subject to the clearing requirements as applicable to the particular security-based swap. Finally, the clearing agency could include an analysis of the effect of a clearing requirement on the market for the group, category, type, or class of security-based swaps, both domestically and globally, including the potential effect on market liquidity, trading activity, use of security-based swaps by direct and indirect market participants and any potential market disruption or benefits. This analysis could include whether the members of the clearing agency are operationally and financially capable of absorbing clearing business (including indirect access market participants) that may result from a determination that the security-based swap (or group, category, type or class of security-based swap) is required to be cleared.

(c) A clearing agency shall submit security-based swaps to the Commission for review by group, category, type or class of security-based swaps, to the extent reasonable and practicable to do so.

(d) A clearing agency shall file as an amendment to this Form 19b–4 any additional information necessary to assess any of the factors the Commission determines to be appropriate in order to make a determination regarding the clearing requirement.

(e) A security-based swap submission pursuant to Section 3C that also is required to be filed as a proposed rule change under Section 19(b) or an advance notice under Section 806(e) of the Payment, Clearing and Settlement Supervision Act shall not take effect until determinations are obtained under each of the other applicable statutory provisions.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

(a) A designated clearing agency shall provide notice on this Form 19b–4 sixty (60) days in advance of any proposed change to its rules, procedures, or operations that could, as defined in Rule 19b–4, materially affect the nature or level of risks presented by the designated clearing agency.

(b) A designated clearing agency shall include in the notice a description of:

(i) The nature of the change and expected effects on risks to the designated clearing agency, its participants, or the market; and

(ii) How the designated financial market utility plans to manage any identified risks.

(c) A designated clearing agency shall file as amendment to this Form 19b–4 any additional information that is required to be filed by the Commission as necessary to assess the effect the proposed change would have on the nature or level of risks associated with the designated clearing agency's payment, clearing, or settlement activities and the sufficiency of any proposed risk management techniques.

(d) A designated clearing agency that implements a proposed change on an emergency basis must file notice with the Commission on Form 19b–4 within 24 hours of implementing the change. In addition to the information required for advance notices, the notice of an emergency change shall include a description of the nature of the emergency and the reason the change was necessary for the designated clearing agency to continue to operate in a safe and sound manner. Any change implemented by a designated clearing agency on an emergency basis also must comply with Section 19(b) and Section 3C of the Act to the extent those sections are applicable.

(e) A proposed change filed pursuant to Section 806(e) that is also required to be filed as a proposed rule change under Section 19(b) or a security-based swap submission under Section 3C shall not take effect until determinations are obtained under each of the other applicable statutory provisions.

11. Exhibits

List of exhibits to be filed, as specified in Instructions C and D:

Exhibit 1. Completed Notice of Proposed Rule Change for publication in the **Federal Register**. Amendments to Exhibit 1 should be filed in accordance with Instructions D and F.

Exhibit 1A. Completed Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice for publication in the **Federal Register**. Amendments to Exhibit 1A should be filed in accordance with Instructions D and F.

Exhibit 2 (a) Copies of notices issued by the self-regulatory organization soliciting comment on the proposed rule change, security-based swap submission, or advance notice and copies of all written comments on the proposed rule change, security-based swap submission, or advance notice received by the self-regulatory organization (whether or not comments were solicited), presented in alphabetical order, together with an alphabetical listing of such comments. If such notices and comments cannot be filed electronically in accordance with Instruction F, the notices and comments shall be filed in accordance with Instruction G.

(b) Copies of any transcript of comments on the proposed rule change, security-based swap submission, or advance notice made at any public meeting or, if a transcript is not available, a copy of the summary of comments on the proposed rule change made at such meeting. If such transcript of comments or summary of comments cannot be filed electronically in accordance with Instruction F, the transcript of comments or summary of comments shall be filed in accordance with Instruction G.

(c) If after the proposed rule change, security-based swap submission, or advance notice is filed but before the Commission takes final action on it, the self-regulatory organization prepares or receives any correspondence or other communications reduced to writing (including comment letters) to and from such self-regulatory organization concerning the proposed rule change, the communications shall be filed in accordance with Instruction F. If such communications cannot be filed electronically in accordance with Instruction F, the communications shall be filed in accordance with Instruction G.

Exhibit 3. Copies of any form, report, or questionnaire covered by Item 1(a). If such form, report, or questionnaire cannot be filed electronically in accordance with Instruction F, the form, report, or questionnaire shall be filed in accordance with Instruction G.

Exhibit 4. For amendments to a filing, marked copies, if required by Instruction D, of the text of the proposed rule change as amended.

Exhibit 5. The SRO may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b–4. Exhibit 5 shall be considered part of the proposed rule change.

SPECIFIC INSTRUCTIONS FOR EXHIBIT 1—NOTICE OF PROPOSED RULE CHANGE

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34– ; File No. SR] [Date]

Self-Regulatory Organizations; [Name of Self-Regulatory Organization]; Notice of Filing [and Immediate Effectiveness] of a Proposed Rule Change Relating to [brief description of subject matter of proposed rule change]

General Instructions

A. Format Requirements

The notice must comply with the guidelines for publication in the **Federal Register**, as well as any requirements for

electronic filing as published by the Commission (if applicable). For example, all references to the Federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, **Federal Register** cite, **Federal Register** date, and corresponding file number (*e.g.,* SR–[SRO]–XX–XX). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. *See also* Rule 0–3 under the Act (17 CFR 240.0–3). Leave a 1-inch margin at the top, bottom, and right hand side, and a 1½ inch margin at the left hand side. Number all pages consecutively, consistent with Rule 0–3 under the Act (17 CFR 240.0–3). Double space all primary text and single space lists of items, quoted material when set apart from primary text, footnotes, and notes to tables.

B. Need for Careful Preparation of the Notice

The self-regulatory organization must provide all information required in the notice and present it in a clear and comprehensible manner. It is the responsibility of the self-regulatory organization to prepare Items I, II and III of the notice. The Commission cautions self-regulatory organizations to pay particular attention to assure that the notice accurately reflects the information provided in the Form 19b–4 it accompanies. Any filing that does not comply with the requirements of Form 19b–4, including the requirements applicable to the notice, may be returned to the self-regulatory organization. Any document so returned shall for all purposes be deemed not to have been filed with the Commission. *See* Instruction B to Form 19b–4.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on (date),* the (name of self-regulatory organization) filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

Information To Be Included in the Completed Notice

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

(Supply a brief statement of the terms of substance of the proposed rule change. If the proposed rule change is relatively brief, a separate statement need not be prepared, and the text of the proposed rule change may be inserted in lieu of the statement of the terms of substance. If the proposed rule change amends an existing rule, indicate changes in the rule by brackets for words to be deleted and underlined for words to be added.)

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements. (Reproduce the headings, and summarize briefly the most significant aspects of the responses, to Items 3, 4, and 5 of Form 19b–4, redesignating them as A, B, and C, respectively.)

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

(If the proposed rule change is to be considered by the Commission pursuant to Section 19(b)(2) of the Act, the following paragraph should be used.)

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the 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.

(If the proposed rule change is to take, or to be put into, effect pursuant to Section 19(b)(3)(A) of the Act and paragraph (f)(6) of Rule 19b–4 thereunder, the following paragraph should be used.)

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

(If the proposed rule change is to take, or to be put into, effect pursuant to Section 19(b)(3)(A) of the Act and subparagraphs (1)–(5) of paragraph (f) of Rule 19b–4 thereunder, the following paragraph should be used.)

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and paragraph (f) of Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

(If the proposed rule change is to be considered by the Commission pursuant to Section 19(b)(7)(D) of the Act, the following paragraph should be used.)

Within 35 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 such proposed rule change, or

(B) After consultation with the Commodity Futures Trading Commission, 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.

* To be completed by the Commission. This date will be the date on which the Commission receives the proposed rule change if the filing complies with all requirements of this form. *See* Instruction B to Form 19b–4.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number XX on the subject line.

Paper Comments

- Send paper comments in triplicate to [Name of Secretary], Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

All submissions should refer to File Number XX. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the [self-regulatory organization]. 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 XX and should be submitted on or before January 20, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[172]

Secretary.

[172] 17 CFR 200.30–3(a)(12).

SPECIFIC INSTRUCTIONS FOR EXHIBIT 1A—NOTICE OF PROPOSED RULE CHANGE, SECURITY-BASED SWAP SUBMISSION, OR ADVANCE NOTICE FILED BY CLEARING AGENCIES

EXHIBIT 1A

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34– ; File No. SR]

[Date]

Self-Regulatory Organizations; [Name of Clearing Agency]; Proposed Rule Change, Security-Based Swap Submission, or Advance Notice Relating to [brief description of subject matter of proposed rule change, security-based swap submission, or advance notice]

General Instructions

A. Format Requirements

The notice must comply with the guidelines for publication in the **Federal Register**, as well as any requirements for electronic filing as published by the Commission (if applicable). For example, all references to the Federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, **Federal Register** cite, **Federal Register** date, and corresponding file number (*e.g.,* SR–[SRO]–XX–XX). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. *See also* Rule 0–3 under the Act (17 CFR 240.0–3). Leave a 1-inch margin at the top, bottom, and right hand side, and a 1½ inch margin at the left hand side. Number all pages consecutively, consistent with Rule 0–3 under the Act (17 CFR 240.0–3). Double space all primary text and single space lists of items, quoted material when set apart from primary text, footnotes, and notes to tables.

B. Need for Careful Preparation of the Notice

The clearing agency must provide all information required in the notice and present it in a clear and comprehensible manner. It is the responsibility of the clearing agency to prepare Items I, II and III of the notice. The Commission cautions clearing agencies to pay particular attention to assure that the notice accurately reflects the information provided in the Form 19b–4 it accompanies. Any filing that does not comply with the requirements of Form 19b–4, including the requirements applicable to the notice, may be returned to the clearing agency. Any document so returned shall for all purposes be deemed not to have been filed with the Commission. *See* Instruction B to Form 19b–4.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1) and Rule 19b–4, 17 CFR 240.19b–4, notice is hereby given that on (date),* the (name of clearing agency) filed with the Securities and Exchange Commission the proposed rule change, security-based swap submission, or advance notice as described in Items I, II and III below, which Items have been prepared by the clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change, security-based swap submission, or advance notice from interested persons.

Information To Be Included in the Completed Notice

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change, Security-Based Swap Submission, or Advance Notice

(Supply a brief statement of the terms of substance of the proposed rule change, security-based swap submission or advance notice. If the proposed rule change is relatively brief, a separate statement need not be prepared, and the text of the proposed rule change may be inserted in lieu of the statement of the terms of substance. If the proposed rule change amends an existing rule, indicate changes in the rule by brackets for words to be deleted and underlined for words to be added.)

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change, Security-Based Swap Submission, or Advance Notice

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change, security-based swap submission 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 clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements. (Reproduce the headings, and summarize briefly the

* To be completed by the Commission. This date will be the date on which the Commission receives the proposed rule change, security-based swap submission, or advance notice filing if the filing complies with all requirements of this form. *See* Instruction B to Form 19b–4.

most significant aspects of the responses, to Items 3, 4, and 5 of Form 19b–4, redesignating them as A, B, and C, respectively.)

III. Date of Effectiveness of the Proposed Rule Change, Security-Based Swap Submission, and Advance Notice and Timing for Commission Action

(If the proposed rule change is to be considered by the Commission pursuant to Section 19(b)(2) of the Act, the following paragraph should be used.)

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the 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.

(If the proposed rule change is to take, or to be put into, effect pursuant to Section 19(b)(3)(A) of the Act and paragraph (f)(6) of Rule 19b–4 thereunder, the following paragraph should be used.)

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

(If the proposed rule change is to take, or to be put into, effect pursuant to Section 19(b)(3)(A) of the Act and subparagraphs (1)–(5) of paragraph (f) of Rule 19b–4 thereunder, the following paragraph should be used.)

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and paragraph (f) of Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

(If the proposed rule change is to be considered by the Commission pursuant to Section 19(b)(7)(D) of the Act, the following paragraph should be used.)

Within 35 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 such proposed rule change, or

(B) After consultation with the Commodity Futures Trading Commission institute proceedings to determine whether the proposed rule change should be disapproved.

(If the proposed change is filed as a security-based swap submission pursuant to Section 3C of the Act, the following paragraph should be used.)

Within 90 days after receiving a security-based swap submission, unless the submitting clearing agency agrees to an extension of time limitation, the Commission shall by order make its determination whether the security-based swap, or group, category, type or class of security-based swaps, described in the security-based swap submission is required to be cleared. In making its determination that the clearing requirement shall apply, the Commission may include such terms and conditions to the requirement as the Commission determines to be appropriate in the public interest.

The clearing agency shall post notice on its Web site of any clearing requirement that is implemented.

(If the proposed change is filed as an advance notice pursuant to the Payment, Clearing and Settlement Supervision Act, the following paragraph should be used.)

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission or the Board of Governors of the Federal Reserve System providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

The clearing agency shall post notice on its Web site of proposed changes that are implemented.

(If the proposed change is filed following the implementation of a change on an emergency basis pursuant to the Payment, Clearing and Settlement Supervision Act, the following paragraph should be used.)

The clearing agency implemented a proposed change that otherwise would be required to be filed as an advance notice because the clearing agency determined that (i) an emergency existed and (ii) immediate implementation was necessary for the clearing agency to continue to provide its services in a safe and sound manner. The Commission may require modification or recision of the proposed change if it finds it is not consistent with the purposes of the Payment, Clearing and Settlement Supervision Act or any applicable rules, orders, or standards prescribed under Section 805(a).

(If the proposal is submitted pursuant to more than one filing requirement, the clearing agency shall add the following language in addition to the language above.)

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, security-based swap submission, or advance notice is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number XX on the subject line.

Paper Comments

• Send paper comments in triplicate to [Name of Secretary], Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

All submissions should refer to File Number XX. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change, security-based swap submission, or advance notice that are filed with the Commission, and all written communications relating to the proposed rule change, security-based swap submission, or advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the [clearing agency]. 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 XX and should be submitted on or before January 20, 2011.

Dated: December 15, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[173]

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–32085 Filed 12–29–10; 8:45 am]

BILLING CODE P

[173] 17 CFR 200.30–3(a)(12).

Federal Register

Thursday,
December 30, 2010

Part V

Environmental Protection Agency

40 CFR Part 52

Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2009–0517; FRL–9244–9]

RIN 2060–AQ62

Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: This action is another in a series of steps EPA is taking to implement the Prevention of Significant Deterioration (PSD) program for greenhouse gas (GHG)-emitting sources. EPA is finalizing its proposed rulemaking to narrow its previous approval of State Implementation Plan (SIP) PSD programs in 24 states that apply to GHG-emitting sources. Specifically, EPA is withdrawing its previous approval of those programs to the extent they apply PSD to GHG-emitting sources below the thresholds in the final Tailoring Rule, which EPA promulgated by **Federal Register** notice dated June 3, 2010. Having narrowed its prior approval, EPA asks that each affected state withdraw from EPA consideration the part of its SIP that is no longer approved. The states for whose SIPs EPA is narrowing approval are: Alabama, California, Colorado, Georgia, Indiana, Iowa, Louisiana, Maine, Maryland, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, and Wisconsin.

DATES: This action is effective on December 30, 2010.

ADDRESSES: EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2009–0517. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* 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. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue, Northwest, 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 EPA Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Michael S. Brooks, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–01), Environmental Protection Agency, Research Triangle Park, NC 27711; *telephone number:* (919) 541–3539; *fax number:* (919) 541–5509; *e-mail address: brooks.michaels@epa.gov.*

SUPPLEMENTARY INFORMATION: For information related to a specific state, local, or tribal permitting authority, please contact the appropriate EPA regional office:

EPA regional office	Contact for regional office (person, mailing address, telephone number)	Permitting authority
I	Dave Conroy, Chief, Air Programs Branch, EPA Region 1, 5 Post Office Square, Suite 100, Boston, MA 02109–3912, (617) 918–1661.	Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont.
II	Raymond Werner, Chief, Air Programs Branch, EPA Region 2, 290 Broadway, 25th Floor, New York, NY 10007–1866, (212) 637–3706.	New Jersey, New York, Puerto Rico, and Virgin Islands.
III	Kathleen Anderson, Chief, Permits and Technical Assessment Branch, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103–2029, (215) 814–2173.	District of Columbia, Delaware, Maryland, Pennsylvania, Virginia, and West Virginia.
IV	Lynorae Benjamin Chief, Regulatory Development Section, Air, Pesticides and Toxics Management Division, EPA Region 4, Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, GA 30303–3104, (404) 562–9040.	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.
V	J. Elmer Bortzer, Chief, Air Programs Branch (AR–18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604–3507, (312) 886–1430.	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.
VI	Jeff Robinson, Chief, Air Permits Section, EPA Region 6, Fountain Place 12th Floor, Suite 1200, 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–6435.	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.
VII	Mark Smith, Chief, Air Permitting and Compliance Branch, EPA Region 7, 901 North 5th Street, Kansas City, KS 66101, (913) 551–7876.	Iowa, Kansas, Missouri, and Nebraska.
VIII	Carl Daly, Unit Leader, Air Permitting, Monitoring & Modeling Unit, EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202–1129, (303) 312–6416.	Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
IX	Gerardo Rios, Chief, Permits Office, EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972–3974.	Arizona, California, Hawaii and the Pacific Islands, Indian Country within Region 9 and Navajo Nation, and Nevada.
X	Nancy Helm, Manager, Federal and Delegated Air Programs Unit, EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101, (206) 553–6908.	Alaska, Idaho, Oregon, and Washington.

I. General Information

A. Does this action apply to me?

Entities potentially affected by this rule include states, local permitting authorities, and tribal authorities.

Entities potentially affected by this rule also include sources in all industry groups, which have a direct obligation under the Clean Air Act (CAA) to obtain a PSD permit for GHGs for projects that meet the applicability thresholds set forth in the Tailoring Rule. The majority of entities potentially affected by this action are expected to be in the following groups:

Industry Group	NAICS [a]
Agriculture, fishing, and hunting	11.
Mining	21.
Utilities (electric, natural gas, other systems)	2211, 2212, 2213.
Manufacturing (food, beverages, tobacco, textiles, leather)	311, 312, 313, 314, 315, 316.
Wood product, paper manufacturing	321, 322.
Petroleum and coal products manufacturing	32411, 32412, 32419.
Chemical manufacturing	3251, 3252, 3253, 3254, 3255, 3256, 3259.
Rubber product manufacturing	3261, 3262.
Miscellaneous chemical products	32552, 32592, 32591, 325182, 32551.
Nonmetallic mineral product manufacturing	3271, 3272, 3273, 3274, 3279.
Primary and fabricated metal manufacturing	3311, 3312, 3313, 3314, 3315, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329.
Machinery manufacturing	3331, 3332, 3333, 3334, 3335, 3336, 3339.
Computer and electronic products manufacturing	3341, 3342, 3343, 3344, 3345, 4446.
Electrical equipment, appliance, and component manufacturing	3351, 3352, 3353, 3359.
Transportation equipment manufacturing	3361, 3362, 3363, 3364, 3365, 3366, 3366, 3369.
Furniture and related product manufacturing	3371, 3372, 3379.
Miscellaneous manufacturing	3391, 3399.
Waste management and remediation	5622, 5629.
Hospitals/Nursing and residential care facilities	6221, 6231, 6232, 6233, 6239.
Personal and laundry services	8122, 8123.
Residential/private households	8141.
Non-Residential (Commercial)	Not available. Codes only exist for private households, construction, and leasing/sales industries.

[a] North American Industry Classification System.

B. How is this preamble organized?

The information presented in this preamble is organized as follows:

Outline

II. Overview of the Final Rule

This action finalizes EPA's proposal to narrow the approval of SIPs that we included in what we call the proposed Tailoring Rule, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule: Proposed Rule," 74 FR 55292, 55340 (October 27, 2009). EPA finalized the Tailoring Rule by **Federal Register** notice dated June 3, 2010, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule: Final Rule, 75 FR 31,514. The Tailoring Rule, which followed a series of actions by EPA that will trigger PSD applicability to GHG-emitting sources as of January 2, 2011, limits PSD applicability for GHG emissions to larger sources.

The Tailoring Rule accomplished this purpose by setting thresholds at which GHG emissions become subject to regulation for PSD and Title V purposes.[1] Under the Tailoring Rule, a source becomes subject to PSD requirements based on its GHG emissions only if it both emits GHGs at or above the Tailoring Rule thresholds,[2] which are calculated on a carbon dioxide equivalent (CO_2e) basis; and it emits GHGs at levels above the statutory 100/250 tons per year (tpy) mass-based threshold generally applicable to all PSD-regulated pollutants, and—if it is being modified—has or will have an emission increase on a mass basis. The Tailoring Rule thresholds were designed to relieve the overwhelming administrative burdens and costs associated with the dramatic increase in permitting burden that would have resulted from applying PSD at the statutory levels on January 2, 2011. Instead, the Tailoring rule established a phasing in of applicability for GHG sources, starting with the largest GHG emitters.

However, in proposing the Tailoring Rule, EPA recognized that even after it finalized the Tailoring Rule, most of the SIPs with approved PSD programs would—until they were revised—

[1] Only the PSD provisions are relevant for this action.

[2] The Tailoring Rule thresholds establish applicability of the PSD permitting program to GHG-emitting sources only if they emit GHG in amounts above the 75,000/100,000 tpy CO_2e.

continue to apply PSD at the statutory thresholds, even though the states would not have sufficient resources to implement the PSD program at those levels. Accordingly, the proposed Tailoring Rule included a proposal to narrow EPA's previous approval of SIPs such that the SIPs would only apply to GHG emissions at or above the higher thresholds established in the Tailoring Rule. When EPA finalized the Tailoring Rule, EPA did not, however, finalize that part of the proposal. Instead, EPA waited to collect more information from the states to determine whether such action was necessary, and, if so, for which states. EPA is now finalizing that part of the Tailoring Rule proposal in 24 states.

Thus, in this action, EPA is narrowing its previous approval of those approved PSD SIP programs that apply PSD to GHG-emitting sources. Specifically, EPA is withdrawing their previous approvals of those programs to the extent the SIPs apply PSD to increases in GHG emissions from GHG-emitting sources with emissions below the Tailoring Rule thresholds. The portions of the PSD programs regulating GHGs from GHG-emitting sources with emissions at or above the Tailoring Rule thresholds remain approved.

The effect of EPA narrowing its approval in this manner is that the provisions of previously approved SIPs that apply PSD to GHG emissions increases from sources emitting GHGs below the Tailoring Rule thresholds will have the status of having been submitted by the state but not yet acted upon by EPA. EPA suggests that affected states take one of two actions to withdraw these no-longer-approved SIP PSD provisions. The state may submit a SIP revision for EPA's approval that incorporates the Tailoring Rule thresholds into the SIP. EPA will treat the approval of such a submission as removing these no-longer-approved provisions. Or, a state may submit a letter to EPA stating that it is withdrawing these provisions from EPA's consideration. For any state that takes neither of these actions, EPA intends to propose to disapprove those provisions. The disapproval, if finalized, will not result in the need to resubmit another SIP revision, sanctions, or a federal implementation plan (FIP). This is because the provisions of the SIP that would be disapproved are not required for any purpose under the CAA or necessary to meet any CAA standard.

This action ensures that the federal law applicable in the affected states does not require PSD permitting for GHG emissions below the final Tailoring Rule thresholds as of January 2, 2011. Once the states take action to amend their state laws, then sources in the affected states will not be subject to federal or state requirements to obtain permits at the lower 100/250 tpy level. Most, if not all, of the affected states have already begun taking steps toward completing these changes at the state level, and plan to complete changes to their state law and make those changes effective by January 2, 2011. In general, these states are now in the process of (or have recently completed) incorporating the state law changes into SIP revisions to submit to EPA for approval. The combination of this rule and state actions will, in the affected states, eliminate, or at least greatly minimize, the time during which GHG-emitting sources that are below the Tailoring Rule thresholds will be subject to PSD in the state under either state or federal law while SIP revisions are being developed, submitted, and approved.

The states for whose SIPs EPA is narrowing approval are: Alabama, California,[3] Colorado, Georgia, Indiana, Iowa, Louisiana, Maine, Maryland, Mississippi, Missouri, New Hampshire, New Mexico,[4] North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, and Wisconsin.

III. Proposed Rule

We assume familiarity here with the statutory and regulatory background discussed in the preambles for the Tailoring Rule proposal and final action, and will only briefly summarize that background here.

Under the CAA PSD program, major stationary sources must obtain a permit prior to undertaking construction or modification projects that would result in specified amounts of new or increased emissions of air pollutants that are subject to regulation under other provisions of the CAA. CAA sections 165(a)(1), 169(1). The permit must, among other things, include emission limitations associated with the best available control technology (BACT). CAA section 165(a)(4).

In recent months, EPA completed four distinct actions related to greenhouse gases under the Clean Air Act. These actions include, as they are commonly called, the "Endangerment Finding" and "Cause or Contribute Finding," which we issued in a single final action,[5] the "Johnson Memo Reconsideration (also called the "Timing Decision")," [6] the "Light-Duty Vehicle Rule (LDVR)," [7] and the "Tailoring Rule." [8] In the Endangerment Finding, which is governed by CAA § 202(a), the Administrator exercised her judgment, based on an exhaustive review and analysis of the science, to conclude that "six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations." 74 FR at 66,496. The Administrator also found "that the combined emissions of these greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas air pollution that endangers public health and welfare under CAA section 202(a)." *Id.* The Endangerment Finding led directly to promulgation of the Vehicle Rule, also governed by CAA § 202(a), in which EPA set standards for the emission of greenhouse gases for new motor vehicles built for model years 2012–2016. 75 FR 25,324. The other two actions, the Johnson Memo Reconsideration and the Tailoring Rule, governed by the PSD and Title V provisions in the CAA, were issued to address the automatic statutory triggering of these programs for greenhouse gases due to the Vehicle Rule establishing the first controls for greenhouse gases under the Act. More specifically, the Johnson Memo Reconsideration provided EPA's interpretation of a pre-existing definition in its PSD regulations delineating the "pollutants" that are taken into account in determining whether a source must obtain a PSD permit and the pollutants each permit must control. Regarding the Vehicle Rule, the Johnson Memo Reconsideration stated that such regulations, when they take effect on January 2, 2011, will, by operation of the applicable CAA requirements, subject GHG-emitting sources to PSD

[3] Specifically, EPA is narrowing its approval of the SIPs for 3 districts within California: Mendocino County, North Coast Unified, and Northern Sonoma County.

[4] EPA is narrowing its approval of both the SIP for New Mexico, as well as the SIP for Albuquerque.

[5] "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66,496 (December 15, 2009).

[6] "Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 FR 17,004 (April 2, 2010). This action finalizes EPA's response to a petition for reconsideration of "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program" (commonly referred to as the "Johnson Memo"), December 18, 2008.

[7] "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25,324 (May 7, 2010).

[8] "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule." 75 FR 31,514 (June 3, 2010).

requirements. 75 FR 17,004. The Tailoring Rule established a series of steps by which PSD and Title V permit requirements for greenhouse gases are phased in, starting with the largest sources of greenhouse gas emissions. 75 FR 31,514. In addition, by **Federal Register** notice dated September 2, 2010, EPA proposed to find that the SIPs for 13 states with approved PSD programs are substantially inadequate to meet CAA requirements because they fail to apply their PSD program to GHG-emitting sources, and EPA proposed to issue a "SIP call" under CAA section 110(k)(5) for those states that would require submission of a corrective SIP revision. 75 FR 53,892. At the same time, EPA proposed a FIP, under CAA § 110(c), for those states. 75 FR 53,883.

In the proposed Tailoring Rule, EPA proposed a major stationary source threshold of 25,000 tpy for GHG on a CO_2e basis, for at least a specified period. EPA recognized that even so, many SIPs with approved PSD programs would require PSD permitting of GHG-emitting sources at the 100/250 tpy statutory major source threshold generally applicable to regulated New Source Review (NSR) pollutants, as well as at the "any increase" level for modifications, and that these SIPs would remain in place even after we finalized the Tailoring Rule. Thus, in those states, until states revised those SIPs, sources would remain subject to these thresholds as a matter of both state and federal law even after we finalized the Tailoring Rule. This would result in the same problems of overwhelming administrative burdens and costs that we designed the Tailoring Rule to address.

EPA also recognized that the solution to these problems lay in the form of SIP revisions that EPA would approve to raise the thresholds in approved state PSD permitting programs to conform to the Tailoring Rule (or, in the alternative, in the form of increased state resources).

Until the states could develop and submit for approval such SIP revisions, and EPA could approve them, EPA proposed to narrow its approval of the existing EPA-approved SIPs that would regulate GHG emissions at levels below the Tailoring Rule thresholds. Specifically, EPA proposed to narrow its approval of the permitting threshold provisions, including the significance threshold provisions in the SIPs, to the extent those provisions required PSD permits for sources whose GHG emissions fall below the proposed Tailoring Rule thresholds. EPA based its proposed narrowing of approval on the fact that while the SIPs would require PSD to apply at the 100/250 tpy levels (and at the any mass increase level for modifications), the states do not have the resources to implement the program at that level, and thus the SIPs were inconsistent with CAA section 110(a)(2)(E)(i), which requires that states provide necessary assurances that they have adequate funding and personnel to implement their SIPs. EPA proposed to rely, as the legal mechanisms for the proposed narrowing of approval, on CAA section 301(a), which provides the EPA Administrator with general regulatory authority to issue regulations necessary to carry out her CAA functions; and on the authority of an agency to reconsider its actions inherent in the Administrative Procedures Act (APA) section 553. In the alternative, EPA proposed to rely on the error correction provision of CAA section 110(k)(6). EPA did not propose to issue a SIP call under CAA section 110(k)(5) for these SIP provisions.

In the final Tailoring Rule, EPA established a schedule to phase-in threshold levels of GHG emissions below which a source will not be required to obtain a PSD permit.[9] EPA established the initial levels (which are higher than those in the proposed Tailoring Rule) in the first two steps of the phase-in schedule, committed the agency to take future steps addressing smaller sources, and excluded the smallest sources from PSD permitting for GHG emissions until at least April 30, 2016.

In addition, in the final Tailoring Rule, EPA chose revision of the definition of the term "subject to regulation" as the mechanism to revise the PSD thresholds for GHG. Under the PSD program, a major stationary source is subject to PSD. A major stationary source is defined as a source that emits 100/250 tpy on a mass basis of a regulated NSR pollutant, and a regulated NSR pollutant, in turn, is defined as, among other things, a pollutant that is subject to regulation under the CAA. In the final Tailoring Rule, EPA defined the term "subject to regulation" so that GHG emissions from sources at or above specified thresholds (depending on the circumstances, 75,000 and/or 100,000 tpy on a CO_2e basis) are treated as subject to regulation. Thus, sources that emit that amount are subject to PSD as long as that amount of GHG also exceeds 100/250 tpy on a mass basis and with respect to modifications there is a defined emissions increase.[10]

Some states advised EPA that it is likely they would be able to implement the Tailoring Rule thresholds by interpreting the term "subject to regulation" in their SIPs. A state's implementation of the Tailoring Rule in this manner, or in any other manner, prior to January 2, 2011, obviates the need for EPA to narrow its approval of the state's SIP. Thus, in the final Tailoring Rule, EPA delayed final action on its proposal to narrow approval for any SIP-approved PSD programs. EPA deferred making any decision regarding whether to narrow its approval of any SIPs until after learning the process and time-line for states to implement the Tailoring Rule. Based on information it had received, EPA expected that many states would quickly adopt the interpretation of the term "subject to regulation" used in the final Tailoring Rule, and thereby obviate the need for EPA to narrow its approval or take any other action with respect to the SIP. Thus, EPA asked states to submit information—in the form of letters due within 60 days of publication of the Tailoring Rule (which we refer to as the 60-day letters)—that would help EPA determine whether it needed to narrow its approval of any SIPs.

Almost all states submitted 60-day letters. The letters, in conjunction with other information EPA received, indicate that the states, localities, and other jurisdictions may be divided into three categories. The first, which includes 7 states, 35 subsections of states, the District of Columbia, American Samoa, Guam, Puerto Rico, the U.S. Virgin Islands, and Indian Territory, does not have an approved SIP PSD permitting program. Instead, federal requirements apply. Thus, in these jurisdictions, the thresholds in the Tailoring Rule will apply without further action.

The second category includes the states (or districts within states) whose SIPs do not appear to apply the PSD program to GHG-emitting sources. As a result, EPA proposed a SIP call and FIP for these states by notice dated September 2, 2010. 75 FR 53892. Based on the 60-day letters, letters EPA received in response to the proposed SIP call and FIP (which we refer to as

[9] The final Tailoring Rule also established a threshold of 100,000 tpy CO_2e for when a source would be considered a "major source" subject to title V permitting under 40 CFR part 70 and part 71. This rule addresses issues related to adoption of the Tailoring Rule thresholds for state PSD programs only. EPA will promulgate a separate rule to address issues related to the adoption of the Tailoring Rule threshold for approved state operating permit programs. EPA notes, however, that some state title V programs are incorporated into SIPs and that further corrections of the SIP may be necessary in such cases.

[10] Unlike the proposed Tailoring Rule, the final Tailoring Rule did not set significance levels for GHG emissions.

the 30-day letters), and additional information EPA has received, EPA finalized (at about the same time as this action) a SIP call in 13 states, including 4 districts within states.

The remaining 30 states and 6 districts within states, the third category, have approved SIPs that apply their PSD program to GHG-emitting sources. In those states, absent further action, sources emitting GHGs at or above the 100/250 tpy levels will be subject to PSD requirements as of January 2, 2011, if they construct or modify. Of these localities, 6 states and 4 districts within states have indicated that they would interpret their SIPs to regulate GHG emissions only above the Tailoring Rule thresholds, and no further action was needed to do so. EPA approved a SIP for 1 state—New York—for the first time in November 2010, and that original approval itself was limited to exclude the part of the PSD program that applies to GHG emissions below the Tailoring Rule thresholds. All or part of twenty-four states, including 4 districts, indicated that they would need to submit SIP revisions to EPA in order to incorporate the Tailoring Rule thresholds. Some of these states indicated, however, that they would not be able to complete these changes prior to January 2, 2011. Some states have completed their SIP revisions and submitted them to EPA, and EPA expects to take final action on them promptly. EPA has only signed SIP revision approvals for two states, Alabama and Mississippi, though neither of these approvals has yet been published as of the signing of this rule. These states—including those that have indicated that they would submit SIP revisions to EPA to incorporate the Tailoring Rule thresholds, but for which EPA has not approved such SIP revision as of the date of this rule—are included in this rule.

It should be noted that this rule focuses on eliminating the PSD obligations under federal law for sources below the Tailoring Rule thresholds in states in the third category, those with approved SIPs that do not incorporate the Tailoring Rule. The sources in those states also have permitting obligations under state law. EPA has strongly encouraged states to eliminate the state law obligations by revising their state law as promptly as possible. Such a revision to state law can eliminate those sources' state obligations, even before the state is able to process the revision as a SIP revision and submit it to EPA for approval. In almost all cases, states are proceeding to revise their state law to reflect the Tailoring Rule thresholds and will have done so by January 2, 2011, or very soon thereafter.

In their 60-day letters, none of the states indicated either that they intended to regulate GHG-emitting sources at a level below the Tailoring Rule thresholds, or that they could or would increase their permitting resources to do so.

IV. Final Rule

A. Action

EPA is taking final action to narrow its approval of the SIPs for certain states. In the final Tailoring Rule, EPA established levels of GHG emissions below which PSD provisions do not apply. However, some SIPs currently apply the PSD program to a source that emits GHGs below the Tailoring Rule thresholds, at levels at which, under the Tailoring Rule, GHGs are not a pollutant "subject to regulation" under the CAA, so that the emitting source is not a major stationary source subject to PSD on account of its GHG emissions. Thus, EPA is now narrowing its approval of some approved SIPs so that the PSD programs under those SIPs are approved to apply to GHG-emitting sources only if those sources emit GHGs at or above Tailoring Rule thresholds. EPA is accomplishing this narrowing by withdrawing its previous approval of those PSD programs to the extent they apply to GHG-emitting sources that emit below the Tailoring Rule thresholds.

Those provisions of SIPs from which EPA is withdrawing its approval will be treated as submitted by the state for approval and not yet acted upon by EPA. If a state submits a SIP revision for EPA's approval that incorporates the Tailoring Rule thresholds into the SIP, EPA will treat the approval of the submission as removing these no-longer-approved provisions. We note that once SIP revisions incorporating the Tailoring Rule thresholds are approved after the issuance of this rule, they will supersede the changes made in this rule. That is, this rule amends the regulatory language in the Code of Federal Regulations (CFR) approving each of the relevant SIPs. When EPA approves a SIP revision, EPA will remove from the CFR the regulatory language added by this rule.

Alternatively, EPA suggests that the affected states may withdraw those provisions from EPA's consideration through a letter to the EPA Regional Administrator. EPA offers the following as model language that the state should feel free to use, but is not required to use:

In its final rule entitled "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans" and published on [DATE OF PUBLICATION IN THE FEDERAL REGISTER], EPA amended the Code of Federal Regulations at [LOCATION OF CFR AMENDMENT RELEVANT TO STATE/DISTRICT] and withdrew EPA's approval of that portion of [STATE]'s SIP that would require sources to seek PSD permitting for emissions of GHGs in amounts below the thresholds specified in the Tailoring Rule, 74 FR 55292 (October 27, 2009). [STATE] now acts to withdraw from EPA's consideration that portion of [STATE]'s SIP from which EPA withdrew its approval in that action. These provisions are no longer intended for inclusion in the SIP, and are no longer before EPA for its approval or disapproval.

If a state does not withdraw the SIP provisions for which EPA is rescinding approval, and does not submit a SIP revision incorporating the Tailoring Rule thresholds that would supercede this rule, EPA intends to propose to disapprove the relevant provisions in the near future. Any disapproval of such SIP provisions—again, those applying PSD to GHG-emitting sources that emit GHGs below the Tailoring Rule threshold—will not, if finalized, result in the need to resubmit another SIP revision, in sanctions, or in a FIP. This is because the relevant provisions are not necessary to meet any applicable CAA requirement. *See* CAA sections 110(k)(3) (requirements for SIP disapproval), 179(a)(2) (sanctions).

In the proposed Tailoring Rule, EPA proposed to narrow its approval for all 50 states, as well as the District of Columbia, Guam, Puerto Rico, the U.S. Virgin Islands, and American Samoa. EPA now finalizes this narrowing of approval for only the SIPs with PSD programs that will apply to GHG emissions as of January 2, 2011, and for which the states have not either said that they interpret their SIPs to incorporate the Tailoring Rule thresholds for GHG emissions without the need for further action, or completed taking any further action necessary to incorporate the Tailoring Rule thresholds. This rule does not include final action on the proposal to narrow EPA's approval of SIPs for states that do not have approved PSD SIP programs (the first category previously described), and states that have approved PSD SIP programs that do not apply to GHGs (the second category previously described). This rule also does not take final action on the proposal to narrow EPA's approval of SIPs for states that have PSD SIP programs that cover GHG emissions, and that have already incorporated the Tailoring Rule thresholds via interpretation, SIP revision, or any other mechanism. The language being used

for this final narrowing rule reflects changes from the language proposed in the Tailoring Rule in order to clarify and reflect the decisions about permitting thresholds reached in the final Tailoring Rule.

The states for whom EPA is narrowing its approval of the SIP PSD program in this action include: Alabama, California, Colorado, Georgia, Indiana, Iowa, Louisiana, Maine, Maryland, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, and Wisconsin.

B. Legal Basis

EPA is narrowing its previous approval for each of the affected SIPs because EPA erred when it approved each SIP's PSD program. In those approvals, EPA failed to account for an important flaw in the SIP. As a result, EPA is rescinding its previous approval for the part of the SIP that is flawed, and EPA is leaving in place its previous approval for the rest of the SIP. The flaw is that the applicability provisions of the PSD program (which determined the pollutants to which PSD permitting applies) were phrased so broadly that they could, under certain circumstances, sweep in more sources than the program could accommodate in light of the resources that, under the SIP—in accordance with what we refer to as the "state assurances" provision under CAA § 110(a)(2)(E)(i)—were available or for which a plan was in place to acquire. The part of PSD applicability that is broader than what the state assurances covered is the part that exceeds EPA requirements for PSD applicability. The following section discusses this basis in more detail, beginning with the PSD applicability provisions; then the state assurances provisions; and then how the two provisions, read together, gave rise to the flaws in the SIPs.

1. PSD Applicability

Each of the states subject to this rule has an approved PSD SIP program that applies to sources of pollutants subject to regulation under the CAA. Some states' programs meet EPA's PSD requirements as they read prior to promulgation of the 2002 NSR rulemaking, which we refer to as the NSR Reform rule.[11] These pre-Reform SIPs, include a PSD applicability provision that provides that PSD applies to "any air pollutant subject to regulation." 40 CFR 51.166(b)(1)(i) (2001). Other states subject to this rule have an approved PSD program that includes the NSR Reform rule. The Reform requirements, replaced the term "any air pollutant subject to regulation" with the term "regulated NSR pollutant," 40 CFR 51.166(b)(1)(i), and defined that latter term to include pollutants regulated under specified provisions of the CAA as well as "any pollutant that is otherwise subject to regulation under [the CAA]." 40 CFR 51.166(b)(49)(iv). This quoted provision is similar to the pre-Reform provision, as both include the phrase "subject to regulation" in reference to the types of air pollutants that will be subject to the PSD program. Thus, each of the states subject to this rule has an approved PSD program—whether pre-Reform or Reform—that applies to any air pollutant that is "subject to regulation" under the CAA.

These applicability provisions mean that under federal law, in each of these SIPs, PSD will expand to cover additional sources that emit a pollutant different than the ones already covered under the PSD program as soon as EPA promulgates a rule regulating that pollutant under any other provision of the CAA. Depending on the pollutant and the number and size of sources that emit it, these applicability provisions could result in a significant and rapid expansion of the PSD program. This is precisely what is happening at present, now that EPA has promulgated the LDVR, to take effect on January 2, 2011, at which time GHGs will become subject to regulation under CAA section 202(a).

Importantly, the states affected by this action, while including in their SIPs a PSD applicability provision that applies PSD to any pollutant "subject to regulation," generally do not interpret their applicability provision, or any other provision in their SIPs, to incorporate limits on PSD applicability with respect to a new pollutant and the SIPs do not contain any other mechanism that would allow the State to interpret applicability more narrowly. As a result, the affected states' applicability provisions include no way to limit the speed or extent of the expansion a PSD program might be required to undergo to regulate new pollutants.

The case of GHGs has highlighted the potential scale of a PSD program for a new pollutant under such open-ended provisions. As described in the final Tailoring Rule, EPA promulgated the LDVR, which is the rule that, upon January 2, 2011, when it takes effect, subjects GHGs to regulation. The LDVR identifies GHGs as the group of six air pollutants made up of carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, and perfluorocarbons. 75 FR 31514, 31519 (June 3, 2010) (Tailoring Rule discussion); 75 FR 25324 (May 7, 2010) (LDVR). Accordingly, the SIPs affected by this action will, as of January 2, 2011, treat GHGs as a pollutant "subject to regulation" and therefore apply PSD to GHG-emitting sources. As previously discussed, these SIPs will apply PSD to new GHG-emitting sources at the 100/250 tpy levels and to modified GHG-emitting sources at the any-mass-increase levels. None of these SIPs, as currently approved, permits the interpretation of the PSD applicability more narrowly, to apply to only GHG-emitting sources at or above the Tailoring Rule thresholds. In contrast, as previously noted, several other states are able to interpret their SIPs more narrowly and, as a result, are not subject to this action.

The scale of the administrative program needed to effectively permit all sources emitting GHGs at the 100/250 tpy levels has highlighted the unconstrained nature of the SIPs' applicability provisions. EPA has recognized that a PSD program regulating GHGs at the 100/250 tpy levels is administratively unmanageable and creates absurd results that were not intended by Congress when it passed the CAA. Thus, in the Tailoring Rule, EPA phased in GHG PSD applicability, so that at the outset PSD applies to GHG-emitting sources only if they also emit GHG in amounts above the 75,000/100,000 tpy CO_2e thresholds set out in that rule.[12] EPA included this limit in its regulations, and through this limit greatly reduced the extent of PSD applicability. This limit was set at a level at which EPA determined states would have the resources to implement a PSD program for GHG emissions. By contrast, each of these SIPs applies GHG PSD applicability more broadly—indeed, much more broadly, to far more

[11] "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Baseline Emissions Determination, Actual-to-Future-Actuals Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects," Final Rule, 67 FR 10816 (December 2, 2002).

[12] In its first phase, starting January 2, 2011, PSD requirements for GHGs apply to sources that are required to seek a PSD permit for non-GHG pollutants, and that also increase emissions of GHG by at least 75,000 tpy CO_2e. In its second phase, starting July 1, 2011, PSD requirements for GHGs will also apply to new sources that emit or with potential to emit at least 100,000 tpy CO_2e, and existing sources that emit or have the potential to emit 100,000 tpy CO_2e and that undertake a modification that increases net emissions of GHGs by at least 75,000 tpy CO_2e.

sources and to much smaller sources—than EPA's regulations do.

We note that there is nothing inherently problematic about a SIP imposing PSD applicability, or applying other control requirements, as broadly as a state might choose. SIPs may lawfully do so and EPA may lawfully approve them in accordance with the provisions of section 110(a) of the CAA. Similarly, there is nothing inherently problematic with a SIP failing to include any measures to limit the scope of its control requirements. Even so, the SIP must provide for adequate resources, and must do so on the appropriate schedule, as discussed next.

2. State Assurances of Adequate Resources

Each of the states subject to this rule was also required to include in its SIP adequate state "assurances," in accordance with CAA section 110(a)(2)(E)(i). This provision requires the SIP to "provide * * * necessary assurances that the State * * * will have adequate personnel, funding, and authority under State * * * law to carry out such implementation plan* * *." EPA has implemented this requirement in 40 CFR 51.280, which provides,

> Each plan must include a description of the resources available to the State and local agencies at the date of submission of the plan and any additional resources needed to carry out the plan during the 5-year period following its submission. The description must include projections of the extent to which resources will be acquired at 1-, 3-, and 5-year intervals.

These CAA and regulatory requirements concerning assurances apply to the SIP as a whole, including the PSD program. Therefore, at the time that the state submitted the PSD provisions of the SIP for EPA approval, the SIP was required to include assurances that adequate resources would be available to implement the SIP in its entirety, including the PSD program.

As previously noted, the affected SIPs included expansive PSD applicability provisions for newly regulated pollutants, without a means to limit that applicability. Under these circumstances, state assurances are needed to assure adequate resources in the event of an expansion of the PSD program to new pollutants, even when this would require a rapid and sizeable expansion of the resources dedicated to the state PSD program, whether due to the large number of sources emitting the new pollutant or any other reason. EPA has the authority to define, under CAA section 110(a)(2)(E)(i), what assurances are "necessary" so that the state will have "adequate" resources. To be sure, EPA does not read the assurances requirement to require that the state should somehow hold in reserve large amounts of resources to cover the possibility that the PSD program would undergo such a large and rapid expansion. However, EPA does read the requirement to require that the state have a plan for acquiring the requisite additional amount of resources in the case of an expansion in PSD applicability. Moreover, that plan should include an implementation schedule that would be consistent with the timing of expansion in PSD applicability. PSD expansion may occur quite rapidly because PSD requirements apply immediately once they are triggered by subjecting a pollutant to regulation. This is because of the CAA requirement that stationary sources may not construct or modify unless they first have acquired a permit. CAA section 165(a). That is, as soon as a pollutant is subject to regulation—as will occur for GHGs on January 2, 2011—the pollutant-emitting sources to which PSD then applies cannot lawfully undertake construction or modification projects without first procuring a PSD permit.

It is clear, however, that none of the SIPs affected by this action include such a plan among their assurances. In the proposed Tailoring Rule, EPA stated that at the time that the LDVR triggers PSD applicability, if it triggers such applicability at the 100/250 tpy level, then far greater numbers of sources will require permitting than currently do. As a result, EPA added, the administrative burdens associated with permitting small sources for affected state and local permitting authorities would overwhelm the authorities. For each state, EPA proposed to rescind approval of the part of the SIP that applies PSD to sources below the Tailoring Rule thresholds, unless the state demonstrated that it had adequate resources to permit at the lower levels. During the comment period on this proposal, no authority contested this understanding of the facts, none stated that they could administer PSD at the 100/250 tpy levels, and none contested the proposal on grounds that they have adequate resources. In the final Tailoring Rule, EPA refined, on the basis of comments, the precise extent of the administrative burden, but confirmed that the burden was overwhelming and that states lacked adequate resources. In the final Tailoring Rule, EPA requested that states submit letters within 60 days of publication of the rule describing how they intended to implement PSD for GHG-emitting sources.[13] In those letters, none of the states claimed they could, or intended to, implement the Tailoring Rule at the statutory levels. From all this, it is clear that none of the states had included in their state assurances an adequate plan to acquire resources to administer the PSD program for their GHG-emitting sources at the 100/250 tpy level.

It must be emphasized that there is nothing inherently problematic with a SIP whose state assurances do not include the previously-described plan to acquire additional resources. Only SIPs that lack any constraints to limit PSD applicability for new pollutants to match their resources must include such a plan.

3. Flaw in SIP

Based on the previous analysis, it is clear that the SIPs subject to this action are flawed. They each are structured in a manner that may impose PSD applicability on new pollutants in an unconstrained manner, and yet they do not have a plan for acquiring resources to adequately administer any large new components of the PSD program, and to do so on the same schedule that sources may become subject to PSD. As previously explained, the SIPs' unconstrained applicability is not by itself a flaw. The flaw is the combination of that unconstrained applicability and the failure of the SIP to plan for adequate resources for that applicability, and do so on the appropriate time-table. In short, the SIPs' PSD applicability provisions and their state assurances are mismatched and therefore the SIP is flawed. As previously discussed, EPA's recently promulgated GHG rules have highlighted this flaw.

EPA notes that since the enactment of the PSD provisions, EPA has periodically subjected pollutants to control for the first time, thereby triggering PSD applicability. At the time the affected SIPs were submitted and approved, this structural flaw could have been recognized. That is, it could have been recognized that (i) the PSD applicability provisions were essentially unconstrained, but that the resources the state assured would be available were constrained; and (ii) at some point in time, a pollutant could become newly regulated that would expand PSD applicability to a point that would require resources beyond what the state assured would be available. It bears reiterating that EPA has discretion to interpret the CAA's SIP requirements,

[13] The 60-day letters are available at *http://www.epa.gov/NSR/2010letters.html.*

including what state assurances are required. In EPA's view, the breadth of the affected SIPs' provisions concerning PSD applicability, combined with the limited state assurances, constitutes a flaw.

C. Legal Mechanisms for EPA Action

Because the SIPs were flawed, EPA approval of them was in error. Two mechanisms are available for addressing that error: The error correction mechanism provided under CAA section 110(k)(6), 42 U.S.C. section 7410(k)(6), or EPA's inherent general authority to reconsider its own actions under CAA section 301(a), 42 U.S.C. section 7601(a), read in conjunction with CAA section 110(k) and other statutory provisions, and case law holding that an agency has inherent authority to reconsider its prior actions.

1. Error Correction Under CAA Section 110(k)(6)

CAA section 110(k)(6) provides as follows:

> Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

The key provisions are that the Administrator has the authority to "determine [ ]" when a SIP approval was "in error," and when she does so, she may then revise the SIP approval "as appropriate," in the same manner as the approval, and without requiring any further submission from the state. With this action, EPA is determining that its action approving the PSD SIP provisions was "in error" due to the mismatch, previously discussed, between the PSD applicability provisions and the state assurances. EPA is further determining that the appropriate action EPA can take—in light of EPA's proposal as part of the proposed Tailoring Rule—to revise that prior action is to rescind approval of the PSD program to the extent it applies PSD to GHG-emitting sources below the Tailoring Rule threshold. Thus, EPA is narrowing its approval of the PSD programs as indicated. EPA may consider further action in the future.

a. Type of Error

These determinations are authorized under the CAA. First, approval of the SIPs in light of the mismatch constitutes an "error" within the meaning of CAA section 110(k)(6). As previously quoted, CAA section 110(k)(6) provides EPA with the authority to correct its own "error," but nowhere does this provision or any other provision in the CAA define what qualifies as "error." Thus, the term should be given its plain language, everyday meaning. Webster's II Dictionary defines an "error" as: "(1) an act, assertion, or belief that unintentionally deviates from what is correct, right or true, (2) the state of having false knowledge . . . (4) a mistake . . ." *Webster's II New Riverside University Dictionary* 442 (Houghton Mifflin Co. 1988). Similarly, t*he Oxford American College Dictionary* 467_(2d ed. 2007) defines "error" as "a mistake" or "the state or condition of being wrong in conduct or judgment." These definitions are broad, and include all unintentional, incorrect or wrong actions or mistakes.

The legislative history of CAA section 110(k)(6) is silent regarding the definition of error, but the timing of the enactment of the provision suggests a broad interpretation. The provision was enacted shortly after the Third Circuit decision in *Concerned Citizens of Bridesburg* v. *U.S. EPA,* 836 F.2d 777 (1987). In *Bridesburg,* the court adopted a narrow interpretation of EPA's authority to unilaterally correct errors. The court stated that such authority was limited to typographical and other similar errors, and stated that any other change to a SIP must be accomplished through a SIP revision. *Id.* at 786. In *Bridesburg,* EPA determined that it lacked authority to include odor regulations as part of a SIP unless the odor regulations had a significant relationship to achieving a NAAQS, and so directly acted to remove 13-year-old odor provisions from the Pennsylvania SIP. *Id.* at 779–80. EPA found the previous approval of the provisions to have been an inadvertent error, and so used its "inherent authority to correct an inadvertent mistake" to withdraw its prior approval of the odor regulations without seeking approval of the change from Pennsylvania. *Id.* at 779–80, 785. After noting that Congress had not contemplated the need for revision on the grounds cited by EPA, *Id.* at 780, the court found that EPA's "inherent authority to correct an inadvertent mistake" was limited to corrections such as "typographical errors," and that instead EPA was required to use the SIP revision process to remove the odor provision from the SIP. *Id.* at 785–86.

When the court made its determination in *Bridesburg* in 1987, there was no provision explicitly addressing EPA's error correction authority under the CAA. In 1990, Congress passed CAA section 110(k)(6), apparently for the purpose of overturning the *Bridesburg* opinion. This is apparent because CAA section 110(k)(6) both (i) authorizes EPA to correct SIP approvals and other actions that were "in error," which, as previously noted, broadly covers any mistake, and thereby contrasts with the holding in *Bridesburg* that EPA's pre-section 110(k)(6) authority was limited to correction of typographical or similar mistakes; and (ii) provides that the error correction need not be accomplished via the SIP revision or SIP call process, which contrasts with the holding of *Bridesburg* requiring a SIP revision. Because Congress apparently intended CAA section 110(k)(6) to overturn *Bridesburg,* the definition of "error" in that provision should be sufficiently broad to encompass the error that EPA asserted it made in its approval action at issue in *Bridesburg,* which goes well beyond typographical or other similar mistakes.

EPA has used CAA section 110(k)(6) in the past to correct errors of a non-technical nature. For example, EPA has used CAA section 110(k)(6) as authority to make substantive corrections to remove a variety of provisions from federally approved SIPs that are not related to the attainment or maintenance of NAAQS or any other CAA requirement. *See, e.g.,* "Approval and Promulgation of Implementation Plans; Kentucky: Approval of Revisions to the State Implementation Plan," 75 FR 2440 (Jan. 15, 2010) (correcting the SIP by removing a provision, approved in 1982, used to address hazardous or toxic air pollutants); "Approval and Promulgation of Implementation Plans; New York," 73 FR 21,546 (April 22, 2008) (issuing a direct final rule to correct a prior SIP correction from 1998 that removed general duties from the SIP but neglected to remove a reference to "odor" in the definition of "air contaminant or air pollutant"); "Approval and Promulgation of Implementation Plans; New York," 63 FR 65557 (Nov. 27, 1998) (issuing direct final rule to correct SIP by removing a general duty "nuisance provision" that had been approved in 1984); "Correction of Implementation Plans; American Samoa, Arizona, California, Hawaii, and Nevada State Implementation Plans," 63 FR 34,641 (June 27, 1997) (correcting five SIPs by deleting a variety of administrative provisions concerning variances, hearing board procedures, and fees that had been approved during the 1970s).

EPA's approval of the PSD SIP provisions, in light of the mismatch between those provisions and the state assurances, was "in error" within the meaning of CAA section 110(k)(6). Under the familiar *Chevron* two-step framework for interpreting administrative statutes, an agency must, under *Chevron* step 1, determine whether "Congress has directly spoken to the precise question at issue." If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." However, under *Chevron* step 2, if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837, 842–43 (1984).

As previously discussed, the PSD SIPs were flawed due to the mismatch between the PSD applicability provisions and the state assurances. EPA's action approving the PSD SIPs in the face of that flaw was "in error" under CAA section 110(k)(6) in accordance with *Chevron* step 1. As previously discussed, "error" should be defined broadly to include any mistake, and approval of a flawed SIP is a mistake.

Even if the term "error" is not considered unambiguously to encompass the mistake that EPA made in approving the PSD SIPs under *Chevron* step 1, and instead is considered ambiguous on this question, then under *Chevron* step 2 EPA has sufficient discretion to determine that its approval action meets the definition of "error." That is, under CAA section 110(k)(6), both the breadth of the term "error" and the authorization for EPA to "determine[ ]"—which is a directive that is inherently discretionary—when it made an error, point towards EPA having sufficient discretion to identify the mismatch in the SIPs as a flaw and to identify its action in approving the PSD SIPs in the face of that mismatch as an error under that provision.

b. Narrowing of Approval

Under CAA section 110(k)(6), once EPA determines that its action in approving the PSD SIPs was in error, EPA has the authority to correct the error in an "appropriate" manner, and through the same process as the original approval, but without requiring any further state submission. The term "appropriate" is open-ended, and therefore confers broad discretion upon EPA to fashion a reasonable type of correction. More generally, CAA section 110(k)(6) authorizes EPA to "determine[ ]" that its action was in error, and does not direct or constrain that determination in any manner. That is, the provision does not identify any factors that EPA must, or may not, consider in making the determination. This further indicates that this provision confers broad discretion upon EPA.

EPA's action corrects the error by rescinding EPA's approval of the PSD threshold provisions to the extent they apply PSD requirements to sources of GHG emissions below the final Tailoring Rule thresholds. Correcting the error in this fashion is appropriate because it narrows the approval to the PSD requirements to the extent they apply to GHG-emitting sources at or above the final Tailoring Rule thresholds. This approach (i) renders the PSD applicability provisions consistent with EPA regulations and (ii) solves the mismatch previously described by assuring that SIP PSD applicability to GHG sources is consistent with EPA's interpretation of the scope of the state assurances of adequate resources for PSD administration.

Correcting the error in this fashion—narrowing the approval of SIPs—is also consistent with the approach that the affected states are taking to administer PSD to GHG-emitting sources. The states have advised EPA that they are proceeding to develop SIP revisions to implement the Tailoring Rule and thereby narrow their SIP PSD programs to GHG-emitting sources at or above the Tailoring Rule thresholds. EPA's record in the Tailoring Rule indicates that the states should have adequate resources to implement their PSD program for GHG-emitting sources at the Tailoring Rule thresholds. In contrast, no state has informed EPA that it prefers to maintain its PSD applicability at the 100/250 tpy level and that it intends to acquire the additional resources to do so.

At this time, EPA is not further addressing, and therefore is not rescinding its approval of, the affected SIPs' PSD applicability provisions to the extent they remain unconstrained in the manner in which they incorporate newly regulated pollutants in respects other than PSD applicability to GHG-emitting sources below the Tailoring Rule thresholds. As a procedural matter, EPA did not propose to do so in the Tailoring Rule proposal and EPA did not receive any comments indicating that it should do so. In addition, CAA section 110(k)(6) gives EPA the authority to make corrections "as appropriate." This language provides EPA with discretion to choose how to make corrections. The current problem resulting from EPA's erroneous approvals of the SIPs in question is limited to the regulation of GHG emissions, and the current rule addresses this problem. The scope of this action does not foreclose further action to address EPA's error in the future. An agency may properly address an issue in step-by-step fashion. *See, e.g., Grand Canyon Air Tour Coalition* v. *F.A.A.,* 154 F.3d 455 (DC Cir. 1998), *City of Las Vegas* v. *Lujan,* 891 F.2d 927 (DC Cir. 1989). 75 FR at 31544.

In accordance with CAA section 110(k)(6), EPA has conducted this narrowing of approval through notice-and-comment rulemaking, which is the same manner as EPA conducted the prior approval.

2. Reconsideration Under CAA Section 301 and Case Law

In the alternative to the error correction under CAA section 110(k)(6) discussed above, EPA is using its authority to reconsider its prior approval actions in order to narrow its approval of the SIPs at issue. This authority lies in CAA section 301(a), read in conjunction with CAA section 110(k) and other statutory provisions, and case law holding that an agency has inherent authority to reconsider its prior actions.

EPA approved some of the SIP PSD provisions affected by this rule prior to 1990, under the authority of CAA section 110 as it read prior to amendment by the 1990 CAA Amendments. Prior to the amendments, CAA section 110(a)(2) authorized EPA to "approve or disapprove [a SIP], or any portion thereof." EPA approved the rest of the SIP PSD provisions affected by this rule after 1990, i.e., under the authority of CAA section 110(k)(3)–(4) as added by the 1990 CAA Amendments. These sections authorize EPA to approve a SIP submittal "as a whole," "approve [the SIP submittal] in part and disapprove [it] in part," or issue a "conditional approval" of a SIP submittal. CAA section 110(k)(3)–(4).

In approving the SIPs under either CAA section 110(a)(2) as it read prior to 1990 or CAA section 110(k), EPA retained inherent authority to revise that action. The courts have found that an administrative agency has the inherent authority to reconsider its decisions, unless Congress specifically proscribes the agency's discretion to do so. *See, e.g., Gun South, Inc.* v. *Brady,* 877 F.2d 858, 862 (11th Cir. 1989) (holding that agencies have implied authority to reconsider and rectify errors even though the applicable statute and regulations do not provide expressly for such reconsideration); *Trujillo* v. *General Electric Co.,* 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to

reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider").

Section 301(a) of the CAA, read in conjunction with CAA section 110 and the case law just described, provides statutory authority for EPA's reconsideration action in this rulemaking. Section 301(a) of the CAA authorizes EPA "to prescribe such regulations as are necessary to carry out [EPA's] functions" under the CAA. Reconsidering prior rulemakings, when necessary, is part of "[EPA's] functions" under the CAA—in light of EPA's inherent authority as recognized under the case law to do so—and as a result, CAA section 301(a) confers authority upon EPA to undertake this rulemaking.

EPA finds further support for its authority to narrow its approvals in APA section 553(e), which requires EPA to give interested persons "the right to petition for the issuance, amendment, or repeal of a rule," and CAA section 307(b)(1), which expressly contemplates that persons may file a petition for reconsideration under certain circumstances (at the same time that a rule is under judicial review). These authorizations for other persons to petition EPA to amend or repeal a rule suggest that EPA has inherent authority, on its own, to issue such amendment or repeal. This is because EPA may grant a petition from another person for an amendment to or repeal of a rule only if justified under the CAA, and if such an amendment or repeal is justified under the CAA, then EPA should be considered as having inherent authority to initiate the process on its own, even without a petition from another person.

EPA recently used its authority to reconsider prior actions and limit its prior approval of a SIP in connection with California conformity SIPs. *See, e.g.,* 68 FR 15720, 15723 (discussing prior action taken to limit approvals); 67 FR 69139 (taking final action to amend prior approvals to limit their duration); 67 FR 46618 (proposing to amend prior approvals to limit their duration, based on CAA sections 110(k) and 301(a)). EPA had previously approved SIPs with emissions budgets based on a mobile source model that was current at the time of EPA's approval. Later, EPA updated the mobile source model. But, even though the model had been updated, emissions budgets would continue to be based on the older, previously approved model in the SIPs, rather than the updated model. To rectify this problem, EPA conducted a rulemaking that revised the previous SIP approvals so that the approvals of the emissions budgets would expire early, when the new ones were submitted by states and found adequate, rather than when a SIP revision was approved. This helped California more quickly adjust its regulations to incorporate the newer model. In this rule, EPA is using its authority to reconsider and narrow its prior approval of SIPs generally in the same manner as it did in connection with California conformity SIPs.

V. Comments and Responses

In this section, we provide responses to comments we received on the proposed Tailoring Rule on narrowing EPA's approval of some SIPs. Several industry commenters (4095, 4106, 4118, 4691, 4870, 5083, 5058, 5131, 5133, 5137, 5140, 5179, 5181, 5278, 5317, 5713, 6414, 16411) and state commenters (2729, 4019, 4866, 4989, 5039, 5084) object to our proposal to narrow our approval of previously fully approved SIPs. One industry commenter (4298) supports our proposal, though would like EPA to take additional actions as well. An environmental commenter (5306) also believes that EPA should accompany its proposed actions with a SIP call.

A. Comments Regarding the Legal Mechanism for the Current Action

Commenters argued that neither CAA section 110(k)(6) error correction authority nor EPA's general authority under CAA 301(a) and APA 553(e) support the action EPA now takes. The arguments opposing both legal mechanisms for this rule include the following:

- The EPA's CAA section 110(k)(6) justification is flawed because section 110(k)(6) authority is limited to the correction of technical or clerical errors made in a SIP approval and does not allow any unilateral revision by EPA of substantive provisions or any changes to the nature or terms of a SIP that EPA has approved in the past. (2797, 4019, 4866, 4870, 4989, 5039, 5083, 5133, 5131, 5140, 5179, 5181, 5279, 5317, 6414)
- The type of action EPA wishes to undertake can only be taken through a SIP call under section 110(k)(5) of the CAA, although that section is not applicable in this situation because SIPs that incorporate the CAA applicability thresholds are not inadequate to "comply with any requirement of the Act." (4106, 4691, 4870, 5058, 5140, 5181, 5278, 5317, 6414)
- The EPA's retroactive limitation on its prior approval of the SIPs is not being done to correct a mistake—even EPA does not claim its approvals were in error at the time it promulgated them. Rather, the Agency is trying to change the SIPs now to avoid substantive and timing problems it has created by its own deliberate actions. (4870, 5058, 5131, 5140, 5181, 5278, 5317, 6414)
- The EPA is not proposing to correct any "error" "in the same manner" as it made its approval. The proposed Tailoring Rule in effect proposes a blanket narrowing on all past approvals; EPA is not issuing an individualized new proposed approval (or disapproval) action for each SIP that had been the subject of an individual EPA notice-and-comment SIP approval proceeding. A SIP call is the proper procedure to address any alleged inadequacies in state resources. (2797, 4989, 5181, 5317)
- In *Concerned Citizens of Bridesburg* v. *EPA,* 836 F.2d 777 (3d Cir. 1987), the court invalidated EPA's attempt to rescind approval of a SIP revision that EPA had approved 13 years earlier on grounds that EPA's original approval was in error. The Court explained that in fact the SIP approval was no longer consistent with EPA policy due to an intervening change in that policy, and that the SIP approval was not an inadvertent mistake that would justify a unilateral change in disregard of procedural requirements for SIP revisions. Some commenters state that in order to be a mistake under *Bridesburg,* the original SIP approval must have been contrary to agency policy at the time of the SIP approval. One commenter also cited *Detroit Edison Co.* v. *EPA,* 496 F.2d 244, 248–49 (6th Cir. 1974) in support of its argument that a substantive change to a SIP is a change in policy rather than a correction of an inadvertent mistake, and EPA cannot implement such a policy change in a SIP unilaterally (a proposed clarification by EPA of a SIP several months after promulgation was not in fact a clarification but a revision because it effected substantive change). (4870, 5080, 5140, 5181, 5278, 5317)
- The EPA's invocation of section 110(k)(6) establishes a troubling precedent that undermines the role of states under the CAA. The EPA's approach is unguided by any standards, criteria, or precedent. States and regulated sources would no longer have confidence that they could rely on approved SIPs, safe from EPA's revision of those SIPs whenever the Agency decides—on any grounds it chooses or no grounds at all—that its prior approval had been an "error." Under this interpretation of section 110(k)(6), EPA could dispense entirely with SIP calls under section 110(k)(5) and the states' role in SIP revisions, which was clearly not what Congress had in mind when it enacted section 110(k). The EPA's approach seriously undermines the carefully crafted federal-state

partnership the CAA creates, which assigns states the primary role in designing SIPs, while giving EPA a more limited, reviewing role. (4870, 5039, 5140, 5181, 5278, 5317)

• The EPA has overstated its authority under CAA section 301(a). The District of Columbia Circuit (DC Circuit) has observed that CAA section 301(a)(1) "does not provide the Administrator with carte blanche authority to promulgate any rules, on any matter relating to the CAA, in any manner that the Administrator wishes." Where the CAA includes express provisions—such as section 110(k)(5) (the SIP call provision)—EPA is required to follow those provisions. If there was a mistake in prior SIP approvals as EPA contends, section 110(k)(5) is EPA's sole and exclusive mechanism for seeking to correct a SIP that has been determined to be inadequate. (4019, 4866, 4870, 5058, 5083, 5131, 5140, 5181, 5278, 5317, 5714)

• The EPA's invocation of 5 U.S.C. 553(e) is legally indefensible. The EPA has mentioned no outstanding petition for EPA to revisit its PSD SIP approvals, so section 553(e) appears to be inapposite. In addition, CAA section 307(d)(1)(B) and the penultimate sentence of section 307(d)(1) expressly state that the provisions of section 553 do not apply to "the promulgation or revision of an implementation plan by the Administrator" under CAA section 110(c), which, in practical effect, is the action EPA proposes here. Even where section 553(e) applies, it merely directs agencies to allow parties to seek revisions of rules; it plainly does not permit agencies to disregard procedural requirements—whether under the APA or under organic statutes such as the CAA—that agencies must follow in effecting any such revisions. (5317, 5714)

As previously discussed, EPA's error correction authority under CAA section 110(k)(6) and, in the alternative, CAA section 301, read in light of EPA's general authority to reconsider its actions, support the action EPA now takes to narrow its prior approval of some states' SIPs. The SIP call process is a distinct and separate authority that Congress has given to EPA for use when EPA determines that a current SIP is substantially inadequate to attain or maintain compliance with the CAA requirements. This process is a means for EPA to require state action. *See, e.g., Sierra Club* v. *Georgia Power Company,* 443 F.3d 1346, 1348 (11th Cir. 2006) (describing the SIP call process generally as a means to state action). Congress explicitly laid out EPA's error correction authority under CAA section 110(k)(6), as a means for EPA to unilaterally reconsider its own prior actions without using a SIP call. EPA's general reconsideration authority also applies to EPA's reconsideration of its own actions.

Sections 110(k)(5) and (6) of the CAA are intended to address different types of problems with SIPs. Section 110(k)(6) targets "error[s]" that EPA made at the time it approved the SIP. Thus, EPA may rely on CAA section 110(k)(6) when EPA's own action—e.g., its original approval of a state's SIP—is erroneous. In contrast, section 110(k)(5) targets "substantial [ ] inadequa[cies]" that prevent the SIP's compliance with CAA requirements and that exist in the SIP at the time of the SIP call regardless of when the substantial inadequacy first arose. Thus, a SIP whose approval was appropriate at the time but later may be shown to contain substantial inadequacies could be amended by the state using a SIP call under CAA section 100(k)(5), but could not be corrected by EPA under CAA section 110(k)(6).

Even so, many circumstances may arise where either a CAA section 110(k)(6) correction or a section 110(k)(5) SIP call could be appropriate. These are situations in which EPA erred in approving a SIP because the SIP was flawed, and that flaw constitutes a substantial inadequacy that prevents the SIP's compliance with a CAA requirement. Under these circumstances, EPA may choose between CAA section 110(k)(6) or section 110(k)(5), and nothing in either of those provisions precludes EPA from choosing to use the other one in the case of an overlap. Section 110(k)(6) of the CAA provides that "[w]henever the Administrator determines that [a specified action] was in error, the Administrator may * * * revise such action* * *." This provision grants discretion to the Administrator to make the indicated determination (including the timing of the determination) and then grants the Administrator the discretion ("may") to revise the action. No other provision in CAA section 110(k)(6), and none in section 110(k)(5), precludes that discretion in a situation in which the Administrator could have instead relied on section 110(k)(5). By the same token, CAA section 110(k)(5) provides that "[w]henever the Administrator finds that the applicable implementation plan for any area is substantially inadequate * * * to * * * comply with any requirement of [the CAA], the Administrator shall require [a SIP revision]." This provision also grants discretion to the Administrator to make the indicated finding (including the timing of the finding) that would trigger the requirement for a SIP revision. No other provision in CAA section 110(k)(5) mandates that the Administrator make the finding (and thereby trigger the requirement for a SIP revision) even if the Administrator could otherwise rely on section 110(k)(6). *See also New York Public Interest Research Group* v. *Whitman,* 321 F.3d 316, 330–31 (2d Cir. 2003) (finding that opening phrase "Whenever the Administrator makes a determination" in CAA section 502(i)(1) grants EPA "discretion whether to make a determination"); *Her Majesty the Queen in Right of Ontario* v. *U.S. E.P.A.,* 912 F.2d 1525, 1533 (DC Cir. 1990) (finding "whenever" in CAA section 115(a) "impl[ied] a degree of discretion" in whether EPA had to make an endangerment finding). Indeed, if, as commenters suggest, section 110(k)(5) were viewed as predominating over section 110(k)(6), then there would be very few circumstances under which section 110(k)(6) would be available because in many instances, the type of error that the Administrator would see fit to correct under section 110(k)(6) would be one that would cause a SIP to be "substantially inadequate" to meet CAA requirements. Such a narrow role for section 110(k)(6) is inconsistent with its plain language, which, again, authorizes its usage "whenever" the Administrator "determines" that EPA's action was in "error." As previously noted, the term "error" should be defined broadly to include any unintentional mistake, and the other quoted terms inherently provide discretion.

In addition to Congress's explicit grant of error correction authority, the DC Circuit recently affirmed EPA's inherent authority to reconsider its own actions in *New Jersey* v. *EPA,* 517 F.3d 574 (DC Cir. 2008), where it explained that an agency normally can change its position and reverse a prior decision. However, the Court added that "when Congress has provided a mechanism capable of rectifying mistaken actions * * * it is not reasonable to infer authority to reconsider agency action." *New Jersey,* 517 F.3d at 583. In that case, the Court did find that Congress had, in fact, limited EPA's ability to remove sources from the list of HAP source categories, once listed, by requiring EPA to follow the specific delisting process at CAA section 112(c)(9).

In the present case, EPA believes that it has the general authority under the CAA to reconsider its previous actions. Congress has also added the specific provision CAA section 110(k)(6), which authorizes correction of errors. EPA

believes that this error correction provision authorizes this action. If section 110(k)(6) has the breadth that EPA believes it has, then it may take the place of EPA's inherent authority to reconsider prior erroneous actions. If section 110(k)(6) has a more limited breadth and does not apply to this action, then EPA continues to have inherent authority to make corrections beyond what section 110(k)(6) authorizes, including this action.

As previously discussed, EPA finds support for its general authority to reconsider under CAA section 301(a). However, we are not relying on CAA section 301(a) as carte blanche authority to promulgate any rules; rather, we are relying on CAA section 301(a) because this action carries out EPA's functions, to reconsider its action under CAA section 110 in approving SIP revisions, as authorized under the case law previously cited. Likewise, EPA finds some support for its authority in APA section 553(e). However, EPA is not relying on APA section 553(e) as direct authority for this action, under which EPA is correcting an error. Rather, EPA considers APA section 553(e) to support the proposition — also supported by case law—that EPA has inherent authority to correct an error. Similarly to the APA, CAA section 307(b)(1), which contemplates petitions for reconsideration by EPA of actions taken on SIP submissions, supports the proposition that EPA has inherent authority to reconsider prior decisions that were in error.

Commenters' concerns that EPA's approach to this rule seriously undermines the CAA federal-state partnership and the primary role given the states in the SIP development process are unfounded. This rule simply corrects an error in accordance with CAA section 110(k)(6); the primary role of states and the nature of the federal-state partnership certainly remains intact. States remain the developers and drafters of the SIPs; EPA remains the arbiter of whether the submitted SIP provisions meet necessary requirements, and thus should be part of the SIP. This federal-state partnership cannot preclude EPA from correcting errors in its own SIP approvals, and the partnership is not threatened by such error corrections. In addition, in accordance with CAA section 110(k)(6), EPA exercises its authority under this provision through notice and comment rulemaking, in which states have the opportunity to comment in order to shape the outcome. Historically, EPA has exercised its authority under CAA section 110(k)(6) very sparingly and judiciously. In the current case, EPA has taken this action after close communication with the states.

As previously discussed, the SIPs addressed here each contained a mismatch between their PSD applicability provisions and their state assurances of adequate resources. EPA erred in approving those SIPs. Since this error recently became apparent, EPA is now promptly taking steps to correct the error in a manner it deems appropriate. We find that use of our CAA section 110(k)(6) authority is appropriate because we are able to rectify the problem with the SIP without the need for state action, and because this approach provides the most efficient means for making the correction. Importantly, however, EPA is not basing its error correction on a change in its approach to an old policy, but rather on a flaw in the SIP that existed at the time of EPA's action on the SIP but which has only recently become apparent.

Section 110(k)(6) of the CAA is available to correct any error in a SIP; EPA disagrees with the commenters who state that this provision may only be used for technical or clerical errors. As previously discussed, the text of CAA section 110(k)(6) applies the provision broadly to any mistake, and does not limit the provision's applicability to only technical or clerical errors. Congress's passage of CAA section 110(k)(6) in 1990 in fact indicated Congress's intent to reinforce EPA's broad authority to unilaterally correct any errors in SIP approvals, coming as it did after the Third Circuit adopted a narrow interpretation of error correction authority in *Concerned Citizens of Bridesburg* v. *U.S. EPA,* 836 F.2d 777 (1987).

Conversely, commenters' concerns that this rule sets a troubling precedent because it is unguided by any standards, criteria or precedent are unfounded. This rule is based on a flaw in the relevant SIPs and EPA's error in approving the SIPs with that flaw. EPA's application of CAA section 110(k)(6) is, by the terms of that provision, limited to an error correction, and this action does not go beyond that limit.

EPA conducted notice and comment on the approval-narrowing for each relevant SIP. This notice and comment process, followed by the issuance of the final rule, corrects the errors in these SIPs in the same manner that EPA previously approved the SIPs. EPA also made an individualized determination regarding each affected SIP that the SIP contains a mismatch between its PSD applicability and state assurances provisions. For each SIP, this mismatch has been made evident, as previously discussed, by (i) EPA's finding in the Tailoring Rule that under their current SIPs, the states would be required to process an enormous number of PSD permits for small GHG-emitting sources, which would overwhelm state resources; and (ii) the fact that no state has objected to this finding and asserted that it does have adequate resources, or that it previously assured EPA it would have adequate resources, for this purpose.

EPA's narrowing of approval amounts to a revision to the federal SIP, but that is inherent in its ability to correct its SIP action under CAA section 110(k)(6). EPA is not changing the state law component of the SIP, which remains fully state enforceable.

B. Comments on Potential Triggering of Anti-Backsliding Provisions

Some commenters expressed concern that anti-backsliding provisions would prevent revision of SIPs to increase the significance threshold for GHG emissions. Commenters were concerned that the EPA's approach to ask states to quickly revise their SIPs to comport with the increased significance thresholds is likely to be challenged by activist groups citing the CAA's anti-backsliding provisions, which limit relaxation in certain rules. Under EPA's interpretation of PSD applicability, once the LDVR requires PSD to apply to GHGs, the existing thresholds contained in SIPs could be alleged by activist groups to become binding on GHGs under the anti-backsliding arguments that these groups are currently advancing in various court cases. Thus, even if a state wanted to revise its regulations similarly to the federal Tailoring Rule and thereby relax the threshold, the anti-backsliding provision might prevent it. (5140, 5181, 5278). One commenter was also concerned more generally that anti-backsliding rules prevent EPA from "adjust[ing] greenhouse gas levels" under the Tailoring Rule. (5713).

None of these comments raised objections to this action narrowing EPA's prior approval of SIPs. Thus, it is not necessary to address these comments here. However, to the extent the concern expressed in these comments could have been raised by changes to SIPs resulting from EPA's narrowing of its prior approval, we choose to address the comments here in the interest of greater responsiveness.

While many commenters did not clarify which CAA provisions they considered "anti-backsliding provisions", they most likely meant to refer to CAA sections 110(l), 110(n)(1), or 193. However, the current rule does not violate any of these provisions.

Under CAA section 193, EPA may only modify any "control requirement" applicable to a nonattainment area that was required or in effect prior to November 15, 1990 if "the modification insures equivalent or greater emission reductions of such air pollutant." These provisions of section 193 apply to controls for pollutants for which an area is designated nonattainment. No area of the country is designated nonattainment for GHGs. This rule prevents certain sources or modification projects that are not currently subject to PSD requirements from becoming subject to PSD due to their emissions of GHGs on January 2, 2010 when GHGs will become "subject to regulation" for purposes of the PSD program. GHGs are not currently subject to regulation under the PSD program. Furthermore, the PSD program does not require emission offsets for new or modified major sources, and EPA does not consider the PSD program to achieve "emissions reductions" for purposes of section 193. Rather, the program merely limits future emissions growth. Thus, section 193 would not limit alteration of a PSD program because any revised program would meet the statutory test. Therefore, the current rule does not violate CAA section 193.

CAA section 110(l) provides that EPA shall not approve a SIP revision "if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in [CAA section 171]), or any other applicable requirement of this chapter." CAA section 171 defines "reasonable further progress" as "such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date." The current rule does not approve a SIP revision. The current rule also would not interfere with attainment of any NAAQS, or with any other requirement of the CAA.

CAA section 110(n)(1) states that a provision that was in a SIP prior to November 15, 1990 may only be changed if it is "approved or promulgated by [EPA] pursuant to this chapter." The current rule is being approved by EPA pursuant to this chapter. The procedure of approval is pursuant to the CAA, and the rule's substance does not violate CAA section 110(l) or any other CAA provision.

CAA section 172(e), which was cited specifically by one commenter, applies to EPA action to "relax a [NAAQS] after November 15, 1990." Since GHGs are not a NAAQS pollutant and this rule does not change any NAAQS standard, this provision is not applicable to the current rule.

C. Comments on Persisting Practical Difficulties at the State Level

EPA received comments that raised concern that EPA is ignoring the fact that it will take time for the states to amend their laws and regulations to accommodate the revised applicability thresholds. Commenters expressed concern that it will be of little help for EPA to quickly amend the relevant SIPs because states will still be bound to implement their underlying programs until corrections can be made. For sources, this means no relief from the statutory thresholds for a lengthy time after GHGs become regulated. (4019, 4095, 4866, 5080, 5083, 5084, 5131, 5133, 5140, 5179, 5278, 5317, 16411)

After this action is published and becomes effective, federal law will not require affected states to issue PSD permits for GHGs emitted at levels below the Tailoring Rule thresholds. Thus, sources in these states emitting GHGs below the Tailoring Rule thresholds will not be federally required to obtain a PSD permit for those emissions.

No action by EPA can amend state law requirements, or relieve emitters of responsibilities under state law. However, most states affected by this rule have already begun the process of amending their state regulations to incorporate the Tailoring Rule thresholds. As previously noted, almost all states are on track to have changed their state law to incorporate the Tailoring Rule thresholds by January 2, 2011 or very shortly thereafter. EPA encourages states to continue to pursue this process. Once states change their state law to incorporate the Tailoring Rule thresholds, then both the state law and federal law permitting requirements will be resolved. States can then process their revised state laws into SIP revisions and submit them for approval. In the proposed GHG PSD SIP Call preamble, EPA included recommendations for some states to streamline their SIP development processes; those recommendations could be used here. In the same proposal, EPA encouraged states to submit their SIP revisions for parallel processing, and thereby speed EPA approval. EPA recognizes that it may take some months to receive EPA approval of the SIP revision, but during this time, the State and Federal law will already each have been changed. This rule thus helps ensure that sources emitting GHGs at below-Tailoring Rule levels will have relief from GHG permitting requirements as early as possible.

D. Comments on Preferred Alternative Courses of Action

EPA received comments advocating alternate courses of action to address SIPs with the 100/250 tpy thresholds for GHGs. These comments include the following:

- If EPA wishes to pursue its current regulatory strategy, it could amend the minimum PSD SIP elements in 40 CFR 51.166 and allow states to develop and submit SIP revisions in accordance with those new provisions. (5182, 5317)
- The EPA should exercise all available legal authority to ensure that SIPs come into conformity with the Tailoring Rule. Instead of taking no action other than to limit approval of SIPs, EPA should mandate or strongly encourage states to revise their PSD rules to reflect the higher thresholds. This could be accomplished through an expedited SIP call or by conditioning section 105 grant funding on appropriate revisions to the PSD rules in SIP-approved states. (4691)
- An industry commenter (4298) supports EPA's efforts to narrow or conform its prior approvals through CAA sections 301(a)(1) and 110(k)(6) with respect to applicability thresholds. However, the commenter believes EPA should take affirmative steps to ensure that states immediately either revise their regulations to raise existing lower thresholds or demonstrate that they have adequate resources and funding to manage their programs utilizing those existing lower thresholds. The commenter also believes that EPA should not finalize any action that would trigger GHG permitting until each state program has been amended (4298).
- An environmental group commenter (5306) believes that EPA and the states should collaborate on an expeditious, smooth transition in carrying out obligations to address GHGs under the PSD programs. The commenter believes it is reasonable for EPA to call for a SIP revision under section 110(k)(5) with an expeditious deadline for states to submit corrective plan revisions. Further, according to the commenter, EPA can ease state adoption of PSD permit program revisions and expedite EPA's own review and approval of the states' adjustments by adopting model guidelines to help inform state rulemaking. The commenter recommends that EPA should promptly start the process with the aim to complete it by the end of 2010.

As previously noted, EPA is strongly encouraging states to amend their SIP requirements to conform to the PSD thresholds established in the final Tailoring Rule, and this rule is consistent with such action. In fact, many states have already begun the process of amending state regulations and submitting those changes to EPA for approval. EPA is working closely with many states to help complete this process as expeditiously as possible. This close interaction obviates the need for guidelines on how states might amend their laws. EPA's narrowing of our prior approval of some SIPs is intended to assure that at least the federal law component of these SIPs will, in essence, reflect the Tailoring Rule thresholds, since not all states whose SIPs will cover GHGs on January 2, 2011 will be able to amend their SIP thresholds by that date.

EPA does not feel that a SIP call would provide any additional benefit over the current action. Since the affected states are already making efforts to change their state laws and amend their SIPs, and have already informed EPA about their plans to make these changes in a time-effective manner, a SIP call would not spur any action that is not already occurring.

Neither this action nor the Tailoring Rule triggered GHG permitting for any state. The Light Duty Vehicle Rule, in conjunction with the operation of the Clean Air Act, has already triggered the applicability of PSD to GHG emitting sources.

VI. Effective Date

This rule is being issued under CAA § 307(d)(1)(V). CAA section 307(d) specifies that rules issued under its provisions are not subject to APA section 553. Thus, the 30-day delay in effective date from the date of signature required under the APA does not apply. In addition, even if APA section 553 were to apply, APA section 553(d) provides an exception for any action that grants or recognizes an exemption or relieves a restriction. Since the effect of this rule will be to relieve many small sources (and permitting authorities) from certain PSD obligations, EPA believes that an immediate effective date is consistent with the purposes under APA section 553(d). EPA believes there is good cause for an immediate effective date due to the regulatory confusion that would result if states were federally required to implement PSD GHG permitting at only the statutory thresholds starting on January 2, 2010. In addition, since this is not a major rule under the Congressional Review Act, the 60-day delay in effective date required for major rules under the CRA does not apply. This rule is thus effective immediately.

VII. Statutory and Executive Orders

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. Instead, this action will significantly reduce costs incurred by sources and permitting authorities relative to the costs that would be incurred if EPA did not revise this rule. In the final Tailoring Rule, EPA stated that based on its GHG threshold data analysis, it estimated that over 80,000 new and modified facilities per year, nationally, would be subject to PSD review based on applying a GHG emissions threshold of 100/250 tpy using a CO_2e metric. This was compared with the 280 PSD permits currently issued per year. Thus, without the final Tailoring Rule, the administrative burden for permitting GHG emissions would increase 280-fold, an unmanageable increase. The current action takes further steps to implement the burden-reduction implemented by the final Tailoring Rule.

In addition, OMB has previously approved the information collection requirements contained in the existing regulations for PSD (*see, e.g.,* 40 CFR 52.21) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0003. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the APA or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this final action on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the U.S. SBA size standards (see 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this final action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives which "minimize any significant economic impact of the * * * rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

We have therefore concluded that this final rule will relieve the federal regulatory burden for most affected small entities associated with the major PSD permit programs for new or modified major sources that emit GHGs, including small businesses, in the affected states. This is because this rule narrows its approval of SIPs in affected states so as to raise the approved PSD applicability thresholds for sources that emit GHGs. As a result, the program changes provided in this rule are not expected to result in a significant economic impact on a substantial number of small entities.

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 1 year. No state will have an increased burden as a result of this rule; any burden related to amending state SIPs to incorporate different GHG emissions thresholds resulted from the final Tailoring Rule, not the current rule. Thus, this rule is not subject to the requirements of sections 202 or 205 of Unfunded Mandates Reform Act (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. This rule is expected to result in cost savings and an administrative burden reduction for all permitting authorities and permittees in the affected states, including small governments.

E. Executive Order 13132—Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This final rule will ultimately simplify and reduce the burden on state and local agencies associated with implementing the PSD permit program, by ensuring that, in affected states, a source whose GHG emissions are below the final Tailoring Rule thresholds will not have to obtain a PSD permit under federal law. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicited comments on the proposed rule from state and local officials. EPA has also consulted with the National Association of Clean Air Agencies and representatives from some individual states in developing this rule.

F. Executive Order 13175—Consultation and Coordination With Indian Governments

Subject to Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA has concluded that this action may have tribal implications. However, it will neither impose substantial direct compliance costs on tribal government, nor preempt tribal law. There are no tribal authorities currently issuing major NSR permits; however, this may change in the future.

EPA consulted with tribal officials early in the process of developing the final Tailoring Rule regulation, which the current rule helps to implement, to allow them to have meaningful and timely input into its development. Prior to publishing the proposed Tailoring Rule, EPA published an advance notice of proposed rulemaking (ANPR) that included GHG tailoring options for regulating GHGs under the CAA. (73 FR 44354, July 30, 2008). As a result of the ANPR, EPA received several comments from tribal officials on differing GHG tailoring options presented in the ANPR which were considered in the proposed Tailoring Rule and final Tailoring Rule. Additionally, EPA also specifically solicited comment from tribal officials on the proposed Tailoring Rule (74 FR 55292, October 27, 2009) in which the actions which EPA now takes were first proposed.

G. Executive Order 13045—Protection of Children From Environmental Health and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive 492 Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211—Actions 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. Further, we have concluded that this rule is not likely to have any adverse energy effects because this action would not create any new requirements for sources in the energy supply, distribution, or use sectors.

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 EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has concluded that it is not practicable to determine whether there would be disproportionately high and adverse human health or environmental effects on minority and/or low income populations from this rule. This rule is necessary in order to allow for the continued implementation of permitting requirements established in the CAA. Specifically, without this rule, the affected states' CAA PSD permitting programs would become overwhelmed and unmanageable by the untenable number of GHG sources that would become newly subject to them. This would result in severe impairment of the functioning of these programs with potentially adverse human health and environmental effects nationwide. Under this rule and the findings under the final Tailoring Rule, EPA is ensuring that the affected states' CAA permitting programs continue to operate by narrowing their applicability to the maximum number of sources the programs can possibly handle. This approach is consistent with congressional intent as it phases in applicability, starting with the largest sources initially, and then other sources over time, so as not to overwhelm state permitting programs. By doing so, this rule allows for the maximum degree of environmental protection possible while providing regulatory relief for the unmanageable burden that would otherwise exist. Therefore, we believe it is not practicable to identify and address disproportionately high and adverse human health or environmental effects on minority populations and low

income populations in the United States under this final rule, though we do believe that this rule will ensure that states can continue to issue PSD permits to significant sources of air pollution.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by SBREFA, 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 rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective December 30, 2010.

L. Judicial Review

Section 307(b)(1) of the CAA specifies which Federal Courts of Appeal have jurisdiction to hear petitions for review of which final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) When the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

This rule narrowing EPA's previous approvals of SIPs in 24 states to correct a flaw in those SIPs is "nationally applicable" within the meaning of section 307(b)(1). The circumstances that have led to this rulemaking are national in scope and are substantially the same for each affected state. They include EPA's promulgation of nationally applicable GHG requirements that, in conjunction with the operation of the CAA PSD provisions, have resulted in GHG-emitting sources becoming subject to PSD. Moreover, in this rule, EPA is applying uniform principles for each affected state in this rule. At the core of this rulemaking is EPA's recognition that when it approved each of the affected SIPs' PSD applicability provisions, it did so in the face of a mismatch—common to each SIP—between the breadth of those provisions and the scope of the resource assurances the states provided. EPA is now addressing this flaw in numerous SIPs across the country through the CAA section 110(k)(6) error correction provisions. EPA's analytical approach for each SIP is the same, its determination that each SIP was flawed and therefore that EPA erred in its approval of each SIP is the same, and EPA's remedial action of rescinding its previous approval of part of the SIP and thereby narrowing its approval of the SIP is the same. This rulemaking action is supported by a single administrative record, and does not involve factual questions unique to the different affected states. In addition, this rule applies to multiple States in numerous judicial circuits across the country.

For similar reasons, this rule is based on determinations of nationwide scope or effect. EPA uses a uniform legal interpretation in all the affected States across the country; for the same reasons in each case, EPA is determining that each SIP was flawed and that EPA therefore erred in approving it. Similarly, EPA is determining that the appropriate remedial action is to rescind its approval in part and thereby narrow its approval, and this too is the same for each state. Because the states are spread across the nation, each of these determinations is nationwide in scope or effect. Moreover, EPA is making these determinations and promulgating this action within the context of nationwide rulemakings and interpretation of the applicable CAA provisions, as noted above.

Thus, any petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by February 28, 2011. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Under section 307(b)(2) of the Act, the requirements of this final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements. Pursuant to section 307(d)(1)(V) of the Act, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to "such other actions as the Administrator may determine." This action finalizes elements of a previous proposed action—the Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Proposed Rule (74 FR 55292, October 27, 2009).

VIII. Statutory Authority

The statutory authority for this action is provided by sections 101, 110, and 301 of the CAA as amended (42 U.S.C. 7401, 7410, and 7601). This action is also subject to section 307(d) of the CAA (42 U.S.C. 7407(d)).

List of Subjects in 40 CFR Part 52

Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Incorporation by reference, Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

Dated: December 23, 2010.

Lisa P. Jackson,

Administrator.

■ For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as set forth below.

PART 52—[AMENDED]

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

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

Subpart B—Alabama

■ 2. Section 52.53 is revised to read as follows:

§ 52.53 Approval Status.

(a) With the exceptions set forth in this subpart, the Administrator approves Alabama's plans for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by July 1, 1980 for the sources covered by CTGs issued between January 1978 and January 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas

(GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in EPA-approved Alabama Department of Environmental Management (ADEM) Rules 335–3–14–.04(1)(d) thru (i) and 335–3–14–.04(2)(u)) and a significant net emissions increase (as defined in EPA-approved Alabama Department of Environmental Management (ADEM) Rules 335–3–14–.04(2)(c) and 335–3–14–.04(2)(w)) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in Alabama Department of Environmental Management (ADEM) Rules 335–3–14–.04(2)(w).

Subpart F—California

■ 3. Section 52.223 is amended by adding paragraphs (f), (g), and (h) to read as follows:

§ 52.223 Approval status.

* * * * *

(f)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in North Coast Unified Air Quality Management District's approved plan apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in the EPA-approved North Coast Unified Air Quality Management District rules at R1–1–130(s2)) and a significant net emissions increase (as defined in the North Coast Unified Air Quality Management District rules at R1–1–130(n1)) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in the EPA-approved North Coast Unified Air Quality Management District rules at R1–1–130(s2).

(g)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in Northern Sonoma County Air Pollution Control District's approved plan apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in the EPA-approved Northern Sonoma County Air Pollution Control District rules at R1–1–130(s2)) and a significant net emissions increase (as defined in the Northern Sonoma County Air Pollution Control District rules at R1–1–130(n1)) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in the EPA-approved Northern Sonoma County Air Pollution Control District rules at R1–1–130(s2).

(h)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in Mendocino County Air Quality Management District's approved plan apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in the EPA-approved Mendocino County Air Quality Management District rules at R1–1–130(s2)) and a significant net emissions increase (as defined in the Mendocino County Air Quality Management District rules at R1–1–130(m1) (1982)) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in the EPA-approved Mendocino County Air Quality Management District rules at R1–1–130(s2).

Subpart G—Colorado

■ 4. Section 52.323 is revised to read as follows:

§ 52.323 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Colorado's plan for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title 1, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) the term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) the term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) the term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in paragraphs I.A.2. through I.A.3, and I.B of Part D of Colorado's Air Quality Commission's Regulation Number 3) and a significant net emissions increase (as defined in paragraphs II.A.26 and II.A.42.a of Part D of Colorado's Air Quality Commission's Regulation Number 3) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in paragraph II.A.42.b of Part D of Colorado's Air Quality Commission's Regulation Number 3.

Subpart L—Georgia

■ 5. Section 52.572 is revised to read as follows:

§ 52.572 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Georgia's plans for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in 40 CFR 52.21(a)(2)(iv) (2006) and the EPA-approved Georgia Environmental Protection Division (EPD) Rules 391–3–1–.02(7)(a)2.(I) thru (IV) (2006)) and a significant net emissions increase (as defined in 40 CFR 52.21(b)(3) and (b)(23)(i) (2006)) occur. 40 CFR 52.21 (2006) is presently incorporated by reference into Georgia's approved plan at EPA-approved Georgia EPD Rule 391–3–1–.02(7). For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in 40 CFR 52.21(b)(23)(ii).

Subpart P—Indiana

■ 6. Section 52.773 is amended by adding paragraph (k) to read as follows:

§ 52.773 Approval status.

* * * * *

(k)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (k), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (k)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (k)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (k)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the

procedures in [326 IAC–2–2–2(d) of Indiana's Administrative Code) and a significant net emissions increase (as defined in 326 IAC–2–1, paragraphs (ii) and (ww) of Indiana's Administrative Code) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in paragraph 326 IAC 2–2–1(ww)(1)(V) of Indiana's Administrative Code.

Subpart Q—Iowa

■ 7. Section 52.822 is amended by adding paragraph (b) to read as follows:

§ 52.822 Approval status.

* * * * *

(b)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in 40 CFR 52.21(a)(2)(iv)) and a significant net emissions increase (as defined in 40 CFR 52.21(b)(3) and (b)(23)(i)) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in 40 CFR 52.21(b)(23)(ii) of this section.

Subpart T—Louisiana

■ 8. Section 52.986 is amended by adding paragraph (c) to read as follows:

§ 52.986 Significant deterioration of air quality.

* * * * *

(c)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in Louisiana's approved plan apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (c), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (c)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (c)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (c)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in the EPA-approved Louisiana Administrative Code (LAC), Title 33, Part III, Chapter 5, Section 509, Subsection B) and a significant net emissions increase (as defined in LAC 33:III.509.B) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in the EPA-approved definition of "significant" at LAC 33:III.509.B.

Subpart U—Maine

■ 9. Section 52.1022 is revised to read as follows:

§ 52.1022 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Maine's plan, as identified in § 52.1020, for the attainment and maintenance of the national standards under section 110 of the Clean Air Act.

(b)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas

(GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) the term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in 06–096 1. of Chapter 100 of Maine's Bureau of Air Quality Control regulations) and a significant net emissions increase (as defined in 06–096, paragraphs 89 and 144 A of Chapter 100 of Maine's Bureau of Air Quality Control regulations) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in 06–096, paragraphs 143 and 144 D of Chapter 100 of Maine's Bureau of Air Quality Control regulations.

Subpart V—Maryland

■ 10. Section 52.1073 is amended by adding paragraph (h) to read as follows:

§ 52.1073 Approval status.

* * * * *

(h)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (h), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (h)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (h)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (h)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that a net significant emissions increase (as defined in 40 CFR part 52.21(b)(3)(i) (2000) and the EPA-approved Maryland rules at COMAR 26.11.06.14 (state effective date 10/10/2001)). For the pollutant GHGs, a net emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in 40 CFR 52.21(b)(23)(ii) (2000).

Subpart Z—Mississippi

■ 11. Section 52.1272 is revised to read as follows:

§ 52.1272 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Mississippi's plan for the attainment and maintenance of national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977.

(b)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation," as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of

this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in 40 CFR 52.21(a)(2)(iv) (2007)) and a significant net emissions increase (as defined in paragraphs 40 CFR 52.21(b)(3) and (b)(23)(i) (2007)) occur. 40 CFR 52.21 (2007) is presently incorporated by reference into Mississippi's plan at EPA-approved Mississippi Commission on Environmental Quality Rule APC–S–5. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in 40 CFR 52.21(b)(23)(ii)(2007).

Subpart AA—Missouri

■ 12. Section 52.1323 is amended by adding paragraph (n) to read as follows:

§ 52.1323 Approval status.

* * * * *

(n)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation," as provided in this paragraph (n), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (n)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (n)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (n)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in 40 CFR 52.21(a)(2)(iv)) and a significant net emissions increase (as defined in 40 CFR 52.21(b)(3) and (b)(23)(i)) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in 40 CFR 52.21(b)(23)(ii).

Subpart EE—New Hampshire

■ 13. Section 52.1522 is amended by adding paragraph (c) to read as follows:

§ 52.1522 Approval status.

* * * * *

(c)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (c), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (c)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (c)—

(i) the term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to

subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (c)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) the term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in 40 CFR 52.21(a)(2)(iv)) and a significant net emissions increase (as defined in paragraphs 40 CFR 52.21(b)(3) and (b)(23)(i)) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in 40 CFR 52.21(b)(23)(ii).

Subpart GG—New Mexico

■ 14. Section 52.1634 is amended by adding paragraphs (d) and (e) to read as follows:

§ 52.1634 Significant deterioration of air quality.

* * * * *

(d)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in New Mexico's approved plan apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) the term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) the term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in the EPA-approved New Mexico Environment Department (NMED) rules at New Mexico Administrative Code (NMAC) 20.2.74.200, Subsection D) and a significant net emissions increase (as defined in the EPA-approved NMED rules at NMAC 20.2.74.7, paragraphs (AK), (AV), and (AW)) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in the EPA-approved NMED rules at Table 2 of NMAC 20.2.74.502.

(e)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in Bernallilo County/City of Albuquerque's approved plan apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) the term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in the EPA-approved Bernallilo County/City of Albuquerque rules at NMAC 20.11.61.11, Subsection D) and a significant net emissions increase (as defined in the EPA-approved Bernanillo County/City of Albuquerque rules at NMAC 20.11.61.7, paragraphs (OO), (YY), and (ZZ)) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in the EPA-approved Bernallilo County/City of Albuquerque rules at Table 2 of NMAC 20.11.61.27.

Subpart II—North Carolina

■ 15. Section 52.1772 is amended by adding paragraph (c) to read as follows:

§ 52.1772 Approval status.

* * * * *

(c)(1) Insofar as the Prevention of Significant Deterioration (PSD)

provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (c), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (c)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (c)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (c)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that a significant net emissions increase (as defined in paragraphs 40 CFR 51.166(b)(3) (1996) and 40 CFR 51.166(b)(23)(i) (1996)) occurs. 40 CFR 51.166 (1996) is presently incorporated by reference into North Carolina's plan at EPA-approved North Carolina Rule 15A NCAC 02D–.544. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in 40 CFR 51.166(b)(23)(ii) (1996).

Subpart KK—Ohio

■ 16. Section 52.1873 is revised to read as follows:

§ 52.1873 Approval status.

(a) With the exceptions set forth in this subpart the Administrator approves Ohio's plan for the attainment and maintenance of the National Ambient Air Quality Standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plan satisfies all the requirements of Part D, Title 1 of the Clean Air Act as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by January 1, 1981 for the sources covered by CTGs between January 1978 and January 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) the term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in 3745–31–01(III)(4) of Ohio's Administrative Code) and a significant net emissions increase (as defined in paragraphs 3745–31–01, paragraphs (SSS) and (LLLLL)(1) of Ohio's Administrative Code) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in paragraph 3745–31–01(LLLLL)(2) of Ohio's Administrative Code.

Subpart LL—Oklahoma

■ 17. Section 52.1929 is amended by adding paragraph (c) to read as follows:

§ 52.1929 Significant deterioration of air quality.

* * * * *

(c)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in Oklahoma's approved plan apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the

Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) the term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) the term emissions increase shall mean that both a significant emissions increase (as calculated using EPA-approved procedures in Oklahoma Air Pollution Control Regulation 1.4.4(b)) and a significant net emissions increase (as defined in the EPA-approved Oklahoma Air Pollution Control Regulation 1.4.4(b)(3) and (22), definitions for "net emissions increase" and "significant) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in 1.4.4(b)(22) of the EPA-approved definition for "significant" of Oklahoma's Air Pollution Control Regulations.

Subpart OO—Rhode Island

■ 18. Section 52.2072 is revised to read as follows:

§ 52.2072 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Rhode Island's plan, as identified in § 52.2070 of this subpart, for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plan satisfies all requirements of Part D, Title I, of the Clean Air Act, as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by January 1, 1981 for the sources covered by CTGs issued between January 1978 and January 1979 and adoption and submittal by each subsequent January as additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) the term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) the term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in 9.1.1 of Rhode Island's Air Pollution Control Regulation No. 9) and a significant net emissions increase (as defined in 9.1.24 and 9.1.34 of Rhode Island's Air Pollution Control Regulation No. 9) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value for "any other pollutant" in 9.1.34 of Rhode Island's Air Pollution Control Regulation No. 9.

Subpart PP—South Carolina

■ 19. Section 52.2122 is amended by adding paragraph (c) to read as follows:

§ 52.2122 Approval status.

* * * * *

(c)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (c), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (c)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (c)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (c)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in South Carolina Air Pollution Control Regulations and Standards (South Carolina Regulations) 61–62.5, Standard No. 7, paragraph (a)(2)(iv)) and a significant net emissions increase (as defined in South Carolina Air Pollution Control Regulations and Standards (South Carolina Regulations) 61–62.5, Standard No. 7, paragraphs (b)(34) and (b)(49)(i)) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in South Carolina Air Pollution Control Regulations and Standards (South Carolina Regulations) 61–62.5, Standard No. 7, paragraph (b)(49)(ii).

Subpart QQ—South Dakota

■ 20. Section 52.2172 is revised to read as follows:

§ 52.2172 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves South Dakota's plan as meeting the requirements of section 110 of the Clean Air Act, as amended in 1977. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D of the Clean Air Act, as amended in 1977.

(b)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in 40 CFR 52.21(a)(2)(iv)) and a significant net emissions increase (as defined in paragraphs 40 CFR 52.21(b)(3) and (b)(23)(i)) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in 40 CFR 52.21(b)(23)(ii).

Subpart RR—Tennessee

■ 21. Section 52.2222 is amended by adding paragraph (d) to read as follows:

§ 52.2222 Approval status.

* * * * *

(d)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (d), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (d)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (d)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (d)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in Tennessee Air Pollution Control Regulation 1200–03–09–.01(4)(c)(4) and a significant net emissions increase (as defined in Tennessee Air Pollution Control Regulation 1200–03–09–.01, paragraphs (4)(b)(4) and (4)(b)(24)(i)) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in Tennessee Air Pollution Control Regulation 1200–03–09–.01, paragraph (4)(b)(24)(ii).

Subpart TT—Utah

■ 22. Section 52.2323 is revised to read as follows:

§ 52.2323 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Utah's plan as meeting the requirements of section 110 of the Clean Air Act as amended in 1977. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title 1, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) the term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in 40 CFR 52.21(a)(2)(iv)) and a significant net emissions increase (as defined in paragraphs 40 CFR 52.21(b)(3) and (b)(23)(i)) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in 40 CFR 52.21(b)(23)(ii).

Subpart UU—Vermont

■ 23. Section 52.2372 is revised to read as follows:

§ 52.2372 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Vermont's plan as identified in § 52.2370 for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act, as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by July 1, 1980 for the sources covered by CTGs issued between January, 1978 and January, 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in the definitions for "actual emissions" and "allowable emissions" under section 5–101 of Chapter 5, subchapter I of Vermont's Air Pollution Control Environmental Protection regulations) and a significant net emissions increase (as defined in the definitions for "significant" under section 5–101 of Chapter 5, subchapter I of Vermont's Air Pollution Control Environmental Protection regulations) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in the definition of "major modification" under section 5–101 of Chapter 5, subchapter I of Vermont's Air Pollution Control Environmental Protection regulations.

Subpart VV—Virginia

■ 24. Section 52.2423 is amended by adding paragraph (t) to read as follows:

§ 52.2423 Approval status.

* * * * *

(t)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (t), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (t)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (t)—

(i) the term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (t)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in 9 VAC 5–80–1605 G of the Commonwealth of Virginia's Administrative Code) and a significant net emissions increase (as defined in the definitions for "net emissions increase," "significant" subparagraph a., and "significant emissions increase" under 9 VAC 5–80–1605 C of the Commonwealth of Virginia's Administrative Code) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value specified in the definition for "significant" subparagraph b. under 9 VAC 5–80–1605 C of the Commonwealth of Virginia's Administrative Code.

Subpart YY—Wisconsin

■ 25. Section 52.2572 is revised to read as follows:

§ 52.2572 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Wisconsin's plans for the attainment and maintenance of the National Ambient Air Quality Standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D for the Ozone portion of the State Implementation Plan depends on the adoption and submittal of RACT requirements on:

(1) Group III Control Techniques Guideline sources within 1 year after January 1st following the issuance of each Group III control technique guideline; and

(2) Major (actual emissions equal or greater than 100 tons VOC per year) non-control technique guideline sources in accordance with the State's schedule contained in the 1982 Ozone SIP revision for Southeastern Wisconsin.

(b)(1) Insofar as the Prevention of Significant Deterioration (PSD) provisions found in this subpart apply to stationary sources of greenhouse gas (GHGs) emissions, the Administrator approves that application only to the extent that GHGs are "subject to regulation", as provided in this paragraph (b), and the Administrator takes no action on that application to the extent that GHGs are not "subject to regulation."

(2) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(i) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(ii) The stationary source is an existing major stationary source for a

regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(3) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(2) of this section, the pollutant GHGs shall also be subject to regulation:

(i) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(ii) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(4) For purposes of this paragraph (b)—

(i) The term greenhouse gas shall mean the air pollutant defined in 40 CFR 86.1818–12(a) as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(ii) The term tpy CO_2 equivalent emissions (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(A) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials.

(B) Sum the resultant value from paragraph (b)(4)(ii)(A) of this section for each gas to compute a tpy CO_2e.

(iii) The term emissions increase shall mean that both a significant emissions increase (as calculated using the procedures in NR 405.025 of Wisconsin's Administrative Code) and a significant net emissions increase (as defined in NR 405.02, paragraphs (24), (27)(a), and (27m) of Wisconsin's Administrative Code) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in NR 405.02(27)(c) of Wisconsin's Administrative Code.

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Federal Register

Thursday,
December 30, 2010

Part VI

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Chapter 1; Parts 1, 4, 12, et al. Federal Acquisition Regulations; Summary Presentation of Rules and Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2010–0076, Sequence 10]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–48; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by DOD, GSA, and NASA in this Federal Acquisition Circular (FAC) 2005–48. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.regulations.gov.*

DATES: For effective dates see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005–48 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755.

LIST OF RULES IN FAC 2005–48

Item	Subject	FAR Case	Analyst
I	Repeal of the Small Business Competitiveness Demonstration Program	2011–005	Morgan.
II	Personal Identity Verification of Contractor Personnel	2009–027	Jackson.
III	Terminating Contracts	2009–031	Parnell.
IV	Payrolls and Basic Records	2009–018	McFadden.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries. FAC 2005–48 amends the FAR as specified below:

Item I—Repeal of the Small Business Competitiveness Demonstration Program (FAR Case 2011–005)

This final rule amends the FAR to remove FAR subpart 19.10, Small Business Competitiveness Demonstration Program. This change is necessary to address the requirements of section 1335 of the Small Business Jobs Act of 2010 (Pub. L. 111–240) which repealed the Small Business Competitiveness Demonstration Program.

This final rule also removes the following clauses: FAR 52.219–19, Small Business Concern Representation for the Small Business Competitiveness Demonstration Program; FAR 52.219–20, Notice of Emerging Small Business Set-Aside; and FAR 52.219–21, Small Business Size Representation for Targeted Industry Categories under the Small Business Competitiveness Demonstration Program.

Item II—Personal Identity Verification of Contractor Personnel (FAR Case 2009–027)

This final rule amends the FAR to provide additional regulatory coverage in subpart 4.13 and in FAR clause 52.204–9 to reinforce the requirement of collecting from contractors all forms of Government-provided identification once they are no longer needed to support a contract. The contracting officer may delay final payment under a contract if the contractor fails to comply with these requirements.

Item III— Terminating Contracts (FAR Case 2009–031)

This final rule amends the FAR to clarify procedures regarding the applicability of FAR part 49, Termination of Contracts, to commercial item contracts. Minor changes are made to the proposed rule published in the **Federal Register** at 75 FR 28228 on May 20, 2010.

The rule specifically impacts contracting officers and contractors by clarifying that FAR part 49 does not apply to the acquisition of commercial items when using procedures at FAR part 12. The rule does not have a significant economic impact on small entities because the rule does not impose any additional requirements on small businesses.

Item IV— Payrolls and Basic Records (FAR Case 2009–018)

This rule adopts as final, with a minor change, the interim rule published in the **Federal Register** at 75 FR 34286 on June 16, 2010. The interim rule amended the FAR at 52.222–8, Payrolls and Basic Records to delete the requirement for submission of full social security numbers and home addresses of individual workers on weekly payroll transmittals by prime contractors. The rule requires contractors and subcontractors to maintain the full social security number and current address of each covered worker, and provide them upon request to the contracting officer, the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. The rule recognizes the Department of Labor's finding that complete social security numbers and home addresses for individual workers are personal information to the worker and that any unnecessary disclosure and submittal of such information creates an exposure to identity theft and the invasion of privacy for workers.

Dated: December 22, 2010.

Millisa Gary,

Acting Director, Federal Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005–48 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–48 is effective December 30, 2010, except for Items I, II, and III which are effective January 31, 2011.

Dated: December 22, 2010.

Shay D. Assad,

Director, Defense Procurement and Acquisition Policy.

Dated: December 22, 2010.

Joseph A. Neurauter,

Deputy Associate Administrator and Senior Procurement Executive, Office of General Services Acquisition Policy, Integrity, and Workforce, U.S. General Services Administration.

Dated: December 21, 2010.

Sheryl J. Goddard,

Acting Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 2010–32901 Filed 12–29–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 12, 19, 22, 52, and 53

[FAC 2005–48; FAR Case 2011–005; Item I; Docket 2010–0112, Sequence 1]

RIN 9000–AL87

Federal Acquisition Regulation; Repeal of the Small Business Competitiveness Demonstration Program

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to remove FAR coverage of the Small Business Competitiveness Demonstration Program, to meet the requirements of section 1335 of the Small Business Jobs Act of 2010.

DATES: *Effective Date:* January 31, 2011.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Karlos Morgan, Procurement Analyst, at (202) 501–2364. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–48, FAR Case 2011–005.

SUPPLEMENTARY INFORMATION:

I. Background

This final rule amends the FAR to delete subpart 19.10 to meet the requirements of section 1335 of the Small Business Jobs Act of 2010 (Pub. L. 111–240), referred to as the Act. Section 1335 of the Act amended the Business Opportunity Development Reform Act of 1988 (Pub. L. 100–656) by striking Title VII (15 U.S.C. 644 note), the Small Business Competitiveness Demonstration Program. In accordance with the Act, the repeal of the Small Business Competitiveness Demonstration Program became immediately effective upon the enactment of the Act and it will apply to the first full fiscal year after the September 27, 2010, date of enactment. This change will remove the policy, procedures, provisions, clauses, and the information collection and recordkeeping requirements associated with the Small Business Competitiveness Demonstration Program, and will update forms deleting any references to the program.

II. Executive Order 12866

This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501–3(a) and 41 U.S.C. 418b, and publication for public comments is not required.

IV. Paperwork Reduction Act

The final rule removes the information collection requirements associated with the Small Business Competitiveness Demonstration Program under OMB Clearance 9000–0100, and does not contain any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35.

List of Subjects in 48 CFR Parts 1, 4, 12, 19, 22, 52, and 53

Government procurement.

Dated: December 22, 2010.

Millisa Gary,

Acting Director, Federal Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 4, 12, 19, 22, 52, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 4, 12, 19, 22, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106, in the table following the introductory paragraph, by removing FAR segments 52.219–19, 52.219–20, and 52.219–21, and their corresponding OMB Control Number 9000–0100.

PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.603 by revising paragraph (b) to read as follows:

4.603 Policy.

* * * * *

(b) Executive agencies shall use FPDS to maintain publicly available information about all contract actions exceeding the micro-purchase threshold, and any modifications to those actions that change previously reported contract action report data, regardless of dollar value.

* * * * *

4.606 [Amended]

■ 4. Amend section 4.606 by removing paragraph (a)(2); and redesignating paragraphs (a)(3) and (a)(4) as paragraphs (a)(2) and (a)(3), respectively.

4.1202 [Amended]

■ 5. Amend section 4.1202 by removing paragraphs (k) and (l); and redesignating paragraphs (m) through (ee) as paragraphs (k) through (cc), respectively.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.303 [Amended]

■ 6. Amend section 12.303 by removing from the end of paragraph (b)(1) ", or if set aside for emerging small businesses".

12.603 [Amended]

■ 7. Amend section 12.603 by removing the second sentence of paragraph (c)(2)(iv).

PART 19—SMALL BUSINESS PROGRAMS

19.304 [Amended]

■ 8. Amend section 19.304 by removing from the first sentence in the introductory text in paragraph (c) "52.212–3(c)(9)" and adding "52.212–3(c)(8)" in its place.

■ 9. Amend section 19.502–2 by revising the last sentence in paragraph (a); and by removing paragraph (d).

The revised text reads as follows:

19.502–2 Total small business set-asides.

(a) * * * The small business reservation does not preclude the award of a contract with a value not greater than $150,000 under subpart 19.8, Contracting with the Small Business Administration, or under 19.1305, HUBZone set-aside procedures.

* * * * *

Subpart 19.10—[Removed and Reserved]

■ 10. Remove and reserve subpart 19.10.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1006 [Amended]

■ 11. Amend section 22.1006 by—

■ a. Removing from paragraph (a)(2)(i)(C) "52.204–8(c)(2)(v) or (vi)" and adding "52.204–8(c)(2)(iii) or (iv)" in its place;

■ b. Removing from paragraph (e)(2)(i) "52.204–8(c)(2)(v)" and adding "52.204–8(c)(2)(iii)" in its place; and

■ c. Removing from paragraph (e)(4)(i) "52.204–8(c)(2)(vi)" and adding "52.204–8(c)(2)(iv)" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.204–8 [Amended]

■ 12. Amend section 52.204–8 by—

■ a. Removing from the date of the provision "Oct 2010" and adding "(JAN 2011)" in its place;

■ b. Removing paragraphs (c)(2)(i) and (c)(2)(ii); and

■ c. Redesignating paragraphs (c)(2)(iii) through (c)(2)(x) as paragraphs (c)(2)(i) through (c)(2)(viii), respectively.

52.212–3 [Amended]

■ 13. Amend section 52.212–3 by—

■ a. Removing from the date of the provision "Oct 2010" and adding "(JAN 2011)" in its place;

■ b. Removing from paragraph (a), the definition "Emerging small business";

■ c. Removing paragraph (c)(8); and

■ d. Redesignating paragraphs (c)(9) and (c)(10) as paragraphs (c)(8) and (c)(9), respectively.

52.219–19 through 52.219–21 [Removed and Reserved]

■ 14. Remove and reserve sections 52.219–19 through 52.219–21.

PART 53—FORMS

53.212 [Amended]

■ 15. Amend section 53.212 by removing "SF 1449, (Rev. 3/2005)" and adding "SF 1449, (Rev. 10/2010)" in its place.

53.213 [Amended]

■ 16. Amend section 53.213 by removing from paragraphs (a) and (f) "SF 1449, (Rev. 3/2005)" and adding "SF 1449, (Rev. 10/2010)", respectively, in its place; and by removing from paragraph (f) "OF 347 (Rev. 4/06)" and adding "OF 347, (Rev. 10/2010)" in its place.

53.214 [Amended]

■ 17. Amend section 53.214 by removing from paragraph (d) "SF 1447 (APR 2008)" and adding "SF 1447 (Rev. 11/2010)" in its place.

53.236–1 [Amended]

■ 18. Amend section 53.236–1 by removing from paragraph (e) "OF 347 (Rev. 03/2005)" and adding "OF 347, (Rev. 10/2010)" in its place.

■ 19. Amend section 53.301–1447 by revising the form to read as follows:

53.301–1447 Solicitation/Contract.

BILLING CODE 6820–EP–P

SOLICITATION/CONTRACT
BIDDER/OFFEROR TO COMPLETE BLOCKS 11, 13, 15, 21, 22, & 27

1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)	RATING	PAGE OF

2. CONTRACT NO.	3. AWARD/EFFECTIVE DATE	4. SOLICITATION NUMBER	5. SOLICITATION TYPE	6. SOLICITATION ISSUE DATE
			☐ SEALED BIDS (IFB) ☐ NEGOTIATED (RFP)	

7. ISSUED BY CODE

NO COLLECT CALLS

8. THIS ACQUISITION IS
☐ UNRESTRICTED OR ☐ SET ASIDE: % FOR:
☐ SMALL BUSINESS
☐ HUBZONE SMALL BUSINESS
NAICS:
SIZE STANDARD:
☐ SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS ☐ 8(A)

9. (AGENCY USE)

10. ITEMS TO BE PURCHASED *(BRIEF DESCRIPTION)*
☐ SUPPLIES ☐ SERVICES

11. IF OFFER IS ACCEPTED BY THE GOVERNMENT WITHIN _____
CALENDAR DAYS (60 CALENDAR DAYS UNLESS OFFEROR INSERTS A DIFFERENT PERIOD) FROM THE DATE SET FORTH IN BLOCK 9 ABOVE, THE CONTRACTOR AGREES TO HOLD ITS OFFERED PRICES FIRM FOR THE ITEMS SOLICITED HEREIN AND TO ACCEPT ANY RESULTING CONTRACT SUBJECT TO THE TERMS AND CONDITIONS STATED HEREIN.

12. ADMINISTERED BY CODE

13. CONTRACTOR OFFEROR CODE FACILITY CODE

14. PAYMENT WILL BE MADE BY CODE

TELEPHONE NUMBER _____ DUNS NUMBER _____
☐ CHECK IF REMITTANCE IS DIFFERENT AND PUT SUCH ADDRESS IN OFFER

SUBMIT INVOICES TO ADDRESS SHOWN IN BLOCK:

15. PROMPT PAYMENT DISCOUNT

16. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION ☐ 10 U.S.C. 2304 ( ) ☐ 41 U.S.C. 253 ( )

17. ITEM NO.	18. SCHEDULE OF SUPPLIES/SERVICES	19. QUANTITY	20. UNIT	21. UNIT PRICE	22. AMOUNT

23. ACCOUNTING AND APPROPRIATION DATA

24. TOTAL AWARD AMOUNT *(FOR GOVERNMENT USE ONLY)*

25. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN _____ COPIES TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY CONTINUATION SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED HEREIN.

26. AWARD OF CONTRACT: YOUR OFFER ON SOLICITATION NUMBER SHOWN IN BLOCK 4 INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN, IS ACCEPTED AS TO ITEMS:

27. SIGNATURE OF OFFEROR/CONTRACTOR

28. UNITED STATES OF AMERICA *(SIGNATURE OF CONTRACTING OFFICER)*

NAME AND TITLE OF SIGNER *(TYPE OR PRINT)*	DATE SIGNED	NAME OF CONTRACTING OFFICER	DATE SIGNED

AUTHORIZED FOR LOCAL REPRODUCTION
PREVIOUS EDITION NOT USABLE

STANDARD FORM 1447 (REV. 11/2010)
Prescribed by GSA - FAR (48 CFR) 53.214(d)

NO RESPONSE FOR REASONS CHECKED			
	CANNOT COMPLY WITH SPECIFICATIONS		CANNOT MEET DELIVERY REQUIREMENT
	UNABLE TO IDENTIFY THE ITEM(S)		DO NOT REGULARLY MANUFACTURE OR SELL THE TYPE OF ITEMS INVOLVED
	OTHER *(Specify)*		
	WE DO		WE DO NOT, DESIRE TO BE RETAINED ON THE MAILING LIST FOR FUTURE PROCUREMENT OF THE TYPE OF ITEMS INVOLVED

NAME AND ADDRESS OF FIRM *(Include Zip Code)*	SIGNATURE
	TYPE OR PRINT NAME AND TITLE OF SIGNER

FROM:

AFFIX
STAMP
HERE

TO:

SOLICITATION NO. _____

DATE AND LOCAL TIME _____

STANDARD FORM 1447 (REV. 11/2010) **BACK**

■ 20. Amend section 53.301–1449 by revising the form to read as follows:

53.301–1449 Solicitation/Contract/Order for Commercial Items.

SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS
OFFEROR TO COMPLETE BLOCKS 12, 17, 23, 24, & 30

1. REQUISITION NUMBER	PAGE 1 OF

2. CONTRACT NO.	3. AWARD/EFFECTIVE DATE	4. ORDER NUMBER	5. SOLICITATION NUMBER	6. SOLICITATION ISSUE DATE

7. FOR SOLICITATION INFORMATION CALL:	a. NAME	b. TELEPHONE NUMBER *(No collect calls)*	8. OFFER DUE DATE/ LOCAL TIME

9. ISSUED BY	CODE	10. THIS ACQUISITION IS ☐ UNRESTRICTED OR ☐ SET ASIDE: ____ % FOR: ☐ SMALL BUSINESS NAICS: ☐ HUBZONE SMALL BUSINESS SIZE STANDARD: ☐ SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS ☐ 8 (A)

11. DELIVERY FOR FOB DESTINATION UNLESS BLOCK IS MARKED ☐ SEE SCHEDULE	12. DISCOUNT TERMS	☐ 13a. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)	13b. RATING 14. METHOD OF SOLICITATION ☐ RFQ ☐ IFB ☐ RFP

15. DELIVER TO	CODE	16. ADMINISTERED BY	CODE

17a. CONTRACTOR/ OFFEROR CODE	FACILITY CODE	18a. PAYMENT WILL BE MADE BY	CODE
TELEPHONE NO.			

☐ 17b. CHECK IF REMITTANCE IS DIFFERENT AND PUT SUCH ADDRESS IN OFFER

18b. SUBMIT INVOICES TO ADDRESS SHOWN IN BLOCK 18a UNLESS BLOCK BELOW IS CHECKED ☐ SEE ADDENDUM

19. ITEM NO.	20. SCHEDULE OF SUPPLIES/SERVICES	21. QUANTITY	22. UNIT	23. UNIT PRICE	24. AMOUNT
	(Use Reverse and/or Attach Additional Sheets as Necessary)				

25. ACCOUNTING AND APPROPRIATION DATA	26. TOTAL AWARD AMOUNT *(For Govt. Use Only)*

☐ 27a. SOLICITATION INCORPORATES BY REFERENCE FAR 52.212-1, 52.212-4. FAR 52.212-3 AND 52.212-5 ARE ATTACHED. ADDENDA ☐ ARE ☐ ARE NOT ATTACHED

☐ 27b. CONTRACT/PURCHASE ORDER INCORPORATES BY REFERENCE FAR 52.212-4. FAR 52.212-5 IS ATTACHED. ADDENDA ☐ ARE ☐ ARE NOT ATTACHED

☐ 28. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN ____ COPIES TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY ADDITIONAL SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED

☐ 29. AWARD OF CONTRACT: REF. _____ OFFER DATED _____. YOUR OFFER ON SOLICITATION (BLOCK 5), INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN, IS ACCEPTED AS TO ITEMS:

30a. SIGNATURE OF OFFEROR/CONTRACTOR		31a. UNITED STATES OF AMERICA *(SIGNATURE OF CONTRACTING OFFICER)*	
30b. NAME AND TITLE OF SIGNER *(Type or print)*	30c. DATE SIGNED	31b. NAME OF CONTRACTING OFFICER *(Type or print)*	31c. DATE SIGNED

AUTHORIZED FOR LOCAL REPRODUCTION
PREVIOUS EDITION IS NOT USABLE

STANDARD FORM 1449 (REV. 10/2010)
Prescribed by GSA - FAR (48 CFR) 53.212

19. ITEM NO.	20. SCHEDULE OF SUPPLIES/SERVICES	21. QUANTITY	22. UNIT	23. UNIT PRICE	24. AMOUNT

32a. QUANTITY IN COLUMN 21 HAS BEEN

☐ RECEIVED ☐ INSPECTED ☐ ACCEPTED, AND CONFORMS TO THE CONTRACT, EXCEPT AS NOTED: _____

32b. SIGNATURE OF AUTHORIZED GOVERNMENT REPRESENTATIVE	32c. DATE	32d. PRINTED NAME AND TITLE OF AUTHORIZED GOVERNMENT REPRESENTATIVE

32e. MAILING ADDRESS OF AUTHORIZED GOVERNMENT REPRESENTATIVE	32f. TELPHONE NUMBER OF AUTHORZED GOVERNMENT REPRESENTATIVE
	32g. E-MAIL OF AUTHORIZED GOVERNMENT REPRESENTATIVE

33. SHIP NUMBER ☐ PARTIAL ☐ FINAL	34. VOUCHER NUMBER	35. AMOUNT VERIFIED CORRECT FOR	36. PAYMENT ☐ COMPLETE ☐ PARTIAL ☐ FINAL	37. CHECK NUMBER

38. S/R ACCOUNT NO.	39. S/R VOUCHER NUMBER	40. PAID BY

41a. I CERTIFY THIS ACCOUNT IS CORRECT AND PROPER FOR PAYMENT		42a. RECEIVED BY *(Print)*	
41b. SIGNATURE AND TITLE OF CERTIFYING OFFICER	41c. DATE	42b. RECEIVED AT *(Location)*	
		42c. DATE REC'D *(YY/MM/DD)*	42d. TOTAL CONTAINERS

STANDARD FORM 1449 (REV. 10/2010) **BACK**

■ 21. Amend section 53.302–347 by revising the form to read as follows:

53.302–347 Order for Supplies or Services.

ORDER FOR SUPPLIES OR SERVICES

PAGE OF PAGES

IMPORTANT: Mark all packages and papers with contract and/or order numbers.

1. DATE OF ORDER	2. CONTRACT NO. *(If any)*
3. ORDER NO.	4. REQUISITION/REFERENCE NO.
5. ISSUING OFFICE *(Address correspondence to)*	
7. TO:	
a. NAME OF CONTRACTOR	
b. COMPANY NAME	
c. STREET ADDRESS	
d. CITY / e. STATE / f. ZIP CODE	
9. ACCOUNTING AND APPROPRIATION DATA	

6. SHIP TO:

a. NAME OF CONSIGNEE

b. STREET ADDRESS

c. CITY / d. STATE / e. ZIP CODE

f. SHIP VIA

8. TYPE OF ORDER

☐ a. PURCHASE

REFERENCE YOUR: _____

Please furnish the following on the terms and conditions specified on both sides of this order and on the attached sheet, if any, including delivery as indicated.

☐ b. DELIVERY – Except for billing instructions on the reverse, this delivery order is subject to instructions contained on this side only of this form and is issued subject to the terms and conditions of the above-numbered contract.

10. REQUISITIONING OFFICE

11. BUSINESS CLASSIFICATION *(Check appropriate box(es))*

☐ a. SMALL ☐ b. OTHER THAN SMALL ☐ c. DISADVANTAGED

☐ d. WOMEN-OWNED ☐ e. HUBZone ☐ f. SERVICE-DISABLED VETERAN-OWNED

12. F.O.B. POINT

13. PLACE OF		14. GOVERNMENT B/L NO.	15. DELIVER TO F.O.B. POINT ON OR BEFORE *(Date)*	16. DISCOUNT TERMS
a. INSPECTION	b. ACCEPTANCE			

17. SCHEDULE *(See reverse for Rejections)*

ITEM NO. (a)	SUPPLIES OR SERVICES (b)	QUANTITY ORDERED (c)	UNIT (d)	UNIT PRICE (e)	AMOUNT (f)	QUANTITY ACCEPTED (g)

SEE BILLING INSTRUCTIONS ON REVERSE

18. SHIPPING POINT	19. GROSS SHIPPING WEIGHT	20. INVOICE NO.

21. MAIL INVOICE TO:

a. NAME

b. STREET ADDRESS *(or P.O. Box)*

c. CITY / d. STATE / e. ZIP CODE

17(h) TOT. *(Cont. pages)*

$

17(i) GRAND TOTAL

22. UNITED STATES OF AMERICA BY *(Signature)* ▷

23. NAME *(Typed)*

TITLE: CONTRACTING/ORDERING OFFICER

AUTHORIZED FOR LOCAL REPRODUCTION
PREVIOUS EDITION NOT USABLE

OPTIONAL FORM 347 (REV. 10/2010)
Prescribed by GSA/FAR 48 CFR 53.213(f)

SUPPLEMENTAL INVOICING INFORMATION

If desired, this order (or a copy thereof) may be used by the Contractor as the Contractor's invoice, instead of a separate invoice, provided the following statement, (signed and dated) is on (or attached to) the order: "Payment is requested in the amount of $ _____ . No other invoice will be submitted." However, if the Contractor wishes to submit an invoice, the following information must be provided: contract number (if any), order number, item number(s), description of supplies or service, sizes, quantities, unit prices, and extended totals. Prepaid shipping costs will be indicated as a separate item on the invoice. Where shipping costs exceed $10 (except for parcel post), the billing must be supported by a bill of lading or receipt. When several orders are invoiced to an ordering activity during the same billing period, consolidated periodic billings are encouraged.

RECEIVING REPORT

Quantity in the "Quantity Accepted" column on the face of this order has been: ☐ inspected, ☐ accepted, ☐ received by me and conforms to contract. Items listed below have been rejected for the reasons indicated.

SHIPMENT NUMBER	PARTIAL		DATE RECEIVED	SIGNATURE OF AUTHORIZED U.S. GOV'T REP.	DATE
	FINAL				
TOTAL CONTAINERS		GROSS WEIGHT	RECEIVED AT	TITLE	

REPORT OF REJECTIONS

ITEM NO.	SUPPLIES OR SERVICES	UNIT	QUANTITY REJECTED	REASON FOR REJECTION

OPTIONAL FORM 347 (REV. 10/2010) **BACK**

[FR Doc. 2010–32900 Filed 12–29–10; 8:45 am]

BILLING CODE

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4 and 52

[FAC 2005–48; FAR Case 2009–027; Item II; Docket 2010–0091, Sequence 1]

RIN 9000–AL60

Federal Acquisition Regulation; Personal Identity Verification of Contractor Personnel

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to provide additional regulatory coverage to reinforce the requirement of collecting from contractors all forms of Government-provided identification once they are no longer needed to support a contract.

DATES: *Effective Date:* January 31, 2011.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Michael Jackson, Procurement Analyst, at (202) 208–4949. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–48, FAR Case 2009–027.

SUPPLEMENTARY INFORMATION:

I. Background

DoD Inspector General Audit Report No. D–2009–005, entitled "Controls Over the Contractor Common Access Card Life Cycle," addressed whether Government controls over contractor Common Access Cards (CAC) were in place and worked as intended. A "CAC" is the DoD term for a Personal Identity Verification (PIV) card. A PIV card is required in order to gain access to a Federal facility. The most prevalent issue of the audit report, and the one that DoD, GSA, and NASA are undertaking to resolve with this case, was that the CACs were not adequately accounted for after contract performance or completion.

DoD, GSA, and NASA are amending the FAR by inserting new paragraphs (d)(1) and (d)(2) under FAR 4.1301, Policy. Paragraph (d)(1) provides policy on recovering PIVs. Paragraph (d)(1) requires that agency procedures ensure that Government contractors account for all forms of Government-provided identification issued to Government contractors under a contract, and return such identification to the issuing agency at the earliest of any of the following, unless otherwise determined by the agency: When no longer needed for contract performance; upon completion of a contractor employee's employment; or upon contract completion or termination. Paragraph (d)(2) authorizes the contracting officer to delay final payment under a contract if the contractor fails to comply with these requirements.

DoD, GSA, and NASA are also modifying FAR clause 52.204–9, Personal Identity Verification of Contractor Personnel, to be consistent with FAR part 4.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 75 FR 28771 on May 24, 2010. Three respondents submitted four comments on the proposed rule, which are addressed below.

Although none of the public comments received caused a change in the FAR text, the FAR text is changed in the final rule as follows:

- FAR 4.1301(d)(1) is revised to clarify that this section applies to agency procedures related to PIV card return.
- FAR 4.1301(d)(1) and 52.204–9(b) are revised to clarify that the rule applies when PIV cards are issued to contractor employees.
- FAR 52.204–9(d) is revised to clarify that the rule flows down to all subcontractor employees when they are required to have access to a Federally-controlled facility and/or routine access to a Federally-controlled information system.
- FAR 52.204–9(d) is also revised to clarify that the prime contractor is responsible for returning all subcontractor PIV cards that have been issued by an agency.

II. Discussion of Public Comments

A. Lost Cards

Comment: Two respondents stated that they have concerns over what happens when a contractor claims to have lost an identity card and therefore cannot return it.

Response: Each agency will establish policies for control of PIV cards. Some agencies, for example, may replace a lost card once, but costs for replacement of any subsequent lost PIV cards may be borne by the contractor. The respondent may be voicing concern that there is a potential for misuse and fraud with lost cards. DoD, GSA, and NASA recommend that agencies program the PIV cards to become inactive if they have not been used after a prolonged period of time.

B. Timing

Comment: Another respondent expressed concern with waiting until the closeout period instead of taking care of the PIV cards at contract completion.

Response: The FAR rule does not authorize waiting until the closeout period, but instead requires the contractor to take action as its employees leave, and again at contract completion. If the contractor fails to take action as its employees leave or at contract completion and the contracting officer does not follow up, then the contracting officer must reconcile the matter at contract closeout.

C. Contractor Involvement in Issuance Process

Comment: Another respondent stated that contractor companies are not typically involved in the PIV card issuance process. Further, contractor responsibility for PIV card retrieval could be improved through involving the contractor/subcontractor in the PIV card issuance process.

Response: The Defense Acquisition Regulation Council and the Civilian Agency Acquisition Council agree that PIV card retrieval could be improved if the contractor was notified when an employee is issued a PIV card. DoD, GSA, and NASA recommend that agencies amend their PIV card procedures, if they are not doing so already, to notify the contractor company when an agency issues a PIV card to a contractor employee. In addition, the rule has been revised to state that the prime contractor is responsible for the return of all PIV cards that have been issued to the subcontractor's employees by the agency.

D. Withholding Payment

Comment: The same respondent had concerns about how long the Government may withhold payment for non-compliance. The respondent stated that the period of time that final payment may be delayed should be specified, *e.g.,* "not to exceed 30 days" or "pending satisfactory resolution of the non-compliance."

Response: It would be unwise to state a specific date such as "not to exceed 30 days" because the contractor may need a longer time to return the PIV card. Adding language like "pending satisfactory resolution of the non-compliance" is superfluous, as it is a given that the Government would only

hold final payment until the non-compliance has been resolved.

III. Executive Order 12866

This is not a significant regulatory action and, therefore, is not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the requirements of the actions required and the clause are not significantly burdensome. Currently, it is a common business practice to have procedures in place to revoke and return PIV cards when no longer in use by the contractor.

V. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35.

List of Subjects in 48 CFR Parts 4 and 52

Government procurement.

Dated: December 22, 2010.

Millisa Gary,

Acting Director, Federal Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 4 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4–ADMINISTRATIVE MATTERS

■ 2. Amend section 4.1301 by adding paragraph (d) to read as follows:

4.1301 Policy.

* * * * *

(d)(1) Agency procedures for the return of Personal Identity Verification (PIV) products shall ensure that Government contractors account for all forms of Government-provided identification issued to Government contractor employees under a contract, *i.e.,* the PIV cards or other similar badges, and shall ensure that contractors return such identification to the issuing agency as soon as any of the following occurs, unless otherwise determined by the agency:

(i) When no longer needed for contract performance.

(ii) Upon completion of a contractor employee's employment.

(iii) Upon contract completion or termination.

(2) The contracting officer may delay final payment under a contract if the contractor fails to comply with these requirements.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 52.204–9 by revising the date of the clause; redesignating paragraph (b) as paragraph (d); adding a new paragraph (b); adding paragraph (c); and revising newly redesignated paragraph (d) to read as follows:

52.204–9 Personal Identity Verification of Contractor Personnel.

* * * * *

Personal Identity Verification of Contractor Personnel (JAN 2011)

* * * * *

(b) The Contractor shall account for all forms of Government-provided identification issued to the Contractor employees in connection with performance under this contract. The Contractor shall return such identification to the issuing agency at the earliest of any of the following, unless otherwise determined by the Government:

(1) When no longer needed for contract performance.

(2) Upon completion of the Contractor employee's employment.

(3) Upon contract completion or termination.

(c) The Contracting Officer may delay final payment under a contract if the Contractor fails to comply with these requirements.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts when the subcontractor's employees are required to have routine physical access to a Federally-controlled facility and/or routine access to a Federally-controlled information system. It shall be the responsibility of the prime Contractor to return such identification to the issuing agency in accordance with the terms set forth in paragraph (b) of this section, unless otherwise approved in writing by the Contracting Officer.

(End of Clause)

[FR Doc. 2010–32895 Filed 12–29–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 49

[FAC 2005–48; FAR Case 2009–031; Item III; Docket 2010–0090, Sequence 1]

RIN 9000–AL56

Federal Acquisition Regulation; Terminating Contracts

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to clarify the applicability of procedures regarding the termination of contracts to the acquisition of commercial items.

DATES: *Effective Date:* January 31, 2011.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Jeritta Parnell, at (202) 501–4082. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–48, FAR Case 2009–031.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule with request for comments in the **Federal Register** on May 20, 2010 (75 FR 28228). This rule clarifies that FAR part 49, Termination of Contracts, does not apply to the acquisition of commercial items when using FAR part 12 procedures.

Discussion of Public Comments

One respondent provided two comments. A discussion of the comments and the changes made to the proposed rule are summarized as follows:

1. Comment: The respondent recommended clarifying the coverage at FAR 49.501 by moving the existing language to FAR 49.002. This language clarifies that FAR part 49 does not apply to commercial item contracts awarded using FAR part 12 procedures.

Response: The Defense Acquisition Regulation Council and the Civilian Agency Acquisition Council (Councils) agree. The language at FAR 49.501, pertaining to the applicability of FAR part 49 to commercial item contracts has

been relocated to FAR 49.002. FAR 49.002(a) is reformatted by adding "(1)" to existing language for sequencing. Additionally, new language was added in (a)(2) to clarify that FAR part 49 does not apply to the acquisition of commercial items when using procedures at FAR part 12.

2. Comment: The respondent recommends simplifying FAR 49.502(a) by removing and relocating the reference to the exceptions for FAR 52.212–4 and 52.213–4 to FAR 49.002.

Response: The Councils agree. The language pertaining to FAR 52.212–4 was relocated to FAR 49.002 as addressed under the first comment. Reference to FAR 52.213–4 remains in FAR 49.501.

II. Executive Order 12866

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DOD, GSA, and NASA certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule does not impose any additional requirements on small entities. The rule merely clarifies that FAR part 49 does not apply to the acquisition of commercial items when using procedures in FAR part 12.

IV. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 49

Government procurement.

Dated: December 22, 2010.

Millisa Gary,

Acting Director, Federal Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 49 as set forth below:

PART 49—TERMINATION OF CONTRACTS

■ 1. The authority citation for 48 CFR part 49 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 49.002 by revising paragraph (a) to read as follows:

49.002 Applicability.

(a)(1) This part applies to contracts that provide for termination for the convenience of the Government or for the default of the contractor (see also 12.403 and 13.302–4).

(2) This part does not apply to commercial item contracts awarded using part 12 procedures. See 12.403 for termination policies for contracts for the acquisition of commercial items. However, for contracts for the acquisition of commercial items, this part provides administrative guidance which may be followed unless it is inconsistent with the requirements and procedures in 12.403, Termination, and the clause at 52.212–4, Contract Terms and Conditions—Commercial Items.

* * * * *

■ 3. Revise section 49.501 to read as follows:

49.501 General.

This subpart prescribes the principal contract termination clauses. This subpart does not apply to contracts that use the clause at 52.213–4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items). In appropriate cases, agencies may authorize the use of special purpose clauses, if consistent with this chapter.

[FR Doc. 2010–32893 Filed 12–29–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 52 and 53

[FAC 2005–48; FAR Case 2009–018; Item IV; Docket 2010–0082, Sequence 1]

RIN 9000–AL53

Federal Acquisition Regulation; Payrolls and Basic Records

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, with one change, the interim rule amending the Federal Acquisition Regulation (FAR) to revise the FAR clause, Payrolls and Basic Records. This revision implements a Department of Labor rule that protects the privacy of workers.

DATES: *Effective Date:* December 30, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Clare McFadden, Procurement Analyst, at (202) 501–0044. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–48, FAR Case 2009–018.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 75 FR 34286 on June 16, 2010. The interim rule implemented changes from the Department of Labor's (DOL's) final rule, Protecting the Privacy of Workers: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, published in the **Federal Register** at 73 FR 77504 on December 19, 2008, that removed the requirement to submit complete social security numbers and home addresses of individual workers in weekly payroll submissions. DOL concluded that such disclosure of personal information from the prime contractor was unnecessary and created an increased risk of privacy violations. The public comment period closed on August 16, 2010. No comments were received and, as a result, DoD, GSA, and NASA have determined to adopt the interim rule as final with a minor change to add a DOL updated form WH–347 found at FAR 53.303–WH–347.

II. Executive Order 12866

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD, GSA, and NASA certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because this rule provides relief for contractors from submitting more personal information than is necessary in the weekly payroll submissions and will not impose any measurable costs on contractors.

IV. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden

previously approved under OMB Control Number 1215–0149, Davis-Bacon Certified Payroll, assigned to the DOL.

List of Subjects in 48 CFR Parts 52 and 53

Government procurement.

Dated: December 22, 2010.

Millisa Gary,

Acting Director, Federal Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 75 FR 34286 on June 16, 2010, is adopted as a final rule with the following change:

PART 53—FORMS

■ 1. The authority citation for 48 CFR part 53 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 53.303–WH–347 by revising the form to read as follows:

53.303–WH–347 Department of Labor Form WH–347, Payroll (For Contractor's Optional Use).

BILLING CODE 6820–EP–P

U.S. Department of Labor
Wage and Hour Division

PAYROLL

(For Contractor's Optional Use; See Instructions at www.dol.gov/whd/forms/wh347instr.htm)

Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

U.S. Wage and Hour Division
Rev. Dec. 2008

OMB No.: 1215-0149
Expires: 12/31/2011

NAME OF CONTRACTOR ☐ OR SUBCONTRACTOR ☐ ADDRESS

PAYROLL NO. FOR WEEK ENDING PROJECT AND LOCATION PROJECT OR CONTRACT NO.

(1) NAME AND INDIVIDUAL IDENTIFYING NUMBER (e.g., LAST FOUR DIGITS OF SOCIAL SECURITY NUMBER) OF WORKER	(2) NO. OF WITHHOLDING EXEMPTIONS	(3) WORK CLASSIFICATION	OT. OR ST.	(4) DAY AND DATE / HOURS WORKED EACH DAY	(5) TOTAL HOURS	(6) RATE OF PAY	(7) GROSS AMOUNT EARNED	(8) DEDUCTIONS: FICA	WITH-HOLDING TAX			OTHER	TOTAL DEDUCTIONS	(9) NET WAGES PAID FOR WEEK
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While completion of Form WH-347 is optional, it is mandatory for covered contractors and subcontractors performing work on Federally financed or assisted construction contracts to respond to the information collection contained in 29 C.F.R. §§ 3.3, 5.5(a). The Copeland Act (40 U.S.C. § 3145) contractors and subcontractors performing work on Federally financed or assisted construction contracts to "furnish weekly a statement with respect to the wages paid each employee during the preceding week." U.S. Department of Labor (DOL) regulations at 29 C.F.R. § 5.5(a)(3)(ii) require contractors to submit weekly a copy of all payrolls to the Federal agency contracting for or financing the construction project, accompanied by a signed "Statement of Compliance" indicating that the payrolls are correct and complete and that each laborer or mechanic has been paid not less than the proper Davis-Bacon prevailing wage rate for the work performed. DOL and federal contracting agencies receiving this information review the information to determine that employees have received legally required wages and fringe benefits.

Public Burden Statement

We estimate that is will take an average of 55 minutes to complete this collection, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding these estimates or any other aspect of this collection, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S3502, 200 Constitution Avenue, N.W. Washington, D.C. 20210

(over)

Date _____

I, _____ _____
(Name of Signatory Party) (Title)

do hereby state:

(1) That I pay or supervise the payment of the persons employed by

_____ on the
(Contractor or Subcontractor)

_____; that during the payroll period commencing on the
(Building or Work)

_____ day of _____, _____, and ending the _____ day of _____, _____, all persons employed on said project have been paid the full weekly wages earned, that no rebates have been or will be made either directly or indirectly to or on behalf of said

_____ from the full
(Contractor or Subcontractor)

weekly wages earned by any person and that no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as defined in Regulations, Part 3 (29 C.F.R. Subtitle A), issued by the Secretary of Labor under the Copeland Act, as amended (48 Stat. 948, 63 Start. 108, 72 Stat. 967; 76 Stat. 357; 40 U.S.C. § 3145), and described below:

(2) That any payrolls otherwise under this contract required to be submitted for the above period are correct and complete; that the wage rates for laborers or mechanics contained therein are not less than the applicable wage rates contained in any wage determination incorporated into the contract; that the classifications set forth therein for each laborer or mechanic conform with the work he performed.

(3) That any apprentices employed in the above period are duly registered in a bona fide apprenticeship program registered with a State apprenticeship agency recognized by the Bureau of Apprenticeship and Training, United States Department of Labor, or if no such recognized agency exists in a State, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor.

(4) That:

(a) WHERE FRINGE BENEFITS ARE PAID TO APPROVED PLANS, FUNDS, OR PROGRAMS

☐ – in addition to the basic hourly wage rates paid to each laborer or mechanic listed in the above referenced payroll, payments of fringe benefits as listed in the contract have been or will be made to appropriate programs for the benefit of such employees, except as noted in section 4(c) below.

(b) WHERE FRINGE BENEFITS ARE PAID IN CASH

☐ – Each laborer or mechanic listed in the above referenced payroll has been paid, as indicated on the payroll, an amount not less than the sum of the applicable basic hourly wage rate plus the amount of the required fringe benefits as listed in the contract, except as noted in section 4(c) below.

(c) EXCEPTIONS

EXCEPTION (CRAFT)	EXPLANATION

REMARKS:	

NAME AND TITLE	SIGNATURE

THE WILLFUL FALSIFICATION OF ANY OF THE ABOVE STATEMENTS MAY SUBJECT THE CONTRACTOR OR SUBCONTRACTOR TO CIVIL OR CRIMINAL PROSECUTION. SEE SECTION 1001 OF TITLE 18 AND SECTION 231 OF TITLE 31 OF THE UNITED STATES CODE.

[FR Doc. 2010–32892 Filed 12–29–10; 8:45 am]
BILLING CODE 6820–EP–C

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2010–0077, Sequence 10]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–48; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005–48, which amend the Federal Acquisition Regulation (FAR). Interested parties may obtain further information regarding these rules by referring to FAC 2005–48, which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov.*

DATES: For effective dates see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below. Please cite FAC 2005–48 and the specific FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755.

LIST OF RULES IN FAC 2005–48

Item	Subject	FAR Case	Analyst
I	Repeal of the Small Business Competitiveness Demonstration Program.	2011–005	Morgan.
II	Personal Identity Verification of Contractor Personnel	2009–027	Jackson.
III	Terminating Contracts	2009–031	Parnell.
IV	Payrolls and Basic Records	2009–018	McFadden.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries. FAC 2005–48 amends the FAR as specified below:

Item I—Repeal of the Small Business Competitiveness Demonstration Program (FAR Case 2011–005)

This final rule amends the FAR to remove FAR subpart 19.10, Small Business Competitiveness Demonstration Program. This change is necessary to address the requirements of section 1335 of the Small Business Jobs Act of 2010 (Pub. L. 111–240) which repealed the Small Business Competitiveness Demonstration Program.

This final rule also removes the following clauses: FAR 52.219–19, Small Business Concern Representation for the Small Business Competitiveness Demonstration Program; FAR 52.219–20, Notice of Emerging Small Business Set-Aside; and FAR 52.219–21, Small Business Size Representation for Targeted Industry Categories under the Small Business Competitiveness Demonstration Program.

Item II—Personal Identity Verification of Contractor Personnel (FAR Case 2009–027)

This final rule amends the FAR to provide additional regulatory coverage in subpart 4.13 and in FAR clause 52.204–9 to reinforce the requirement of collecting from contractors all forms of Government-provided identification once they are no longer needed to support a contract. The contracting officer may delay final payment under a contract if the contractor fails to comply with these requirements.

Item III—Terminating Contracts (FAR Case 2009–031)

This final rule amends the FAR to clarify procedures regarding the applicability of FAR part 49, Termination of Contracts, to commercial item contracts. Minor changes are made to the proposed rule published in the **Federal Register** at 75 FR 28228 on May 20, 2010.

The rule specifically impacts contracting officers and contractors by clarifying that FAR part 49 does not apply to the acquisition of commercial items when using procedures at FAR part 12. The rule does not have a significant economic impact on small entities because the rule does not impose any additional requirements on small businesses.

Item IV—Payrolls and Basic Records (FAR Case 2009–018)

This rule adopts as final, with a minor change, the interim rule published in the **Federal Register** at 75 FR 34286 on June 16, 2010. The interim rule amended the FAR at 52.222–8, Payrolls and Basic Records to delete the requirement for submission of full social security numbers and home addresses of individual workers on weekly payroll transmittals by prime contractors. The rule requires contractors and subcontractors to maintain the full social security number and current address of each covered worker, and provide them upon request to the contracting officer, the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. The rule recognizes the Department of Labor's finding that complete social security numbers and home addresses for individual workers are personal information to the worker and that any unnecessary disclosure and submittal of such information creates an exposure to identity theft and the invasion of privacy for workers.

Dated: December 22, 2010.

Millisa Gary,

Acting Director, Federal Acquisition Policy Division.

[FR Doc. 2010–32888 Filed 12–29–10; 8:45 am]

BILLING CODE 6820–EP–P

Federal Register

Thursday,
December 30, 2010

Part VII

The President

Executive Order 13562—Recruiting and Hiring Students and Recent Graduates

Federal Register
Vol. 75, No. 248
Thursday, December 30, 2010

Presidential Documents

Title 3—

The President

Executive Order 13562 of December 27, 2010

Recruiting and Hiring Students and Recent Graduates

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 3301 and 3302 of title 5, United States Code, it is hereby ordered as follows:

Section 1. *Policy.* The Federal Government benefits from a diverse workforce that includes students and recent graduates, who infuse the workplace with their enthusiasm, talents, and unique perspectives. The existing competitive hiring process for the Federal civil service, however, is structured in a manner that, even at the entry level, favors job applicants who have significant previous work experience. This structure, along with the complexity of the rules governing admission to the career civil service, creates a barrier to recruiting and hiring students and recent graduates. It places the Federal Government at a competitive disadvantage compared to private-sector employers when it comes to hiring qualified applicants for entry-level positions.

To compete effectively for students and recent graduates, the Federal Government must improve its recruiting efforts; offer clear paths to Federal internships for students from high school through post-graduate school; offer clear paths to civil service careers for recent graduates; and provide meaningful training, mentoring, and career-development opportunities. Further, exposing students and recent graduates to Federal jobs through internships and similar programs attracts them to careers in the Federal Government and enables agency employers to evaluate them on the job to determine whether they are likely to have successful careers in Government.

Accordingly, pursuant to my authority under 5 U.S.C. 3302(1), and in order to achieve a workforce that represents all segments of society as provided in 5 U.S.C. 2301(b)(1), I find that conditions of good administration (specifically, the need to promote employment opportunities for students and recent graduates in the Federal workforce) make necessary an exception to the competitive hiring rules for certain positions in the Federal civil service.

Sec. 2. *Establishment.* There are hereby established the Internship Program and the Recent Graduates Program, which, along with the Presidential Management Fellows Program, as modified herein, shall collectively be known as the Pathways Programs. I therefore direct the Director of the Office of Personnel Management (OPM) to issue regulations implementing the Pathways Programs consistent with this order, including:

(a) a description of the positions that executive departments and agencies (agencies) may fill through the Pathways Programs because conditions of good administration necessitate excepting those positions from the competitive hiring rules;

(b) rules governing whether, to what extent, and in what manner public notice should be provided of job opportunities in the Pathways Programs;

(c) a description of career-development, training, and mentorship opportunities for participants in the Pathways Programs;

(d) requirements that managers meaningfully assess the performance of participants in the Pathways Programs to identify those who should be considered for conversion to career civil service positions;

(e) a description of OPM oversight of agency use of the Pathways Programs to ensure that (i) they serve as a supplement to, and not a substitute for,

the competitive hiring process, and (ii) agencies are using the Pathways Programs in a genuine effort to develop talent for careers in the civil service;

(f) a description of OPM plans to evaluate agencies' effectiveness in recruiting and retaining talent using the Pathways Programs and of the satisfaction of Pathways Programs participants and their hiring managers; and

(g) standard naming conventions across agencies, so that students and recent graduates can clearly understand and compare the career pathway opportunities available to them in the Federal Government.

Sec. 3. *Internship Program.* The Internship Program shall provide students in high schools, community colleges, 4-year colleges, trade schools, career and technical education programs, and other qualifying educational institutions and programs, as determined by OPM, with paid opportunities to work in agencies and explore Federal careers while still in school. The Internship Program would replace the existing Student Career Experience Program, established pursuant to Executive Order 12015 of October 26, 1977. The following principles and policies shall govern the Internship Program:

(a) Participants in the program shall be referred to as "Interns" and shall be students enrolled, or accepted for enrollment, in qualifying educational institutions and programs, as determined by OPM.

(b) Subject to any exceptions OPM may establish by regulation, agencies shall provide Interns with meaningful developmental work and set clear expectations regarding the work experience of the intern.

(c) Students employed by third-party internship providers but placed in agencies may, to the extent permitted by OPM regulations, be treated as participants in the Internship Program.

Sec. 4. *Recent Graduates Program.* The Recent Graduates Program shall provide individuals who have recently graduated from qualifying educational institutions or programs with developmental experiences in the Federal Government intended to promote possible careers in the civil service. The following principles and policies shall govern the Recent Graduates Program:

(a) Participants in the program shall be referred to as "Recent Graduates" and must have obtained a qualifying degree, or completed a qualifying career or technical education program, as determined by OPM, within the preceding 2 years, except that veterans who, due to their military service obligation, were precluded from participating in the Recent Graduates Program during the 2-year period after obtaining a qualifying degree or completing a qualifying program shall be eligible to participate in the Program within 6 years of obtaining a qualifying degree or completing a qualifying program.

(b) Responsibilities assigned to a Recent Graduate shall be consistent with his or her qualifications, educational background, and career interests, the purpose of the Recent Graduates Program, and agency needs.

Sec. 5. *Presidential Management Fellows Program.* The Presidential Management Fellows (PMF) Program is an existing program established pursuant to Executive Order 13318 of November 21, 2003, that aims to attract to the Federal service outstanding men and women from a variety of academic disciplines at the graduate level who have a clear interest in, and commitment to, the leadership and management of public policies and programs. The following requirements shall govern the PMF Program upon the revocation of Executive Order 13318, as provided in section 8 of this order:

(a) Participants in this program shall continue to be known as Presidential Management Fellows (PMFs or Fellows) and must have received, within the preceding 2 years, a qualifying advanced degree, as determined by OPM.

(b) Responsibilities assigned to a PMF shall be consistent with the PMF's qualifications, educational background, and career interests, the purposes of the PMF Program, and agency needs.

(c) OPM shall establish the eligibility requirements and minimum qualifications for the program, as well as a process for assessing eligible individuals for consideration for appointment as PMFs.

Sec. 6. *Appointment and Conversion.* (a) Appointments to any of the Pathways Programs shall be under Schedule D of the excepted service, as established by section 7 of this order.

(b) Appointments to the Recent Graduates or PMF Programs shall not exceed 2 years, unless extended by the employing agency for up to 120 days thereafter.

(c) Appointment to a Pathways Program shall confer no right to further Federal employment in either the competitive or excepted service upon the expiration of the appointment, except that agencies may convert eligible participants noncompetitively to term, career, or career conditional appointments after satisfying requirements to be established by OPM, and agencies may noncompetitively convert participants who were initially converted to a term appointment under this section to a career or career-conditional appointment before the term appointment expires.

5 CFR PART 6

■ **PART 6—[AMENDED]**

Sec. 7. *Implementation.* (a) Civil Service Rule VI is amended as follows:

(i) 5 CFR 6.1(a) is amended to read:

OPM may except positions from the competitive service when it determines that (A) appointments thereto through competitive examination are not practicable, or (B) recruitment from among students attending qualifying educational institutions or individuals who have recently completed qualifying educational programs can better be achieved by devising additional means for recruiting and assessing candidates that diverge from the processes generally applicable to the competitive service. These positions shall be listed in OPM's annual report for the fiscal year in which the exceptions are made.

(ii) 5 CFR 6.2 is amended to read:

OPM shall list positions that it excepts from the competitive service in Schedules A, B, C, and D, which schedules shall constitute parts of this rule, as follows:

Schedule A. Positions other than those of a confidential or policy-determining character for which it is not practicable to examine shall be listed in Schedule A.

Schedule B. Positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination shall be listed in Schedule B. Appointments to these positions shall be subject to such noncompetitive examination as may be prescribed by OPM.

Schedule C. Positions of a confidential or policy-determining character shall be listed in Schedule C.

Schedule D. Positions other than those of a confidential or policy-determining character for which the competitive service requirements make impracticable the adequate recruitment of sufficient numbers of students attending qualifying educational institutions or individuals who have recently completed qualifying educational programs. These positions, which are temporarily placed in the excepted service to enable more effective recruitment from all segments of society by using means of recruiting and assessing candidates that diverge from the rules generally applicable to the competitive service, shall be listed in Schedule D.

(iii) The first sentence of 5 CFR 6.4 is amended to read:

Except as may be required by statute, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedules A, C, or D or from positions excepted from the competitive service by statute.

The second sentence of 5 CFR 6.4 is to remain unchanged.

(iv) The first sentence of 5 CFR 6.6 is amended to read:

OPM may remove any position from or may revoke in whole or in part any provision of Schedule A, B, C, or D.

The second sentence of 5 CFR 6.6 is to remain unchanged.

(b) The Director of OPM shall:

(i) promulgate such regulations as the Director determines may be necessary to implement this order;

(ii) provide oversight of the Pathways Programs;

(iii) establish, if appropriate, a Government-wide cap on the number of noncompetitive conversions to the competitive service of Interns, Recent Graduates, or PMFs (or a Government-wide combined conversion cap applicable to all three categories together);

(iv) administer, and review and revise annually or as needed, any Government-wide cap established pursuant to this subsection;

(v) provide guidance on conducting an orderly transition from existing student and internship programs to the Pathways Programs established pursuant to this order; and

(vi) consider for publication in the *Federal Register* at an appropriate time a proposed rule seeking public comment on the elimination of the Student Temporary Employment Program, established through OPM regulations at 5 CFR 213.3202(a).

(c) In accordance with regulations prescribed pursuant to this order and applicable law, agencies shall:

(i) use appropriate merit-based procedures for recruitment, assessment, placement, and ongoing career development for participants in the Pathways Programs;

(ii) provide for equal employment opportunity in the Pathways Programs without regard to race, ethnicity, color, religion, sex, national origin, age, disability, sexual orientation, or any other non-merit-based factor;

(iii) apply veterans' preference criteria; and

(iv) within 45 days of the date of this order, designate a Pathways Programs Officer (at the agency level, or at bureaus or components within the agency) to administer Pathways Programs, to serve as liaison with OPM, and to report to OPM on the implementation of the Pathways Programs and the individuals hired under them.

Sec. 8. *Prior Executive Orders.* (a) Effective March 1, 2011, Executive Order 13162 (Federal Career Intern Program) is superseded and revoked. Any individuals serving in appointments under that order on March 1, 2011, shall be converted to the competitive service, effective on that date, with no loss of pay or benefits.

(b) On the effective date of final regulations promulgated by the Director of OPM to implement the Internship Program, Executive Order 12015 (pursuant to which the Student Career Experience Program was established), as amended, is superseded and revoked.

(c) On the effective date of final regulations promulgated by the Director of OPM to implement changes to the PMF Program required by this order, Executive Order 13318 (Presidential Management Fellows Program), as amended, is superseded and revoked.

Sec. 9. *General Provisions.* (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law, regulation, Executive Order, or Presidential Directive to an executive department, agency, or head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party

against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
December 27, 2010.

[FR Doc. 2010–33169
Filed 12–29–10; 11:15 am]
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At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''PLUS'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

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H.R. 1061/P.L. 111–323

Hoh Indian Tribe Safe Homelands Act (Dec. 22, 2010; 124 Stat. 3532)

H.R. 2941/P.L. 111–324

To reauthorize and enhance Johanna's Law to increase public awareness and knowledge with respect to gynecologic cancers. (Dec. 22, 2010; 124 Stat. 3536)

H.R. 4337/P.L. 111–325

Regulated Investment Company Modernization Act of 2010 (Dec. 22, 2010; 124 Stat. 3537)

H.R. 5591/P.L. 111–326

To designate the airport traffic control tower located at Spokane International Airport in Spokane, Washington, as the ''Ray Daves Airport Traffic Control Tower''. (Dec. 22, 2010; 124 Stat. 3556)

H.R. 6198/P.L. 111–327

Bankruptcy Technical Corrections Act of 2010 (Dec. 22, 2010; 124 Stat. 3557)

H.R. 6278/P.L. 111–328

Kingman and Heritage Islands Act of 2010 (Dec. 22, 2010; 124 Stat. 3564)

H.R. 6473/P.L. 111–329

Airport and Airway Extension Act of 2010, Part IV (Dec. 22, 2010; 124 Stat. 3566)

H.R. 6516/P.L. 111–330

To make technical corrections to provisions of law enacted by the Coast Guard Authorization Act of 2010. (Dec. 22, 2010; 124 Stat. 3569)

S. 30/P.L. 111–331

Truth in Caller ID Act of 2009 (Dec. 22, 2010; 124 Stat. 3572)

S. 1275/P.L. 111–332

National Foundation on Fitness, Sports, and Nutrition Establishment Act (Dec. 22, 2010; 124 Stat. 3576)

S. 1405/P.L. 111–333

Longfellow House-Washington's Headquarters National Historic Site Designation Act (Dec. 22, 2010; 124 Stat. 3581)

S. 1448/P.L. 111–334

To amend the Act of August 9, 1955, to authorize the Coquille Indian Tribe, the Confederated Tribes of Siletz Indians, the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw, the Klamath Tribes, and the Burns Paiute Tribe to obtain 99-year lease authority for trust land. (Dec. 22, 2010; 124 Stat. 3582)

S. 1609/P.L. 111–335

Longline Catcher Processor Subsector Single Fishery Cooperative Act (Dec. 22, 2010; 124 Stat. 3583)

S. 2906/P.L. 111–336

To amend the Act of August 9, 1955, to modify a provision relating to leases involving certain Indian tribes. (Dec. 22, 2010; 124 Stat. 3587)

S. 3199/P.L. 111–337

Early Hearing Detection and Intervention Act of 2010 (Dec. 22, 2010; 124 Stat. 3588)

S. 3794/P.L. 111–338

Formerly Owned Resources for Veterans to Express Thanks for Service Act of 2010 (Dec. 22, 2010; 124 Stat. 3590)

S. 3860/P.L. 111–339

To require reports on the management of Arlington National Cemetery. (Dec. 22, 2010; 124 Stat. 3591)

S. 3984/P.L. 111–340

Museum and Library Services Act of 2010 (Dec. 22, 2010; 124 Stat. 3594)

S. 3998/P.L. 111–341

Criminal History Background Checks Pilot Extension Act of 2010 (Dec. 22, 2010; 124 Stat. 3606)

S. 4005/P.L. 111–342

Preserving Foreign Criminal Assets for Forfeiture Act of 2010 (Dec. 22, 2010; 124 Stat. 3607)

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